FEAR AND TREMBLING AT THE COURT: DIMENSIONS OF UNDERSTANDING IN THE SUPREME COURT'S RELIGION JURISPRUDENCE

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I. INTRODUCTION

Few areas of constitutional interpretation match the "endless struggle"[1] that characterizes the Supreme Court's jurisprudence involving religion. From its earliest interpretations, the story of religion at the Court can be fairly described as one of flip-flops and zig-zags.[2] Two opposing "values"[3] in religion cases—(1) religious autonomy[4] and (2)

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[1] G.W.F. HEGEL, NATURAL LAW 60, (T.M. Knox Trans., 1975). *See also infra* part II. (discussing the difficulty yet necessity of balancing religious autonomy against the importance of general laws).

[2] *See infra* part II.A. (examining the inconsistencies in the Supreme Court's religion cases).

[3] In this article I use the term "value," a usage which stands in contrast to Robert Cover's preference for "norms" in his ground breaking exploration of what he calls "legal hermeneutics." *See* Robert M. Cover, FOREWORD: Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) (defining "legal hermeneutics" as "[t]he problem of meaning in law . . ."). Despite this difference, I share his premise that the "objectification of the norms to which one is committed frequently, perhaps always, entails a narrative—a story of how the law, now object, came to be, and more importantly, how it came to be one's own." *Id.* at 45. Given the significance of "narrative" for legal hermeneutics, the term "value" may be a better term, for two reasons. First, I find H. Richard Niebuhr's relational notion of "value" a congenial depiction: "Value means worth for selves. . . . Value . . . means quality . . . but the quality of valued things is one which only selves can apprehend." *See* H. RICHARD NIEBUHR, *The Story of Our Life, in* THE MEANING OF REVELATION, 50 (1941). Values, in this sense, are never neutral. No neutral test, accordingly, is a good fit in protecting the value of religious autonomy. Second, to refer to the value of religious self-determination in the Constitution is helpful in situating decisions and jurisprudential theories about the free exercise clause. As Justice Brennan

social coherence[5]—have created a dialectical tension that has proven difficult to resolve. Because the relationship between the value of religious autonomy, on the one hand, and the value of social coherence, on the other, is dialectical,[6] these two values should not be disjoined.[7] By analyzing these two sources of tension simultaneously, a solution to the inconsistency in the Supreme Court's religion jurisprudence may begin to emerge.

Examining the tension between the values of religious autonomy and social coherence sets the present inquiry apart from what are perhaps the two dominant approaches to the study of the Establishment

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observed in School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), the Court's "task is to translate the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." *Id.* at 236 (citation omitted). "Value," by being indeterminate yet "majestic" (and therefore important or significant), relativizes those theories and frameworks which are overlaid on and which are derived from it including this one). That is, no jurisprudential treatment of the value ever exhausts the "value." "Norm" would be more fitting in describing not our constitutional saga, but a particular religious narrative. *See infra* note 228 (discussing "big" and "little" narrative frameworks).

[4] For the purposes of this Article, "autonomy" is used to describe a religious claimant's autonomy, not the autonomy of state and local officials. *See infra* part II (discussing religious autonomy).

[5] For the purposes of this Article, "social coherence" is synonymous with "public order"; "social coherence" is not intended to refer to the social coherence of a particular religious community. *See infra* part II (discussing social coherence).

[6] The term "dialectic" is archaic and has acquired a whole host of meanings. Its sense in American law schools, as "the dialectic of the Socratic method," as every first-year law student knows, is essentially meaningless; to Socrates it meant to discourse in a conversational manner. Plato (leaving aside for the moment his "Seventh Letter") and Aristotle shifted the meaning somewhat to include, respectively, the supreme kind of knowledge that explains everything, and reasoning from probable premises. Kant's use of it in his "Transcendental Dialectic" in the CRITIQUE OF PURE REASON refers to that branch of philosophy that (more or less) unmasks illusions. The sense of the term intended in this article is more along the lines of the "thesis, antithesis, and synthesis" dialectic that Hegel stole from Fichte. Hegel termed his synthesis the "*Aufhebung*" ("sublation"), which captures what is rational in the synthesis, casting aside whatever in the thesis or antithesis is otherwise. For an extended treatment of the term "sublation" as employed by Hegel, see MICHAEL INWOOD, A HEGEL DICTIONARY 283-85 (1992).

[7] My underlying argument in this article is not that social coherence as a value should be excluded from consideration in religion controversies before federal courts, but that social coherence and autonomy are dialectically related and that both values should be included as part of such deliberations. Error occurs when these values are disjoined. *See infra* part IV (the values of social coherence and autonomy are not independent values but are interdependent, and sustained by and based on each other).

and Free Exercise Clauses of the First Amendment (the "Religion Clauses")[8]—which are historical[9] or legal approaches or some combination of both.[10] Instead of employing a historical or legal approach to examine the Supreme Court's religion jurisprudence, I have adopted an interpretive or "hermeneutical"[11] approach to uncover and

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[8] The Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[9] Although I mention some historical materials in my discussion of the diverging goals of religious freedom and public order, I deal only with the overall historical perspective. The justification for this is that my purpose is to try to discover what hermeneutical principles, if any, exist in each of two differing narratives—(1) the narrative of the Religion Clauses' adoption, and (2) the narrative of the Religion Clauses' earliest interpretations. A vast literature has gathered around the historical meanings of the Religion Clauses, as can be viewed from the footnotes and bibliographies of such books as THE SUPREME COURT ON CHURCH AND STATE (1962 ed., Joseph Tussman); PHILIP B. KURLAND, RELIGION AND THE LAW (1962); WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1964); and WILLIAM H. MARNELL, THE FIRST AMENDMENT (1964).

[10] I acknowledge at the outset that my exploration must be tentative. But this is not saying anything new. As Chief Justice Burger once wrote about the Religion Clauses:

> There are always risks in treating criteria discussed by the Court from time to time as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. . . .
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> [C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Tilton v. Richardson, 403 U.S. 672, 679 (1971). *See also, infra* note 169 (examining Chief Justice Burger's religion jurisprudence).

[11] One commentator provides a working definition of "hermeneutical" as interpretation, further connecting interpretation as hermeneutics with Hermes, who, at least according to Heidegger:

> [B]rings the message of destiny; *hermeneuein* is that laying-open of something which brings a message. Such "laying-open" becomes a "laying-out" explaining of that which was already said through poets, who themselves, according to Socrates in Plato's dialogue the Ion (534e), are "messengers [*Botschafter*] of the gods," *hermenes eisin ton theon*. Thus, traced back to their earliest known root words in Greek, the origins of the modern words "hermeneutics" and "hermeneutical" suggest the process of "bringing to understanding. . . ."

analyze the competing values that have guided the Court's religion decisions, decisions that have frequently gone in seemingly different directions. As the Court enters "post-modernity,"[12] an additional

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RICHARD E. PALMER, HERMENEUTICS 13 (1969). So hermeneutics is interpretation, but not exactly interpretation in any common sense kind of way. Therefore, although the approach that I adopt is in a loose sense a kind of constitutional interpretation, it is not—to be sure—constitutional interpretation as ordinarily done. This approach ought not to offend, as far as new tests for constitutional analysis are concerned, my thesis operates on another level—one more in the background. "Philosophy," said Wittgenstein, "leaves everything as it is." LUDWIG WITTGENSTEIN, 1 PHILOSOPHICAL INVESTIGATIONS § 124 (1958). "Philosophy simply puts everything before us . . . . The work of the philosopher consists in assembling reminders for a particular purpose." *Id.* at § 109. Problems are resolved "by arranging what we have always [known]." *Id.* The importance of the later Wittgenstein for hermeneutics has been argued by Karl-Otto Apel in ANALYTIC PHILOSOPHY OF LANGUAGE AND THE *GEISTESWISSENSCHAFTEN* (1967) (arguing that the work of the later Wittgenstein shares the basic hermeneutical conviction of the priority of life over abstract thought). The import of a hermeneutical approach to constitutional cases is, it seems to me, a limiting one—not to decide cases, but chiefly to debunk them, or at least to "de-habitualize" the perceptions of readers of those cases. *See infra* part III.A. (discussing hermeneutics as a technique of interpretation of the values of the Religion Clauses).

Of course, hermeneutics itself can be debunked, not for falsely over-simplifying an inquiry, but for erring in the opposite direction and over-burdening an inquiry with the high start-up costs of an unfamiliar technique and unnatural vocabulary. In the present study, these costs have been reduced to the extent possible.

[12] Somewhat reluctantly, I refer to "post-modernity" because the phrase "post-modern" begins to dot the current academic literature. *See, e.g.*, David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) (book review). Also, my argument for pluralistic free exercise constitutional protections is to some extent an argument for a jurisprudence that does justice to polysymbolic religiosity. *See generally* LONNIE D. KLIEVER, THE SHATTERED SPECTRUM: A SURVEY OF CONTEMPORARY THEOLOGY 185-205 (1981). As early as 1971, Sydney Ahlstrom referred (somewhat disparagingly) to an already present-tense "[p]ost-modern man." SYDNEY AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE (1972). Fixing the appropriate reference is an important question in an interpretive inquiry regarding the Religion Clauses given that "polysymbolic religiosity" is apparently one of the defining characteristics of post-modern consciousness, that polysymbolic religiosity is pluralism, and that "the struggle between the modern and the post-modern is at depth a religious struggle." KLIEVER, *supra*, at 197-98. Kliever further suggests: "For polysymbolic religiosity there is . . . no single symbol system, no single social structure, no single historic tradition for expressing the religious concerns and commitments of life." *Id.* at 199. Perhaps the best known popular example of a polysymbolic approach to the phenomenon of religion is that of Joseph Campbell. Mircea Eliade's work is another. *Id.* at 200. *See generally* JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984) (Providing a useful analysis of the meaning of post-modernism in philosophy and literary criticism).

approach may prove to be of some utility or interest.

Initially, I identify the Supreme Court's pattern of flip-flops and zig-zags in its religion cases and then trace this conflict to the tension between the opposing values of religious liberty and social coherence.[13] I then explore the values that have been protected in both the enactment and the interpretation of the Religion Clauses via a narrative perspective.[14] I do this primarily by asking two questions. The first question is: "Why was it necessary to the Framers of the United States Constitution that the Religion Clauses be adopted?" The second question is: "Why, assuming that by denying a free exercise claim the Court engages in a restrictive interpretation of the Religion Clauses, has the Court so often thought it necessary to interpret these Clauses restrictively?"[15] In an attempt to answer these questions, I look at the narrative setting of the Religion Clauses' adoption, as well as of the Supreme Court's interpretations. Indeed, these two narratives exhibit manifestly differing hermeneutics.[16] Finally, I examine how the two hermeneutics function in the jurisprudence of Justice Harlan Fiske

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[13] *See infra* part II. (explicating the values of religious autonomy and social cohesion and describing the tension between these two values).

[14] *See infra* part III. (discussing a narrative approach and the values which the narratives of the Religion Clauses have sought to protect).

[15] Hopefully, the matter of intellectual prestige is not a sub-text to the Court's recent opinion in *Smith*, but I do not think this should be automatically ruled out. For criticisms of depreciatory analyses of so-named "primitive" or "precritical" religion, see MARY DOUGLAS, *The Bog Irish, in* NATURAL SYMBOLS 59-77 (1973) ("There is no person whose life does not need to unfold in a coherent symbolic system"); D.Z. Phillips, *Are Religious Beliefs Mistaken Hypotheses?, in* RELIGION WITHOUT EXPLANATION 26-43 (1978) (Arguing for logical space for religious belief versus an approach that endeavors to tidy-up religious and/or primitive discourse by analyzing such statements as if they were only justified by metaphysical or epistemological foundations); Bronislaw Malinowski, *Myth in Primitive Psychology, in* MAGIC, SCIENCE, AND RELIGION 93-148 (1954) (Myth establishes a social charter and moral pattern of conduct combining primitive faith with moral wisdom). *Hialeah* leaves open the question: Did the Court "de-primitivize" Santaria by locating the religion on a "common sense" continuum that begins with the right to animal sacrifice and ends with the right to barbecue? *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 61 U.S.L.W. 4587, 4590 (U.S. June 11, 1993).

[16] In this article I am not using the term hermeneutics in its traditional sense of a systematic study of principles and methods of interpretation. Instead I rely on thinkers like Schleirmacher, Heidegger, Gadamer, and Ricoeur who use hermeneutics in the sense of interpreting how something in the past can "mean" today. *See generally* E.V. MCKNIGHT, MEANING IN TEXTS (1978). Second, in speaking, e.g., of the Framers I employ the singular term "hermeneutic." Typically, this singular usage refers to a specific and self-acknowledged framework.

Stone, who places primary importance on religious freedom, and the jurisprudence of John Hart Ely, who subordinates religious liberty to the preservation of public order.[17]

II. TWO VALUES IN THE SUPREME COURT'S RELIGION DECISIONS: RELIGIOUS AUTONOMY AND SOCIAL COHERENCE

A. THE COURT'S DECISIONS INVOLVING RELIGION: A PATTERN OF FLIP-FLOPS AND ZIG-ZAGS

As a result of the struggle with the tension between religious freedom and public order, the Supreme Court has explicitly and implicitly changed sides in deciding religious issues, thereby creating an inconsistent and seemingly irreconcilable pattern in its freedom of religion jurisprudence. In *Barnette*, the Court took the unusual step of explicitly overruling its prior decision in *Minersville School District v. Gobitis*, wherein the Court denied a free exercise petition which alleged that requiring school children to salute the flag violated the Constitution.[18] *Barnette* presents the joining of the dispute between the religious "right of self-determination"[19] and social coherence in an important way (with Justice Stone as the advocate of autonomy and Justice Frankfurter as the advocate of coherence). In *Jones v. Opelika*,[20] the Court sustained a licensing fee for vendors of religious literature, only to allow a petition for rehearing and vacate the decision eleven months later, thus disallowing the fee.[21] In *Zorach v. Clauson*,[22] the

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[17] *See infra* part III.E. (discussing the views of Justice Harlan Fiske Stone and John Hart Ely).

[18] *Id.* at 598.

[19] *Barnette*, 319 U.S. at 630.

[20] 316 U.S. 584 (1942) *vacated by* Jones v. Opelika, 319 U.S. 103 (1943). In *Opelika*, an Alabama law required that all persons who sell books purchase a license. *Id.* at 586. Jones sold pamphlets without a license on the street, which contained information about his beliefs as a Jehovah's Witness. *Id.* He was convicted of a violation of the licensing law, and subsequently, petitioned the Supreme Court to reverse his conviction, alleging that the law violated his First Amendment rights. *Id.* at 587-88. The Court upheld the statute, reasoning that it did not interfere with petitioner's First Amendment rights, but was instead a valid commercial regulation. *Id.* at 597.

[21] Jones v. Opelika, 319 U.S. 103 (1943).

[22] 343 U.S. 306 (1952). In *Zorach*, a New York City "released-time" program permitted, upon written parental request, the release of students during the school day from school grounds for the purpose of religious education and worship. *Id.* at 308.

Court sustained the constitutionality of a "released-time" program of religious instruction.[23] However, four years earlier, in *McCollum ex. rel. v. Board of Education*,[24] the Court had decided (by an 8-1 vote) that the First Amendment barred such a voluntary "released-time" program.[25] Moreover, in *Sherbert v. Verner*,[26] the Court effectively overruled *Braunfeld v. Brown*,[27] a decision handed down only two years earlier.[28]

Writing for the Court, Justice Douglas upheld the program against a challenge that it violated the First Amendment by dispensing with the separation of church and state. *Id.* at 315. The majority reasoned that, unlike *McCollum*, no public school classrooms were used and no public funds were expended for the program. *Id.* at 309. The Justice found that the program did no more than accommodate schedules to outside religious activities, and that this type of accommodation is not forbidden by the Bill of Rights. *Id.* at 315. For a detailed analysis of the *Zorach* decision, see G. Sidney Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000 (1981).

[23] *Zorach*, 343 U.S. at 315.

[24] 333 U.S. 203 (1948). In *McCollum*, the Supreme Court struck down an Illinois released-time program that allowed students to attend religious instruction on school grounds during part of the normal school day; those students who did not wish to attend the religious instruction used that part of the day to pursue their secular studies. *Id.* at 209-10. Justice Black concluded that the program was an unconstitutional prohibition on the establishment of religion. *Id.* at 210. The Justice reasoned that this program promoted close cooperation between school and religious authorities, and found that the program allowed students to be released from their legal obligation to attend school. *Id.* In so recognizing, the Court determined that this use of the tax-established public school system "falls squarely under the ban of the First Amendment." *Id.* at 209-10. For a sustained discussion of the *McCollum* case, see Buchanan, *supra* note 22.

[25] *Id.* at 210. The Court distinguished its decision in *McCollum* by emphasizing in *Zorach* that students left the school premises for their released-time instruction. *Zorach*, 343 U.S. at 309. *Zorach* elucidates a position that is avowedly consistent with both *Everson* and *McCollum*; but the neutrality mandated in these two Establishment cases is not "neutrality" at all in the *Zorach* sense. In *Zorach*, "benevolent neutrality" could be better read "accommodation." *See Walz*, 397 U.S. at 668. Professor Paul Kauper has suggested a three-fold division of Supreme Court decisions regarding government and religion, a division which continues to be relevant: (1) those supporting *Everson's* theory of strict separation, (2) those holding a theory of neutrality, and (3) those seeking an accommodation between the two clauses. *See generally* PAUL KAUPER, RELIGION AND THE CONSTITUTION (1962) (suggesting that the accommodation category derives from *Zorach*).

[26] 374 U.S. 398 (1963). *See infra* note 47 (detailing the *Sherbert* decision).

[27] 366 U.S. 599 (1961). The Court in *Braunfeld* upheld a Pennsylvania criminal statute that precluded the retail sale of items such as clothing and home furnishings on Sundays. *Id.* at 600. The Court rejected the appellants argument that the law violated the Equal Protection Clause of the Fourteenth Amendment and prohibited the free exercise of religion. *Id.* at 609. Chief Justice Warren repeated the *Reynolds'* belief/action dichotomy and noted that while "the freedom to act, even when the action

Both *Sherbert* and *Braunfeld* dealt with the petition of Sabbatarians for relief from economic hardship that they incurred as a result of refusing to work on Saturday. The *Sherbert* Court held that a state's denial of unemployment compensation benefits to a Seventh-Day Adventist violated her right to the free exercise of religion.[29] The *Braunfeld* Court, on the other hand, held that a statute prohibiting retail sales on Sundays did not violate the free exercise rights of members of the Orthodox Jewish faith whose religious beliefs precluded them from working between nightfall on Friday and nightfall on Saturday.[30] In 1972, the Court seemed to effectively abandon a ninety-four year old belief/action rule,[31] only to return to it eighteen years later in

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is in accord with one's religious convictions, is not totally free from legislative restrictions." *Id.* at 603 (quoting Cantwell v. Connecticut, 310 U.S. 296, 306 (1940)). For a detailed analysis of the *Braunfeld* opinion, see G. Michael McCrossin, Comment, *General Laws, Neutral Principles and the Free Exercise Clause*, 33 VAND. L. REV. 149 (1980).

[28] For some scholars, free exercise cases can be divided into either pre- or post-*Sherbert* cases, because *Sherbert* represented "a shift in the interpretation" of the Clause. *See, e.g.*, JAMES CHILDRESS, CONSCIENTIOUS OBJECTION 22 (1982); Alfred G. Killelea, *Standards for Expanding Freedom of Conscience*, 34 U. PITT. L. REV. 531 (1973). In his opinion concurring in the animal sacrifice decision, Justice Souter suggests that the division of free exercise cases now should be between either pre- or post-Smith cases. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 61 U.S.L.W. 4587, 4598 (U.S. June 11, 1993) (Souter, J., concurring).

[29] *Sherbert*, 374 U.S. at 410. The Court held *only* that a state "may not constitutionally apply the eligibility provisions [of unemployment compensation benefits] so as to constrain a worker to abandon his religious convictions respecting the day of rest." *Id.*

[30] *Braunfeld*, 366 U.S. at 609.

[31] In Reynolds v. United States, the Court set in motion the belief/action distinction, 98 U.S. 145, 166 (1878), upholding the federal government's right to make polygamy a crime. *Id.* The Court reasoned that, although Mormons may have a religious duty to engage in polygamy, the government was pursuing non-religious ends and regulating conduct rather than beliefs and that, therefore, criminalizing polygamy did not implicate the Free Exercise Clause. *Id. See also supra* note 27.

Subsequently, in Wisconsin v. Yoder, 406 U.S. 205 (1972), involving a petition of the Amish for exemption from Wisconsin's compulsory education laws, the Court effectively abandoned the belief/action doctrine by determining that when a state or governmental action interferes with religious liberty, it is not adequate that a state show merely that there exist no less intrusive alternatives for fully advancing its objectives. *Id.* at 236 (1972). If the grant of an exemption to a state or governmental action will almost accomplish a state's or government's intended goals, an exemption will generally be required, notwithstanding a slight sacrifice of its objectives. *Id.* Applying this rationale, the Supreme Court invalidated Wisconsin's refusal to exempt fourteen and fifteen year old Amish students from the mandate of attending school until the age of sixteen. *Id.*

Employment Division, Department of Human Resources v. Smith.[32] Moreover, *Smith* seemed to signal a retreat, from what has commonly been referred to as a "compelling interest" mode of analysis; in favor of a rational basis standard, as the animal sacrifice case makes clear, the retreat was effected most basically by reducing the zone of constitutional interests protected by a free exercise analysis to laws that make manifest a hard-core interest in religious persecution.[33] With respect to the

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at 234.

In addition to *Reynolds*, there were several other Supreme Court cases directly affecting the rights of Mormons. A group of cases, France v. Connor, 161 U.S. 65 (1896); Chapman v. Handley, 151 U.S. 443 (1894); and Cope v. Cope, 137 U.S. 682 (1891) all involved the issue of the disinheritance of polygamous wives and children in Utah. In re Nielsen, 131 U.S. 176 (1889) and In re Snow, 120 U.S. 274 (1887) involved the issue of the Double Jeopardy Clause, where charges of adultery and unlawful cohabitation as well as an attempt to split up a unlawful cohabitation charge into several parts were held violative of the Free Exercise Clause. The Court upheld the Edmunds Act in its denial of the right to vote in the territories in Murphy v. Ramsey, 114 U.S. 15 (1885). In Clawson v. United States, 114 U.S. 477 (1885), the Court upheld the Act's exclusion of all Mormons from a grand jury in a polygamy case. In Cannon v. United States, 116 U.S. 55 (1885), *vacated and dismissed for lack of jurisdiction*, 118 U.S. 355 (1886), the Court upheld a conviction for unlawful cohabitation under the Act even though the government had failed to prove that Cannon had engaged in marital relations with another besides his lawful spouse after the Act's passage.. (I am indebted to Gene C. Schaerr for pointing out this cluster of Mormon cases to me.)

[32] 494 U.S. 872 (1990). The issue before the Supreme Court in *Smith* was whether members of the Native American Church had a right under the Constitution to take the hallucinogenic drug peyote during religious ceremonies. *Id.* at 874. The Court held that generally applicable legislation trumps the Free Exercise Clause. *Id.* at 890. In fact, the holding in *Smith*, representing a return to the belief/action dichotomy, is not surprising in light of a prior Supreme Court decision, *See* Bowen v. Roy, 476 U.S. 693 (1986). *Bowen* involved a claim of American Indian parents who believed that being required to obtain a social security number for their daughter, Little Bird of the Snow, robbed their daughter's spirit. *Id.* at 696. The *Bowen* Court held that the government was allowed to condition food stamps and welfare payments upon obtaining a social security number. *Id.* at 701. In sum, the *Bowen* decision had cast doubt on the Court's willingness to continue to hold to *Yoder's* rejection of *Reynolds* the belief/action dichotomy.

[33] In a compelling interest analysis, a court uses strict scrutiny and requires the state to show that its regulation is the least restrictive means of achieving the state's purposes. *See, e.g.*, Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd mem.*, 472 U.S. 478 (1985) (equally divided Court). In the free exercise context, the Court has applied this two-step analysis with reference to a possible burden on religious autonomy: (1) Does the regulation impose a burden on the right to the free exercise of religion?, and (2) Does a compelling interest justify such a burden in the least restrictive way? This two-step analysis has been changed in *Hialeah* to (1) Does the regulation rely on an expressly or suspiciously unstated or understated anti-religious classification; (2) Does

question of whether the government can compel military training for pacifists, the Court has zig-zagged back and forth from no[34] to yes[35] to

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a compelling interest justify such religious persecution in the least restrictive way? In this sense, the Court's majority in *Smith* and in *Hialeah* can fairly be characterized as employing, *sub silentio*, a reversal of the Court's precedents involving religious free exercise. Because of this leap, there is a question of the continuing validity of *Yoder*, representing a reversal of the belief/action dichotomy, and *Sherbert*, elucidating the compelling state interest test under a neutral state regulation. *See* Church of the Lukumi Babalu Aye, Inc. v. *Hialeah*, 61 U.S.L.W. 4587 (U.S. June 11, 1993); Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990). In *Yoder*, Chief Justice Burger wrote that:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.
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> . . . .
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> It is true that activities of individuals, even when religiously based, are often subject to regulation . . . . But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.

Yoder, 406 U.S. at 215, 220. Further, Justice Douglas, in his *Yoder* dissent, stated: "The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds* . . . ." *Yoder*, 406 U.S. at 247 (Douglas, J. dissenting). *See also* Sherbert v. Verner, 374 U.S. 398, 403-10 (1963) (holding that a state may not constitutionally apply the eligibility provisions of unemployment compensation so as to compel an individual to abandon his religious convictions regarding a day of rest). On the other hand, the fact that the Court did not expressly overturn *Yoder* or *Sherbert* makes it possible to continue to employ them in Free Exercise litigation, and to use these cases as possible distinguishing features to argue around *Smith*, a point which Justice Souter suggests in his *Hialeah* concurrence. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 61 U.S.L.W. 4587, 4599-4600 (U.S. June 11, 1993) (Souter, J. concurring).

[34] *See* United States v. MacIntosh, 283 U.S. 605 (1931) (holding that the question of whether a citizen should be exempt from participating in the armed forces depends "upon the will of Congress and not upon the scruples of the individual," and a naturalized citizen has no greater privilege), *overruled by* Girouard v. United States, 328 U.S. 61 (1946).

[35] *See* Welsh v. United States, 398 U.S. 333 (1970) (extending conscientious objector status to all persons whose opposition to war in any form is based on a sincere belief and not necessarily on purely pragmatic reasons); United States v. Seeger, 380 U.S. 163 (1965) (granting an exemption from military service to all individuals who objected to

maybe.[36] And finally, in the 1992 October Term of the Court, the inconsistent pattern seemed to continue, this time on the subject of school graduation prayers.[37] This pattern of flip-flops reflects a defect in the Court's religion jurisprudence by rendering decisions that are lop-sidedly coherentist (if not completely so).

Despite this on-going tendency to ignore and thereby run the risk of the disjunction of the two values of religious autonomy and social coherence, the Supreme Court has sometimes appeared to be aware of both of the values' existence as well as the tension between them. In *Cantwell v. Connecticut*,[38] for example, the Court spoke of "the weighing of two conflicting interests."[39] In that case, involving a Jehovah's Witness who successfully opposed a state licensing requirement for religious solicitation, the Court had to weigh "the interest of the United States that the free exercise of religion not be prohibited" against "an obvious interest [of Connecticut] . . . in the preservation and protection of peace and good order within her borders."[40] Normally, however, its "full steam ahead" for authors of the Court's opinions, without any stated concern for icebergs discernible just ahead.

B. THE SUPREME COURT AND RELIGIOUS SELF-DETERMINATION

The Court's difficulty in defining religion dates back, as do so many of its other Religion Clause difficulties, to the Mormon free

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all wars based on sincerely held personal principles that were fundamentally equivalent to a theistic religious belief).

[36] *See* Gillette v. United States, 401 U.S. 437 (1971) (denying an exemption to those whose religious opposition was not to war in general, but merely to a particular or unjust war).

[37] Compare the cases of Lee v. Wiesman, 112 S.Ct. 2649 (1992) (no graduation prayers allowed because principal involved) with the Court's denial of certiorari in Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), *cert denied*, 61 U.S.L.W. 3819 (Graduation prayer allowed because students generated the idea, principal not involved). *See* Respondent's Brief in Opposition, Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992) (No. 92-1564). The Court's alleged "inconsistency" could be explained by the protection of student religious autonomy in both cases. It could also be argued that the Court's earlier decision in *Lee* was simply very narrowly crafted.

[38] 310 U.S. at 296. *See infra* note 76 (detailing the *Cantwell* opinion).

[39] *Id.* at 307.

[40] *Id.*

exercise cases.[41] "The word 'religion'," noted Chief Justice Waite in *Reynolds v. U.S.*[42], "is not defined in the Constitution."[43] Since then the issue has hung in the air. In *Davis v. Beason*,[44] the Court undertook to determine the meaning of "religion."[45] It held that the Mormon

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[41] *See* France v. Connor, 161 U.S. 65 (1896); Chapman v. Handley, 151 U.S. 443 (1894); Cope v. Cope, 137 U.S. 682 (1891); *In re* Nielsen, 131 U.S. 176 (1889); *In re* Snow, 120 U.S. 274 (1887); Cannon v. United States, 116 U.S. 55 (1885), *vacated and dismissed for lack of jurisdiction*, 118 U.S. 355 (1886); Murphy v. Ramsey, 114 U.S. 15 (1885); Reynolds v. United States, 98 U.S. 145 (1878).

[42] 98 U.S. 145 (1878).

[43] *Id.* at 162.

[44] 133 U.S. 333 (1890). Mr. Davis was convicted of conspiracy to obstruct Idaho Territorial law by taking the "elector oath", which required a person registering to vote to swear that "I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy . . ." when, in fact, he was a member of the Mormon Church. *Id.* at 335-36. The trial court found that, as a member of the Mormon Church, Mr. Davis knew that the church advocated bigamy and polygamy. *Id.* at 335. Mr. Davis challenged the statute as a "law respecting the establishment of religion," and thus violative of the First Amendment. *Id.* at 335-36. Justice Field, writing for the Court, noted that bigamy and polygamy are crimes properly condemned by the Territory as "[t]hey tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and to debase man." *Id.* at 341. In upholding the conviction, the Court held that it was never the purpose of the First Amendment to prohibit generally applicable criminal legislation punishing "acts inimical to the peace, good order and morals of society." *Id.* at 342.

[45] For the case against any unequivocal reliance on the word "religion" (on the grounds that "religion" is a reified concept and therefore inadequate to summarize the phenomenon of religiousness) see, WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION: A REVOLUTIONARY APPROACH TO THE GREAT RELIGIOUS TRADITIONS (1978). Unfortunately, in seeking to avoid over-generalizing, Smith over-generalizes himself; nevertheless, there is something in his "religion/religiousness" distinction that may be useful for constitutional analysis. Smith suggests that "we might . . . scrutiniz[e] our practice of giving religions names and indeed of calling them religions." *Id.* at 15.

> "The word 'religion' has had many meanings; it . . . would be better dropped. This is partly because of its distracting ambiguity, partly because most of its traditional meanings are, on scrutiny, illegitimate. The only effective significance that can reasonably be attributed to the term is that of 'religiousness,' but for this generic abstraction other words are available—we could rehabilitate perhaps the venerable term 'piety.'"

Id. at 194. Similarly, consider Wittgenstein's comment against the "craving for generality" and the error of trying to treat definitions as propositional summaries instead

Church fell outside of the Court's definition of religion, and therefore, the constitutional language that guarantees the free exercise of religion was deemed an irrelevant application to the case.[46] In contrast to *Davis*, the Court has at times shown a disinclination to define religion, choosing instead to accept a religious claimant's definition. In *Sherbert v. Verner*[47] and *Wisconsin v. Yoder*,[48] for example, the religious

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of merely as functional place holders: "Think of the tools in a tool-box: there is a hammer, pliers, a saw, a crew-driver, a ruler, a glue-pot, nails and screws.—The functions of words are as diverse as the functions of these objects." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS I § 11 (1958). The trick, he thought, was to avoid looking "for something in common to all the entities which we commonly subsume under a general term." LUDWIG WITTGENSTEIN, BLUE BOOK 17 (1980). "The idea that in order to get clear about the meaning of a general term one had to find the common element in all its applications has shackled philosophical investigation." *Id.* at 19. Therefore, do not say " there must be something in common . . . *look and see* whether there is anything common to all. . . . To repeat, don't ask for the meaning, ask for the use." WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra*, § 66. "Wittgenstein was not declaring that the words 'meaning' and 'use' are general synonyms." Norman Malcolm, *Wittgenstein, in* VIII THE ENCYCLOPEDIA OF PHILOSOPHY 337 (P. Edwards ed.). "By the 'use' of an expression he meant the special circumstances, the 'surroundings', in which it is spoken or written." *Id.* "The use of an expression is the language game in which it plays a part." *Id.* Against the concern that Wittgenstein's approach trivializes, dislocates, or obscures religion, *see generally* Ludwig Wittgenstein, *Lectures on Religious Belief, in* LECTURES AND CONVERSATION 53-72 (Cyril Barrett ed., 1972). For a more sustained analysis of Wittgenstein and the "religion/religiousness" distinction (as well the discussion of John Hart Ely, see *infra* part III.E.2); Ashby D. Boyle II, *Religion, Justice, and the Constitution in*, PHILOSOPHICAL ISSUES AND TEXTS (1994).

[46] *Davis* 133 U.S. at 342. Ironically, while the Court in *Davis* situated the Mormons as excluded from the "free exercise of religion" because they were not a "religion," as early as 1835 Mormon leader Joseph Smith had taken a much less procrustean view, proclaiming government's duty to "secure to each *individual* the free exercise of *conscience*." JOSEPH SMITH, 2 HISTORY OF THE CHURCH 247 (1932) (canonized as Doctrine and Covenants § 134:2) (emphasis added).

[47] 374 U.S. 398 (1963). In this pivotal 1963 decision the Supreme Court held that a state's refusal to grant unemployment compensation benefits to a Seventh-Day Adventist who was fired for her unwillingness to work on Saturdays, her religion's day of rest, violated her right to the free exercise of religion. *Id.* at 410. In so holding, the *Sherbert* Court determined that the state's refusal to give the religious complainant unemployment compensation benefits inevitably compelled her to choose between receiving benefits and practicing her religion. *Id.* This choice, the Court maintained, placed "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." *Id.* at 404. For a detailed analysis of the *Sherbert* decision, see Richard M. Zamboldi, Comment, *Religious Accommodation Under* Sherbert v. Verner: *The Common Sense of the Matter*, 10 VILL. L. REV. 337 (1965).

complainants identified themselves as members of a particular religious class, thereby alleviating the Court from the responsibility of defining religion.[49]

After these cases it became clear that others—who felt as deeply as did the Seventh-Day Adventists and Amish about the issues that these cases raised—did not wish to practice or profess a particular, identifiable religion to qualify as religious plaintiffs. This development raises an interesting question: "Is conscientious refusal a constitutional privilege only for members of organized religions?" In response to this query, Michael Walzer said that the state "cannot extend legal toleration to persons who refuse the ordinary duties of citizenship—especially not once it has been agreed that all consciences are equally tender and that no particular membership and above all no religious affiliation entitles a man to be treated differently than his fellows."[50] If, however, the conscience boundary falls along religious lines only for the purposes of interpreting the Religion Clauses, are not worthy individuals who are equally entitled to constitutional protection likely to be unfairly

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[48] 406 U.S. 205 (1972). In *Yoder*, the Supreme Court held that Wisconsin's refusal to exempt fourteen and fifteen year old Amish students from the mandate of attending school until the age of sixteen violated the Free Exercise Clause. *Id.* at 207. The Amish students' parents successfully demonstrated to the Court that compulsory high school education conflicted with the Amish belief that Amish practitioners should be taught to earn their living through farming and other rural activities. *Id.* at 209-13. Recognizing that virtually all Amish children continued to reside in the Amish community throughout their lives, the Court found that the informal vocational training that Amish children received adequately prepares them for that lifestyle. *Id.* at 225. Thus, although acknowledging the state's interest in requiring that all of its citizens be well-educated, the Court decided that since this interest did not constitute an interest "of the highest order" that could not be achieved by means other than denying an exemption, the Amish must be granted an exemption. *Id.* at 214-15. For an in-depth discussion of the *Yoder* case, see Debra D. McVicker, Note, *The Interest of the Child in the Home Education Question*: Wisconsin v. Yoder *Re-examined*, 18 IND. L. REV. 711 (1985); Marc H. Pullman, Note, Wisconsin v. Yoder: *The Right to Be Different—First Amendment Exemption for Amish Under the Free Exercise Clause*, 22 DEPAUL L. REV. 539 (1972).

[49] *Yoder*, 406 U.S. at 235-36.

[50] MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 136 (1970). It is possible that Walzer oversimplifies. Membership is no predictor of who has made the existential commitment within the group to step forward and suffer the tribulation of actually claiming possible free exercise protection. Such an undifferentiated picture of religion in the free exercise context is no complement to religion because it masks the role personal autonomy plays in actualizing religious belief. *See generally* JOHN BUNYAN, THE PILGRIM'S PROGRESS (Roger Sharock ed. 1982). Furthermore, not all members either act or believe alike: while all consciences are equally valuable, they are not, apparently, equally conscientious.

excluded? In grappling with this difficult question, the Court would generally find it easier to ignore the Free Exercise Clause or to restrict its application to identifiable groups, rather than to expand it.

The appeal to groups, however, is itself problematic. Given that the most significant number of cases involving free exercise claims involve disputed exceptions,[51] turning to the group as the relevant constitutional index *not only* again raises the issue of defining religion (now in order to ascertain a group's identity), but the turn to groups also presents the specter of violating the Establishment Clause.[52] If the group is the pivot, then sustaining the free exercise claim will almost always involve conferring an entity benefit through the apparatus of government to sustain free exercise. Furthermore, defining religion objectively is difficult or impossible;[53] indeed, the question can be

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[51] *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Wisconsin v. Yoder, 406 U.S. 205, (1972); Sherbert v. Verner, 374 U.S. 398 (1963); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); and Reynolds v. U.S., 98 U.S. 145 (1878) (to name perhaps the most well-known). Against this backdrop of seeking legal exceptions, the aberration is Church of Lukumi Babalu Aye v. Hialeah, 61 U.S.L.W. 4587 (U.S. June 11, 1993), where the church is actually a party and where the legal rule is invalidated. This suggests the possibility of two types of free exercise jurisprudence: one for exceptions (where the law is suspended for a party) and one for "targeting" (where the law is abolished). *See id.* at 4592-93. In any event, Justice Souter was surely correct to suggest the inapplicability of an "exceptions" type test to a targeting type case, especially as a means to try to consolidate *Smith*. *See id* at 4598 (Souter, J., concurring).

[52] John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1313-14, 1319-20 (arguing that court-ordered free-exercise exemption impermissibly favor religion over non-religion). For criticism of Ely's treatment of the Free-Exercise Clause, see *infra* part III.E.2.

[53] *See* RUDOLF OTTO, THE IDEA OF THE HOLY (1979). If the underlying phenomena which the Court must come to terms with in its religion decisions as part of the task of defining "religion" involves Otto's category of the "numinous," (as it well might) then reliance on concepts would indeed be of limited utility to the Court. The holy or numinous is "*mysterium tremendum et facinosum*," "wholly other," "quite beyond the sphere of the usual, the intelligible, and the familiar," and the source of the "raw material for the feelings of religious humility." *Id.* passin. Instead of the generalized epistemic relation, "subject-concept-object," Otto's reformulation is "subject-numinous-object," a relation that is flatly incompatible with the Court's decisional procedures.

For analyses similar to Otto's, see Max Weber's analysis of "charisma" (The Theory of Social and Economic Organization 358-395 (trans. A.M. Henderson and Talcott Parsons, Talcott Parsons ed. 1947)) and Emile Durkheim's analyses of the "sacred," THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (trans. Joseph Ward Swain 1954).

asked—Are courts ever competent to make this kind of determination?[54] On this point, Justice Frankfurter aptly observed: "Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the 'religion' which the Constitution protects."[55]

As a means around these obstacles, the Court has sometimes given religious status to deeply held, individualistic, ethical convictions,[56] which effectively leaves the judicial definition of "religion" up to the free exerciser, and which also is free from establishment anxieties.[57] In *Welsh v. United States*,[58] a case involving a single,

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[54] The flip-side of defining "religious" would appear to be defining the "sacrilegious," something which Courts used to do badly, and today do not even endeavor to do at all. *See* Robert A. Brazener, Annotation, *Validity of Blasphemy Statutes or Ordinances*, 41 A.L.R. 3d, 519 (1972). For a similar conclusion about a specific instance of the Court's "incompetence" to define religion, see Paul Ramsey, *The Legal Imputation of Religion To An Infant In Adoption Proceedings*, 34 N.Y.U. L. REV. 649 (1959).

[55] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943).

[56] *See, e.g.*, United States v. Seeger, 380 U.S. 163, 165-66 (1965) (interpreting "religion" to include non-theistic beliefs); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (recognizing that a religious belief need not necessarily acknowledge a Supreme Being, and that non-theistic as well as theistic religions deserve free exercise protection).

[57] Although *Seeger* is, strictly speaking, a case involving statutory construction, it is also a case where no definition of religion was presupposed, unlike *Sherbert* and *Yoder*. In the absence of a definitional presupposition, the Court did not itself supply one, indicating instead an openness to consider as "religious" beliefs those which were unattached to religion. The Court clearly did not define "religion" in *Seeger* as a Tillichian "ultimate concern," however close it came to doing so. *But see* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066 (1978). *See also* J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 340-44 (1969) (advocating "ultimate concern" as the constitutional definition of religion). The problems with this definition have been stated elsewhere. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 595-77 (1982). While inadequate as a definition, "ultimate concern" works well as an illustrative example, whose importance in litigating free exercise cases is not to be minimized. But these criticisms of "ultimate concern" (and others) still assume the need for a constitutional definition of religion. Because the Court's free exercise holdings do not turn on the definitional inquiry, one who searches for the "true" constitutional definition of religion is necessarily asking the wrong question. *See also supra* note 45 (on definitional considerations).

[58] 398 U.S. 333 (1970). In *Welsh*, the Supreme Court reversed the petitioner's conviction for "refusing to submit to induction into the Armed Forces." *Id.* at 335. Section 6(j) of the Universal Military Training and Service Act exempted an individual from military service if he or she was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form." *Id.* (quoting Universal Mil. Training and Service Act, ch. 625, 62 STAT. 612 (1948)). The petitioner asserted a

secular conscientious objector to the Vietnam War, the Court effectively established that a person's deeply held moral or ethical beliefs could be constitutionally protected without being based on any "religion" per se.[59] In so holding, Justice Clark echoed the words of Judge Irving R. Kaufman of the Court of Appeals in *United States v. Seeger*[60]: "[I]n today's 'skeptical generation' . . . the stern and moral voice of conscience occupies that hallowed place in the hearts and minds of men which was traditionally reserved for the commandments of God."[61] This is precisely *not* a definition of religion. Acknowledging the individually-based significance of firmly held moral views and the importance of strong public policy considerations, the Court adjudicated the plaintiff's assertion, "I have concluded . . . that [being drafted] is unethical."[62] The Court's adjudication was based on a centrality requirement originally employed by the Court in *Seeger*.[63] The test of religion in *Seeger* was

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conscientious objector claim under § 6(j) based not on religious beliefs, but instead on his belief that "killing in war was wrong, unethical, and immoral." *Id.* at 337. Relying on *Seeger*, which interpreted "religion" to include non-theistic beliefs, the Court stated that a religious conscientious objector exemption may be based on any "moral, ethical, or religious beliefs about what is right or wrong" as long as "these beliefs are held with the strength of traditional religious conviction." *Id.* at 339-40. Consequently, the Court held that the petitioner's deeply held beliefs concerning the taking of a life entitled him to a conscientious objector exemption. *Id.* at 343-44. For an extensive analysis of the *Welsh* decision, see Theodore F. Denno, Welsh *Reaffirms* Seeger: *From a Remarkable Feat of Judicial Surgery to a Lobotomy*, 46 IND. L.J. 37 (1970).

[59] *Welsh*, 398 U.S. at 337.

[60] United States v. Seeger, 326 F.2d 846 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965).

[61] *Id.* at 853.

[62] *Welsh*, 398 U.S. at 338 (quoting *Seeger*, 326 F.2d at 848).

[63] *Id.* at 338. *See also* United States v. Seeger, 380 U.S. 163, 193 (1965). Seeger and two other petitioners asserted conscientious objector claims under the Universal Military Training and Service Act, seeking exemptions from military service. *Id.* at 166-68 (citing Universal Mil. Training and Service Act, ch. 625, 62 STAT. 612 (1948)). The Act defined religion as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." *Id.* at 165 (quoting 62 STAT. 612, § 6(j)). The exemption clearly applied to religious conscientious objectors, but the petitioner argued that the exemption should also apply to non-religious conscientious objectors and to non-traditional religious beliefs that did not adhere to a conventional god. *Id.* at 165, 186. The Supreme Court interpreted the exemption broadly, holding that the meaning of "religious training and belief" embraced *all* religions but excluded merely political, sociological, or philosophical views. *Id.* at 165. For an exhaustive analysis of the *Seeger* opinion, see Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982); Comment, *Conscientious Objectors—The New "Parallel Belief" Test*—United States v.

transposed into a test of "religiousness", stated in these words: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . . ."[64] In short, *Welsh* and *Seeger* seem to turn the free exercise of religion into the free exercise of autonomy,[65] or the

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Seeger, 14 CATH. U. L. REV. 238 (1965).

[64] *Welsh*, 398 U.S. at 339 (quoting *Seeger*, 380 U.S. at 176)).

[65] Regarding the principle of autonomy, for overviews on some of the basic issues, see THOMAS HOBBES, LEVIATITAN, 126-28 (C. MacPherson ed. 1968) (stating that self-determination should be subjective); and JOHN RAWLS, A THEORY OF JUSTICE 209-10, 515-16 (1971) (arguing that John Stuart Mill's theory of autonomy contains a critical principle of rationality). The reason that these theoretical differentiations between subjective or objective conceptions of autonomy need not be considered here is that all of the competing theories share the same underlying feature of "moral seriousness." *See*, Gene Outka, *Religion and Moral Duty: Notes on Fear and Trembling, in* RELIGION AND MORALITY 227 (Gene Outka and John Reeder eds., 1973) (discussing features of moral seriousness). It is with "fear and trembling" that the free exercise clause brings into court such extremely personal, even intimate beliefs and actions: free exercisers have their "whole life in it." *Id. See* SOREN KIERKERGAARD, FEAR AND TREMBLING (ed. & trans. by Howard V. Hong and Edna H. Hong, 1983) (Kierkergaard's portrayal of this fear and trembling is the intended reference for the title of this article, referring to parties, not the Court). A matter is morally serious,

> [w]hen a person appeals to his conscience . . . [and] claims that if he were to commit the act in question, he would violate his conscience. This violation would result not only in such unpleasant feelings as guilt or shame or both but also in a fundamental loss of integrity, wholeness, and harmony in the self . . . .

JAMES F. CHILDRESS, CONSCIENTIOUS OBJECTION 168-69 (1982). Chief Justice Burger may have had just such a concern about moral seriousness in mind when he stated in Wisconsin v. Yoder, 406 U.S. 205 (1971), that the Court, "must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent." *Id.* at 215. Furthermore, at least within the free exercise context, to choose a "winning" theory of autonomy would have the ironic effect of destroying and not promoting autonomy, given that judicial enforcement of a single theory would, as a constitutional matter, constitute in the act of selection an act of paternalism by the Court. About the last thing the Court should do is seek to protect free exercisers from free exercise out of the Court's belief that it knows better than anyone what's "really" going on behind the veil of religion regarding autonomy (with certain exceptions for judicial notice as noted *infra* in note 83). *See also* Gerald Dworkin, *Paternalism, in* PATERNALISM 19, 20-21, 23-24 (R. Sartorius ed., 1983) (describing the paternalism/autonomy nexus). It is also important to note that differing theories of autonomy all presuppose the pre-existence and on-going maintenance of the basic social structures of the state; to put this abstractly, the particular (the particular claim of self-determination brought under the Free Exercise Clause) is grounded in the universal (the state) for it is only within the state that culture in general gives rise to the individual's

"free exercise of conscience"[66] and to do away with the necessity for, but not necessarily the sufficiency of, a corporate claim. The bottom line, as Paul Ramsey noted, is that the question concerning nonreligious positions "is whether they any longer exist."[67]

It is important to note that this purported expansion of the free exercise of religion is much less radical than it appears. The purported "expansion" does not expand any of the formal characteristics of the "prima facie" case, all of which remains "religious" in the Framers' original adverbial sense, with the centrality and sincerity of the claim squarely the burden of the party seeking protection.[68] The substantive "expansion" provides a less narrow path into court, but enduringly straight is the gate to a successful free exercise claim. Nevertheless, such an expansion of the clause may certainly appear to give free exercise of conscience the power to thwart or at least challenge public policy at every turn. Against this backdrop, however, a court quick to react may deny valid constitutional claims, thinking it better "to shoot first and ask questions later." This unfortunate result, it would appear, is now perhaps more likely to befall free exercisers than ever before in the Court's history.

C. THE SUPREME COURT'S CONCEPT OF PUBLIC ORDER AS APPLIED TO RELIGIOUS SELF-DETERMINATION

While the Framers believed that legal protection and even accommodation for religiously inspired conduct would promote religious freedom, the Court contrastingly has been concerned with the possible public disorder stemming from religiously inspired conduct.[69] Part of

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self-realization through the exercise of self-determination. The particular must be grounded in the universal in order for the individual to achieve existence, to exist realiter, a fact that serves to limit the autonomy of autonomy. *See supra* note 83 (specifying examples).

[66] *See supra* note 46.

[67] *See* Paul Ramsey, *Reference Points in Deciding About Abortion*, *in* THE MORALITY OF ABORTION, LEGAL AND HISTORICAL PERSPECTIVES 60-61 (John T. Noonan ed., 1970).

[68] *See supra* notes 51-76 and accompanying text.

[69] *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888 (1990) (In holding that religiously motivated ingestion of peyote is not protected by the Free Exercise Clause, the Court stated, "[a]ny society adopting . . . a system [of presumptive invalidity of restrictions of any type of religious conduct] would be courting anarchy. . . ."); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (In affirming petitioners right to distribute religious literature, the Court warned "[n]othing we have

the puzzle to the Court's hermeneutic of distrust[70] seems related to an underlying conceptual opaqueness about just what the Court means when it says that it is "protecting" the public order from the free exercise of religion.[71] For instance, the Court has stated several times that protecting the public order is central to its Religion Clauses reasoning. In the Mormon cases,[72] the Court spoke initially of protecting "peace and good order,"[73] which it later refined in *Davis v. Beason*[74] as

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said is intended to even remotely imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. . . . Without a doubt a state may protect its citizens from fraudulent solicitation. . . ."); Davis v. Beason, 133 U.S. 333 (1890). The court, in upholding the anti-polygamy/bigamy oath ordinance, derided these particular religious practices, in that:

> they tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind.

Id. at 341.

[70] *See infra* part III.D. (discussing the hermeneutic of distrust of religious self-determination as substantiation for the establishment and maintenance of public order).

[71] It has apparently become common for Justices, *see supra* note 69 and *infra* notes 72-79 and accompanying text, and scholars to define the underlying issue in free exercise conflicts as one essentially between religion and the public order. For example, in his book, Richard Morgan, pays particular attention to the "relationship between religion and the public order;" in the introduction alone he repeats the phrase "the relationship of religion to the public order" five times in 20 pages. RICHARD E. MORGAN, THE SUPREME COURT AND RELIGION (1972). *See also* RELIGION AND THE PUBLIC ORDER, (Villanova University School of Law Institute of Church and State, Donald A. Giannella ed., published from 1963-67). Given his "public order" fixation, it comes as no surprise that Morgan's ultimate conclusion is to oppose "expanding greatly the protection of religiously motivated behavior." MORGAN, *supra*, at 210. Indeed, Morgan exemplifies an approach that is one-sided because it analyzes the free exercise of religion in the light of an exclusive or nearly exclusive worry over the "public order." *Id.*

[72] *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

[73] *Reynolds*, 98 U.S. at 163. In *Reynolds*, the Supreme Court upheld the federal government's right to make bigamy a crime. *Id.* at 166. The religious claimant alleged that such governmental action violated the Free Exercise Clause by preventing Mormons from practicing their religious duty of polygamy. *Id.* at 162. The Court rejected the Mormons' claim, ruling that religiously related polygamy was "in violation of social duties." *Id.* at 164.

[74] 133 U.S. 333 (1890). *See supra* note 44 (describing the *Davis* case).

"peace, good order, and morale of society."[75] In *Cantwell v. Connecticut*,[76] the Court referred again to the protection of "peace and good order."[77] Most recently, in *Employment Division, Department of Human Resources v. Smith*,[78] the Court ruled against the religious claimant to avoid "courting anarchy."[79]

When a court in interpreting the Religion Clauses claims that it is preserving the public order, what kind of claim is it really making? It is doubtful that a court is defending a secular purpose by making a valid

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[75] *Id.* at 342.

[76] 310 U.S. 296 (1940). In *Cantwell*, the appellants, who were Jehovah's Witnesses, were convicted of breach of the peace and religious solicitation without prior approval from the Secretary of Public Welfare. *Id.* at 300-301 (citations omitted). The appellants challenged both convictions and, in particular, asserted that the solicitation statute under which they were charged violated the First and Fourteenth Amendments. *Id.* The Supreme Court acknowledged that a state can regulate the time, place, and manner of public solicitations to protect peace and good order in the community through general, non-discriminatory legislation. *Id.* at 304. However, the Court struck down the solicitation statute, finding that it authorized a censorship of religion by the Secretary, who could arbitrarily withhold approval for solicitation. *Id.* at 305. With respect to the appellants' convictions for breach of the peace, the Court found that the appellants' religious solicitation aroused animosity, but did not constitute a clear and present danger to public peace and order. *Id.* at 310-11. Thus, the Court reversed the appellants' convictions for unlawful solicitation and breach of the peace. *Id.* For an extensive discussion of the *Cantwell* decision, see the intriguing analysis by James D. Gordon, *Free Exercise on the Mountain Top*, 79 CALIF. L. REV. 91, 97 (1991); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 CALIF. L. REV. 297, 317 (1988).

[77] *Id.* at 307.

[78] 494 U.S. 872 (1990). In *Smith*, the respondents were dismissed from employment by a private drug rehabilitation organization because they ingested an illegal hallucinogenic drug, peyote, at a religious ceremony. *Id.* at 874. Subsequently, the respondents were denied unemployment compensation benefits under an Oregon law disqualifying employees discharged for work-related misconduct. *Id.* The Supreme Court held that if state law proscribes religiously inspired peyote use within the reach of a general drug prohibition, then the First Amendment's Free Exercise Clause permits the state to deny unemployment compensation to individuals discharged because of such use. *Id.* at 890. In so holding, the Court noted that the Free Exercise Clause does not excuse individuals from compliance with a law on the mere ground that the law prohibits (or requires) certain conduct that their religion requires (or prohibits). *Id.* at 878-80. Furthermore, the Court refused to apply the balancing test set forth in *Sherbert*, finding the test inapplicable to a generally applicable criminal law. *Id.* at 882-89; *see supra* note 47 (discussing *Sherbert* in general and the *Sherbert* balancing test). For thorough discussions of the *Smith* decision, see Douglas M. Wright, Jr., Recent Decision, 61 MISS. L.J. 223 (1991); Thomas F. LaMacchia, Note, *Reverse Accommodation of Religion*, 81 GEO. L.J. 117, 123-29 (1992).

[79] *Smith*, 494 U.S. at 888. *See supra* notes 32 and 69.

empirical claim. For example, the record shows that only the Mormons sought protection for polygamy. In all probability, the practice of polygamy was abhorrent to a significant number of non-Mormons (inclusive of the Court) as well as some Mormons of the time. Monogamy in the nation as a whole was not proximately threatened as an institution, let alone one that was about to vanish; in all likelihood, monogamy had never been safer.[80]

Accordingly, the Court's sense of duty to deny free exercise and to enforce this denial in the name of public order was not a duty grounded empirically as a threat to the on-going vitality of monogamy. Far from making a constitutional or legal point, the Court's public order argument is better described as non-consequentialist, which in turn suggests that the Court's public order touchstone is characteristic of a moral or metaphysical, rather than a legal, claim. The real motivation is perhaps better captured by Justice Bradley's lazy comment in *Late Corp.*, that American society and civilization (circa the late 1800's) is "the civilization which Christianity . . . produced in the Western World,"[81] thereby casting doubt on whether or how public safety was in fact implicated.

Given the truism that subjective arbitrariness should not be a constitutional touchstone, it is disconcerting to contemplate the prospect that the Court has been using its own unargued, unexamined and perhaps more importantly, unempirical local views of religion and of public safety as a principle of constitutional adjudication. In so doing,

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[80] "Polygamy does not attract much, or all Asia would by this time be Mahommedan," *One Hundred Years Ago,* THE SPECTATOR (London), September 29, 1990, at 11 (quoting THE SPECTATOR (London), 27 September 1890) (regarding polygamy and the Mormons). "It will be interesting to observe if the emigration to Utah suffers in consequence of the change [the abolition of polygamy by the Mormons after the Supreme Court's Mormon decisions]. We should say it would not, the real attraction of the Mormon community being that it is a community—a successful attempt, that is, to organize industry on a grand scale." *Id.* Nor did polygamy "attract" all Mormons, even when the Church authorized its practice. In 1890, the Mormon Church sent a delegation to Washington to lobby Congress on the religion's behalf, headed in part by members who "although loyal to the Church and its ideals, had not entered plural marriage and were quite willing to pledge that they would not do so." *See* JAMES B. ALLEN AND GLEN LEONARD, THE STORY OF THE LATTER-DAY SAINTS 418-19 (2d ed. 1992).

[81] Late Corp. Church of Jesus Christ v. United States, 136 U.S. 1 (1890). At least at the outset of its dealings with the Court, as a Christian church, the Mormon church presumably had no quarrel here with the Justice, and was surprised to learn this boundary left it on the outside of Christian America looking in. The attendant cessation of the practice of polygamy by the Mormons is discussed in, THOMAS O'DEA, THE MORMONS 104-14 (1970).

the Court has cast itself, however unwittingly, in the role of establishing and policing a metaphysical principle to sort out the "really" religious claims presented to it from other types of religious claims, backed up by an artificial interpretation of the history of religious belief and practices, to determine which religious claims are "truly" dangerous. One of the appeals of the *Seeger* and *Welsh* decisions in not defining religion is that by resisting the definitional temptation, the Court appeared to confirm the truism that bias should not be a constitutional touchstone. Bias may be more powerfully (and more perniciously) expressed by placing it within the neutral language or generalized application of an unspecified concern for public safety, as the court has effectively chosen to do at present.[82]

Where a true concern for public safety or order exists, courts have proven themselves competent to state with specificity what exactly is being threatened by religion.[83]

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[82] Judge Learned Hand once explained:

> Judges are seldom content merely to annul the particular solution before them . . . . On the contrary, they wrap up their veto in a protective veil of adjectives such as . . . "normal," "reasonable," "inherent," "fundamental," or "essential," whose office usually . . . is to disguise what they are doing and to impute to a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.

LEARNED HAND, THE BILL OF RIGHTS 70 (1958). *See also infra* note 132 (on Justice Scalia's history-free approach to free exercise).

[83] *See* Jacobson v. Massachusetts, 197 U.S. 11, 127 (1905) (holding that religious objectors required to be vaccinated against communicable disease); Congregation Beth Yitzchok v. Ramapo, 593 F.Supp. 655, 658-63 (S.D.N.Y. 1984) (enforcing fire code over religious objections); O'Moore v. Driscoll, 28 P.2d 438 (Cal. App. 1933) (involving a civil cause of action against priest for religiously motivated false imprisonment). The state should also be entitled to hold "free exercisers" responsible for harming others. *See also* Kirk v. Commonwealth, 44 S.E.2d 409, 419 (Va. 1947) (holding that a pastor may be convicted of involuntary manslaughter for handing a poisonous snake to wife during religious ceremony). These cases involve a specific harm to specific parties. Additionally, though no case on point was located, I would include the assignment of personal responsibility and ability for religiously motivated acts of gratuitous, self-inflicted injury without also prohibiting such acts. These types of specific threats to public order or safety are qualitatively different in kind from the often expressed view that religion is "politically dangerous." *See* Robin W. Lovin, *Perry, Naturalism, and Religion in Public*, 63 TUL. L. REV. 1301 (1989). This second type of threat has sometimes been reasonable, given specific historical factors, none of which characterize the present state of national affairs. *See id.*

III. DIMENSIONS OF UNDERSTANDING IN INTERPRETING THE RELIGION CLAUSES

A. CHOICE OF PROCEDURE

One may ask: Why employ a narrative method? Unfortunately, this question does not lend itself to the type of binding, objective answer that lawyers and judges have been taught to prefer. Instead, an answer to this question derives from the subjective insight that, as Robert Cover has pointed out, the "objectification of the norms to which one is committed frequently, perhaps always, entails a narrative—a story of how the law, now object, came to be. . . ."[84] The practical cash-value of narrative in the present context is that narrative allows one to observe a serious interpretative or hermeneutical gap—namely, that the Court is bound both by the values of the Framers of the Constitution and the values in the Court's own precedents. These values, however frequently conflict. Further, each value, more than existing as any kind of philosophical or legal proposition, is also part and parcel of a tradition, a tradition embedded originally in different interpretative frameworks that must be separately understood if one is to understand the respective values. A strictly "legal read" of these values is unfortunately likely to be merely propositional, and yet the task of understanding these traditions from a hermeneutical point of view is holistic, not propositional. In short, understanding the tension between religious autonomy and social coherence is pre-eminently a "hermeneutical" task:

> The wholeness anticipated in all understanding, then, is the making whole, the unification, of two parties when they come to agreement on a given topic. Historical understanding is the endeavor to bring about a meaningful agreement, an agreement in substance, between two traditions, one past, the other present. This whole, therefore, is emphatically not the wholeness of the past tradition in itself. The whole that is projected is not the autonomy of an object that is to stand over against the interpreting subject, for that would be at the outset both to defeat the purpose of understanding, which is the unification of the two parties; and to deny that what is

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[84] Cover, *supra* note 3, at 45. In addition to the work of Cover, my insights into narrative derive from Stanley Hauerwas and Alasdair MacIntyre, *see infra* note 228 (dealing further with Hauerwas and MacIntyre), and more basically, from the work and thought of the late Hans Frei, of whom I was blessed to know as a teacher and a friend.

> being said concerns the interpreter too. The past is not understood as a closed circle in the sense of a thing in itself that could be understood intrinsically. It is understood only in relation, for understanding it means reaching an understanding between the past and the present.[85]

But if there are patterns of unarticulated values about "religiousness" in the Court's "psychology," how can such hidden or non-obvious values be uncovered and related to each other?[86] The answer depends upon understanding the answers to two questions: (1) Why was it necessary to the Framers of the Religion Clauses that the Clauses be adopted at all?, and (2) Why has the Court frequently thought it necessary to interpret the constitutional promise of the protection of religion as it has, without protecting the challenged conduct or by protecting it as a matter of speech, not religion? Indeed, these questions are helpful in discovering the Religion Clauses' values because, as Dewey articulated: "[v]aluation takes place only when there is something the matter . . . some need, lack, or privation."[87] Contemplation of these two questions and potential answers suggests yet a third question—Is it possible that the historical narrative behind the enactment of the First Amendment can help to illuminate what values the Religion Clauses were designed to protect? Since this turn to history for a hermeneutical inquiry raises the specter of a gigantic inductive study, we can look to history only to provide us with a generalized foundation for these values. As Justice Brennan has pointed out, however, under-generalization is a trap for the unwary in this area: "A too literal quest for the advice of the Founding Fathers . . . seems to me futile and misdirected . . . [for] the historical record is at best ambiguous."[88]

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[85] JOEL C. WEINSHEIMER, GADAMER'S HERMENEUTICS 177 (1988).

[86] The question being asked here is somewhat similar to those motivating James B. Atleson in his book, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) in which Atleson endeavors to deal with "unarticulated notions" and "instances of doctrinal development [which] suggest a hidden set of values and assumptions, Id., 6-7. Atleson concludes that "[u]nderlying American labor law is a set of rarely expressed values . . ." Id., ix.

[87] John Dewey, Theory of Valuation (1939), *quoted in* WALTER KAUFMAN, NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, AND ANTI-CHRIST, 254 n.27 (1974).

[88] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). William Anderson also argues that what the Framers specifically intended becomes cloudy once one moves beyond general notions. William

Notwithstanding Justice Brennan's cautionary advice, one must not lose sight of the fact that "[f]or every constitution there is an epic."[89] The epic behind our Constitution is essential to one basic point that even the ambiguous history of the Religion Clauses can support—the Framers sought ultimately to protect religious liberty from the state and federal governments. To say this is to attribute to the Framers' a "teleology:" the "final cause" or purpose of the Clauses is the goal of protecting religious self-determination.[90]

B. THE POSSIBILITY OF AN ORIGINALIST POINT OF DEPARTURE

The reason for opposing what I have referred to in the last section as a legal or propositional read of the clauses is that utterances of the Religion Clauses that are too theoretical, too abstract, or that seek to capture in a singular proposition or holding what the clause(s) are all about, run a serious risk of filling in constitutional gaps in ways that lack rational direction or purpose.[91] As a matter of investigating

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Anderson, *The Intentions of the Framers*, 49 AM. POL. SCI. REV. 340 (1955). Although Anderson's type of anti-historicist argument might not work so well in other contexts, it does seem appropriate here.

[89] Cover, *supra* note 3, at 4.

[90] For introducing discussions of final causation, *see* ROBERT S. BRUMBAUGH, THE PHILOSOPHERS OF GREECE, 183-186 (1981) and R.M. HARE, PLATO, 70 (1982). The final cause is the purpose for which something comes to be, while the formal cause is the plan, schema or pattern to which something should conform. (Hare notes that, generally speaking, the only one of the traditional four causes—final, formal, material, and efficient—to survive into modernity is efficient causation, which explains a thing's source of motion.) The Court has the "duty" to protect, that is, the "goal" of religious autonomy. This sets up a different logic of interpretation than the constitutional deontological approach of the Court. There is a distinction regarding flexibility to be made for a strict scrutiny test justified teleologically rather than deontologically.

[91] This is a vault into the void necessarily creates interpretative trouble. As former Chief Justice Burger posited: "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." Walz v. Tax Com. of New York, 397 U.S. 664, 668 (1970). To put the point about the risks of inordinate abstraction another way, as Edward Levi has summarized the matter: "The rule will be useless. It will have to operate on a level where it has no meaning." LEVI, THE NATURE OF LEGAL REASONING, (1949) at 9. For a complaint against this type of essentialist tendency in philosophy, see RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 306-07 (1979). *See supra* note 45 (discussing Wittgenstein's parallel complaint). This same concern about the cost of too much generalization also suggests that the *Welsh* and *Seeger* reluctance to judicially define religion is well-founded as a jurisprudential matter.

any values that might exist latently beneath the surface, a plain meaning approach is, of course, even less helpful. As Wittgenstein observed: "You say to me: 'You understand this expression, don't you? Well then—I am using it in the sense you are familiar with.'—As if the sense were an atmosphere accompanying the word, which it carried with it into every kind of application."[92] The words in the Religion Clauses are not perspicacious, and a plain reading of the Clauses to discern what values, if any, inspired the language employed is inevitably a disappointing and insufficient, although important, endeavor. Once perspicaciousness is ruled out, hermeneutics become inevitable.

Despite some authority to the contrary,[93] the language stated in the "free exercise" clause is susceptible to differing, sometimes even contradictory, meanings. The same holds true for a plain reading of the Establishment Clause, especially since that Clause does not prohibit the establishment of religion *per se*, but instead prohibits any laws "*respecting* the establishment of religion."[94] Accordingly, a rejection of a "plain meaning"[95] procedure for interpretive legal inquiries would appear to be methodologically compelled as a point of departure. This rejection is not, however, a rejection of the constitutional text or of the intent of

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See supra part II.A.

[92] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS I § 117 (1968).

[93] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 16 (1980) ("[W]hat seems invariably to get lost in excursions into the intent of the framers . . . [is] that the most important datum bearing on what was intended is the constitutional language itself"). "Exercise" could be a verb or it could be a naming word.

[94] *See* U.S. CONST. amend. I (emphasis added). This point was also made by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> [t]he language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion.

Id. at 612.

[95] My criticism here relates to attempts to collapse the meaning of the clauses into only an inquiry into the Framer's original intent such that an identity relation is established between the two. There is, admittedly, no express "plain meaning rule" of constitutional interpretation. For an in-depth analysis of the plain meaning rule, which is exclusively a tool of statutory interpretation and which has made a successful return to the Court, see Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2 (1939).

the Framers. It is rather an acceptance of the text coupled with the recognition that the text contains an "excess of meaning" which always "goes beyond the author's intention, explicit or implicit."[96] An originalist point of departure is therefore both possible and necessary but not sufficient.

C. THE FRAMERS' HERMENEUTIC OF RELIGIOUS PRIVACY

The Framers of the First Amendment sought to protect religious liberty, usually in the form of the liberty of autonomy of unpopular religious minorities, from attack by two separate agents—the state's government and the state's religion—that urged nation-wide social coherence.[97] Although two in number, the First Amendment's Religion Clauses have the singular purpose of promoting and protecting religious autonomy. Specifically, the Free Exercise Clause was teleologically designed to protect religious freedom from political infringement, while the Establishment Clause was intended as a guarantee against federal concordats between God and Caesar, as had occurred in the Old World and in some of the colonies and states.[98]

Indeed, the preservation of religious freedom was particularly important in 1789 since religious liberty was in jeopardy from the threats of powerful political and ecclesiastical enemies.[99] It may require some historical imagination to recall that when the Religion Clauses officially became part of the Constitution in 1791, the threat of an established church was real.[100] The colonies of Virginia, Georgia, the Carolinas

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[96] David E. Linge, *Introduction* to HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS at xi, xxv (David E. Linge tran. & ed., 1977). Gadamer could perhaps be described as an "original intent" theorist—but only for half of the time. The reason for this half-heartedness is that the "meaning of a text surpasses its author not occasionally, but always." *Id.* For the same reason, it would not be congenial to completely by-pass the significance of either the words in the original text nor the intentions originally governing that text. *See also* Rush Rhees, Discussions of Wittgenstein 75 (1970) ("Speaking is not one thing, and 'having meaning' is not one thing either."). *Cf. infra* note 132 (discussing Justice Scalia's disuse of historical sources in *Smith*).

[97] *See generally* WILLIAM H. MARNELL, THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA (1964).

[98] *Id. See supra* note 90 (on teleological causation).

[99] *See generally* THOMAS J. CURRY, THE FIRST FREEDOMS, CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986) (setting forth a history of American church and state involvement in the seventeenth and eighteenth centuries). *See also supra* note 9 (collecting historical authorities).

[100] *Id.* at 104.

and Maryland had all established the Church of England as an official state church.[101] Massachusetts, New Hampshire, and Connecticut established *de jure* and *de facto* state churches with both a Congregationalist majority and an Anglican minority, vying for preeminence.[102] A sentiment against religious coercion, at least in part, prompted James Madison to introduce the two Religion Clauses to the first Congress along with a proposal to make the Clauses binding on state governments in addition to the federal government.[103] Madison explained that "there is more danger of those powers being abused by the State Governments than by the Government of the United States."[104] The Framers apparently remembered with genuine horror the persecution of Protestants in England under the reigns of both Elizabeth and Charles I—a persecution sparked, ironically, by fears of persecution. As Roland Bainton noted: "Englishmen would not tolerate Catholics because they did not trust Catholics to be tolerant of Protestants."[105] Concerning this background of intolerance, the *Everson* Court acknowledged:

> The centuries immediately before and contemporaneous

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[101] *See id.* at 104-5.

[102] *See id.* at 106-20.

[103] Madison's "incorporation" motion to the First Congress suggests a hermeneutical significance that can be put into perspective by a comment from Schleirmacher:

> Understanding always involves two moments: to understand what is said in the context of the language with its possibilities and to understand it as a fact in the thinking of the speaker . . . these two hermeneutical tasks are completely equal . . . .

F.D.E. SCHLEIRMACHER, HERMENEUTICS: THE HANDWRITTEN MANUSCRIPT 98-99 (H. Kimmerle ed., J. Dulce and J. Forstman trans., 1977). As legal authority, the status of Madison's motion to the first Congress is much less certain, and far from dispositive. In fact, Madison's idea would not be realized until 1940 when, in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Supreme Court applied the prohibitions of the Establishment Clause to the states, holding that "[t]he fundamental concept of liberty embodied in . . . [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Id.* In fact, in an 1845 case, the Supreme Court had reached an opposite conclusion on the same issue. *See* Permoli v. New Orleans, 44 U.S. 589 (1845). *See also* LEO PFEIFFER, GOD, CAESAR, AND THE CONSTITUTION 14 (1975) (citing *Permoli*).

[104] ALPHEUS T. MASON AND WILLIAM M. BEANEY, AMERICAN CONSTITUTIONAL LAW 550 (1978).

[105] ROLAND BAINTON, THE TRAVAIL OF RELIGIOUS LIBERTY 230 (1951).

> with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.[106]

Twenty-five years later in *Wisconsin v. Yoder*[107] the Court further recognized the importance of the phenomenon of intolerance when it observed teleologically that "forced migration of religious minorities was an evil which lay at the heart of the Religion Clauses,"[108] an insight about the Framer's goal in adopting the clauses, which the present Court has subsequently consolidated.[109] Ironically, this intolerance[110]

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[106] *Everson*, 330 U.S. at 8-9.

[107] 406 U.S. 205 (1972).

[108] *Id.* at 218 n.9. *See also* Everson v. Bd. of Educ., 330 U.S. 1, 8-10 (1947) (discussing conditions and practices of laws respecting the establishment of religion and the imposition of taxes to support them prior to and during the early settlement of the United States).

[109] *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 61 U.S.L.W. 4587, 4590, 4594 (U.S. June 11, 1993). In concluding that Hialeah's anti-animal sacrifice ordinance unconstitutional burdened religious exercise, the Court stated:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. . . . Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.

Id. at 4594.

[110] It is also ironic that the phenomenon of intolerance is perhaps the most adequate "fusion point" between past and present interpretative horizons to guide an inquiry into the meaning of the values behind the Free Exercise Clause. On the one hand, concerns for intolerance motivated the Framers to adopt the Religion Clauses while, on the other, intolerance against religion has sometimes seemed to motivate the Court in deciding religion controversies. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 694 (Douglas, J., dissenting) (warning against the ominous, growing wealth of churches and expressing

survived from the old countries to reappear in most of the colonies.

1. Anne Hutchinson

Anne Hutchinson was a victim of the harsh intolerance of the religious bigots in Colonial New England.[111] Perhaps the most controversial of her teachings was the idea of personal revelation from God. Governor Winthrop, among others, felt it was his duty to "protect the Word [of God] and the state from this instrument of Satan."[112] This lack of tolerance and subsequent "trial" and banishment of Anne Hutchinson from the Massachusetts Bay Colony demonstrated how quick the Puritans were to forget their own victimization.

Governor Winthrop "could not recognize in Anne Hutchinson's teachings the outlines of another religious and political philosophy with its own right to exist."[113] To acknowledge the strength of these competing view points would be to admit that his own religious ideals were somehow not correct—a possibility that never occurred to Winthrop. The trial of Anne Hutchinson and her willingness to stand up to the unfounded accusations leveled against her[114] helped to provide strength and conviction for those who would follow in her steps.[115]

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disfavor with churches' "incessant demands on the public treasury" in the form of government grants and tax exemptions). *See also* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE UNITED STATES 261 (1840) ("at the time of the adoption of the constitution . . . . [a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation"). On the concept of a "fusion point" in hermeneutics, see generally HANS-GEORG GADAMER, TRUTH AND METHOD 273 and passim (1975) ("[t]he fusion of horizons . . . [is] not simply the formation of one horizon . . . . Every encounter . . . involves the experience of tension between the text and the present. The hermeneutic task consists not in covering up this tension by attempting a naive assimilation but in consciously bringing it out").

[111] *See* Edmund S. Morgan, *The Case Against Anne Hutchinson, in* ANNE HUTCHINSON: TROUBLER OF THE PURITAN ZION 51, (Francis J. Bremer ed., 1981)

[112] *Id.*

[113] *Id.* at 53.

[114] *Id.* at 54.

[115] *Id.*, at 51. As Winnifred Rugg notes, Anne Hutchinson was "a lonely exemplar in newborn America of that freedom of thought, word, and action that women now accept as unthinkingly as the air they breathe." *Id.* (I am grateful to Heidi Boyle for calling this item to my attention.)

2. Roger Williams

In response to intolerance, those involved in the "lively experiment" of Roger Williams in Rhode Island created a society whose special concern was to promote the protection of religion from state intervention. Robert Cover points out that the "faith of Roger Williams" is a key to understanding the protection of religion in its original narrative context.[116] In 1644, Roger Williams wrote: "[i]t is the will and command of *God* that . . . a *permission* of the most *Paganish, Jewish, Turkish,* or *Antichristian consciences* and *worships,* be[] granted to *all* men in all *Nations* and *Countries* . . . ."[117] William's concern for the protection of religions that were not only non-Christian, but anti-Christian as well, is remarkable especially in consideration of the Supreme Court's frequent difficulties with all but high-culture religions. The experiment begun by Williams "became the doctrinal pacesetter and model for American Protestant development during the eighteenth century."[118]

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[116] Cover, *supra* note 3, at 18 (quoting MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 7-8 (1965)). Cover agrees with Mark DeWolfe Howe that this theological turn in uncovering the underlying values that prompted the adoption of the Establishment Clause would probably not sit well with the Court in more modern times. *Id.* My appropriation of Howe's work in this section—to try to establish the value of religious self-determination—is, I believe, justified despite my omission of Howe's points regarding federalism. As a matter of ordinary historical investigation, which the present study is not, *see supra* section I, it would be difficult to attribute to the founding fathers the intention to protect the new republic from all state-established religion as such, since the wording of the Religion Clauses makes possible the interpretation that the Framers wanted to protect not only the free exercise of religion, but also the established religions of several states from federal intervention. *But see, supra* notes 99-110. *See also,* Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,* 24 VILL. L. REV. 3, 11 (1978-79) (discussing three historical bases from which the meaning of the Religion Clauses may have been derived).

[117] *See* Roger Williams, *The Bloody Tenet Of Persecution for Cause of Conscience, discussed in A Conference Between Truth and Peace, quoted in* J. MARK JACOBSEN, THE DEVELOPMENT OF AMERICAN POLITICAL THOUGHT 71 (1932).

[118] MORGAN, *supra* note 111, at 13-14. One commentator acknowledged: "Toleration had a long English history; separation—conceived in the English writings of Roger Williams—had its beginnings as an historical fact only on the shores of this continent." PHILIP KURLAND, RELIGION AND THE LAW 17 (1962). *See also* SIDNEY MEAD, THE LIVELY EXPERIMENT (1963); EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND STATE 115-35 (1967).

3. James Madison

In 1776, during Virginia's Constitutional Convention, James Madison penned the phrase "free exercise of religion."[119] George Mason had proposed a clause to protect religious freedom; its language, however, appeared inadequate to Madison, then a twenty-six year old graduate of Princeton, where he had studied religion under the Calvinist tutelage of John Witherspoon.[120] Madison judged Mason's language—that "all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience"—as too weak.[121] "Toleration" was the wrong word for Madison because it "implied something which existed as a gift from the government, and not

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[119] Madison's contemporary, the German thinker Schleirmacher, set forth the division of hermeneutical analysis into grammatical and psychological or technical interpretative categories, each being equally important. While Roger Williams' significance perhaps embodies the latter part of this division, the grammar of the text starts and ends with James Madison. *See generally* WERNER G. JEANROND, TEXT AND INTERPRETATION AS CATEGORIES OF THEOLOGICAL THINKING (1988). Yet were one to collapse the present analysis into merely an inquiry about Madison's "authorial intentions," the analysis would then bear a logical resemblance to the plain-meaning approach already rejected as hermeneutically inadequate, because a short-cut to nowhere.

[120] *See generally* VIRGINIA MOORE, THE MADISONS (1980). According to Moore, Madison was a Trinitarian Christian and devout Episcopalian all of his life. For the content of Witherspoon's "conservative" (anti-Lockean) religious point of view as taught to Madison, see JOHN WITHERSPOON, LECTURES ON MORAL PHILOSOPHY (1810). Philosophy also made significant contributions in Madison's intellectual formation.

> [O]ur founding fathers, particularly James Madison, were influenced very much by the philosophical systems of Thomas Hobbs (1588-1679) and Gottfried Wilhelm Leibnitz (1646-1716). Hobbes espoused the doctrine that sovereignty is unlimited and indivisible. This was very important to the framers of our Constitution, again Madison in particular, as they provided for sovereignty to reside in the peoples of the several states. They were influenced too by Leibnitz in that they fostered religion by expressly guaranteeing freedom of religion and thus impliedly disdaining freedom from religion. George Wilhelm Friedreich Hegel (1770-1831) and Thomas Carlyle (1795-1881) came along a generation after our founding fathers. However, they had a profound influence upon many of the jurists who have interpreted our Constitution . . . .

H. Newcomb Morse, *The Provinces of God and Government Under the Constitution: Relating to Hobbes, Hegel, Leibnitz, Carlyle*, 12 OKLA. CITY U. L. REV. 841, 841 (1987).

[121] MARVIN MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 21 (1978). *See also supra* note 99 (on historical sources).

as a matter of right."[122] As a substitute for "toleration," Madison proposed that "all men are entitled to the *full and free exercise* [of religion] according to the dictates of conscience."[123]

The Virginia formulation was decisive for the nation as a whole in 1789 when the First Congress sought to enact a guarantee for religious liberty. Here, as elsewhere, Madison was "more responsible than any one for the content of the Constitution."[124] Indeed, the importance of Madison's influence necessitates an inquiry into the nature of the Madisonian impress.

Madison used the word "exercise" clearly to include both conduct as well as belief. Far beyond making merely a grammatical point, Madison also asserted a moral worldview as evidenced by his choice of language. Writing in his Memorial and Remonstrance of 1785, Madison elaborated on the metaphysical background implied by his choice of terms:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of *every man to exercise it as these may dictate.* This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men. It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render the Creator such *homage*, and such only, as he believes acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.[125]

For Madison, citizens had a property right in being left to their own convictions and to their own consciences. As one commentator

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[122] *Id. See also* DANIEL J. BOORSTIN, HIDDEN HISTORY, EXPLORING OUR SECRET PAST 181 (1989) ("religious toleration is to be sharply contrasted to religious liberty . . . . The Founding Fathers despised the condescension that was implied in the very concept of toleration"). *See also supra* note 118 (on toleration in English history).

[123] MABLIN, *supra* note 121, at 21 (emphasis added).

[124] *See* MAX BELOFF, THE FEDERALIST PAPERS vii (1948).

[125] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, II Madison 183-191, *reprinted in* Everson v. Bd. of Educ. 330 U.S. 1, 64 (1947).

posited, concerning Madison's view: "When governments pride themselves on guarding inviolability of property, let them see to it that they respect the property in rights as well as the rights of property."[126] Indisputably, government existed *per se* to guard both types of these possessions. Not only was the state to protect against unlawful seizures of property, but also to protect against undue burdens upon religious autonomy.

4. Theology and the Great Awakening

Historical experience, however, was only one of the factors motivating the concerns of people like Williams and Madison to make autonomy, in the form of the free exercise of religion, a substantive constitutional value. Theology contributed as well.[127] Jonathan Edwards, most famously, made important, even if unintended, contributions. The Great Awakening's focus on the "individual and private character of the Protestant religious experience" diminished the importance of institutional mediation of a spiritual nature.[128] A corollary to the lessened significance of institutional mediation was that state interference was perceived as an illicit institutional mediation. As the Court observed in *Ballard,* "man's relation to his God was made no concern of the state."[129] Because of this distrust of institutions—which was itself religiously motivated—that came between man and God, the new Constitution, specifically the Bill of Rights, was designed in part to render such interference politically difficult to accomplish.

5. Conclusion

While the historical analysis of this section clearly permits a much

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[126] ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 124 (1950).

[127] Troeltsch correlated the "emergence of religious individualism" with the "destruction of the old sociological organism of the sacramental and sacerdotal church." ERNST TROELTSCH, 1 THE SOCIAL TEACHINGS OF THE CHRISTIAN CHURCHES 328 (1931). "[T]he rarely permanent attainment of individualism was due to a religious and not a secular movement, to the Reformation. . . ." *Id.* at 381.

[128] MORGAN, *supra* note 111, at 15. *See* EDWIN SCOTT GAUSTAD, THE GREAT AWAKENING IN NEW ENGLAND 125 (1957); ANSON PHELPS STOKES & LEO PFEIFFER, CHURCH AND STATE IN THE UNITED STATES 11-13 (1964).

[129] 322 U.S. 78, 86.

more thorough discussion,[130] the Framers' hermeneutic of privacy can at this point nevertheless be summarized. For the Framers, the First Amendment was necessary to protect religiously motivated claims of self-determination. As one commentator has put the matter: "[a]t least part of the explanation of the Free Exercise Clause has to be that for the framers religion was an important substantive value they wanted significantly to put beyond the reach of the federal legislature."[131] The historical memory of religious persecution and a theological belief that the state should not interfere in the God-relation should be part of any telling of the tale of the Religion Clauses.

Furthermore, religion as a phenomenon was recognized originally by the Framers as a diverse collection of beliefs and practices; an appeal to a saner, simpler time to help settle the issue would be simply false.[132] In fact, the consciousness of an inclusiveness of world religions was expressly echoed later when the Constitution was being debated. James Iredell asked, in the North Carolina debates concerning the adoption of the Federal Constitution: "[H]ow is it possible to exclude any set of men, without taking away the principle of religious freedom which we ourselves so warmly contend for?"[133] Indeed, religion as a concept in the New World originally reached "the most Paganish, Jewish, Turkish, or Antichristian consciences and worships."[134] As Professor Gaustad has stipulated concerning America's religious history: "[i]n the

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[130] *See supra* note 9 (listing historical materials).

[131] *See* ELY, *supra* note 93, at 94.

[132] The absence of a saner, simpler time in this area of constitutional history may, along with Framers' clear purposes in adopting the Free Exercise Clause, help explain Justice Scalia's opinion in *Smith*, which is free from the historical arguments that characterize his jurisprudence generally. *See, e.g.*, Burnham v. Superior Court of California, 495 U.S. 604 (1990). *Burnham* affirmed presence as a constitutionally valid means to obtain jurisdiction over a defendant. *Id.* at 627. Justice Scalia, writing for the majority, justified the doctrine's validity based upon the doctrines's deep jurisprudential roots. *Id.* at 611. The Justice traced the presence doctrine's origins to Roman Law and determined that the doctrine was well grounded in the American common law when the states ratified the Fourteenth Amendment in 1868. *Id.* Other than the possible presence of a Roman Law predicate, the algorithm by which history—now you see it, now you don't—is in turn relevant and irrelevant to the Justice in deciding cases has, as far as I have been able to determine, never been disclosed.

[133] J. ELLIOTT, 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194 (1836).

[134] Williams, *supra* note 117, at 71-74.

beginning was complexity; and the complexity has endured."[135] The result of this complexity, both then and now is that: "religious variety preceded political unity," creating the necessity that the values be ordered such that political unity accommodate religious variety, and the other way around.[136]

D. THE SUPREME COURT'S HERMENEUTIC OF DISTRUST: RELIGIOUS BELIEF V. RELIGIOUS CONDUCT

While the value of religious self-determination constitutes part of an answer to the question of why it was important to adopt the Religion Clauses, another value, a very different value than religious liberty, can be seen in the Court's first efforts to interpret the promise of protection for religious activity. This is the policing and protection of public order. Although the Court has not hesitated to return to the Founding Fathers or to the history of Virginia in its search for the Religion Clauses' core meaning, "the claims of Civil Society"[137] have too often been given almost automatic precedence over the free exercise of religion. The Court's first confrontation between religious freedom and government illustrates this restrictive approach, constraints which are motivated to a significant extent out of concern for protecting the state from religion.

1. The Mormon Cases

That the framers' original hermeneutic would be tested and eventually come into conflict with other principles of interpretation such as the hermeneutic of distrust of religion that arose out of the Mormon

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[135] EDWIN S. GAUSTAD, FAITH OF OUR FATHERS: RELIGION AND THE NEW NATION 3 (1987) (referring to radical Protestant pluralism). Yet it is precisely this lack of "pattern" that appears constitutive of the formal cause of the Clauses. *See supra* note 90 (discussing modes of causation).

[136] BOORSTIN, *supra* note 122, at 180-81. Boorstin states that:

> [T]he nation was created from areas with diverse sects. Oddly enough, the fact that the colonies already had their several and various established churches contributed to this necessity. A federal nation was plainly not founded on a religious base . . . . [I]n the American colonies, religious variety preceded political unity and had to be accommodated within it."

Id.

[137] Everson v. Bd. of Educ., 330 U.S. 1, 64 (1947).

cases was predicted in what Professor Ackerman has called Hegel's "only significant comments concerning America":

> As to the political condition of North America, the general object of the existence of the State is not yet fixed and determined, and the necessity for a finer combination does not yet exist; for a real State and real Government arise only after a distinction of classes has arisen, when wealth and poverty become extreme, and when such a condition of things presents itself that a large portion of the people can no longer satisfy its necessities in the way in which it has become so to do. But America is hitherto exempt from this pressure, for it has the outlets of colonization constantly and widely open . . . . By this means the chief source of discontent is removed.
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> . . . .
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> North America will be comparable with Europe only after the immeasurable space which that country presents to its inhabitants shall have been occupied, *and the members of the political body shall have begun to be pressed back on each other.*[138]

Almost a century passed after the enactment of the Bill of Rights before the Supreme Court accepted for argument any religion cases under the First Amendment. Not until the later part of the nineteenth century did the Justices hear a cluster of cases that forced them to evaluate the values of religious freedom and public order under the First

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[138] G.W.F. Hegel, *in*, BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION, 286-87 n.57 (1977) (citation omitted) (emphasis added). Historians know all this as the "frontier thesis" (of Frederick Jackson Turner), which argues that the American "character" was formed by continued expansion and changed by closure of the frontiers. *See* FREDERICK JACKSON TURNER, *The Significance of the Frontier in American History, in* THE FRONTIER IN AMERICAN HISTORY 1, 1-38 (1920). Of course, historical revisionism has left very little of Turner's thesis unchallenged. Hegel's comment occurs almost half a century before the Mormons arrive at the Court and almost a century before a Turner develops the point historically. In Hegel's analysis, therefore, the observation would not seem to require a historical basis, as it never was predicated upon one. Hegel's point was instead dialectical—he was looking to an antithetical moment in history from the standpoint of philosophical theory.

Amendment's Free Exercise Clause. In *Reynolds v. United States*,[139] *Murphy v. Ramsey*,[140] *Davis v. Beason*,[141] and especially, *Late Corp. of Church of Jesus Christ v. United States*,[142] the Court held that, although religious beliefs were absolutely beyond the sphere of national regulation, associational self-determination, even where there existed no clash of rights, was not.[143]

Given Madison's expanded sense of the values intended by the word "exercise,"[144] the Mormon cases involved an interesting use of history by the Court. The Court rejected the logic of a Madisonian view of religious liberty, and instead adopted what it perceived as a Jeffersonian approach. Whatever differences these two theories might have had, and the Court was almost certainly wrong about them,[145] it is ironic that, while Madison won at the First Congress in his broad understanding of "exercise," he lost at the Supreme Court in 1878 in *Reynolds v. United States*.[146]

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[139] 98 U.S. 145 (1878). *See infra* note 151 (describing public reaction to the *Reynolds* case). For an extensive discussion of the *Reynolds* decision, see Jeremy M. Miller, *A Critique of the* Reynolds *Decision*, 11 W. ST. UNIV. L. REV. 165 (1984) and BRUCE A. VAN ORDEN, THE LIFE OF GEORGE REYNOLDS, PRISONER FOR CONSCIENCE SAKE (1992).

[140] 114 U.S. 15 (1885). The action was brought to recover damages alleged to have arisen by reason of the defendant's wrongful and malicious refusal to permit the plaintiffs to be registered as qualified voters in the Territory of Utah. *Id.* at 17. As a result, they were precluded from voting for a delegate to the Forty-eighth Congress. *Id.* at 17. The Court held that the defendants, as registered officers, were required to exercise diligence and good faith in the inquiries and [were thus] responsible in damages for rejections made without reasonable cause, or maliciously." *Id.* at 46-47. The Court went on to chastise the defendant's actions as wrongful and malicious, and consequently held for the plaintiffs. *Id.* at 47.

[141] 133 U.S. 333 (1890). *See supra* note 44 (discussing the *Davis* decision in detail).

[142] 136 U.S. 1 (1890). *See supra* notes 81.

[143] *Id.*

[144] *See supra* part III.C.3. and accompanying text (elucidating James Madison's view that religious autonomy deserves the utmost protection).

[145] The difference between Madison and Jefferson was exaggerated by the *Reynolds* court. Jefferson suggested: "[O]ur rulers can have authority over natural rights only as we have submitted them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others." THOMAS JEFFERSON'S NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed. 1972).

[146] 98 U.S. 145 (1878) (affirming a lower court's ruling that an individual's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land).

To compound the irony, the Mormons relied on Jefferson's inspiration to support their claim that a prohibition of polygamy violated their right to the free exercise of religion.[147] In the 1786 *Statute of Virginia for Religious Freedom*, authored by Jefferson, he had envisioned the protection of *conduct* and not just belief, a point further elaborated in his autobiography with sufficient clarity to convince the Mormons that the Court would vindicate their claims. Jefferson wrote that the statute was "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohametan, the Hindoo and Infidel of every denomination."[148] Polygamy, of course, was and is a distinguishing "Mohametan" precept. Jefferson stated that religion "does . . . no injury [if] it neither picks my pocket on breaks my leg."[149] Despite the clarity of Jefferson's conclusion that conduct should be protected from state and governmental intrusion, the Court ruled that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices,"[150] with Chief Justice Waite citing Jefferson in his unanimous opinion for the Court.[151] In so doing, the Court erroneously rejected the Mormons' argument that "religious liberty is a right embracing more

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[147] Jefferson's views here are quoted by George Q. Cannon, a high-ranking Mormon leader, in the CXXXII North American Review 466 (1881).

[148] Thomas Jefferson, *in* FRANK SWANCARA, THOMAS JEFFERSON VERSUS RELIGIOUS OPPRESSION 126 (1969).

[149] *Id.*

[150] *Reynolds*, 98 U.S. at 166.

[151] *See* Van Orden, *supra* note 139, at 87. Chief Justice Waite's private papers reveal that in an informal poll of the Court by the Chief two months before the Reynolds decision issued, only five justices voted to uphold the polygamy conviction while four disagreed. *Id.* at 86. Public reaction to the *Reynolds* decision divided into essentially two categories: reaction from inside of Utah and all the rest. The New York Times thought the decision a "great gain" for the country and "a decided victory." *Id.* at 87. The New York Tribune stated that "polygamy" was an "abomination . . . on the same level with murder." *Id.* For her part, Eliza R. Snow, a polygamous wife, contrastingly wrote in the Utah press:

> "Let us chase thousands of honorable, loving wives to be stigmatized as prostitutes, and their offspring as bastards. Let us immure in prisons those brave men, who, for the sake of worshipping God according to the dictates of their own conscience, left their homes and graves of their noble ancestors, and sought relief in the sterile American desert."

Id. at 88.

than mere opinion, sentiment, or belief. It includes all human conduct that gives expression to the relation between man and God."[152]

2. The Unseverability of Religious Belief from Religious Conduct

By differentiating action from belief in the Mormon cases as well as in *Employment Division, Department of Human Resources v. Smith,*[153] "the Court announced a rule which rendered the Free Exercise clause practically meaningless."[154] In the Mormon cases, the Court created *ex nihilo* and without reference to the Framers' purposes a dichotomy that stayed in effect for nearly a century and, given *Smith,* possibly forever (as perhaps befits *ex nihilo* creations).[155] The Court's reliance on the dichotomy, however, is simply wrong.

To begin with, both halves of the dichotomy are mistaken even as pieces of the truth. The first half of the dichotomy, concerning belief, is mistaken because the idea that mere religious belief is beyond even a compelling state interest might sound good, but closer analysis shows that this distinction does not hold true unqualifiedly. In *Davis v. Beason,*[156] the Court held "that expression of belief, and even associating with persons of the same belief, may constitute action subject to governmental restriction."[157] To take a better example, courts also have not hesitated to sustain dismissals of elementary school-bus drivers whose religious convictions included a self-profaned belief in the divine necessity of infant sacrifice; whether sacrifice was likely to occur was less

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[152] Arguments for the Appellant, Davis v. Beason, 133 U.S. 333, 338 (1890). *See infra* note 160 and accompanying text.

[153] 494 U.S. 872 (1990). *See supra* note 32 (describing the *Smith* case).

[154] PFEIFFER, *supra* note 103, at 36. For cases relying on Pfeiffer's authority on the Free Exercise Clause, see Larson v. Valente, 456 U.S. 228 (1982); Welsh v. United States, 398 U.S. 333 (1970) (Harlan, J., concurring); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970); Illinois v. Allen, 397 U.S. 337 (1970); McGowan v. Maryland, 366 U.S. 420 (1961) (Douglas, J., dissenting).

[155] *See, e.g.,* The Church of Lukumi Babalu Aye v. Hialeah, 61 U.S.L.W. 4587 (June 11, 1993). In deciding its most recent free exercise case, the Court left the *Smith* belief/action dichotomy intact. Justice Souter points out in his concurrence that the Court's *Smith* rule, *see supra* note 78, was unargued and unbriefed, *id* at 4601 (Souter, J., concurring), so the dichotomy was imposed (to paraphrase Yogi Berra) nunc pro tunc deja vu *ex nihilo,* all over again.

[156] 133 U.S. 333 (1890). *See supra* note 44 (discussing *Davis*).

[157] *Davis,* 133 U.S. at 334.

relevant in guiding the Court than the belief alone.[158] Further, in 1955 the Supreme Court "refused to disturb a decision by a Utah court depriving parents of the custody of their children because they persisted in teaching them . . . polygamy." Courts, in short, have recognized the inapplicability of the dichotomy where imminent harm to innocent third parties is involved.[159]

The problem involved in the second half of the dichotomy, concerning action, involves a misunderstanding by the Court of the very nature of religion and freedom of conscience. After all, the category of action or conduct could hardly be more basic, given that the religious basis for deeds is soteriological.[160] To think of religious traditions apart from this interest in salvation, which is such a bottom line concern, but which the Court's dichotomy seems to do, is more than a little hard to follow, given that judgement for deeds or conduct is more than merely a life or death matter for religious folk.[161] Even assuming the dichotomy were workable, it is far from clear that the belief/action split makes any sense. As Laurence Tribe has noted, "[e]xpression and

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[158] *See* Hollon v. Pierce, 64 Cal. Rptr. 808, 810 (1967).

[159] *See* In re Black, 283 P.2d 887 (Utah 1955) *cert. denied*, 350 U.S. 923 (1955). *See also* PFEIFFER, *supra* note 103, at 32.

[160] On the other hand, with regard to certain, distinguished Eastern religious traditions, the *Smith* dichotomy is perhaps less complex, as the Bhagavad Gita reveals:

> [A]ction is far inferior
> To discipline of mental attitude.
> In the mental attitude seek thy (religious) refuge;
> Wretched are those whose motive is the fruit (of action).

THE BHAGAVAD GITA II: 49 (Franklin Edgerton trans., 1978). As Franklin Edgerton has explained, "[e]ven good deeds are still deeds, and must have their fruit, according to the doctrine of 'karma.' And to attain the *summum bonum* man must get rid of all deeds, of all karma." *Id.* at 126 (Interpretation). While Book II of the Gita seems to suggest the conclusion that what is good for karma is bad for the Constitution—the absence of all conduct—the Gita also deals with *bhakti yoga*, which promulgates act-mediated other regard:

> Freedom from activity is never achieved by abstaining from action. Nobody can be perfect by merely ceasing to act.

BHAGAVAD GITA III: 44 (Swami Prabhavanada and Christopher Isherwood, 1944) (distinguishing the "path of knowledge" and the "path of selfless action").

[161] "He will render to every one according to their deeds." A. COLIN DAY, ROGET'S THESAURUS OF THE BIBLE 467 (1992) (collecting scriptures). *See supra* note 65 (discussion the "fear and trembling" involved in asserting a free exercise claim).

conduct, message and medium are . . . inextricably tied together in all communicative behavior . . . ."[162] "Words," to quote Wittgenstein, "are deeds."[163] Religious "talk" is additionally, to a very large extent, a "performative utterance,"[164] thereby straddling the dichotomy at the "atomic" level.

The belief/action dichotomy, therefore, in almost every instance

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[162] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 827 (2d. ed. 1988).

[163] LUDWIG WITTGENSTEIN, CULTURE AND VALUE 46e (Peter Winch trans., amended 2d ed. 1980). *See also*, LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS I § 546 (G.E.M. Auscombe trans., 2d ed. 1963).

[164] A performative utterance has been defined as a speech-act "that actually describes the act that it performs, i.e. it performs some act and simultaneously describes that act." JAMES HURFORD AND BRENDAN HEASLEY, SEMANTICS 235 (1983). Religious speech is often just like this. *See* ANTHONY C. THISELTON, NEW HORIZONS IN HERMENEUTICS 16-17 (1992) (phrases such as "I forgive you" "I hereby authorize you" and other forms of religious speech such as "acts of promise, acts of blessing, . . . acts of repentance, acts of worship, acts of authorization, acts of communion, and acts of love [are] extra-linguistic transactions [or] speech acts . . . [and] lie near the heart of what the Bible is all about.")

The significance of this "extra-linguistic" distinction is visible form the Mormon cases. The belief/action dichotomy, in *Reynolds v. United States*, was apparently devised to deal with the Mormon practice of polygamy. In the subsequent Mormon cases, a belief/advocacy/action trichotomy was used to regulate not only the practice of polygamy, but its advocacy as well. The trichotomy was invented to expand the dichotomy to preclude a possible classification of advocacy as belief so that advocacy would be open to regulation. Evidently, advocacy simply was not similar enough to action to fit comfortably within the Court's "action" half of the original dichotomy. The Edmunds Act, 22 Stat. 30 (1882), and the Edmunds-Tucker Act, 24 Stat. 635 (1887), exemplify the inadequacies and inequities of a belief/advocacy/action distinction. The Edmunds Act made it a felony in the Territories to commit or advocate plural marriage and deprived polygamists of basic political rights, including the right to vote, hold public office, or serve as a juror. Edmunds Act, ch. 47, § 8, 22 Stat. at 31-32. The Edmunds-Tucker Act put the property of the Mormon Church into the hands of the federal government (thereby financially crippling the church), denied the Church legal standing as an institution and disenfranchised Mormons individually. Edmunds-Tucker Act, ch., 307, § 17, 24 Stat. 635, 638. The Mormons appealed to the Court for relief from both Acts, arguing that "[r]eligious liberty is a right embracing more than mere opinion, sentiment, faith, or belief." The Court, however, upheld the legislation. *See* Davis v. Beason, 133 U.S. 333 (1890); Late Corp. of the Church of Jesus Christ v. United States, 136 U.S. 1, 42 (1890) (upholding the provision of the Edmunds-Tucker Act which provided for the property of the Mormon Church to escheat to the United States). Writing for the Court in *Late Corp.*, Justice Bradley observed that the Mormons were in contempt, not technically in contempt of the Court, but in contempt of the country and the Christian values for which it stood. *Id.* at 38. For a discussion of the Edmunds Act and the Edmunds-Tucker Act, see K. Michael Otto, Comment, *"Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists as Custodial and Adoptive Parents,* 1991 UTAH L. REV. 881, 893-94 (1991).

is too imprecise of a test to judge government regulation of the free exercise promise because the Court superimposes a dichotomy on a continuum. The Court often has emphasized that "[p]recision of regulation is the touchstone in an area so closely touching our most precious freedoms."[165] Yet, the *Reynolds* Court, perceived a substantial risk to the value of social coherence and determined that the value of religious self-determination must be subordinated to that of the preservation of public order, with the result that by misconstruing the framers purposes the die, unfortunately, was cast.[166]

E. Two Hermeneutics Under Conditions of Modernity: Chief Justice Stone and John Hart Ely

After *Reynolds v. United States*,[167] concern for protecting the state from religion predominated in the Court's religion decisions. In addition to the Court's "public order" jurisprudence, in instances where the Court decided in favor of free exercise, it often did so based on the First Amendment's promise of free speech, negating the necessity to

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[165] Communist Party of Indiana v. Whitecomb, 414 U.S. 441, 447 (1974) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[166] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), provides an alternative approach to the restricted view that only religious practices historically premised on fundamental moral opinions warrant protection. Writing for the Court, Chief Justice Burger attempted to balance religious autonomy against the demands of social coherence in a way different from the *Reynolds* Court. *Id.* at 202. The Chief Justice determined that in *Yoder*, unlike *Reynolds*, the scales tipped towards autonomy:

> It is true that activities of individuals, even when religiously based, are often subject to regulation . . . . But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.

Id. Although Chief Justice Burger could have plausibly analogized *Reynolds* (as a threat to marriage/public order) to *Yoder* (as a threat to education/public order), he did not. In a dissenting opinion, Justice Douglas opined: "The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds* . . . ." *Id.* at 247 (Douglas, J., dissenting). Nevertheless, the dichotomy of *Reynolds* seems to have an enduring appeal.

[167] 98 U.S. 145 (1878).

balance religious liberty against social coherence.[168] The Court did so, I believe, because of a hermeneutic of fear and distrust of religion;[169]

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[168] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1942). In the flag-saluting case of *Barnette*, Jehovah's Witnesses were victorious not because of freedom of religion, but because of freedom of mind. *Id.* at 644. John Hart Ely explained that "[t]he Court in *Barnette* . . . stated that the presence or absence of religious objections on the part of the complainants was entirely beside the point . . . . What *Barnette* holds is that the state cannot compel an affirmation of patriotic loyalty." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 n.363 (1970). Notwithstanding the majority's determination that the religious claimants were entitled to freedom of mind, and not necessarily freedom of religion, Justice Murphy referred specifically to the freedom of religion in his concurring opinion:

> [T]here is before us the right of freedom to believe, freedom to worship one's maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

Barnette, 319 U.S. at 645 (Murphy, J., concurring). *See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (limiting the case to First Amendment grounds, the Court found appellant's religious mission "to preach the true facts of the Bible" immaterial, and determined that the free exercise of religion does not involve cursing a police officer); Cantwell v. Connecticut, 310 U.S. 296 (1940) (the Court reversed defendant's conviction for breach of the peace for playing religious records in the street as being inconsistent with the freedom of speech because defendant's acts did not provoke violence or social disorder).

[169] *See supra* part III.D. The Court's hostility has also been noted from within its own ranks. For example, early on in his tenure, Chief Justice Burger expressed the hope that the Court's "callous indifference" towards free exercise might "at some future date" be replaced by "a more enlightened and tolerant view." Meek v. Pittenger, 421 U.S. 349, 387 (1975). Over the next decade, the Chief Justice proceeded to move the Court into a posture of consistent protection of free exercise. In fact, in retrospect it can now be said that the "Burger Court" deserves credit—which it has yet to fully receive—for consistently reaffirming the protection of religious autonomy in its interpretations of the First Amendment's Religion Clauses. For Supreme Court opinions exhibiting this affirmation, all authored by Chief Justice Burger, *see, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (affirming a city's right to display a creche); Marsh v. Chambers, 463 U.S. 783 (1983) (affirming a state legislature's right to begin its session with a prayer); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (holding religiously affiliated schools not to be with in the jurisdiction of the National Labor Relations Board); McDaniel v. Paty, 435 U.S. 618 (1978) (striking down Tennessee law barring clergy from serving in the state legislature); Wooley v. Maynard, 430 U.S. 705 (1977) (affirming motorists right not to display New Hampshire state motto on religious grounds); Serbian Eastern Orthodox Diocese v. Miliovjevich, 426 U.S. 696 (1976) (affirming church's right to control its internal hierarchy without state interference); Wisconsin v. Yoder, 406 U.S. 205 (1972) (affirming Amish parents' right to educate teenage children at home on

the Court seemed to fear that constitutionally protected religious self-determination would in some unspecified way unleash dangerous anti-social powers. Against this background it appeared that the problem of balancing religious autonomy and public order could be avoided, at least temporarily, by recasting the problem as one involving not religion, but speech.[170] Accordingly, the Court effectuated an assimilation of

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religious grounds despite compulsory attendance law); Tilton v. Richardson, 403 U.S. 672 (1971) (affirming right of religiously affiliated colleges to receive federal building grants for secular purposes). Furthermore, speeches by Chief Justice Burger suggest a construal of the Framers' purposes consistent with his opinions for the Court. *See, e.g.*, Warren E. Burger, Address at the J. Reuben Clark Law School, The Role of the Lawyer in Modern Society (Sept. 5, 1975) (transcript available in William Mitchell School of Law, Warren E. Burger Law Library).

> [W]e will do well to look again at both those documents [the Declaration of Independence and the Constitution of the United States]. We see that in the Declaration itself not less than four times the authors expressed direct reliance on God as 'the Supreme Judge.' as 'the Creator,' and in the closing sentence the Declaration calls for the protection of Divine Providence. . . . [T]he authors of those great documents were guided . . . by a Divine Providence.

Id. Speaking at the funeral of Justice William O. Douglas, the Chief Justice said:

> As a judge, he was firm in keeping the church-state separation under the Religion Clauses of the First Amendment, but this in no sense came from hostility for the religion. Quite the contrary. His positions stemmed from a profound belief that, to protect the free exercise of religion, governments must keep hands off.
>
> Perhaps nowhere did his religious convictions emerge more clearly than in his opinion in Zorach v. Board of Education. In upholding the New York Statute allowing release of students from classes to take part in worship or religious instruction, he wrote this: "We are a religious people whose institutions presuppose a Supreme Being . . . ."

Warren E. Burger, Remarks at the Funeral of Justice William O. Douglas at the National Presbyterian Church, Washington, D.C. (Jan. 23, 1980) (transcript available in William Mitchell School of Law, Warren E. Burger Law Library). *See also supra* note 62 (describing *Zorach*).

[170] In other situations, the Court also has affirmed protections for religious conduct on grounds other than ones involving the Free Exercise Clause. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university's refusal to permit student religious groups to meet anywhere on campus violated the religious group's First Amendment right to free speech and association). *See infra* section III.E.1., discussing Harlan Fiske Stone's free exercise jurisprudence.

freedom of religion and freedom of speech. This elision of religious freedom and secular freedom, observed Mark DeWolfe Howe, made evident that the Supreme Court's mind-set in the 1940's was secular, not religious.[171] Howe further posited:

> One other influence which worked in favor of the assimilation of the religious to secular freedom was the fact—which I conceive to be undeniable but acknowledge to be unprovable—that the temper of the Court's mind in the 1940's was far more secular than religious. In nearly every opinion in which religious liberty was an issue during that decade, the Court seems to have gone out of its way to insist that whatever protection it would give to religion it would also give to non-religious speech or conviction.[172]

In addition to the Court's free speech elision, members of the Court would from time to time advance an argument grounded in a fear of religious self-determination that has been called the "progression argument."[173] The progression argument, a slippery slope fallacy, holds

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[171] HOWE, *supra* note 116, at 109. The Free Exercise dichotomy between belief and action surfaced later in a slightly disguised form in freedom of speech cases. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reversing a Ku Klux Klan leader's conviction for advocating violent action, which is protected under the First Amendment so long as it does not produce imminent lawless action); Noto v. United States, 367 U.S. 290, 297-98 (1961) (reversing Communist Party member's conviction for advocating the overthrow of the United States government because it was not *present* advocacy, but merely an intent for future advocacy); Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction of Communist Party leaders for advocating overthrow of the United States government); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (school children's refusal to salute the flag for religious reasons was not dispositive to the resolution of the case); Whitney v. California, 274 U.S. 357 (1927) (Affirming conviction of petitioner for assisting in the organization of the Communist Labor Party in violation of California Criminal Syndicalism Act) *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969). Just as the belief/action dichotomy circumscribed the free exercise of religion, it may well have done so regarding the freedom of speech as well.

[172] HOWE, *supra* note 116, at 109.

[173] Lemon v. Kurtzman, 403 U.S. 602, 624 (1971). in *Lemon*, Rhode Island's 1969 Salary Supplement Act ("Supplement Act") and Pennsylvania's Education Act ("Education Act") had been continually challenged on the basis of the First Amendment. *Id.* at 606. The Supplements Act provided for a 15% salary supplement for teachers in nonpublic schools spending less money on secular education for the average pupil. *Id.* at 607. These teachers were required to teach courses offered in public schools, using

that any state protection conferred because of a religious or even a "religiousness" classification "would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion."[174] Interestingly, no such progression argument has been employed by the Supreme Court in its free speech cases, where it has more willingly taken risks of public disorder.[175] Also, in contrast to its

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the same materials, and were not allowed to teach religion. *Id.* at 608. Most of the teachers benefiting from the Supplement Act taught at Roman Catholic schools. *Id.* at 608-609. Likewise, Pennsylvania's Education Act authorized the state Superintendent of Public Instruction "to 'purchase' certain 'secular educational services' from nonpublic schools, including teacher's salaries, textbooks, and instruction materials." *Id.* at 609. the schools were only reimbursed for certain secular subjects, and the textbooks and materials were subject to the superintendent's approval. *Id.* at 610. The contracts were made with schools with over 20% of the state's students, the majority of whom were attending Catholic schools. *Id.*

The Supreme Court held that both statues were unconstitutional under the First Amendment's Establishment Clause. *Id.* at 615. The Court reasoned that the cumulative impact of the entire relationship arising under the statutes involved excessive entanglement between government and religion. *Id.* The Court further described the entanglement in the Rhode Island Program by explaining that since the schools' work with children of an impressionable age, there existed a greater danger for the intermingling of religious and secular disciplines. *Id.* at 616. In addition, the Court acknowledged that the Supplement Act required the government to inspect school records to determine the extent to which the government expenditure was attributable to secular, as opposed to, religious activity. *Id.* at 620. Similarly, the Court recognized entanglement in the Education Act because it required surveillance to ensure that teachers receiving benefits teach only secular subjects, and mandated inspection of nonpublic school records to determine what expenditures were actually needed for secular education. *Id.* The Court further concluded that the Education Act was defective because it provided continuous financial aid to church related schools. *Id.* at 621.

[174] *Id.*

[175] The Court, in Whitney v. California, 274 U.S. 357 (1927) *overruled by*, Brandenburg v. Ohio, 395 U.S. 444 (1969), maintained that "[f]ear of serious injury cannot alone justify suppression of free speech and assembly." *Id.* at 376. (Holmes, J., concurring). *Whitney* involved the legislature's right to ban speech that advocated for the use of force or violence to effectuate political change irrespective of the substantive dangers that such speech posed. *Id.* at 357. The Court held that mere membership in an organization urging criminal syndicalism was substantively dangerous, thereby requiring conviction under the California Criminal Syndicalism Act, which forbade the knowing membership in any organization advocating the use of force or violence to bring about political change. *Id.* at 371-72. Thereafter, the Court reaffirmed and even extended this position in Terminiello v. Chicago, 337 U.S. 1 (1949), by observing that "freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view." *Id.* at 3-6.

free speech cases, the Supreme Court has apparently applied a "more restrictive view" to the protection of religious liberty, despite the Court's announced similarities between free speech and freedom of religion. In West Virginia State Bd. of Educ. v. Barnette,[176] for example, the ACLU, in an *amicus* brief, argued that because "freedom of speech cannot be abridged unless its exercise presents a clear and present danger to the community[,] . . . there is every reason to apply this same rule to the exercise of religious freedom."[177]

1. Harlan Fiske Stone

Overruling the Supreme Court's decision in *Minersville School District v. Gobitis*,[178] the *Barnette* Court[179] held that school children

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(holding that speech which "stirs the public to anger, [or] invites dispute," does not constitute "fighting words," and therefore warrants First Amendment protection). Subsequently, abandoning the *Whitney* Court's reasoning that certain types of speech were intrinsically dangerous, the Supreme Court, in Brandenburg v. Ohio, 395 U.S. 444 (1969), elucidated new requirements that a statute proscribing speech must meet to pass constitutional muster. *Id.* at 447. Speech advocating the use of force or crime can only be prohibited when two conditions are fulfilled: (1) the advocacy is "directed to inciting or producing imminent lawless action," and (2) the advocacy is also "likely to incite or produce such action." *Id.* at 447.

[176] 319 U.S. 624 (1943)

[177] *Id.* at 633. The Court declined the invitation. *Id.* at 634. Therefore, in free speech cases, unlike in free exercise cases, there is rarely a countervailing constitutional interest to be protected.

[178] 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In *Gobitis*, a Pennsylvania statute, similar to the West Virginia law at issue in *Barnette*, required that all students and teachers in Pennsylvania participate in the flag salute ceremony and recite the pledge of allegiance. *Id.* at 591. Failure to comport with the statute based on religious beliefs resulted in the expulsion of two children who were Jehovah's witnesses. *Id.* at 591-92. Thereafter, the children's father brought suit to enjoin the requirement of participation in the ceremony as a condition of school attendance. *Id.* at 592. The Court upheld the law, reasoning that the First Amendment's Religion Clauses do not protect citizens from general state action that is not intended to promote or restrict religious beliefs. *Id.* at 594. Indeed, Justice Stone's dissent foreshadowed the Court's reversal in *Barnette*, three years later. For a detailed discussion of the *Gobitis* decision, see Stephen W. Gard, *The Flag Salute Cases and the First Amendment*, 31 CLEV. ST. L. REV. 419 (1982).

[179] 319 U.S. 624 (1943). In *Barnette*, a West Virginia statute required that all teachers and students in its public schools participate in the salute of the United States flag. *Id.* at 626. The law mandated a stiff arm salute while reciting the pledge of allegiance, presumably as a show of support for the nation during World War II. *Id.* Failure to comply with the statute resulted in expulsion for as long as the refusal continued. *Id.* at 629. Two children who were Jehovah's Witnesses refused to comply

cannot be required to salute the flag.[180] In so holding, the majority based its decision on free speech grounds, effectively avoiding an interpretation of the Free Exercise Clause, notwithstanding that Justice Stone had previously argued for a holding based on the Free Exercise Clause in his *Gobitis* dissent. Specifically, Justice Stone acknowledged "that there have been but few infringements of personal liberty by the state [in history] which have not been justified, as they are here, in the name of righteousness and the public good."[181]

One reason for the Court's avoidance of a free exercise rationale in *Barnette* might have been the sense of caution expressed by Justice Frankfurter in his dissent. Although Justice Frankfurter's specific warning appeared to be against the risks to fundamental fairness of placing religious believers in a privileged class of citizenship, his more basic concern was to protect the Court from the complexity that he thought would follow from casting itself as a protector of seemingly innumerable patterns of religious conduct.[182] The dissenting Justice warned:

> When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations.[183]

However, to phrase the issue in a case involving one religion as also involving two-hundred and fifty essentially dissimilar others is to potentially "load the dice" unfairly against any constitutional protection

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with the law based on their religious beliefs, which did not allow them to "bow down" to a "graven image." *Id.* They instituted this action to restrain the law's enforcement. *Id.* The Court struck down the law, holding that a state cannot compel students to salute the flag. *Id.* Using a free speech/free expression analysis, the Court reasoned that a state compelling expression of an opinion is as forbidden by the Constitution as a state censoring or suppressing an opinion. *Id.* at 633-34. *See generally*, Laurie Allen Gallancy, Comment, *Teachers and the Pledge of Allegiance*, 57 U. CHI. L. REV. 929 (1990) (Giving a detailed analysis of the *Barnette* case).

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

[181] *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting).

[182] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 660 (1943) (Frankfurter, J., dissenting).

[183] *Id.* at 658 (Frankfurter, J., dissenting).

of religious conduct by requiring an individual to defend against an infinite permutation of potential religious tenets despite the sincere and meaningful belief that he or she may possess. Additionally, increasing the number of variables in the equation by such a margin would appear to contradict the Court's "case and controversy" limit of adjudicating a concrete issue between adverse parties. Overall, a free exercise claim is unfairly burdened by the bewitching simplicity of this type of *reductio ad absurdum*,[184] whether the *reductio* is expressly stated by the Court or expressed only by implication.[185] The conflict between religious autonomy and social cohesion, is in fact, the chief source of "[t]he considerable internal inconsistency in the opinions of the Court"[186] pertaining to religion.

While the Court was debating the *Gobitis* decision, Justice Stone reiterated his view in a letter to Justice Felix Frankfurter: "I am truly sorry not to go along with you . . . . The case is one of the relative weight of imponderables and I cannot overcome the feeling that the

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[184] The United States Constitution limits federal court jurisdiction to "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. Thus, federal courts are prohibited from rendering advisory opinions based on abstract or hypothetical questions when no party is before the Court who has suffered or is about to suffer a particular injury. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3.7 (2d ed. 1988).

[185] Justice Scalia in *Smith* seems to have been, like Justice Frankfurter before him, anxious about the numbers involved when dealing with religious scruples. *See infra* note 234. *See also* note 230 (discussing Justice O'Conner's criticism of the *Smith* majority's reliance on a "parade of horribles")

[186] Walz v. Tax Com. of New York, 397 U.S. 664, 668 (1970). The other notable source of the inconsistencies in the Supreme Court's religion decisions is the clash between the Religion Clauses themselves. Chief Justice Burger stated that the Religion Clauses "are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.* at 668-69. Justice Rehnquist has also recognized the clash between the Religion Clauses, describing this conflict as "the channel between the Scylla and Charybdis through which any state or federal action must pass." Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting). Even so, some scholars have written about the Free Exercise Clause alone, based on the premise that the "area of 'establishment' is usually looked upon as a separate problem" from free exercise. *See*, Ferdinand F. Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546 (1963). Before 1947, however, this approach would have been unnecessary. The 1947 case, Everson v. Bd. of Educ., 330 U.S. 1 (1947), involved the use of publicly financed transportation for school children, some of whom were parochial school children. *Id.* at 3. In *Everson*, the Court interpreted the requirements of the Establishment Clause in such a fashion as to impinge directly upon the interpretation of subsequent Free Exercise cases. *Id.* As a result, all Establishment Clause cases today are likely to be mixed cases, with Free Exercise Clause issues implicitly included in the mix. *Id.*

Constitution tips the scales in favor of religion."[187] In his dissent, Justice Stone argued that the constitutional guarantees of personal liberty "must . . . be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions . . . ."[188] Justice Stone observed that although the constitutional guarantees of individual liberty are not absolutes, "[h]istory teaches us that there have been but few infringements of personal liberty by the state which have not been justified . . . in the name of righteousness and the public good . . . ."[189]

Mark DeWolfe Howe explained: "The thesis of Justice Stone . . . would seem to find in the Constitution an assurance that religious values and religious interests enjoy a higher status than do other values and interests."[190] Indeed, Justice Stone's famous footnote in *United States v. Carolene Products Co.*[191] clearly supports Howe's interpretation of Justice Stone's theory. In this footnote, Justice Stone explicitly included a concern for religions (i.e., religious minorities)—a term that is more definite than religion *simpliciter*—and expounded upon his thesis urging for the utmost protection of religious values and interests. Justice Stone set forth the following proposition:

> [1] There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten

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[187] ALPHEUS T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 150 n.45 (1958).

[188] *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting).

[189] *Id.*

[190] HOWE, *supra* note 116, at 111.

[191] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *Carolene Products* is an "apparently unimportant" case in which the Supreme Court by a six-to-one vote sustained the constitutionality of a federal statute prohibiting interstate commerce in "filled milk." WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS 724 (1979). *See* Carolene Products, 304 U.S. at 152-53. The relative insignificance of *Carolene Products*, however, did not diminish the importance of Justice Stone's footnote. In fact, Justice Stone's Free Exercise dissents nearly always refer one back to his discussion in *Carolene Products*. Justice Stone's footnote has transcended the particular issue of "filled milk" to become the basis for an entire school of American jurisprudence, whose precepts, I argue, are important for recovering some of the Framers' original sense of the constitutional role of religion as a value. For a detailed analysis of the *Carolene Products* decision, see J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1988); Wojciech Sadurski, *Judicial Protection of Minorities: The Lessons of Footnote Four*, 17 ANGLO-AM. L. REV. 163 (1988).

> amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
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> [2] It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
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> [3] Nor need we inquire whether similar considerations enter into the review of statutes directed at particular *religions* . . . or national . . . or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[192]

2. John Hart Ely

Although *Carolene Products* has never been used by its advocates with regard to religious liberty,[193] the well-worn statement of Marx that "the criticism of religion is the beginning of all criticism"[194] is relevant to the criticism of Ely. In fact, Justice Stone expressly referred to religious minorities in this footnote and explicitly expressed a concern for religious autonomy as a constitutional concept that can be impinged upon only by a compelling state interest.[195] However, while a *Carolene*

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[192] *Carolene Products*, 304 U.S. at 152-53 n.4 (emphasis added).

[193] Rather, the footnote has been used for the general proposition that a stricter standard of review should be employed in the review of laws which prejudice "discrete and insular minorities." *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 (4th ed. 1991). The courts have utilized the "discrete and insular minority" language as a starting point for equal protection jurisprudence. *Id.*

[194] *See* Paul Ramsey, *Religious Aspects of Marxism*, *in* NINE MODERN MORALISTS 57 (1962).

[195] Generally speaking, under a strict scrutiny test, a discriminatory statute will be upheld only if it is necessary to the attainment of a compelling governmental objective. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding the confinement all persons of Japanese ancestry because of the compelling need to prevent sabotage and

Products[196] jurisprudence protects the Free Exercise Clause, perhaps the most well-known contemporary expositor of *Carolene Products*, John Hart Ely, proves to be a curiously calloused exegete on free exercise issues. In fact, Ely's observation that "[f]or all its notoriety and influence, the *Carolene Products* footnote has not been adequately elaborated" encompasses Ely's own *Carolene Products* jurisprudence with regard to free exercise.[197]

One of the stated benefits of a *Carolene Products* jurisprudence is consistency.[198] It purports to yield to original intent where there is sufficient clarity to do so, and only develops clauses of the document where the Framers seem to invite such development.[199] But Ely turns his back on this approach when it comes to the Free Exercise Clause; *Carolene Products'* deference to legislative value judgments appears to tempt Ely to flee from the very appearance of substance or materiality more than he can resist. After recognizing that the Framers "clearly wanted to put religion beyond the reach of the legislature,"[200] Ely perversely goes on to classify cases like *Sherbert v. Verner*[201] as "aberrations."[202] In Ely's lexicon, "aberration" seems to be an

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espionage during World War II). In order for the state's position to prevail, the burden of proof falls on the state to show a compelling state interest. NOWAK AND ROTUNDA, *supra* note 193, § 14.3 (4th ed. 1991). *See supra* note 33 (explaining the Supreme Court's apparent flip-flops between the compelling state interest standard (*Yoder*), the rational basis test (*Smith*), and now the "new" strict scrutiny (*Hialeah*).

[196] 304 U.S. 144 (1938).

[197] ELY, *supra* note 93, at 76.

[198] Ely refers to its application as the "Carolene Products approach" where "discrete and insular minorities are entitled to heightened judicial solicitude." ELY, *supra* note 93, at 152-33. In addition, Ely points to the success of the Carolene perspective in the protection of free expression, which he feels the Court should play a significant role in protecting the values it has deemed truly fundamental. *Id.* at 249.

[199] *See generally* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Lea Brilmayer, *Carolene, Conflicts and the Fate of the Inside-Outsider*, 134 U. PA. L. REV. 1291 (1986).

[200] ELY, *supra* note 93, at 94 (explaining that such cases were "neither precedential nor destined to become precedents themselves").

[201] 374 U.S. 398 (1963) (holding that a state cannot deny unemployment benefits to a woman who refused to work on Saturday due to religious beliefs). *See supra* note 47 (describing the *Sherbert* case in detail).

[202] ELY, *supra* note 93, at 16. Writing in 1970, Ely hastened to predict *Sherbert's* demise. "Whatever authority *Sherbert* possessed has been drained by last term's *Welsh* Decision." John Hart Ely, Motivation in Constitutional Law, 79 YALE L.J. 1205, 1322 (1970). But, until *Smith*, because of *Yoder*, this was wishful thinking: "Read in conjunction with *Sherbert*, *Yoder* can be seen to have substantially expanded the scope

especially serious word. So far as I have been able to determine, he uses it only twice in both his articles and books, once when referring to *Sherbert*, and another time when referring to *Scott v. Sandford*.[203] In the light of Ely's jurisprudence, however, "aberration" is a misplaced term to describe *Sherbert*.

After explaining that the Framers drafted the Free Exercise Clause to protect the substantive value of religion[204] and conceding that paragraph one of *Carolene Products* is "pure interpretivism,"[205] Ely makes an interpretive leap of his own to conclude disarmingly that "[w]hatever the original conception of the Free Exercise Clause, its function during essentially all of its functional life has been one akin to the Equal Protection Clause and thus entirely appropriate to a Constitution."[206] This analogy, however, is inappropriate. Free exercise protection differs from and is greater than equal protection.[207]

What, exactly, is the significance of an equal protection analysis in free exercise jurisprudence? A short review of Justice Frankfurter's free exercise opinions can provide the answer since Justice Frankfurter, like Ely, thought free exercise was best interpreted as a guarantee of

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and operation of the free exercise clause, rousing it finally from its long dormancy. By upholding the religious liberty claim *Yoder* established that *Sherbert* was not an aberration, and that progeny would follow." Note, *Conservatorship and Religious Cults: Divining a Theory of Free Exercise*, 53 N.Y.U. L. REV. 1247, 1263 (1978).

[203] U.S. (19 How.) 393 (1856). In this infamous decision, the Supreme Court dealt with the controversy of whether a slave taken from a slave state to a free state as defined by the Missouri Compromise was entitled to his freedom. *Id.* at 403. The Court held that he was not free and that the Missouri Compromise was unconstitutional. *Id.* at 454. The Court reasoned that congressional action emancipating slaves was a taking of a property interest, therefore violating the slave owner's constitutional rights. *Id.* at 451-53. The Court accordingly relegated the slaves to noncitizen status and denigrated them as being less than human. For an exhaustive discussion of the *Scott* case, see NOWAK & ROTUNDA, *supra* note 193, § 14.5; TRIBE, *supra* note 162, § 3-6; Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449 (1989).

[204] ELY, *supra* note 93, at 94.

[205] *See* ELY, *supra* note 93, at 76.

[206] ELY, *supra* note 93, at 100. Ely asserts that the Free Exercise Clause has not been used as traditional constitutional provisions which are invoked to "assume that [the] majority not systematically treat others less well than it treats itself." *Id.* at 101.

[207] In turn, Ely suggests that since the Free Exercise Clause is part of an "odd assortment of constitutional provisions that do not try to ensure that everyone's interests will be actually or virtually represented at the point of substantive decision," it has failed to function as a religion clause *per se*, but rather has been incorporated into an Equal Protection Clause model. *Id.*

equal protection. Justice Frankfurter's dissent in *Follett v. McCormick*[208] provides a useful example. In this case, Jehovah's Witnesses had refused to pay a local proselyting tax.[209] Ruling that the tax was unconstitutional, the Court reasoned that such a "flat tax imposed on the exercise of a privilege granted by the Bill of Rights."[210] Justice Frankfurter correctly pointed out that the tax was equally imposed on all proselytes, and therefore, if the fee was "attacked as a denial of the Equal Protection of the Laws, the contention would be frivolous."[211] In so positing, Justice Frankfurter adopted a purely procedural standard for equal protection analysis. Accordingly, Justice Frankfurter, with whom Ely and now Justice Scalia[212] would presumably concur, determined that the state tax did not trespass the process-defined constitutional boundary. The final result of this procedural test, although equally unfair to all, is nevertheless still unfair. As Cardozo once said, "[u]niformity ceases to be a good when it becomes uniformity of oppression"[213] and it would appear to follow that, if there is nothing constitutionally zoned off to protect the value of religious self-determination, religious liberty is jeopardized, irrespective of strict scrutiny for express or quasi-express enactments of religious discrimination or persecution.[214]

Acknowledging the need for a constitutional zone of protection, Justice Stone, in his dissent in *Jones v. Opelika*,[215] elaborated:

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[208] 321 U.S. 573 (1944). In *Follett*, the Court held that the government may not levy a tax that impinges on the exercise of a right guaranteed by the First Amendment. *Id.* at 578. The Court reasoned that "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is . . . obnoxious," whether they exercised from the pulpit or by traveling door to door. *Id.* at 577 (citing Crosjean v American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

[209] *Follett*, 321 U.S. at 574.

[210] *Id.* at 575 (quoting *Murdock*, 319 U.S. at 113) (citing Jones v. Opelika, 319 U.S. 103 (1942)).

[211] *Id.* at 580 (Frankfurter, J., dissenting).

[212] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 876-78 (1990). *Cf.* Follett v. McCormick, 321 U.S. at 581-83 (Frankfurter, J., dissenting) (arguing that exempting merchants of religious books from a business license tax is, in fact, a government subsidy of religion).

[213] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-13 (1921).

[214] *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 61 U.S.L.W. 4598 (U.S. June 11, 1993).

[215] 316 U.S. 584, 608 (1942) (Stone, J., *vacated*, Jones v. Opelika, 319 U.S. 103 (1943). *See supra* note 19 (discussing *Jones* in detail).

> It lends no support to the present tax to insist that its restraint on free speech and religion is non-discriminatory because the same levy is made upon business callings carried on for profit, many of which involve no question of freedom of speech and religion and all of which involve commercial elements—lacking here—which for present purposes may be assumed to afford a basis for taxation apart from the exercise of freedom of speech and religion. . . . The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. . . . They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.[216]

In contrast to Ely's position, a *Carolene Products* approach is in harmony with the Religion Clauses' founding hermeneutic of protecting religion since the footnote expressly relates to the protection of discrete and insular religious minorities or religions against the state.[217] Furthermore, because paragraph one is substantive, a *Carolene Products* approach would be especially concerned about the right of the free exercise of conscience for *all* as a preferred freedom.[218]

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[216] *Id.* at 608 (Stone, J., dissenting). Similarly, Chief Justice Burger wrote in *Yoder* that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

[217] *Carolene Products*, 304 U.S. at 153 n.4.

[218] Paragraph one applies to instances where legislation "on its face appears to be within a specific prohibition of the Constitution." It is substantive in that it indicates in what instances the stricter scrutiny of the prohibitions of the third paragraph apply to the prohibition against discrimination of discrete and insular minorities. *See Carolene Products*, 304 U.S. at 153 n.4. The reason Ely goes to the procedural side of *Carolene Products* here is because Ely, like Louis Lusky, fails to attend sufficiently to paragraph 1. Lusky's reasons for this were personal. While a law clerk for Justice Stone, Lusky wrote paragraphs 2 and 3. As the opinion was circulated, paragraph 1 was added at the prodding of Chief Justice Hughes. It is to be expected that in his expounding, Lusky's own contribution would assume priority over Hughes' revision. Although these backstage asides are valuable to Ely and any other *Carolene Products* adumbrator, they are not relevant to the legal significance of the footnote. The significant point is that Justice Stone put all three paragraphs into the footnote, and then developed all of the footnote in subsequent cases.

3. Conclusion

A necessary implication of following a *Carolene Products* approach in the context of constitutional decisions about religion seems clear: any legislation or administrative action that burdens or chills the free exercise of religion must bear more than a mere rational relationship to a purpose or goal of the state. The Court has appropriately expressed concern for chilling effects with regard to hindering the right to free speech; although Justice Stone's *Carolene Products* analysis seems consistent with the Framers' hermeneutic of privacy,[219] Ely's *Carolene Products* analysis is more likely to promote chilling than to prevent it. Placed between *Carolene Products'* explicit protection of religion and the distrust of religion, Ely's choice is unjustified but clear: he chooses distrust. In fact, this choice can be explained by Ely's acceptance and adoption of the same hermeneutic of fear and distrust of religion which the Court has also suffered from.[220] The result of this distrust is that, while criticizing those who would create substantive rights out of "merely" procedural constitutional promises, Ely in turn pulls out merely procedural protections from parts of the Constitution which he acknowledges to be substantive.[221] Therefore, the logical gap in Ely's jurisprudence regarding religion *is* the Court's hermeneutical problem regarding religion. Perhaps it is a nice and tidy fit then, that it is that part of a *Carolene Products* jurisprudence that Ely misstates—regarding free exercise—on which the Court has chosen to rely.[222] This ill-founded reliance on Ely leaves the Court's procedural free exercise protection of a substantive value, in Ely's memorable phrase, characterizable as "green pastel redness."[223]

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[219] *See supra* part III.C. (describing the Framers' hermeneutic of privacy).

[220] The "hermeneutic of suspicion" which the Court has from time to time evidenced by its non-empirical concern for protecting religion from the public order should be distinguished from Paul Ricoeur's "hermeneutic of suspicion" since the point to Ricoeur's project is primarily to employ Freudian theory. My use of the term "suspicion" is essentially sub-clinical, indicating only an unreasonable fear not warranted empirically. (Perhaps clarity indicates that I call the Court's hermeneutic, "the Court's hermeneutic of sub-clinical suspicion").

[221] ELY, *supra* note 93, at 18-19.

[222] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 61 U.S.L.W. 4587, 4591 (U.S. June 11, 1993) (relying on Ely).

[223] ELY, *supra* note 93, at 18. Alternative statements for the present Court's approach to free exercise might be that the Court uses a jurisprudence of, "neutral substantive value-ism" content to live with "incidental atomizing burdens." *Id.*

IV. CLOSING ARGUMENTS: THE END OF FREE EXERCISE?

As the Court enters "post-modernity,"[224] it may become more necessary than ever to harmonize the conflicting values of religious autonomy and social coherence.[225] The Court, however, has shown signs indicating that it has quit the struggle, choosing instead to try to decide cases involving religion by establishing bright line rules.[226] Not

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[224] *See supra* note 12 (discussing the term "post-modernity" and its phenomena of widely varying, polysmbolic religiosity).

[225] It is my argument that clarity about the tension of the two values implicated by constitutional religion controversies does not make deciding religion cases any easier, as certain of the religion decisions of Justice O'Connor helpfully clarify. Nor should it. *See, e.g.,* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (O'Connor, J., concurring); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (Opinion by Justice O'Conner). Nor should it. In fact, Justice O'Connor's opinions in this area of constitutional law appear to have adequately recognized this basic tension in values. Her recognition of the tension in turn suggests that some criticisms of the Justice are themselves defective, being too single-minded, and because her critics have solved too quickly the ambiguity inherent in this conflict of values, where the truth is, finally, partly ambiguous. *See, e.g.* Joel L. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1830 (1990) (Criticizing Justice O'Conner's use of "complacent pragmatism" in deciding Lyng v. Northwest Indian Cemetery Protective Assn, 495 U.S. 439 (1988)). (My criticism here is confined to the free exercise part of Singer's article.) For two reasons, I would contend that Singer's description of the Justice's changing pattern in free exercise controversies of analysis should change signs (where a negative value denotes interpretive inadequacy and a positive value denotes interpretive adequacy). The first reason is that she appears to be attending to the conflict in values; in the words of a former Solicitor General of the United States, the Justice is "a very thoughtful person who takes cases one at a time and decides them individually." Rex E. Lee, *A Court-Side View,* B.Y.U. TODAY, September 1991 at 19, 52 (stating the theory of judging implied by the present analysis). The second reason is that Justice O'Connor appears able to consider differing ways of looking at the world which are contradicted by the assertion of the free exercise claim against the demands of the state, a capability which is, I think, one of the basic requirements to assess adequately constitutional disputes involving religion. The article's subtitle comes from the capacity for appreciating different dimensions of understanding in the religion context. (The phrase "dimensions of understanding" is borrowed from Thomas Ogletree's book, HOSPITALITY TO THE STRANGER, DIMENSIONS OF MORAL UNDERSTANDING (1985)). As their legacies reflect, Chief Justices Stone and Burger combined these judicial traits, traits that render a "synthesis" of the competing values a more likely feature of a judge's constitutional decision making regarding religion. *See supra* section III.F.1. (discussing Stone) and *supra* note 169 (discussing Burger).

[226] *See* Robert Giuffra, Jr., *Making Your Case Before the Rehnquist Court*, LEGAL TIMES, Oct. 7, 1991, at 24, 25 (speaking of the Rehnquist Court's "preference for bright-line rules"):

only is the Court's present bright line rule at risk of being void for vagueness,[227] its adoption is both unduly burdensome to religion as well as harmful to that very "public order" which the Court so aggressively seeks to protect.[228] Such an assessment about the Court's skewed

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> In one of its more controversial decisions, *Employment Division, Oregon Department of Human Resources v. Smith*, the Rehnquist Court, with Justice Scalia writing for the majority, held that the Free Exercise Clause of the First Amendment did not bar a state from applying its general prohibition against ingestion of peyote to persons whose religion prescribes its sacramental use. 494 U.S. 872, 890 (1990). Of more lasting significance, the Court indicated that the balancing test of *Sherbert* did not apply to challenges to across-the-board criminal prohibitions that happen to ban religious practices. *Id.* at 882-86. *See* Sherbert v. Verner, 374 U.S. 398, 402-03 (1963) (discussing the balancing of religious freedom and public order).

Id. Smith's progeny, *Hialeah*, appears to confirm Professor Giuffra's conclusion about this preference for bright-lines is correct.

[227] [227] As Justice Souter pointed out in *Hialeah*, the Court post-*Smith* leaves standing pre-*Smith* holdings that are contradictory or inconsistent. *See Hialeah*, 61 U.S.L.W. 4587, 4598 (U.S. June 11, 1993). The addition of a "bright line rule" to a mass of incompatible rules would seem to merely increase the total mass of incompatible rules; the cumulative effect is worse, not better.

[228] That socially disordering consequences could follow from *Smith* is discernible from the factual foundations of Justice Blackmun's dissent in the case. Justice Blackmun noted that:

> [n]ot only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol .... (the Church's "ethical code" has four parts: brotherly love, care of family, self-reliance, and avoidance of alcohol (quoting from the Church membership card)) .... Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

494 U.S. 872, at 972. The potential harm to the Native American Church was a direct injury to the that church's "community of character." *See* STANLEY HAUERWAS, A COMMUNITY OF CHARACTER 9-71 (1981). Specifically, the Native American community of character was harmed by the Court because "religious symbols dramatized in rituals ... are felt somehow to sum up, for those for whom they are resonant, what is known about the way the world is, the quality of the emotional life it supports, and the way one ought to behave while in it." *See* Clifford Geertz, *Ethos, World View, and the Analysis of Sacred Symbols, in* THE INTERPRETATION OF CULTURES 127 (1973). "Ritual," in other words, "sustains general morale ... by asserting and demonstrating the interdependence among men." CLIFFORD GEERTZ, ISLAM OBSERVED 92 (1969). *See also* MIRCEA ELIADE, RITES AND SYMBOLS OF INITIATION: THE MYSTERIES OF BIRTH,

perceptions seems plausible. After all, it was Justice Scalia writing for

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REBIRTH AND INITIATION (1975). (For criticism of Eliade, see Edmund Leach, *Sermons by a Man on a Ladder*, N.Y. REVIEW OF BOOKS, October 20, 1966, and GUILIFORD DUDLEY III, RELIGION ON TRIAL: MIRCEA ELIADE AND HIS CRITICS (1977). For a sympathetic treatment of Elaide, see MacLinskott Ricketts, *In Defence of Elaide: Toward Bridging the Gap Between Anthropology and the History of Religions*, 4 RELIGION 13 (1974).) Additionally, religious traditions through their narrative power often contribute to civic virtue. *See* George Washington, *Washington's Farewell Address, in* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 603, 316 ("Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports."); G.W.F. HEGEL, REASON IN HISTORY 64 (trans. Robert S. Hartman 1953) (stating "obedience to prince and law . . . so easily connected with reverence toward God"). The stories and rituals of religion *or* religiousness *or* a religious ethic *or* an ethic of religiousness have often grounded a nonconsequentialist teleological sense of the self, self-understood as an entity that is both continuous with itself and cooperating with others, within both society and cosmos. As Alasdair MacIntyre has observed:

> We enter human society . . . with one or more imputed characters—roles into which we have been drafted—and we have to learn what they are in order to be able to understand how others respond to us and how our responses to them are apt to be construed. Deprive children of stories and you leave them *unscripted, anxious stutterers* in their actions and in their words. Hence there is no way to give us an understanding of any society, including your own, except through the stock of stories which constitute its initial dramatic resources. Mythology, in its original sense, is at the heart of things. Vico was right and so was Joyce. And so too of course is that moral tradition from heroic society to its medieval heirs according to which the telling of stories has a key part in educating us into the virtues.

ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY, 201 (1981) (emphasis added). An equipped constitutional jurisprudence, keeping in mind the saga of Framer's concerns against intolerance, should act as an enclosing "big" narrative "writ large" to provide refuge for narratives of the nation's pluralistic and widely diverse (and sometimes sociologically fragile) "communities of character." This is the "end" or "telos" of free exercise.

In the present, this narrative power from the Framers has shifted from its primary dwelling place at the Supreme Court to the legislative arm, at both state and federal levels. *See infra* note 243 (on progress post-*Hialeah* of the Religious Freedom Restoration Act). This development may well represent a paradigm shift in the constitutional protection of religious freedom, but then Senators and members of Congress *also* pledge to uphold the Constitution, so such, a shift is but one more tribute to the inspiration of the Framers. Such a paradigmatic switch would also appear to make Ely's constitutional theory regarding religion regarding religion a self-fulfilling prophecy, self-consuming artifact, or unwitting vehicle of a historical synthesis for which it was an antithetical source of combustion. *See supra* part III.E.3. (noting the current Court's ill-founded reliance on Ely).

the Court in *Employment Division, Department of Human Resources v. Smith*, who queried whether social anarchy would have been "courted" had the Court affirmed the right of two members of the Native American Church to sacramentally ingest peyote,[229]—a point to which Justice Scalia adhered even after Justice O'Connor observed that the majority was drawing legal conclusions based on a fictive "parade of horribles."[230]

However, *Smith* and progeny, far from being the demise of the values enshrined in the Free Exercise Clause, constitute only one more moment in the Court's long struggle to interpret its constitutional duties. As Justice Souter's concurrence in *Hialeah* makes clear, currently "we are left with a free-exercise jurisprudence in tension with itself".[231] Justice Souter's description of "a free-exercise jurisprudence in tension with itself" goes a long way in describing not only free exercise jurisprudence post- and pre-*Smith* but also in describing the entire history of the Court's interpretations of the Free Exercise Clause.[232] This tension is derivative of two values, values which the Court must acknowledge as simultaneously binding: (1) protecting the right of religious self-determination, and (2) preserving the public order.[233] Although the intentionally chilling effect of *Smith* on free exercise claims may shock the conscience,[234] and although some of the chill is now

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[229] *Smith*, 494 U.S. at 890.

[230] *Id.* at 902 (O'Conner, J., Concurring); *See* Church of Lukumi Babalu Aye v. Hialeah, 61 U.S.L.W. 4587, 4591 (U.S. June 11, 1993).

[231] Hialeah, 61 U.S.L.W. at 4598 (Souter, J., concurring).

[232] *See id. See also supra* part II.A. (describing zig-zags and flip-flops as a recurring and predictable feature of the Court's free exercise jurisprudence). *Smith* free exercise jurisprudence is inordinately tilted towards the value of social coherence; *Yoder* and *Barnette* do not have this problem. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) *overruled by,* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Reynolds v. United States, 98 U.S. 145 (1878). In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court's desire to protect the self-determination of a religious group against the demands of the state did justice to the hermeneutical basis relied on by the Framers in originally adopting the Religion Clauses. *See id.* Similarly in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Court correctly subordinated concerns for a perceived—falsely perceived—risk to social unity for the sake of protecting conscience. *See id.* Synthesis of the competing values is, these cases serve to demonstrate, possible.

[233] *Id.*

[234] See Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 889 n.5 (1990) (criticizing a balancing approach to Free Exercise). Justice Scalia wrote that:

> [C]ourts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use

gone from the air,[235] free exercise claimants do not come into court calculating the niceties of current jurisprudential climates,[236] and sooner or later, *Smith* will fall by the wayside. The weight of the opinion's own over-written one-sidedness will over time, do *Smith* in, and the tension will then be balanced by the Court, hopefully, in a way more pragmatically consistent with the Framers' purposes.[237]

Overall, recognizing that one hundred years of religion decisions have revealed or uncovered a pattern of competition between two frameworks, the value of religious self-determination must be lexically ordered so the overriding and decisive value in the Supreme Court religion jurisprudence. Social coherence and religious autonomy, however, should not be perceived as independent truths; neither value

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> Justice Blackmun's terminology) or the "constitution[al] significan[ce] of the burden on the particular plaintiffs" (to use Justice O'Connor's terminology) suffices to permit us to confer an exemption. It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

Id. Justice Scalia appears to be engaging in a different balancing test, weighing the convenience of federal judges and the interests of judicial economy against the protection of the free exercise of religion.

[235] *See* Hialeah, 61 U.S.L.W. 4587 (U.S. June 11, 1992).

[236] "The LORD is on my side; I will not fear." PSALMS 118:6; "If God be for us, who can be against us?" ROMANS 8:31; "I fear not what man can do: for perfect love casteth out fear[,]" MORONI 8:16, THE BOOK OF MORMON.

[237] *Cf.* Steven D. Smith, *The Rise and Fall of Religious Freedom,* 140 U. PA. L. REV. 149, 239 (presenting a less optimistic but very interesting account, (called to my attention as this article was about to be published) the author states: "[o]ur current constitutional discourse can not adequately justify religious freedom . . . and the constitutional protection of religious freedom is . . . in a process of deterioration"). Smith's thesis that "our constitutional commitment to religious freedom" is "self-negating," *id.* at 149, however, represents an opportunity for dialectical synthesis, for which his analysis leaves little or no logical space. But I surely agree with Professor Smith that "[i]n perhaps no other area of constitutional law have confusion and inconsistency achieved such undisputed sovereignty." *Id.* at 150. Perhaps the difference between my optimism and Smith's pessimism regarding the Court's on-going potential to protect the substantive value of religious liberty is the result of his diachronic analysis, whereas mine is largely synchronic (the conflicting values are not to be ordered sequentially but contemporaneously). *See* J.A. CUDDON, A DICTIONARY OF LITERARY TERMS 237 (3d ed. 1991) (defining diachronic as "though/across time" and synchronic as "together time").

should be taken as true by itself or an "abstraction" results.[238] Rather, each value is "sustained by and based on" the other,[239] being "moments of an organic unity in which they do not conflict, but in which each is as necessary as the other."[240] Otherwise, when "some single aspect,"[241]

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[238] Abstractions in Hegel's view are false and indicate a "false consciousness." *See* Alasdair MacIntyre, A SHORT HISTORY OF ETHICS, 206 (1966). There appear to be these two variations on the Court's "single aspect" free exercise errors: thinking metaphysically about "public order," reifying instead of specifying (by excluding autonomy in the Court's "order" analysis); over-intellectualizing and thinking abstractly about the phenomena of religion or religiousness, thereby indulging in the dread of apparently inconceivable numbers of free exercisers who will descend on the courts, rather than letting life come before thought, deciding free exercise controversies one case at a time.

[239] G.W.F. HEGEL, PHILOSOPHY OF RIGHT, 139 (Trans., T.M. Knox 1967). Hegel's ethics suggests a possible synthesis of the values at the level of philosophical or jurisprudential theory. Hegel articulates an understanding of the real which allows for a positive obligation towards social structures. The praiseworthy ethical aspects of Hegel also include a place for individual autonomy, although as *aufhebung* within the State. (Hegel's debt to Kant concerning autonomy is substantial, but Hegel has the additive aspect of being able to deal with a concern for social structures.) Because this harmony of autonomy and coherence is derived from Hegel's ontology, a hesitation enters. If one commits to the logical movement of Absolute Spirit into objectivity, one also seems logically to take on the transmoral aspect of Hegel. But apparently nobody makes this move. *See* Charles Taylor, HEGEL 538 (1984) (maintaining that Hegel's "actual synthesis is quite dead . . . [t]hat is, no one actually believes his central ontological thesis."). For Gadamer, however, apparently there is more to the death of a thinker's theories than otherwise meets the eye: "the first and last principle of Gadamer's hermeneutics[:] [w]e do not get over the classics or beyond them." Joel C. Weinsheimer, GADAMER'S HERMENEUTICS 133 (1985). As Gadamer states in TRUTH AND METHOD, "I am absolutely convinced, quite simply, that we have something to learn from the classics." Hans-Georg Gadamer, TRUTH AND METHOD 490 (1975). *See e.g. infra* note 240 (discussing Hegelian constitutional interpretation in opposition to slavery).

[240] G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 2 (A.V. Miller trans., 1977). Julian Marias has restated the point this way: "there are no independent truths, and nothing is true by itself." JULIAN MARIAS, HISTORY OF PHILOSOPHY 326 (1967). That the parts must be viewed in terms of one whole is also part of Gadamer's statement of the fusion of horizons. *See supra* note 110. Hegel's perceived obscurity has occasioned some famous complaints. No clear account of Hegel, thought G.E. Moore, could be a true one. As an undergraduate, Moore studied under McTaggert, a Hegelian, whose lectures on Hegel were dedicated to clarifying Hegel's obscurity. Moore thought that McTaggert was much too clear: "certainly Hegel never meant anything so precise." PAUL LEVY, MOORE: G.E. MOORE AND THE CAMBRIDGE APOSTLES 60 (1979). Moore's rebellion spread to Bertrand Russell, and it could be said that the effects of this rebellion are still present today. The study of Hegel in the Anglo-American tradition has been characterized largely by criticism that has traded on shibboleths. *See e.g.*, R.W.M. DIAS, JURISPRUDENCE 529 (1976) (Hegel's philosophy is a highly abstract scheme of verbal juggling into which divergent interpretations can be fitted). The criticism of Dias,

such as fear of social anarchy, is set forth as the "purpose and essence of the whole,"

> [t]he natural consequence is that, since such a specific aspect has no necessary connection with the other specific aspects which can be found and distinguished, *there arises an endless struggle* to find the necessary bearing and predominance of one over the others; and since inner necessity, non-existent in singularity, is missing, each aspect can perfectly well indicate its independence of the others.[242]

It seems safe to predict that the Court will continue to fall off one side of the horse only to climb back up and fall off the other until it becomes more self-conscious about the push and pull between the values that its religion decisions clearly reflect. Until then, the Court will be deciding cases involving religion with a conceptual scheme that is partly illuminating and partly obscuring. Given the complexities inherent in religion cases, complexities that involve both values and facts, any effort by the Court to clarify or re-present its present religion jurisprudence (as in *Smith*) will merely reinforce categories which are destined to fail. Meanwhile, while the Court continues its "endless struggle" of clarifying the meaning of Free Exercise, there is—at least for

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however, can help to explain why Hegel has been put to such irreconcilable uses and applications as those of Nazism, as discussed briefly in Volume 2 of Karl Popper's The Open Society and Its Enemies (1980), to Hegel's use in this country, where, in its only incarnation as a "school of thought," Hegelian constitutional jurisprudence was centered on the absolution of slavery. As one commentator has noted:

> [T]he Hegelians' government was neither a contract, nor a system of checks and balances, nor a summary of group interests. . . . The state rather institutionalized the national consciousness in a political document and a tradition. Abraham Lincoln believed in just this notion of the Constitution and the Union, said the Hegelians. . . . The purpose of the war was that of Lincoln—to establish an "ethical state," a living regime welding together law and morality.

BRUCE KUCKLICK, CHURCHMEN AND PHILOSOPHERS, FROM JONATHAN EDWARDS TO JOHN DEWEY 181 (1985) (citations omitted) (discussing Hegelianism in American intellectual thought in the 1800's and the use of Hegel at that time in interpreting the Constitution).

[241] HEGEL, *supra* note 240, at 60 (emphasis added).

[242] *Id.*

the moment[243]—lamentation and disappointment throughout the land.

[243] The House of Representatives has passed The Religious Freedom Restoration Act which statutorily overturns the *Smith* decision. H.R. 1308 103 Cong., 1st Sess. (1993). After *Hialeah* was handed down, the week of June 14, 1993, the Senate Judiciary Committee approved the House version without amendment and the Act is now awaiting floor action. S.578, 103 Cong., 1st sess. (1993). The Bill, which is expected to pass with no or little problem, will re-establish the pre-*Smith* strict scrutiny standard, thereby effecting a type of statutory parchment patch for the hole *Smith* tore out of the Bill of Rights.