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Procedural Polytheism

by

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The Importance of The Inquiry

"A cult is a religion with no political power"

Tom Wolfe
In Our Time (1980)

"You wrote me recently to inquire about any holdings of this Court to the effect that this is a Christian Nation. There are statements to such effect in the following opinions: Church of the Holy Trinity v. United States. Zorach v. Clauson. McGowan v. Maryland."

Justice Sandra Day O'Connor
Letter to the Supreme Court For Republicans (1987)

In the United States sixty-eight years ago, during a war against a fascist government that was in the process of murdering six million people because of their religious identity, a man was castrated for his religious beliefs. Another was tarred and feathered; still more were arrested and held without charge. As Martin Marty recounts it, "sheriffs often refused to protect Witnesses under attack. Members were arrested, were imprisoned without charge, had their automobiles wrecked, and saw their halls attacked. Maine saw six beatings. Citizens of a town in Illinois assaulted a caravan of Witnesses' cars."[i] While the American treatment of this minority cannot fairly be compared to the German experience, the irony, indeed hypocrisy, should not escape us. It did not escape the Solicitor General of the United States, who, after a year of "fits of viciousness"[ii] against the Witnesses, remarked that "since mob violence will make the government's task infinitely more difficult, it will not be

tolerated. *We shall not defeat the Nazi evil by emulating its methods*."[iii] Further amplifying the hypocrisy, what led to this outburst of religious persecution emanated from precisely the institution that had itself taken on the duty of protecting religious freedom: the Supreme Court of the United States.

What had precipitated this outburst of violence against the Witnesses was their refusal to recite the Pledge of Allegiance.[iv] Their inability to do so stemmed from a religious prohibition of idolatry, which applied to the Pledge notwithstanding the fact that the addition of 'under God' was almost fifteen years away.[v] This command violated the state law in Pennsylvania that made it mandatory for all students to stand and recite the Pledge. The children refused and the parents appealed to the Supreme Court on the belief that doing so would alleviate the deep spiritual conflict, and its coincident constitutional issue. This case[1], and the one that quickly overturned it[2] will be further discussed in detail in Chapter Two.

Almost seventy years removed from the events of 1940, the Supreme Court has not yet discovered a way to respect the rights of religious minorities without in the process reaffirming their alienation from mainstream American society. The purpose of this essay is to propose a means of considering, and passing judgments on, free-exercise claims made before the Supreme Court that minimizes the divisive nature of the outcome while also widening the net of religious exemption to ensure that the same prejudices that may lead to non-accommodation at the ballot box do not similarly impair our ability to accommodate at the bench.

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[1] Minersville School District v. Gobitis 310 U.S. 586 (1940)
[2] West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943)

The two primary criticisms that can be leveled against the Court's free-exercise jurisprudence are amply illustrated by the story told by *Minersville* and *Barnette*. The first, and perhaps most important, criticism speaks to the lack of regard the Court has shown towards religious groups whose unpopularity and obscurity place them in most acute need of constitutional protection. Religious individuals and groups that fall into this category are described in this essay to suffer from a lack of recognizability among both the populace and the justices that hinders their efforts to be granted treatment consummate with that granted to more mainstream sects. The issue of recognizability, as this essay endeavors to show, has serious implications for how the Court should approach free-exercise claims.

The second criticism of the Court's jurisprudence that animates this inquiry relates to how groups can be alienated from American society by the way in which exemptions are granted. That is to say, even when the Court has successfully overcome the barrier of recognizability and ruled in favor of the religious minority, it has done so in such a way that defines the rights and privileges accorded to them as inhering in the group specifically, not in the package of civil liberties granted to all American generally. The distinction is an important one. When the Court accepts a free-exercise claim on the basis of the a particular religious practice, it sets apart those individuals for, in the view of some, 'special treatment.' Absent that religious practice, an individual would not enjoy such an exemption and/or accommodation. When the Court refused to grant the Witnesses the right to sit during the pledge, it did so on the grounds that the Witnesses possessed no special right to do so; when it later affirmed their right to sit during the pledge, it was because *everyone* had the right to

do so. The former decision opened the Witnesses up to scorn, ridicule, and violence. The latter reinserted them into the American community.[3]

In addition to the problem of recognizability, this essay proposes that the Court does not fully comprehend the relationship between the depth and breadth of its grants of exemption when it considers a case. The depth of an exemption is the extent to which a fully recognized religious group or individual is allowed to evade duties or obligations expected of other citizens by virtue of their religious beliefs. On the other hand, the breadth refers to the applicability of the exemption to different groups in society along a spectrum of recognized "religiosity." Each decision the Court makes can be viewed as a point on the nexus between two spectrums, one of depth and one of breadth. What this essay suggests is that the deeper the exemption, the less broad can be its application. Conversely, the broader the part of the population to which the exemption applies, the shallower the grant must be. This relationship will counsel that a free-exercise jurisprudence that seeks to be highly inclusive must necessarily also be less willing to grant significant exemptions from otherwise applicable laws. The result of this essay proposed approach is precisely that one. However, the depth/breadth relationship will be used primarily to assess, and criticize, the Court's free-exercise decisions.

As an alternative to the Court's current treatment of free-exercise claims, I propose that the Court should, to the extent possible, root its analysis and its decisions

[3] Their reinsertion into the American community has been to the benefit of most Americans. So great has been their contribution to the realm of religious freedom that Justice Harlan Fiske Stone was led to remark that "the Jehovah's Witnesses ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties."

in rights analogous to the case at hand. That is, it seeks to import rights and liberties from other sections of the Constitution in defense of the free-exercise claim being made. If a free-speech claim is implicated by the facts of the case, the Court should focus on the content of that claim in its analysis of the free-exercise claim being made. In this regard, the model I am proposing is polytheistic- it worships the many liberties bestowed upon the people by the Constitution- hence, procedural polytheism.

The essay will proceed in the following manner: In chapter two, I will seek to establish a motivation for this inquiry by demonstrating that the Court's current free-exercise jurisprudence does not offer the substantive protection to religious minorities that the Constitution requires. I will give an overview of the Court's recent free-exercise jurisprudence that seeks to establish that the Court neither protects religious minorities when they merit protection nor recognizes that the extent of protection granted would be untenable if analogous exemptions were granted to religious minorities not comprehended by the Court. It will include an overview of some of the scholarly criticisms directed at the Court's free-exercise jurisprudence from two distinct perspectives. The first perspective complains that the Court has been insensitive to the peculiar nature of religious claims and as a result, has not accepted as constitutionally valid claims made by deeply religious individuals. The second perspective views the Court's jurisprudence as failing an underlying standard of equality that permeates the Constitution when it grants special treatment to individuals or groups solely based on the religious content of their beliefs or actions. This perspective recommends a broader net of such special treatment to avoid, to the extent possible, the definition of "religion" by the Court.

Having laid out the primary criticisms of the Court's free-exercise jurisprudence in Chapter Two, in Chapter Three I will propose an alternative means for considering free-exercise claims. This section is the heart of the essay and will also inform Chapter Four. The chapter will acknowledge some of procedural polytheism's intellectual antecedents while stressing the importance of the distinction between them and what is proposed in this essay. In particular, the approaches recommended by Phillip Kurland, Christopher Eisgruber, and Lawrence Sager will be assessed.

Chapter Four will take the approach proposed in Chapter Three and apply it to a number of free-exercise cases that the Court has heard over the course of the twentieth-century. The purpose of this chapter is to fully explicate the application of procedural polytheism in a number of more difficult cases the Court has considered. In it, I will outline the facts of the case, summarize the Court's judgment and opinion, and then apply procedural polytheism to discover if the Court's decision comports with what is recommended. If not, an alternative decision will be proposed as either a full dissent or a concurrence.

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Weaknesses of Jurisprudence

Over the second half of the twentieth-century, the Supreme Court's religious freedom jurisprudence has drawn its fair share of criticism. Though all decisions and jurisprudential approaches are subject to critical analysis, the Court's decisions regarding religious freedom seem particularly unpalatable to critics on the left[vi], right[vii], and in the population at-large[viii]. Indeed, as Stephen Carter points out, "the cases in which the justices struck down the recital of organized prayers in the public school classrooms [are] decisions that for three decades have ranked (in surveys) among the most unpopular in our history."[ix] As I seek to demonstrate over the course of this chapter, it is not merely that religion plays such a central role in individuals' lives that animates the often vitriolic criticism of the Court's current religious freedom jurisprudence but rather a fundamental tension in jurisprudence itself. It is no small feat- indeed it is quite illustrative of my claim- that the Court has been able to attract criticism from both sides of the religious freedom debate. In the following pages I will review two principal, and opposing, criticisms of the Court's jurisprudence: First, that the Court affords too little protection to religious free-exercise claims and is insensitive to the peculiar nature of religious freedom claims with respect to non-religious claims to liberty; and second, that the Court, by virtue of recognizing a special claim in religious belief or religious behavior, is violating the

spirit of equality that permeates the Constitution and further, when it endeavors to define the scope of religion and its sphere of special protection, it necessarily goes about the business of telling individuals, many of whom may have deeply held beliefs, that theirs are not religious or do not rise to the level that deserve protection under the free-exercise clause.

Since the Bill of Rights was incorporated by the Fourteenth Amendment to weigh upon the behavior of the states, the scope of the free-exercise clause has been gradually expanding. At the forefront of this expansion have been the claims of individuals whose religious beliefs are not in the mainstream- that is, those individuals for whom the free-exercise clause, if it is to have any meaning all, is meant to protect. As Kathleen Sullivan points out, "not a single religious exemption claim has ever reached the Supreme Court from a mainstream religious practitioner."[x] This rather stunning observation suggests that the free-exercise clause is an important protection afforded to religious minorities and further, that the majority requires no such protection because its interests are safeguarded by the legislative branch. Stated in another way, exemptions are unnecessary for groups that possess a majority. Their "exemptions" are built into the laws passed by a legislature adhering, or merely sympathetic, to the dominant religion. If this is the case, then the willingness of the Court to entertain claims of unconstitutional restriction on the free-exercise of religious beliefs will determine the extent to which minority religions are able to practice their religious beliefs in the face of an occasionally indifferent majority.

Of the religions whose lack of mainstream acceptance has led to hostility and insensitivity by both the Court and the public, few have been subject to as much

criticism and scorn as Mormonism. Its treatment at the hands of the Court in late nineteenth century is a stirring reminder of the influence that religious bigotry can have over the decisions of Supreme Court justices. In *Davis v. Beason*, a case regarding a law enacted in the Territory of Idaho limiting the right to vote to only those males who had sworn an oath that they did not practice polygamy and were not a member of any organization that "advises, counsels, or encourages" anyone to commit polygamy, the Court was unsympathetic to the plea of the Mormon petitioners.[xi] Writing the opinion of the Court, Justice Douglas offered a withering approximation of the (then) Mormon principle of polygamy:

> Few crimes [bigamy and polygamy] are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.[xii]

While the Court's approximation of the morality of polygamy is open to debate, it is reasonably clear that the tone that the opinion took towards the claim of the petitioners was one of casual disregard at best and active bigotry at worst. There was no inquiry into the importance or centrality of the beliefs considered by the Court. Mormonism, which now enjoys general acceptance as a religion, is not even granted this luxury by Justice Field- recall the dismissive comment that "to call their advocacy a tenet of religion, is *to offend the common sense of mankind.*" Field went on to ask whether "a man [can] excuse his practices to the contrary, because of his religious belief", asserting that "to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[xiii] Yet, as some critics have maintained,

that is precisely the purpose of the free-exercise clause[xiv]. If, as Stephen Carter argues,

> a religion is, at its heart, a way of denying the authority of the rest of the world,; it is a way of saying to fellow humans beings and to the state those fellow humans have erected 'no, I will not accede to your will.'[xv]

then the meaning of the free-exercise- whose sole province and application, textually, is religion- must in some way operate in precisely the way that Douglas laments it should not.

In their analysis of constitutional protection of religious freedom, Christopher Eisgruber and Larry Sager put forth a broad doctrinal approach that stresses equality over privilege. Styled "equal liberty", it is a useful lens through which to view the decisions the Court has made regarding free-exercise claims due to its explicit devotion to non-preferentialism.[4] Its usefulness emanates from its unwillingness to consider the religious nature of a belief or conduct as a characteristic that has legal significance. Approaching the Court's rulings from the perspective of insisting on strong protection of religious freedom claims, the extent to which the Court does not meet the less stringent criteria of equal-liberty, it more egregiously fails to accord religions its due protection. For the sake of stressing the failure of the Court to develop an internally consistent jurisprudence that offers substantive protection to the free-exercise of religion, the bar is set intentionally low. Equal liberty has three components that guide its application:

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[4] In this particular case, non-preferentialism refers merely to not valuing certain religions (or indeed religion) over other belief systems and religions. It does not refer to the doctrine developed for Establishment Clause cases that insists that funding or support be accomplished on a non-preferential basis.

1) No members of our political community ought to be devalued on account of their spiritual foundations of their important commitments and projects.
2) We have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities.
3) Equal liberty insists on a broad understand of Constitutional liberty generally.[xvi]

Accompanying the approach of equal liberty is Eisgruber and Sager's command that the Court exhibit "equal regard" when considering the free-exercise claims of religions petitioners. Equal regard requires that the state must show the same concern for the fundamental needs of all its citizens.[xvii] The example given by the two to illustrate the proper application of equal regard cites a decision handed down by [then] Circuit Court Judge Samuel Alito for the Third Circuit regarding a claim made by two Sunni Muslims who were officers in the Newark, New Jersey police force. The force had a rule that required officers to be clean-shaven, but this regulation clashed with the religious precept governing the behavior of Sunni Muslims, two of whom were members of the force and both of whom wore beards in respect to their beliefs. They sought a religious exemption from the rule but were denied one by the police force. Judge Alito found the claims of the two men to be compelling and ruled in their favor, noting that the Newark police force allowed officers to be exempt from the grooming rule if they suffered from folliculitis, a skin condition that made shaving especially painful.[xviii] Given that the force was willing to allow exemption to their grooming rule for health reasons, equal regard would compel Newark to similarly treat religious claims against the rule as legitimate.[5]

[5] It is unclear whether the City of Newark had an exemption for officers with folliculitis through its own initiative, or through the Americans with Disabilities Act.

In an example of the Court exhibiting a lack of equal regard that had a profound and visible effect on the group whose unfamiliar religious beliefs had been undervalued, the Court took up the claim of a group of Jehovah's Witnesses whose children had refused to salute the flag despite the legal requirement to do so. As outlined in the opinion of *Minersville v. Gobitis*, the rule was a state regulation requiring that "pupils in the public schools, on pain of expulsion, participate in a daily ceremony of saluting the national flag whilst reciting in unison a pledge of allegiance to it "and to the Republic for which it stands; one Nation indivisible, with liberty and justice for all"."[xix] Its purpose, according to the Court, was the "promotion of national cohesion" which was "the basis of national security"[xx]- a purpose the Court accorded great weight as against the claim of the petitioning family. The opinion reveals a stunning dearth of respect for the claims the Gobitis family, placing the state interest in securing national cohesion above that of protecting religious liberty. Its quotation of Halter v. Nebraska, a case regarding the use of the flag in commercial advertisements, further indicated the inability of the Court to fully consider the claims of the petitioners. By first noting that

> . . . the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. . . . it signifies government resting on the consent of the governed; liberty regulated by law; *the protection of the weak against the strong*; security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression.[xxi]

it asserts, in the same breath, that the Court recognizes the flag's significance as a symbol of protection of the weak against the strong, as a beacon of freedom "in

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If the latter is the case, the point is diminished, though still holds. That is, since the City of Newark was manifestly *able* to allow an exemption to its regulation, it would be compelled to do so through equal liberty in the Sunni case.

its truest, best sense", and then forcibly compels the weak to salute a symbol that it cannot in good conscience worship. Precisely because the claim that an individual cannot worship the flag (what is ostensibly a non-controversial symbol) was foreign and indeed, undervalued by the Court, the free-exercise clause was not given its fullest expression. That religion could compel such recalcitrant behavior towards a symbol of national unity was not accepted by this Court due, in part, to how difficult it was for the Justices to fully recognize both the religiosity of the claim and the importance of the refusal to salute.

Minersville plainly fails the standards set by Equal Liberty insofar as it devalues, both in outcome and in the text of the opinion, the Witnesses on account of thei spiritual foundation of their commitments. It further fails Equal Liberty by asserting a narrow conception of constitutional liberty. Loyalty oaths, by insisting upon the adoption of a certain belief among the citizens, are antithetical to freedom of expression and belief. In this particular case, it also impinges upon the right to free-exercise of religion. The Court conceded none of these.

Adding injury to insult, the Court's decision unleashed a wave of persecution against the Jehovah's Witnesses- the Department of Justice received hundreds of reports detailing the burning of meeting places, beatings and even castrations within just two weeks of the ruling[xxii]. By announcing to the country that a religious minority had sought exception from a patriotic duty and by further determining that this claim was illegitimate and not deserving constitutional protection, the Court had publicly ostracized the Jehovah's Witnesses and had subjected them to the persecution that followed.

Just three years later, the Court reconsidered the very claim that it had rejected in Minersville when it granted a writ of certiorari to a group of West Virginian Jehovah's Witnesses who had challenged a local statute similar to that obtaining in the Minersville case. In what was essentially a rehearing of the Minersville case, the Court- which had replaced two members in the interim[6]- reversed its earlier decision in West Virginia v. Barnette. In his opinion, Justice Jackson grounds the decision not in free-exercise rights that are peculiar to religious claims, but rather in a broader right to freedom of expression. Noting that

> freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[xxiii]

Justice Jackson brought the Witnesses back into the American polity. Notably absent in his opinion is a reference to a right that inheres specifically in religious belief. It did not, as the Minersville case did, conceive of the claims made by the Jehovah's Witnesses as seeking a special privilege on account of their religion. The contrast between the treatment of the same claim made by the same minority religion with only three years and two justices distinguishing the circumstances of the cases suggests that in the prior case, the Jehovah's Witnesses claims had been *discounted* on account of the unrecognizability of the religious claims being made. That is, if the right not to salute the flag is universal (as Barnette asserts), then why was the claim made by the Witnesses readily dismissed just three years earlier? Though no certain

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[6] Justice McReynolds resigned in 1941 and was replaced by Justice James Byrnes. Justice Byrnes only served for a year and a half and was subsequently replaced by Justice Wiley Ruteledge. Chief Justice Charles Evans Hughes also stepped down in 1941 and was replaced by Chief Justice Harlan Fiske Stone. Justice Robert Jackson took the spot vacated by Associate Justice Stone's promotion to Chief Justice

conclusion can be drawn from this striking contrast, the situation is highly suggestive of a lack of equal regard with respect to the Witnesses' claims. It indicates that the identity of the petitioners, and the content of their minority religion, weighed upon the outcome of the case. Recalling condition two of equal liberty- that there is no constitutional reason to accord special privilege or disability to actions or beliefs that happen to be religious- it is apparent that the Court, from the perspective of those pressing for enhanced protection of religious claims, failed on this point.

A more recent case failing the test of equal liberty, and consequently, any formulation of religious preferentialism is a case that gets at the heart of the problem of undervaluing the beliefs brought before the Court. In 1990, the Court granted cert to a case involving Oregon's controlled substance law, which banned the use of Peyote under any circumstances, including religious ceremony. Alfred Smith and Galen Black, who had been fired and subsequently denied unemployment on account of their having admitted to taking Peyote during a religious ceremony, brought the case to the Court on the grounds that the law that had prohibited them from keeping their job and from receiving unemployment had unconstitutionally violated their right to freely exercise their religious beliefs.[xxiv] The decision, which held that Smith's claim to protection under the Free-Exercise Clause was not constitutionally sound, relied upon the apparent lack of limiting principle to granting this type of religious claim protection. Writing for the Court, Scalia observed that "there would be no way…to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes…"[xxv]

A common concern regarding free-exercise claims is that the excepting of citizens from generally applicable laws is disruptive of public order. That is, absent a clear limiting principle to the exception, such decisions will force the Court into the awkward position of explaining why a particular group can openly violate a law passed by the legislature- and why others cannot. Interestingly, Justice Blackmun writes in his dissent that this fear of similar claims being made as a result of an exception to the law is misplaced: "The state's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions."[xxvi] Though I do not suggest that a state or municipality must point to empirical data suggesting that a given type of exemption will give rise to a "flood of other religious claims", it correspondingly cannot speculate that it will without such data.

However, again taking up the standard of equal liberty as a benchmark, the decision in Smith may not lack an analogue to act as a guide. As Eisgruber and Sager point out in their analysis of the Smith decision, Oregon exempted the sacramental consumption of wine from its prohibition of underage drinking- an accommodation that does not admit an obvious limiting principle, but is evidently accepted by the State of Oregon as legitimate.[xxvii] In other words, "while Oregon did nothing to accommodate the use of peyote during Native American religious rituals, it expressly accommodated the use of another drug, alcohol, during Christian religious ceremony."[xxviii]

The apparent inconsistency between the treatment of the Native American ritual of Peyote ingestion and the treatment of mainstream Christian sacrament for minors is telling. While it is true that the rule excepting underage consumption of alcohol for sacrament is not a judicially enforced exception (and so the Court does not have to account for the inconsistency), that the Court did not acknowledge the apparent ease with which the state government can except similar behavior for other religions suggests that the Court did not regard the claim made by the Native Americans to be as legitimate. At first glance, this inconsistency is understandable- if not excusable. Relative to the consumption of alcohol, the ingestion of peyote is not a common occurrence in American society. Further, as far as religious ceremonies go, intuition suggests that more Americans are familiar with the use of sacramental wine in Christian ceremonies than the use of peyote in the ceremonies of the Native American Church. It is precisely this unfamiliarity that militates against the religious minority from getting equal protection in the legislative branch- and suggests that an alternative approach to the Free-Exercise Clause is warranted if the clause is to grant substantive protection to religious minorities.

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While the examples of under-protection often have a real and tangible impact on the lives of those involved- take the Jehovah's Witnesses example in Gobitis, for instance- when the Court offers a legally unsatisfying justification for the protection it does grant, it is no less problematic. Often, the "victims" of over-protection are our

nation's commitment to equality, and indirectly, the individuals not given special exception.[7] Examining the Minersville and Barnette cases from a different perspective, the Court was able to avoid the accusation that special privilege was being granted to a religious minority by couching its decision in freedom of speech rights accessible to all rather than more narrowly constrained religious freedom rights that are applicable only to certain religious groups. However, in other cases the Court has not taken this approach when justifying the special treatment of religious claims it found compelling. Following the analysis in the first half of the chapter, this section will examine those cases where the Court has extended *too much* protection to religious groups or where it extended protection to religious claims but failed to accord similar rights to non-religious claims (or claims that were not recognized by the Court to be religious). That is, conceived in the framework mentioned in the introduction, its decisions sacrificed adequate breadth for nonessential depth.

In terms of special exceptions granted to narrowly constrained religious claims, two cases come to mind that cast the relationship between equal protection and special (religious) protection into a distilled and easily discernible tension. The first considers the claims of another religious minority whose belief system is in stark contrast to the beliefs and lifestyle of mainstream America- the Amish. In addition to living a secluded Luddite existence that eschews the technological advances of contemporary society, the Amish have their own educational standards that must be maintained in the self-sufficient community and, significantly, not in the public

[7] In a different era, philosophically motivated conscientious objectors may fall into the latter category as they were met with great resistance at first when they sought the same rights that more explicitly religious claims were granted. See United States v. Seeger (380 U.S. 163)

school system offered by the state. In the case at hand[8], three members of the Old Amish Order from New Glarus, Wisconsin, refused to send their fourteen and fifteen year old children to school, in violation of the state's compulsory education law, which mandated that children attend school through the age of sixteen.[xxix] Delivering the opinion of the Court, Chief Justice Burger found that the free-exercise claims made by the respondents were valid due, in part, to the recognizable religiousness of the claim and due to the fundamental nature of the religious precepts being imposed upon. By first establishing that

> The unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free-exercise of respondent's religious beliefs.[xxx]

Chief Justice Burger found that this particular exemption from the rule of law of the State of Wisconsin was constitutionally sanctioned. Yet, the source of criticism of this decision does not arise from the understandably accommodating nature of the ruling on the facts of the case, but rather from what he first establishes as the benchmark of a successful free-exercise claim. Again, to quote Chief Justice Burger at length to allow the Court to speak for itself:

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his

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

> own standards on matters of conduct in which society as a whole has important interests.[xxxi]

His point regarding the concept of ordered liberty introduces a necessary limit on the breadth of exemptions granted, but also emphasizes the problematic nature of free-exercise jurisprudence. While the free-exercise clause would be meaningless if it did not exempt certain individuals from the duties and restrictions placed upon the society as a whole, the depth and breadth of the exemptions granted can vary considerably. Chief Justice Burger's formulation stresses the religious nature of the Amish's claim- but the case at hand does not force us to confront the important question of what constitutes a religious claim. The Amish belief system- regardless of whether or not it is religious- is a well-established and commonly recognized philosophy whose adherents, by virtue of the sacrifices undertaken on behalf of their beliefs, are manifestly devoted to their way of life. It is a convenience of recognizability that few other organizations or ways of life enjoy. Indeed, Burger himself admits that "few other religious groups or sects could make"[xxxii] such a showing. While the issue of recognizability will be discussed at greater length later in the essay, it is worth briefly exploring a religion for which recognizability, and the standard of demonstrating centrality, might be an issue. Adherents of Native American religions, one of which will figure prominently in chapter four, would be in such a category.[9]

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[9] While the Court is undoubtedly familiar with, in particular, Native American sects, their relative unfamiliarity with the central tenets of those religions will make it more difficult to assess the centrality of the beliefs infringed by a particular law. I do not need to assert that the Court will be completely unaware of, or hostile to, a minority religion to highlight the issue of recognizability. I only need to note the relative disadvantage the minority religions must bear. We are, after all, (demographically speaking), a Judeo-Christian nation.

The problems inherent in Chief Justice Burger's justification for the Court's ruling relate to the thorny issue of identifying religious belief. Burger's narrow conception of constitutionally recognized religious belief invites the criticism leveled by critics that "in determining whether an activity is a religion for the purposes of the first amendment…one begins with what is familiar and defines in part by excluding the unfamiliar."[xxxiii] Thus the Amish, a familiar component of American religious life, are quite rightly granted special protection for their beliefs, but Native Americans, whose religious beliefs are less familiar to mainstream America, are not granted such protection. In *Yoder*, the Court could call upon the "unchallenged testimony of acknowledged experts" to bolster its grant of exemption for a practice they perceived to be central to the Amish way of life. Yet, as critics point out,

> The inability of courts to comprehend Native American religious practice undermines courts' ability to give due weight to Native American claims: the centrality test's distinction between central and peripheral religious rituals has little meaning to Native American because they do not- and courts therefore should not- rank the importance of the rituals that comprise their religious life.[xxxiv]

By utilizing a test based on religious belief, the Court is forced to inquire into and make judgments upon the belief systems of the considered religions.[10] Further, this approach inevitably colors the judgment of the Court by implicitly setting the standard for religious belief as the religions most familiar to the justices involved. Indeed, the religious background of the justices may sometimes weigh heavily on their approach to the claim being made: in his dissent in *Edwards v. Aguillard*, Justice Scalia makes the bold claim that "the body of scientific evidence supporting creation

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[10] This type of judgment is amply illustrated by Justice Field's language in his majority opinion in Davis v. Beason (133 U.S. 333): "Crime is not the less odious because sanctioned by what *any particular sect may designate as religion.*"

science is as strong as that supporting evolution. In fact, it may be stronger."[xxxv] This, in spite of the fact that seventy-two Nobel Prize winning scientists had submitted amicus briefs testifying to the religious nature of creationism.[xxxvi] While the religious background of the justices will inevitably inform or even interfere with their decisions, it is the approach used by the Court in weighing free-exercise claims that makes the Court most susceptible to interference rather than information.

In *Sherbert v. Verner*[11], a similar standard rooted firmly in *religious* belief was set to ascertain the validity of a free-exercise claim made by the petitioner seeking exemption from penalty for her refusal to work on Saturday. Sherbert had been fired from her job in a textile mill because as a Seventh-Day Adventist, she was unable to work on Saturdays. She similarly refused other employment opportunities offered for the same reason. When she sought unemployment benefits, the South Carolina Employment Security Commission denied her application because her unemployment was the consequence of her own particular preference for workdays.[xxxvii] The Court found that since "not only is it apparent that the appellant's declared ineligibility for benefits derives solely from the practice of her religion," and that "the pressure upon her to forego that practice is unmistakable,"[xxxviii] that Sherbert's claim that her right to free-exercise of her religion had been violated was a valid one. Further, as Justice Brennan wrote in the majority opinion, "significantly, South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we hold infringing the Sabbatarian's religious liberty."[xxxix] Thus, even among evidently

[11] Sherbert was subsequently overruled by Employment Division v. Smith (494 U.S. 872), but the shift in jurisprudence did not bring the Court closer to something approximating procedural polytheism.

religious beliefs, South Carolina's legislation had a distinctly sectarian bias towards the mainstream Christian practice of Sunday worship. While the majority is willing to admit that withholding unemployment benefits from Sherbert based on a difference in Christian sects is constitutionally unsound, it does not admit a broader definition of religion or religious protection. As the Justice Harlan points out in the dissent, "the state, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated."[xl] This criticism of such exceptions has been echoed by Phillip Kurland, who notes that "to permit individuals to be excused from compliance with the law solely on the basis of religious beliefs is to subject others to punishment for failure to subscribe to those same beliefs."[xli]

There are two criticisms that can be leveled against the type of exemptions granted by the Court today[12] that distill the problem into two related issues. The first is that the exemptions granted to religious actions or organizations allow individuals or groups to unjustly avoid the duties and restrictions placed upon all citizens. That is, the depth of the exemptions granted is too great to be justifiable. The second is the breadth of the qualifying beliefs and/or organizations- essentially, who is granted special protection and when. As noted earlier, the bias on the Court appears to be towards the familiar, mainstream religions (which are precisely the religions that likely do not require protection) at the expense of Native American, Eastern or otherwise marginalized religions. The criticisms are related and, when viewed in

[12] Or, in the case of Smith, not granted.

concert, establish a useful way of analyzing free-exercise jurisprudence. Where the Court has erred in the past has been where it granted too much leeway to certain religious beliefs, or where it withheld even justifiable exemptions from religions it found unorthodox or suspect. While it is not a sure indication of the sentiments of the Court, it is very suspect that the first significant diminishment of the right to free-exercise came in a case where the respondents were members of a Native American religion.

When one views the Court's free-exercise jurisprudence from the standpoint of the related depth and breadth criticisms, it becomes apparent that a move towards a broader net of application may impact the extent to which the Court, and the public, is willing to tolerate special exemption. To give a far-fetched but illuminating example taken right out of a case in Kansas involving an effort to teach Intelligent Design, suppose a man who professed to be an adherent of the religion of the Flying Spaghetti Monster sought exemption from working on Fridays on account of the "Pastafarian" belief that Fridays must be a day of rest.[xlii] Suppose further that this individual is sincerely devoted to his religion and is not trying to make a mockery of religious protection. How willing would the Court be to grant such an exemption? If it refused to grant exemption, it could not be because the exemption would be too deep. That is, since it found Sherbert's claim to be valid regarding her Saturday worship, the refusal to grant exemption would be due to an unjustifiable breadth of the right to exemption.

What the example illuminates is, first, that the Court must be mindful of relationship between its rulings on free-exercise claims made by easily recognizable religions and those that may yet possess general acceptance; second, that in this

specific case, the exception granted by the Court in *Sherbert* was too deep of an exemption.[13]

* * * * *

From the perspective of both depth and breadth of exemption, the Court has on occasion failed to offer substantive protection the religious minorities due to the relative unrecognizability of their belief systems. Religion as conceived by the Court has historically been too narrow a definition to capture all the fundamental belief systems adhered to by the diverse American populace. From Mormonism to the Church of Latter Day Saints to most forms of Native American worship, there has been, and continues to be, a resistance to recognize the legitimate free-exercise claims of religious minorities. If the free-exercise clause is to grant substantive protection to religious minorities, it must avoid, to the extent possible, any barrier to fully appreciating the claims made by religious minorities. Though, admittedly, the Court has moved towards a broader construction of religion since it began assessing such claims, this movement merely reflects the gradual absorption of previously marginalized groups into the mainstream. What the free-exercise clause is most often concerned with, however, are the marginalized tributaries that have not yet (if they ever) been incorporated into the mainstream. In chapter three, I will outline an

[13] Anticipating an obvious objection, I would similarly characterize the exemption granted to Sunday worshippers as too deep. In light of the relationship between depth and breadth outlined in the chapter, an exemption with the level of depth granted in Sherbert would prevent the Court from extending this right to other groups- whether they worship Saturday, Monday, or every third Tuesday.

alternative approach to free-exercise claims that avoids the damming of this integration.

3

An Alternative Method: Overcoming Recognizability

It may be asked why then does the First Amendment separately mention free-exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter…It was to assure religious teaching as much as secular discussion, rather than to assure greater license, that led to its separate attachment.

Justice Jackson in Douglas v. City of Jeanette

Given the distressing state of the Supreme Court jurisprudence with respect to free-exercise claims, another approach must be considered that avoids the dual criticisms outlined in chapter three. To briefly reiterate, the exemptions and privileges granted by the free-exercise clause can be described by the depth and the breadth of the exemptions. The depth of the rights granted refer to the extent to which individuals captured by the clause can opt out of duties they otherwise would be expected to perform and how much weight is accorded to the claim of centrality of the belief being protected. The breadth of the rights granted is the size of the net capturing the individuals granted exemption. Taken to an extreme, a free-exercise clause with maximum depth and breadth would exempt all individuals from any duty or obligation they found to be in conflict with their own beliefs- no matter how trivial. Taken to the other extreme, the situation would be correspondingly grim- no claims of exemption would be entertained by the government regardless of the depth of

conviction or the rarity of the claim. What this paper is concerned with, however, is the more realistic combination of intermediate levels of depth and breadth- examples of which were outlined in chapter three.

Given the limited nature of the free-exercise clause, its goal would likely best be served by a deep and narrow set of exemptions. That is, in those areas where a truly religious belief is being unnecessarily constrained by state action, the Court should demonstrate great deference towards the claimant. However, as outlined in chapter three, the contours of a workable and fair constitutional definition of religion are difficult to ascertain. Indeed, the result of free-exercise inquiries focusing on the importance of a belief in a given religion often favors precisely those religions that least require special protection- at the expense of the minority, "unrecognizable" religions whose members most require it. It is this tendency that forces the hand of the equal liberty oriented scholar towards a broader and shallower religious exemption. In this chapter, I will set forth an alternative mode of evaluating free-exercise claims that tries to minimize the negative effects of conventional free-exercise inquiry. In brief, the approach takes ideas propounded by Eisgruber et al., Weber and Kurland, and takes them a step further in light of the dual risk of unrecognizability impacting the success of claims and of divisiveness being engendered by claims of religiously centered claims of exemption.

As a starting point, I wish to outline the approaches advanced by Kurland, Eisgruber and Sager. Phillip Kurland was one of the first constitutional theorists to suggest that the two religion clauses suggested a coherent treatment of religion as something that cannot be a category that receives special (whether beneficial or

disadvantageous) treatment. The heart of Phillip Kurland's analysis of free-exercise claims is his contention that

> The freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.[xliii]

His approach, which would have the dual effect on the Court's current jurisprudence of broadening the free-exercise claims respected by the Court and narrowing the areas within which establishment issues may arise, comports well with the other Amendments to the Constitution that stress equality over special privilege (the First's freedom of speech clause and Fourteenth's equal protection clause immediately come to mind). While Kurland himself does not advance the argument that free-exercise claims should be made via reliance on the rights of free speech or equal protection, his approach does have the effect of likening its application to the ones used by free-speech and equal protection analysis. Kurland's theory, as one might expect given the unsettled state of religion clause jurisprudence, is not without its detractors. The primary criticism of Kurland's interpretation of the religion clauses emanates from the rather obvious observation that religion was given specific mention in the First Amendment- and that that has special significance. Criticizing the notion that religion should be neither benefited nor burdened by the state, Laurence Tribe points out that

> The Framers, whatever specific applications they may have intended, clearly envisioned religion as something special; they enacted that vision into law by guaranteeing the free-exercise of *religion* but not, say, of philosophy of science.[xliv]

By folding the two clauses into one, neutral affirmation of the irrelevance of religious content or belief with respect to state action, Kurland's thesis would be unpalatable to

those individuals for whom the literal text of the Constitution is ideal gauge of the Court's jurisprudence.[14] However, as the previous chapter highlights, the difficulties in effectively and fairly ascertaining what is and what is not religion may overwhelm the goal of strict adherence to the text of the First Amendment.

First published in the 1960s Kurland's view of the religion clauses has since been revisited and updated by a group of scholars seeking to promote what they call "equal separation." Their analysis differs from Kurland's insofar as it places greater emphasis on locating the rights to be protected by the religion clauses, in analogous civil liberties granted by the Constitution. However, at the heart of their claim is the contention that

> There is seldom a *legally significant* characteristic of religion so unique that it is not shared by similar nonreligious individuals and groups. The conclusion to be drawn is that in most aspects, religious individuals and interests are subject to the same laws as other similarly situated individuals and groups[xlv]

By denying the legal significance of religion or the religious motivation of certain acts, Weber avoids the problem of defining religion altogether. For him, what constitutes a religious belief is a purely academic question that should not weigh upon the decisions made by the Court with respect to free-exercise claims. Yet, cast in the terms of the depth and breadth relationship discussed earlier, his approach does not make the free-exercise clause more shallow than it otherwise would be. Responding to criticisms of his interpretation, Weber argues that

> The point of equal separation is *decidedly not* that religious individual's and groups' activities and practice should be brought

[14] Further, if one were to adopt a strategy of framer's intent, the clauses would likely (though not necessarily) preclude the inclusion of Judaism, Islam, or Santerianism in free-exercise claims.

> down to the level of other similar individual's and groups' activities and practice, but that the latter should be elevated to the same level as the former.[xlvi]

That is, Weber seeks to create a broader free-exercise clause while maintaining the depth of protection already (if inconsistently) offered to evidently religious claims.

The interpretation favored by Eisgruber and Sager, Equal Liberty, is briefly outlined in chapter three, but merits further discussion. Eisgruber and Sager begin their analysis with what is largely the same starting point as Kurland's, which "depends upon the idea that the state must not discriminate between religious convictions and comparably serious secular convictions."[xlvii] Their theory, however, is more robust in terms of its practical application than what is offered by Kurland. With respect to exemptions from generally applicable laws or regulations of the state, their method of interpretation recommends seeking analogous exemptions granted (or, in the absence of concrete examples, hypothetical ones that sufficiently accord with the exemption claim at hand) and inquiring into whether the analogy is apt- and if the organization or the state has granted exemption in those cases. To briefly reiterate the example given by the authors, they refer to a case wherein two Sunni-Muslim officers of the Newark Police Department sought exemption from a grooming regulation that mandated that officers remain clean-shaven.[xlviii] The basis of the exemption granted by the U.S. Court of Appeals was that a similar exemption was written into the regulation for individuals suffering from folliculitis. Using this separate exemption as a guide, the Court found that the Newark Police Department commitment to a well-groomed force did admit exemption.

At the heart of all three approaches is a similar proposition: that the free-exercise clause must, to the extent possible, consider the claims of individuals whose beliefs are not recognizably "religious." The strategy I am putting forth takes this claim and seeks to further bolster the practical application of equal liberty. In the vein of Eisgruber and Sager's approach, what follows is how the dual issues of recognizability and divisiveness should have an effect on the Court's impression of free-exercise claims they are presented with.

* * * * *

Perhaps the most problematic element of the free-exercise clause is the object of its concern: religion. Far from being obvious, the line dividing those claims that can be considered sufficiently religious and those that are merely "important" is blurry and likely serpentine. Further, by virtually any definition, religion touches on matters of great importance, or, "ultimate concern"[xlix]- and so a debate about what is and what is not religious will involve inquiring into, and passing judgment upon, the deeply held beliefs of other individuals. Indeed, in the United States, we are constantly confronted by new organizations or belief systems that force a reconsideration of the American conception of religion. Finally, the arbiters in this debate are individuals who, despite all efforts to the contrary, are inevitably influenced by their own religious background and beliefs. In many cases, the Justices are beneficially informed by the grounding in moral behavior they possess as a result of their religious background. However, when the issue comes to defining that which

is of ultimate concern to them, unfamiliar groups making a claim of commonality between themselves and those of more mainstream religions are undeniably disadvantaged. It is against this backdrop of uncertainty that the removal of religion from the free-exercise clause finds its motivation.

The removal of religion from the free-exercise clause would not, as will likely be argued, take religion out of the purview of the First Amendment. Indeed, in this conception of the free-exercise clause, such a removal affords protection to a greater diversity of religious beliefs- ones that heretofore have not been fully recognized as "religious." In addition to the criticisms of the Court's religion clauses jurisprudence outlined in chapter three, which point out the difficulty the Court has in announcing opinions "that conflict with the personal views of the justices as private citizens,"[l] there is another consideration that must be addressed when analyzing the religion clauses as they apply to "religion." For this, I look to the history of the Establishment Clause for guidance, as it has an older and more robust pedigree of constitutional analysis.

In his 1986 historical analysis of the Establishment Clause, Leonard Levy lays bare the distinction between what was commonly meant as an establishment in Europe, and what notion of establishment prevailed in the colonies and subsequently, the states. His analysis of the statutes, letters and behavior in 18th century America gives a strong rebuke to contemporary scholars who assert that the establishment clause was merely a prohibition on selective aid to religion and not a prohibition on non-preferential aid to all sects. What is most relevant to this analysis, however, is the findings he describes about the nature of what constituted a *religious* establishment.

In Levy's words, "no American state at the time [1790] maintained an establishment in the European sense of having an exclusive or state church designated by law."[li] The establishments that prevailed among the thirteen colonies instead amounted to "the taxation of everyone for the support of religion, but allowed each person's tax to be remitted to the church of the person's choice."[lii] What motivated this distinction was an effort to move away from the narrowly prescribed notion of religion that the British government had imposed upon both the colonies and the nation of Britain. The Anglican Church's dominating presence was felt in the colonies right to the years preceding the Declaration of Independence. As late as 1771, the colonists were being prosecuted for unlawfully assembling "under the pretense of the exercise of Religion in other manner than according to the Liturgy and Practice of the Church of England."[liii] This European notion of state supported religion had made an indelible mark on the colonists and Framers involved in the religions clauses' construction.

Following the passage of the Constitution in September of 1787, an editorial in the Philadelphia Independent Gazetteer writing in favor of religious liberty in the newly formed Union, paints a vivid picture of the motivations of the colonists in their formation of the new nation:

> To take a proper view of the ground on which we stand, it may be necessary to recollect the manner in which the United States were originally settled and established.- Want of charity in the religious systems of Europe and of justice in their political governments were the principal moving causes, which drove the emigrants of various countries to the American continent. The Congregationalists, Quakers, Presbyterians, and other British dissenters, the Catholics of England and Ireland, the Hugonots of France, the German Lutherans, Calvinists, and Moravians…established themselves in the different colonies thereby laying the ground of that catholicism in ecclesiastical

> affairs, which has been observable since the late revolution: Religious liberty naturally promotes corresponding dispositions in matters of government…In short, danger from ecclesiastical tyranny, that long standing and still remaining curse of the people- that sacrilegious engine of royal power in some countries, can be feared by no man in the United States.[liv]

What arose in the wake of this rush towards religious freedom was, in the eyes of those involved, a government that respected all religious belief. In light of a "want of charity in the religious systems of Europe", the United States was meant to rid itself of that unpleasant tendency. What is peculiar, then, about the non-European establishments that were maintained by the former colonies was the highly constrained nature of them. That is, though the establishments were putatively of only religion writ large (as opposed to the Anglican Church in particular), "in no state or colony…was there ever an establishment of religion that included every religion without exception. Judaism, Buddhism, Mohammedism, or any religion but a Christian one was ever established in America."[lv] Levy further illustrates the conflation of religion with Christianity when he points out that "establishment in Massachusetts meant government of religion generally, that is, *of several different protestant churches*"[lvi] (ital. mine).

What this is meant to illustrate is not merely that the states were intolerant of non-Christian religions (which they certainly were), but rather that non-Christian religions were not afforded the same privileges that Christian ones were, during a period where all "religions" were generally thought to be established. It is an historical starting point for the type of familiar/unfamiliar distinction that motivates discrimination between religion and what is claimed to be non-religion. Indeed, in the

words of Leonard Levy, "where Protestantism was established, it was *synonymous* with religion (ital. mine)."[lvii]

Thus, even during a period wherein the right to religious liberty prevailed and the negation of government prescribed establishment decried, the establishments that did prevail were of a strikingly narrow and constrained nature.[15] The difference between the 18th century's narrowly constrained view of religion and the 21st century's is one of degree, not kind. The Court still displays an ignorance to, and sometimes disrespect for, religions not in the mainstream. To give an example, Scalia, himself a devout Catholic, one remarked in an oral argument that he believed that Muslims accepted the Ten Commandments.[lviii] Further, as mentioned in chapter three, Scalia also makes the breathtaking claim that the evidence supporting intelligent design is not merely equal to that supporting evolution, but that "in fact, it may be stronger."[lix] If religion is to be the starting point and defining quality of a successful free-exercise claim, such claims will be at the mercy of this type of inattention and neglect to the evidence at hand. Once again, the criticism is not meant to highlight the shortcomings of the Court, but rather of the approach- it allows the understandable ignorance of foreign religious beliefs to have a large role in the relative weight accorded to free-exercise claims.

The starting point for an analysis of a free-exercise claim then, should not be whether a belief is sufficiently religious, but rather if the belief is sufficiently important or meaningful to the claimant. Inquiries of this sort have been undertaken

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[15] Given the populations that had settled in the colonies, this is of no surprise. However, the significance lies in the words used describing this narrowly constrained establishment.

in the past when weighing free-exercise claims against the interest of the state in upholding the law from which exemption is sought, but they have often been rooted in an inquiry into the religious precepts themselves, not the weight that the claimant accords them personally. The approach suggested here finds its strength in recommending that reference to the specific theology considered should supplement, only if necessary, the analysis of the claim. It has often been the case that an absence of clearly articulated theology has doomed the claims of potential free-exercise exemptions[16]. The absence of theology, however, does not necessarily suggest an absence of religion- and this has been to the detriment of true religious minorities. As the Harvard Law Review points out,

> The court's failure to distinguish between religious activity and the derivative theological articulation of that activity deserves particular criticism. The court declared that "MOVE cannot law claim to be a comprehensive, multi-faceted theology." But theology is not religion. Theology is to religion what anthropology is to human culture: a second-level commentary about a pre-existing activity. Indeed, mainstream Christianity developed a comprehensive, multi-faceted theology only after centuries of experience, reflection, and argumentation.[lx]

The upshot, of course, is that the religions with comprehensive, multi-faceted theologies (like Christianity) will be given greater protection. Conversely, religions such as the Native American Church or more vaguely defined personal philosophies will correspondingly suffer. What is most problematic about this arrangement is the extent to which this right to free-exercise may end up favoring those groups that enjoy power in the legislative branch at the expense of the groups who require the

[16] See: Bowen v. Roy 476 U.S. 693 (1986)

most protection- and whose interests were likely the motivating factor of the inclusion of the Bill of Rights.

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Practical Implications

The practical implications of this approach to free-exercise claims can be outlined in three rules of analysis.

1) Free-exercise claims brought before the Court should first identify the relevant analogous right guaranteed elsewhere in the Constitution. For instance, for Jehovah's Witnesses seeking exemption from mandatory flag salutes, the right would be a First Amendment right to free speech. For the Santerians in Florida, the Court would adopt an equal protection mode of analysis (more on the level of scrutiny later).
2) Inquiries into the relative importance of the beliefs or actions that are impeded by the state should begin with the claimant his or herself. The testimony offered by the individual should be accorded the greatest weight. Claimants will also be expected, however, to provide corroborating evidence of the depth and importance of the beliefs they charge are being prohibited. If such evidence includes reference to spiritual texts or overarching theologies, it should be in support of and related to, the claims made by the person before the Court. In the absence of such tangible reinforcement of the claim, the Court should be receptive to alternative means of demonstration. Indeed, in

light of the aforementioned tendency to grant greater leeway to recognizably "religious" beliefs, the Court should undertake to understand the source of the claim.

3) Having ascertained the relevant rights involved and the depth or importance of the beliefs restricted, the Court can then begin to balance the interest of the state against the right of the claimant. It is here that the Court's established jurisprudence in the analogous rights will provide guidance. Relating the level of scrutiny entailed by the claim to the depth or importance of the conviction impeded, the Court's decision will reflect a broader acceptance of the rights of individuals to opt-out of those laws that profoundly impact the lives of the individuals involved and will avoid, where possible, a narrowly constrained notion of what type of beliefs warrant protection.

The strategy outlined above takes as its model the efforts made on behalf of religious minorities that have couched claims of free-exercise in the relevant rights located elsewhere in the Constitution. Though first demonstrated in the flag salute cases in the 1940s, the strategy has found its fullest expression in the hands of Jay Sekulow, whose success in arguing free-exercise claims before the Court has proven the both workability and compelling nature of such an approach (his organization, the American Center for Law and Justice won all the cases it tried in the first two years of its existence). Its initial success in 1943 greatly benefited the Witnesses, and set the groundwork for what was to come in 1990s. In the words of Stephen Guliuzza, "their

[Jehovah's Witnesses] persistent efforts to defend free-exercise, or at least a combination of free-exercise and free speech, dramatically expanded their religious liberty- even if it came at the expense of a robust interpretation of the free-exercise clause."[lxi]

The most recent iteration of this strategy was provoked by a feeling among Christian conservatives that rights to free speech and equal protection, while robustly protecting the interests of women, racial minorities and unpopular speech, were ignoring the interests of religious speech and spiritual people. Adopting the straightforward notion that "speech is speech" and that "content shouldn't matter,"[lxii] the group has sought to bring religious interests up to the level of those previously recognized as meriting constitutional protection. An example that illustrates the strength of using analogous modes of analysis and shows the success of Sekulow's group is the case of *Lamb's Chapel.* A group sought to show a Christian-based film series promoting family values made by Dr. James Dobson in a public high school's auditorium and were denied such access by the school on the grounds that the lessons would be taught from a religious standpoint.[lxiii] The group argued that the denial of access was an unconstitutional violation of the right to free speech- that the school had engaged in content discrimination. The Court's response to this claim followed a straight-forward free speech mode of analysis. That is,

> 1) The free speech claim must prevail unless there is a compelling interest,
> 2) a risk of an establishment of religion might provide the state with a compelling interest, and
> 3) after applying either the *Lemon* test or the endorsement test, there is no a sufficient fear of an establishment.[lxiv]

In *Lamb's Chapel,* which is ostensibly an establishment clause case, the interest that is set against the state's fear of establishment is the religious group's right to free speech, not its right to free-exercise of religion. There is no special right located in the content of the movie- indeed, the group is trying to strip the movie of any distinction stemming from its content. It seeks equal treatment and uses the freedom of speech as a vehicle towards minimizing the impact of the establishment clause.

A second case that illustrates the strength and applicability of the analogous rights approach is one wherein the analogous right being invoked is the right to freedom of association. In 1990, the Boy Scouts of America (BSA) revoked the membership of Assistant Scoutmaster and Eagle Scout James Dale on the grounds that he violated the BSA standard against homosexuals among the membership.[lxv] Dale filed suit in New Jersey, arguing that his removal violated the public accommodations laws of New Jersey that prohibited such discrimination. The argument set forth by the BSA, and subsequently adopted by the 5-4 majority, was that the BSA's right to associate, as guaranteed by the First Amendment, exempted them from New Jersey's anti-discrimination laws. Writing the opinion of the Court, Justice Rehnquist echoes this sentiment:

> the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.[lxvi]

The operative word of the above phrase, and the point on which the Court disagrees, is the significance that the exclusion of homosexuals has in the constellation of BSA beliefs.

The disagreement turns about the extent to which the Justices are willing to grant deference to the claims of the litigants with the respect to the importance of the exclusion of homosexuals. Admitting that "the Scout Oath and Law do not expressly mention sexuality or sexual orientation," and that the terms "'morally straight' and 'clean' are by no means self-defining" (the two rules cited to revoke Dale's membership), Rehnquist nonetheless takes on the word of the litigants that homosexuality does not fall within either category. This level of deference meshes well rule two outlined above. Though Rehnquist did inquire into what may be described as the theology of the Boy Scouts of America, it was only as a supplement to the claims advanced by the BSA, not a replacement of their testimony.

Writing in dissent, Justice Stevens has strong words for the approach advocated by this paper and adopted by the Court:

> I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further…It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that inquiry must be "limited," because "it is not the role of the courts to reject a group's expressed values or find them internally inconsistent.[lxvii]

Justice Stevens, however, overstates the extent to which the majority grants deference to the claims of the litigants. Justice Rehnquist does give great weight to the Boy Scouts claims, but the BSA supplements its argument with their rules and regulations that stress moral straightness.

In a case similar to *Lamb's Chapel*, the Court addressed a claim by a religious group on a university campus that sought to use the facilities granted to other student groups "for the purpose of worship and religious discussion".[lxviii] The petitioners

alleged "that the University's discrimination against religious activity and discussion violated their rights to free-exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States."[lxix] Writing the opinion of the Court, Justice Powell argues that

> Here UMKC [The University of Missouri Kansas City] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.[lxx]

To overwhelm the right of the religious group to use the forum, the state must demonstrate a compelling interest in such a restriction, Powell further relates. The University seeks to demonstrate a compelling state interest pointing to the risk of establishment inherent in a policy of granting religious groups access to publicly funded facilities. In response, the Court applies the Lemon test to ascertain if this grant of access would indeed constitute an unconstitutional establishment- which would subsequently overwhelm a claim of freedom of speech since, as the court observes, "the interest of the University in complying with its constitutional obligations may be characterized as compelling."[lxxi]

The application of the Lemon test, in this instance, results in a determination first, that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion,"[lxxii] and second (and more importantly), that a "religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion."[lxxiii] Here the Court places religious beliefs and content on the same level as its other, non-religious counterparts. In doing so, the

Court's treatment of religion *raises it up* to the same level as other forms of speech by couching the claim made by the petitioners in their right- held by all- to free speech. While this reasoning has been attacked as a debasement of the special character of religious beliefs or speech, the consequence of it in this case is the opening of a forum for religion that had previously been reserved for secular purposes. Stephen Guliuazza, one such critic of the approaches suggested by Weber et. al., describes the outcome of *Widmar* this way: "Incredibly, in *Widmar* the Court treats 'worship' as a type or subcategory of 'speech.' Therefore, it is unacceptable, without compelling interest, to limit 'speech,' one type of which is 'worship.'"[lxxiv] Further, Guliuzza offers an extended comment on the approach advanced in this paper and demonstrated by the Court in *Widmar* that merits both reference and refutation:

> Thus, although evangelicals have used the free speech clause to successful [*sic*] carve out space for religious groups over the traditional government claims to police power, and the fear that protecting religious liberty might constitute an establishment of religion, they have contributed to the fortification of the reduction principle. *Their willingness to cash in on the court's liberality with respect to free speech, while allowing the free-exercise clause to remain in a weakened, atrophied state, may be prudent in the short term. I am not sure how wise it will prove to be in the long run.*[lxxv]

Recalling the experience of the Jehovah's Witnesses in *Minersville,* Guliuzza's claim that this approach is potentially unwise in the long term loses some steam. In the flag salute cases, it was precisely the exclusive nature of the claim being made by the Witnesses that subjected them to both public and judicial scrutiny. Such is the nature of the free-exercise clause. To the extent that a minority's beliefs are not accepted by the majority (and thus not considered for legislative exception), their right under an

exclusive free-exercise clause, even if enforced, highlights rather than diminishes the rift between the group in question and American Society at large.

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Procedural Polytheism in Action

Having laid out the form of the approach recommended by this paper, I must now describe its practical application in cases already heard by the Court to fully illustrate the contours of the jurisprudence that would result from the adoption of this method. What follows is the application of those guiding principles to eight cases the Court has already heard and passed judgment upon. The organization of this chapter is of particular importance as the cases will be grouped into three categories: cases for which I would join the majority opinion (full agreement in result and reasoning), cases for which I would write the concurrence (agreement in result but not reasoning) and finally, cases for which I would stand in full dissent (disagreement in both result and reasoning). The following cases will be reviewed:

1) Reynolds v. United States (1878) 98 U.S. 145
2) Boy Scouts of American v. Dale (2000) 530 U.S. 640
3) Adell v. Sherbert (1963) 374 U.S. 398
4) Bowen v. Roy (1986) 476 U.S. 693
5) Good News Club, et al. v. Milford Central School (2001) 533 U.S. 98
6) State of Wisconsin v. Jonas Yoder (1972). 406 U.S. 205

7) Employment Division, Department of Human Resources of Oregon, et al. v. Alfred L. Smith et al. (1990) 494 U.S. 872
8) Minersville v. Gobitis. (1940) 310 U.S. 586[17]

However, before the cases listed above come under the scrutiny of procedural polytheism (P.P.), a brief reiteration of what P.P. stands for is in order. In short, there are three aspects of P.P. that merit mention: first, that the Court should view the facts of a case being heard with an eye for analogous rights implicated by the claims of the petitioners; second, that inquiries into the religiousness or importance of the beliefs or conduct at hand should begin with the individual or group rather than being primarily concerned with ideology or dogma; and third, that the Court then apply the level of scrutiny implicated by the right identified in the first prong to the state regulation or exemption analyzed.

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[17] A note on the choice of cases: I took as a starting point for my choice of cases the cases discussed in Finn, John et. al. *Constitutional Law, Essays, Cases and Comparative Notes*. Lanham: Rowman & Littlefield Publishers, Inc, 2004. I sought to include cases that represent the Court's jurisprudence from 1878 through 2000. Though far from comprehensive, the list includes cases where the court has extended "deep" protection (*Sherbert*), where it has refused to extend protection and thus set a narrow scope of religion (*Minersville*), where it has attached a shallow right to the free-exercise clause (*Smith*), and where the Court has applied reasoning very similar to procedural polytheism (*Dale*). To the extent possible, I have tried to confront cases that both illustrate the applicability of the approach and show the outcomes that would likely result from its application. The "decisions" in this chapter are not rigid and, as will be discussed in the concluding chapter, are themselves subject to debate.

For any paper that seeks to recommend a new approach to free-exercise claims, the issue of *Reynolds v. United States* and the treatment it gives to religious belief must be addressed. It was, by most accounts, the first free-exercise case to reach the Court- due in part to the peculiar nature of the jurisdiction involved. Since the law governing the Utah Territory was a federal one, the Court did not have to touch the issue of incorporation and instead was able to approach the free-exercise claim head on. The facts of the case repeat the familiar narrative of state discrimination against Mormon polygamy and further highlights the crucial importance of recognizability as an impediment to fair adjudication of free-exercise claims.

George Reynolds, a member of the Church of Latter Day Saints, unlawfully married two women in the Utah Territory in violation of laws prohibiting such behavior.[lxxvi] Reynolds made the claim that, among other constitutional violations committed during the trial, his right to freely exercise his religion had been unconstitutionally abridged by the Utah statute. Writing the opinion of the Court, Justice Waite begins by observing the difficulty in discovering the scope of religion- with which this paper has been concerned:

> The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guarantied?[lxxvii]

By adopting an approach that is rooted in the definition of religion that prevailed during the founding, the Court understandably exhibits a tone towards the Mormon belief in polygamy that is less than compassionate. Justice Waite further asks if an

individual possessed a religious belief in human sacrifice if "it would be seriously contended that the civil government under which he lived could interfere to prevent a sacrifice?"[lxxviii] Though arguing by analogy, it is telling that the Court did not choose a more apt analogue to bigamy. Meant to highlight the tension between the assertion of free-exercise rights and the majority's interest in order, the analogy nonetheless both trivializes and demonizes the beliefs of the Mormon petitioner.

Perhaps the most glaring error the Court commits in its decision in *Reynolds* is the extent to which it is unable, or unwilling, to entertain an intermediate state of affairs between total denial of minority claims and an unlimited grant of exemption from state laws. Indeed, Waite argues that "to permit this [exemption from bigamy laws] would be to make the professed doctrines of religious belief superior to the law of the land and in effect to permit every citizen to become a law unto himself."[lxxix] This failure to acknowledge a middle ground between the outcome of the decision and the specter of anarchy leads inevitably to an evisceration, at least temporarily, of the free-exercise clause. In Waite's opinion, the clause only protects belief, not action. Yet, one is quickly drawn to the question: what is the value of belief if the method by which it can be conveyed or discussed is itself subject to inescapable regulation?[18] These objections aside, the issue of the proper ruling (in terms of procedural polytheism) remains.

The wording of the majority opinion and the extent to which the Court seems unable to grant a middle-ground between the refusal of all action-based claims and

[18] One is further led to ask what a protection against intrusions on the right to believe actually protects you against. What exists in your mind and (importantly) not in action, is by definition impossible to regulate.

anarchy militates against joining the majority opinion. There is a lack of regard, at least in the opinion, for the claim made by Reynolds that bigamy is an essential part of his religious belief. In this particular case, the Court fails even the minimal test of inquiring directly into the importance of bigamy in the Mormon religion itself. It more severely fails the requirement that the inquiry begin with the claimant himself. Despite the shortcomings of the opinion, however, procedural polytheism would recommend concurrence in this case. This decision arises from two considerations: first, that although Reynolds does possess a legitimate claim under the free-exercise clause, the interest in protecting it does not overwhelm the interest the state has to protect against the potential negative externalities of polygamous marriages.[19]

Even had the Court more fully acknowledged the importance of polygamy in the Mormon belief system, the analogous rights that could come to defend such a practice in the face of a clear state interest to prohibit are difficult to identify. Given the nature of the claim being made, one would first look to the First Amendment's protection of free speech and association. Yet, although the Court has recognized that "the First Amendment's protection of expressive association is not reserved for advocacy groups," in order to qualify for freedom of association protection, "a group must engage in some form of expression, whether it be public or private."[lxxx] Thus, Reynolds' poly-marriage, whose purpose is more strictly religious observance would not qualify under this type of analysis the way that a religious group seeking to express and further ideas might. A second analogous right that merits consideration

[19] There is some difficulty, however, disentangling religious bigotry from legitimate criticism when approaching an issue like polygamy. However, the treatment of women and younger men at the hands of church elders in the fundamentalist sect of the Church of Latter Day Saints supports the latter rather than the former in this case.

would be the right to equal protection- why is it that polygamous marriage is singled out as a type of behavior that merits prohibition and such moral opprobrium. Yet, unlike the example of the Santerians in Florida (whose animal slaughter was not materially different from kosher slaughter or slaughter for consumption), the Utah Territory would be able to identify characteristics that inhere specifically to polygamy itself (and not the identity of its practitioners) to justify its prohibition.

Fast forwarding eighty years to a case heard in 1963, I now come to consider a case that places procedural polytheism in a starker contrast to the jurisprudence that has historically prevailed in the Court. The case to which I refer is *Sherbert v. Verner*, wherein an individual's right to receive unemployment benefits despite a religious objection to working on Saturday is reaffirmed due to a right to free-exercise that is not overwhelmed by a compelling state interest. The fact pattern of the case requires that one isolate and address many separate issues before a full decision can be made on the merits of the claim.

Adell Sherbert, a Seventh Day Adventist, was discharged by her employer on account of her refusal work on Saturdays, which is the Sabbath day of her faith. Following her discharge, Sherbert sought unemployment compensation from the South Carolina Employment Security Commission, but was denied because her unemployment stemmed from her choice not to work on Saturdays.[lxxxi] Sherbert appealed the denial on the ground that it infringed her right to freely exercise her religion. Of particular note for this paper is the fact that, as observed by Justice Brennan, "significantly, South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we hold infringes the Sabbatarian's religious

liberty."[lxxxii] That is, "when in times of 'national emergency' the textile plants are authorized by the State Commissioner of Labor to operate on Sunday", but

> 'no employee shall be required to work on Sunday…who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious…objections, he or she shall no jeopardize his or her seniority by such refusal or be discriminated against in any other manner.'[lxxxiii]

South Carolina thus accommodates certain types religious exemption while refusing to tolerate religious exemptions that are indistinguishable from the accommodation noted above. This fact will be controlling in the decision offered by procedural polytheism.

The Court recognizes that Sherbert's claim is, indeed, rooted in a deeply held religious belief. In light of this recognition, the majority holds that since "the pressure upon her [Sherbert] to forego [the practice of Adventism] is unmistakable,"[lxxxiv] that the lack of compelling state interest to justify such pressure requires that the Court find in Sherbert's favor. Further, the Court rejects the argument that the conditioning of *benefits* upon religious belief is meaningfully different from the active impediment of religious exercise by pointing to the majority opinion in *Speiser v. Randall*, where they emphasized that "to deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[lxxxv] By adopting a mode of analysis originally applicable to freedom of speech analysis, the Court does import some procedural polytheism into its opinion. However, there is one aspect of the decision that would differ considerably under a polytheistic mode of analysis, while not changing the outcome of the decision.

A second analogous right that provides guidance in assessing Sherbert's claim is the Fourteenth Amendment right to equal protection. Here, Brennan's observation regarding South Carolina's exemption for Sunday worshippers reveals its importance. Having identified and recognized the importance of resting on Saturday and having further recognized that conditioning benefits on religious belief is effectively the same as punishing individuals for such beliefs, the Court can now weigh Sherbert's compelling claim against the state's interest in denying coverage. In order to satisfy the standards of procedural polytheism the state of South Carolina must demonstrate that it has a compelling interest in not merely prohibiting individuals on unemployment coverage from habitually missing a day each week from work- it must justify prohibiting individuals from missing any day *but Sunday*, which is a considerably more difficult task[20]. Its willingness to allow for exemption for Sunday worshippers places the burden of justification squarely on the state The state likely could not meet the strict requirements of such an equal protection violation, which would thus suggest a concurrence.[21] Here, procedural polytheism provides a robust protection of religious liberty rooted rights accessible to all individuals regardless of the relative recognizability of their religious beliefs.

A case that highlights the particularly complex problem of recognizability came before the Court in 1986 when the father of a 2-year-old girl, upon refusing to

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[20] It may be able to achieve this justification on the grounds that although the special treatment of Sunday had religious origins, it has been essentially washed of its sectarian essence and has begun to stand for a day of rest in American culture. It has become deeply rooted in our history and traditions. However, the facts remains that there are many individuals for whom Saturday is the day of rest.

[21] Classification such as this one based, implicitly, on religion would receive suspect classification.

furnish her Social Security number, was denied benefits under the Aid to Families with Dependent Children (AFDC) program and the Food Stamp program.[lxxxvi] Stephen J. Roy, the man bringing the claim before the Court, argued that by being forced to furnish his daughter's Social Security number in order to receive benefits, his right to freely exercise his religion was being infringed. Chief Justice Burger, announcing the majority opinion, described Roy's claim this way;

> In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.[lxxxvii]

Roy asserted that his interest in preventing his daughter from having her spirit 'robbed' from her emanated from his Native American religious beliefs, which viewed technology as the "Great Evil".[lxxxviii] Further, he argued that in order to ensure that his daughter, Little Bird of the Snow, could attain "greater spiritual power", he must prevent the use of her Social Security Number in any form.[lxxxix]

A few notes on the facts of the case. First, the claim brought by Roy is manifestly one that tests a traditional (or any) definition of religion. To start, Roy's objection to obtaining a Social Security number only recently developed and the record does not demonstrate that there exists a theological prohibition against such use of the Social Security numbers in the religion to which Roy subscribes.[xc] Further, though this should not prejudice Roy's claim to protection under the free-exercise clause, his is a religion that does not enjoy mainstream acceptance or familiarity. The precepts of the Abenaki Tribe are familiar perhaps only to its adherents- and this may pose a problem for any adjudicating body assessing a free-exercise claim. Finally,

Roy's behavior during the District Court proceedings further strains his claim to possessing a deeply held religious belief. His initial claim at the start of the trial was that he objected to the conditioning of benefits upon the assignment of a Social Security number, the act of which would rob his daughter of her individuality. When it was revealed during the trial that Little Bird of the Snow had, in fact, been assigned a Social Security number, Roy "claimed at that point that he was instead concerned more with the use and dissemination of the number rather than having to provide it to the government."[xci]

The Court began its analysis of Roy's claim by observing that

> Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute…Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family.[xcii]

This claim regarding the distinction between freedom of belief and freedom of individual conduct, which comports with the precedent noted in *Reynolds,* suggests an early skepticism regarding Roy's claim. In order to combat this distinction, however, Roy's lawyers cite a Joint Resolution passed by Congress concerning American Indian religious freedom. Its language explicitly mentions the exercise of religion as protected by U.S. law:

> It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to *believe, express, and exercise* the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[xciii] (ital. added)

In light of the free-exercise clause, Congress' passage of this additional Joint Resolution seems to indicate that its meaning is something greater than the protection afforded by the free-exercise clause. However, the Court rejects this argument, instead interpreting the passage of the Joint Resolution as merely a reaffirmation of rights already protected by the First Amendment.

Having rejected Roy's argument that the Joint Resolution conferred additional protection onto Native American belief systems, the Court then set about to weigh the interest of the state as against Roy's interest in protecting the individuality of his daughter. Interestingly, the Court seems to engage in a kind of analysis that would be suggested by procedural polytheism, by noting that "the administrative requirement does not create any danger of censorship or place a direct condition or burden on the dissemination of religious views. It does not intrude on the organization of a religious institution or school."[xciv] In this part of the majority opinions argument, the Court is asserting that the burden of possessing and furnishing a Social Security number does not threaten a right to free speech ("…does not create any danger of censorship…") nor does it threaten the right to form expressive associations ("…it does not intrude on the organization of a religious institution…"). While the heart of the Court's decision is ultimately a more straightforward free-exercise analysis, the Court did feel it necessary to acknowledge analogous rights that may be infringed as a result of its ruling.

The decision that would be compelled by applying a polytheistic mode of analysis is a concurrence that takes issue with the extent of the inquiry into Roy's religious beliefs. The issue may be moot, however. The Court's opinion does not give

enough emphasis to Roy's specific claim- that is, his beliefs and why he possesses them. The reason this may be moot is that the strength of the state's interest in utilizing Social Security numbers overwhelms the Roy's claim that the state condition its behavior on his religious beliefs- and so the opinion did not have to fully establish and explain Roy's position. Noting that "governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions" and that "a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each objection to such conditions or restrictions is entitled to substantial deference."[xcv]

Finally, though the Court gives only passing reference to the interest it may have in protecting the religious speech and association, its affirmation that its decision does not infringe upon those interests satisfies part one of procedural polytheism. That is to say, there does not seem to be a significant claim to be made regarding Roy's right to free speech or association that would overwhelm the state's aforementioned interest in the use of the Social Security numbers.

One more recent case that merits discussion is more likely to be characterized as an establishment clause case rather than a free-exercise clause case, but it possesses many of the elements of a proper application of procedural polytheism that demonstrate its practical use and further indicate the way in which it would be applied. The case to which I refer is *Good News Club et al. v. Milford Central School*, wherein an establishment-clause-minded school district adopted a policy regarding the public use of its facilities that denied access to religious groups.[xcvi] In this case,

the Court concluded that "Milford restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation."[xcvii] Justice Thomas's opinion grounded its conclusion on the observation that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[xcviii]

Though Thomas' opinion takes as a premise of his argument a description of the guarantee of neutrality that superficially comports with what would be recommended by procedural polytheism, the particular facts of the case merit analysis to more fully explicate the contours of the result that procedural polytheism would counsel. What distinguishes *Good News Club* from *Widmar* and *Lamb's Chapel*, and what both Justice Stevens and Justice Souter harp upon in their dissents, is that the group in *Good News Club* meant not merely to offer a religious viewpoint, but to advance and promote conversion to the Christian faith. That is, in the words of Justice Souter,

> It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. The majority avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint."[xcix]

The distinction that Justice Stevens offers clarifies the extent to which this regulation operates upon religious activities only.

> If a school decides to authorize after school discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups- for

> example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan- to hold meeting, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not.[c]

That is, it is not viewpoint discrimination if the object of regulation is the furtherance or promotion of a specific group whose interests lay in recruiting members to their cause. This applies to both religious and non-religious organizations in a way that is facially neutral. However, the peculiar nature of religion- by definition, religious beliefs are central and fundamental to the individuals who hold them- may blur the line between what Justice Stevens refers to as speaking from a unique view point and recruiting others to join their respective groups. That is, if the adherents of a particular religion discuss current event topics from their own unique point of view, their discussion will inevitably advance, or at least reflect, fundamental truths that constitute the adherent's religious belief. For most, these fundamental truths impose upon them a positive obligation to add to the flock- to enlighten the population *so that they, too, can be saved, or more generally, can have an 'accurate' view of the world.*

This positive obligation will cast many of the discussions Justice Stevens refers to in a light that may preclude most forms of religious discussion on school property- and perhaps that is the outcome that Justice Stevens seeks. The result, however, is a facially neutral test that effectively penalizes speech that is religious.[22] Such a result is contrary to a robust protection of religious liberty and is predicated on an assumption that political and religious beliefs similarly act on the individuals who hold them.

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[22] For further, though brief, discussion on the broader establishment clause implications of procedural polytheism, see the concluding chapter.

Wisconsin v. Yoder (1972) poses a number of difficult questions that get at the heart of procedural polytheism to free-exercise claims. The facts of the case do not admit immediate identification of analogous rights, nor do they allow a direct inquiry into the importance of the beliefs at issue.[23] In *Yoder*, the Amish families appealing their conviction for refusing to send their children to school after the age of fourteen were not able to bring their issue to Court on account of the Amish belief literal interpretation of the Biblical command to "turn the other cheek." Thus, their testimony was not included on the record. Further complicating the issue, is the peculiar exemption that is sought- not only do the claimants not appear in Court, the individuals for whom the outcome of the case likely matters most are not the primary decision makers; they are the children. These initial considerations laid out, I now move onto a full analysis of the case and a judgment on its outcome.

The Supreme Court Reports notes that the

> defendants, who were members of the Amish faith, refused to send their children, aged 14 and 15, to public school after the children had completed the eighth grade. In Green County Court, Wisconsin, the defendants were convicted for violating Wisconsin's compulsory school attendance law requiring children to attend school until the age of 16.[ci]

Based on these facts, the Court identified two opposing interests regarding the issue of whether the parents have a right of exemption from the compulsory attendance laws. The state's interest is one of "universal education", which is "not totally free from a balancing process" insofar as it "impinges upon fundamentals rights" such as, perhaps, the right of "parental direction of the religious upbringing and education of

[23] They do, however, include the testimony of an expert on the Amish religion that gives uncontradicted testimony regarding the centrality of the beliefs at issue.

their children in their early and formative years" which "have a high place in our society."[cii] This right, which emanates from the Amish way of life, may indeed present a fundamental right requiring a level of scrutiny that places the burden on the state. The Court also argued, however, that

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matter of conduct in which society as a whole has important interests.[ciii]

Chief Justice Burger touches upon the very premise of this thesis when he observes that "a determination of what is a 'religious' belief or practice entitled constitutional protection may present a most delicate question." Indeed, this thesis has endeavored to combat the usage of "religion" as the starting point for free-exercise analysis. That said, however, Chief Justice Burger's reliance upon the religious nature of the Amish claim does not thereby doom the decision.

On the count of demonstrable religiosity, the Amish in this case leave no doubt as to their level of commitment to a religious faith. Their claim is bolstered by the testimony of experts on religion as well as the Court's familiarity with the Amish as a religious group recognized by many as a particularly serious one. Dr. John Hostetler, an expert on Amish society, testified that "the modern high school is not equipped in curriculum or social environment to impart the values promoted by Amish society"[civ] and that further:

> Compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would

> produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.[cv]

It is thus quite clear that the Amish are captured by the Court's definition of religion and that the Amish's interest in exemption from compulsory education laws is exceptionally strong. It stands in opposition to the state's interest in universal education, which the Court noted was "not totally free from a balancing process." Further, what the State of Wisconsin is arguing is not merely that unless all students attend school through a certain age, the interest of the state will be severely impaired. Rather, it is making the somewhat more tenuous argument that, on the margin, the two additional years the Amish seek to avoid will cause this harm to the state. It is this imbalance between the robust religiosity (and recognizability) of the Amish's claim and the rather tenuous and weak claim made by the State of Wisconsin that compels the Court to decide in favor of the Yoder. A justice adopted procedural polytheism would be forced to concur, with two reservations.

The first reservation stems from the standard set by Chief Justice Burger regarding the religious nature of the claim. It manifestly does not comport with procedural polytheism due to its explicit reliance on "religion"- admittedly ill-defined by the Court- and its inquiry into the Amish faith by way of expert testimony rather than into the words and beliefs of the claimants themselves.[24] The second reservation stems from the argument set forth by Justice Douglas in his dissent that speaks to the

[24] Part of this reliance on the testimony of religious experts can be explained by the Amish's inability, as part of their faith, to go to Court on their behalf. That said, however, the opinion does not contain sufficient reference to the individuals themselves, focusing primarily on the expert testimony in its treatment of the validity of Yoder's claims.

rights of the children involved. In the opinion, the Court fails to address the interest of the individuals most directly affected by the state's law: the children whose education and world-views will be shaped by the outcome of the Court's decision. His argument can be summed up by this passage from his dissent:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today…If he is harnessed to the Amish way of life by those in authority of him and if his education is truncated, his entire life may be stunted and deformed.[cvi]

Justice Douglas opinion turns upon the appeal that this new and amazing world of diversity would have for an Amish fifteen year old attending Wisconsin public schools. Yet, whether the appeal is great or minuscule, his opinion does damage to the majority's acceptance of exemption. If, for example, Justice Douglas is off the mark and this new and amazing world is quite distasteful to the Amish children, then the Amish community should not fear the additional two years of public schooling. The threat to the Amish religion to which Dr. Hostetler referred would be minimal and the benefit to the children involved would be, at worst, also minimal. If, on the other hand, the premise of Justice Douglas' analysis is on the mark and the Amish children are both drawn to and excited by the awe-inspiring array of diversity, technology and ideas that are presented in American public schools, then perhaps the Court's protection of the Amish religion's vitality is at the expense of the liberty of Amish children to experience all (or even any) that makes up modern American life-in its magnificence and in its loathsomeness.

Though procedural polytheism does not give mention to properly identifying the interested parties, it is premised upon the Court's ability to do so. In this case, the Court failed to give proper accord to the individuals most affected by the compulsory education law. If, as Dr. Hostetler asserts, the full education of Amish children will "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today,"[cvii] then perhaps the problem lies not in the Wisconsin law, but rather in the anachronistic practices of the Amish community. While I do not mean to suggest that the Amish way of life is in any way inferior to that of an individual fully engaged in the modern community, I believe that some Amish children placed into this position *would* like to make that argument- or at least be given a chance to evaluate the opportunities outside of the Amish community. The Court's decision forecloses this inquiry.

The effective result of this decision is that Amish children will remain at the mercy of their parents' rather unique educational tastes for longer than they otherwise would under normal compulsory attendance laws. For some, this is a victory of a reclusive religious community seeking to remain robust in an increasingly modern world whose temptation constantly threatens the flock. For others, this stands as a potential roadblock to the Amish children's intellectual development- for even if these children find the ideas and ways of life they are exposed to distasteful, their confidence and enthusiasm in their faith will be more vigorous and comprehensive, having confronted, contemplated, and rejected the alternative option.

The final, and perhaps most important, case to be addressed in this chapter illustrates the problem of recognizability, the tension between the depth and breadth

of a granted exemption, and the difficulty in precisely defining religion under the free-exercise clause. The case, *Employment Division v. Smith (1990)*, revisits many of the arguments historically levied against religious exemptions in its denial of the claimants' petition. The facts of the case are as follows:

> Two drug rehabilitation counselors, both of whom were members of the Native American Church, were fired from their jobs with a private corporation in Oregon because they had ingested peyote, a hallucinogenic drug, for the sacramental purposes at a ceremony of the Church. The counselors applied to the Employment Division of Oregon's Department of Human Resources for unemployment compensation, but the department's Employment Appeals Board ultimately denied their applications on the ground that the counselors had been discharged for misconduct connected with work.[cviii]

The contention of the claimants is "that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons."[cix]

Justice Scalia's majority opinion rejects the contention that the test to be applied in this case is the compelling state interest test, or strict scrutiny. Rather, though the

> "compelling government interest" requirement seems benign, because it is familiar from other fields…What it produces in those other fields- equality of treatment and an unrestricted flow of contending speech- are constitutional norms; what it would produce here- a private right to ignore generally applicable laws- is a constitutional anomaly.[cx]

Thus, the Court here adopts a test less rigorous than compelling state interest and is further concerned with an apparent lack of meaningful distinction between Smith's claim of exemption and other, perhaps more outrageous, claims. For instance, as Scalia pointed out, "there would be no way, we observed, to distinguish the Amish

believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes."[cxi] The Court's conclusion, then, is that "to make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"… contradicts both constitutional tradition and common sense."[cxii]

While the Court reached a majority in this case, the opinion was not without its dissents and reservations. Notably, Justice O'Connor took issue in her concurrence with Scalia's framing of the problem when she commented that

> our free-exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. *If the First Amendment is to have any vitality, it ought not to be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.*[cxiii](ital. added)

In addition to O'Connor's reservations about the jurisprudential effect Scalia's opinion would have on future free-exercise cases, Justice Blackmun disputed the 'slippery slope' argument that underlies part of Scalia's argument. When Scalia made reference to the difficulty in precisely ascertaining the distinction between claims of Smith's sort and other, more significant claims,[25] there was an implicit reliance on the notion of a slippery slope. That is, the inability to distinguish between cases is only meaningful if other individuals, taking a ruling in favor of Smith as a guide, seek exemption from other duties or regulations. Justice Blackmun disputed this underlying premise when he observed that

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[25] By significant here, I refer to cases where an individual may refuse to pay taxes. This outcome, if admitting no discernible limit, could be quite injurious to the government. On the other hand, if many individuals merely successfully sought to use Peyote, the effect on the government would likely be smaller.

> The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions.[cxiv]

Finally, and perhaps most significantly, Justice Blackmun disagreed with the way in which Justice Scalia framed the question. Blackmun wrote that "it is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondent's claim",

> but the State's narrow interest in refusing to make an exception for the religious ceremonial use of peyote. Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor.[cxv]

These excerpts leave a lot to be digested. There is clearly a fundamental difference between the way the majority approaches the problem and the way Justice Blackmun does. Scalia's analysis is reminiscent of the reasoning in Minersville, which argued that

> to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is *no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children.*[cxvi] (Ital. added)

The inability of the Court, in this case as in Minersville, to discover a middle ground between limitless exemption and rigid refusal to grant them, eviscerated the free-exercise clause in cases where such protection is most needed. This inability is further highlighted in a passage in the majority opinion with which procedural polytheism would take greatest issue and which gets to the heart of one of primary flaws of the Court's current jurisprudence:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself.[cxvii]

Here, Justice Scalia acknowledged half of the problem of recognizability- religious practices that are not widely engaged in are at a disadvantage due to the dominance by Judeo-Christian religions of the American democratic system. What he did not acknowledge, indeed what his opinion manifests, is the disadvantage minority religions face in the judicial system. This is the part of the problem of recognizability with which procedural polytheism is primarily concerned.

Douglas Laycock, in an article written in anticipation of the Court's hearing of the case, lays out the potential consequences of a ruling similar to the one actually handed down by the Court. In it, he begins by framing the issue in such a way that gets to the heart of the problem of recognizability. "It should think hard…to make sure it is not suppressing a small and unfamiliar religion on the basis of principles it would not apply to a mainstream faith."[cxviii] Further, Laycock takes issue with the slippery slope argument dealt with above in a passage that also addresses the issue of sincerity (and the difficulty in identifying it) in free-exercise cases:

> The equality half of this argument has two serious defects. First, it assumes that because we will inadvertently persecute some religious minorities -- those who cannot convince us of their sincerity -- we would do better to persecute them all, including those who are both sincere and harmless. Because we will inevitably get some cases wrong, we should get them all wrong. It is an odd and unappealing sort of equality. If we are serious about the free-exercise of religion, we should protect free-exercise whenever we can, by protecting sincere religion in most cases even if we realize that human error will prevent us from protecting it in all cases. Second, we know from experience that we will not enact this odd "ideal" of persecuting all religions equally. The mainstream faiths will always be exempted. So will any

> minority faiths that become socially accepted, or somehow get the sympathetic ear of enough legislators.[cxix]

His fear, or rather, his method of making the threat of a weak free-exercise clause real to his Judeo-Christian audience, is that if the Court can deny protection to a practice so central to the Native American Church, what would protect similar rituals in Christianity? He writes, "because Purim is far less central theologically, a decision that Oregon could ban the peyote ritual would clearly imply that it could ban the use of intoxicating amounts of wine to celebrate Purim."[cxx] A result that would likely be unpalatable to many more people than a decision banning religious use of peyote-though the former would be *more* justifiable jurisprudentially than the latter.

With these criticisms in mind, procedural polytheism would recommend a dissent. The primary mode of analysis would arise from the analogous right found in the Fourteenth's Amendment right to equal protection under the law. Procedural polytheism would be satisfied by the ample evidence available on behalf of Smith testifying to the centrality of the peyote ritual in the practice of his religion. Finally, and following the equal protection mode of analysis, the state's interest in regulating the use of peyote would not overwhelm Smith's right to freely exercise his religion. This final judgment arises from the fact that fourteen states[26] and the Federal Government find that such use of the drug does not pose such a threat.[cxxi] While I do not mean to assert that the State of Oregon is wrong in its estimation that peyote is a drug worth of regulation, their mere assertion that it does pose a threat does not

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[26] Arizona, Colorado, Idaho, Iowa, Kansas, Minnesota, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Wisconsin and Wyoming. Oregon has since amended its peyote law to exempt Native Americans using the drug sincerely, with religious intent.

satisfy procedural polytheism's standard for justification of state infringement of the right to freely engage in an activity that is central to the practice of one's religion.

Three years after the *Smith* ruling, the United States Congress passed the Religious Freedom Restoration Act, which sought to reestablish compelling state interest as the standard by which to measure free-exercise claims.[cxxii] It passed the House of Representatives unanimously and the Senate by a margin of 97-3, and was signed into law by President Bill Clinton. Though facing an initial setback when the Supreme Court ruled that the Congress had overstepped its power to enforce the Fourteenth Amendment,[cxxiii] the Court later reaffirmed the constitutionality of the Act's application to Federal laws in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[cxxiv] a case that is strikingly similar to *Smith*, in that it discussed the use of an illegal substance during a religious ceremony.

Though the full effect of *Smith* has been somewhat ameliorated by Congressional action and subsequent Court modification, it stands as a modern example of the persistent problem of recognizability. In the realm of American religious diversity, there will always be a margin that is thought, if only temporarily, to be meaningfully different than what has come in the past- and thus meriting less favorable treatment. Throughout the early and mid twentieth century, the Mormons and the Jehovah's Witnesses occupied this fringe (which the case law during that period amply demonstrates); today's fringe may still be occupied by religions relating

to Native American culture or it may be that Scientology is the new, supposedly meaningfully different, threat to the American view of religion.[27]

[27] A very recent, and quite fascinating, "war" has been declared on Scientology by a group of computer hackers on the internet who seek to expose all of the allegedly criminal activity that the Church has engaged in. While not yet constitutionally relevant, this internet vigilantism poses interesting questions about the future of religious (for the moment I will ignore the debate about whether Scientology is indeed a religion) persecution. The perpetrators of this war, self-styled "Anonymous", have persistently sought to reveal internal Scientology documents testifying to their criminality. Scientology has, I believe, begun to represent the fringe of American religion.

5

Concluding Remarks

This essay has endeavored to explore the current contours of the Supreme Court jurisprudence as it relates to the free-exercise of religion and to propose an alternative method of assessing these claims before the Court. It is, by admission, an ambitious endeavor. I do not presume to have accomplished this feat in one year of undergraduate research. Indeed, my work has built upon the scholarship of intellects- far greater and well-versed than mine- who have themselves not fulfilled the lofty goal of the stated purpose of my undergraduate thesis. It is with this in mind that I seek to anticipate and address concerns and criticisms of the method laid out in the preceding chapters, while also conceding areas of weakness to be built upon or improved.

One way of describing the method by which procedural polytheism addresses free-exercise claims is by comparing the free-exercise clause to a router. Its duty is to recognize the nature of the claim coming in and to reroute the group or individual towards the relevant right or Amendment, where the individual will find his or her proper protection. For some, this punches a hole in the First Amendment protection of religious freedom by simply disposing of the rights inherent in religious belief and replacing those rights with a mirror that deflects such claims away from its former

reserve of constitutional protection. Upon a superficial analysis of the rules outlined in chapter three, one may be inclined to agree.

An initial response to this criticism would dispute the extent to which the substance of the free-exercise clause has been removed. As outlined in chapter four, procedural polytheism does, in practice, recommend protection or exemption for individuals bringing free-exercise claims before the Court. It merely does not use religion as a starting point. Instead, it places a greater emphasis on the stated beliefs of the individuals themselves. Two important points commend this shift in approach. The first, recognizability, has been discussed at length earlier in the essay, but merits one last mention. If the free-exercise clause is to protect those parts of the populations whose religious beliefs are not accommodated, implicitly or explicitly, by the legislatures, it must include those religions that operate at the fringe of the American religious community. Often, it is not the Baptists suffering at the hands of a southern legislature who require protection, but rather the Native Americans, or the Mormons. What this further counsels is a broad conception of religion as it is defined by the Supreme Court because a narrow one will likely fall into the tendency where

> In determining whether an activity is a religion for the purposes of the First Amendment, as in any application of a definition, one begins with what is familiar and defines in part by excluding the unfamiliar.[cxxv]

Though one cannot say with certainty that a member of the Supreme Court is more familiar with Roman Catholicism than they are familiar with Sikhism, their relative demographic strength suggests they may.[28] If the Court is to fulfill the goal of

[28] According to the 2002 census, there were 66,404,000 Roman Catholics in the United States. The 1999 census counted 80,000 Sikhs.

protecting those religious minorities most likely to have their religious beliefs abridged, it must itself adopt a stance that accounts for this tendency.

By favoring a broad conception of what constitutes a religious belief or action, the Court confronts the second point that favors a shift in approach. Stated simply, there is an inverse relationship between the depth and the breadth of exemptions- one must strike a balance between the size of the net and the strength with which it moves claimants to a higher plane of constitutional protection. If we are to possess the "scheme of ordered liberty" to which Justice Cardozo referred in *Palko v. Connecticut*,[cxxvi] it will require the Court to be mindful of the relationship between and amongst rights. Thus, if one grants that the issue of recognizability advises a broad constitutional definition of religion, then one must also concede that the depth of such exemptions be somewhat shallower than they were previously. It is this shallowness that is what gives the free-exercise clause under procedural polytheism the look of a mere mirror.

In chapter four, I applied procedural polytheism to eight cases the Court had already heard to demonstrate its applicability and the type of judicial outcomes it would produce. The outcomes, however, are not meant to be rigid proclamations of what judicial decision a Justice implementing procedural polytheism necessarily *had* to arrive at. As with all jurisprudential tests and methods of analysis, there is ample room for disagreement even *within* the confines of a particular test. To give an example, I wrote in chapter four that procedural polytheism suggests that the Court's ruling in *Good News Club* was indeed the correct one. The contested regulation denied access by religious groups to a school's facilities on the grounds that it feared

establishment clause violation if it were to give such resources to a religious organization. The Court found that the regulation was an unconstitutional infringement of the group's right to free speech, and only tangentially their right to freedom of religion, on the basis of what was effectively a content-based restriction on who could access the public forum.

The use of the freedom of speech component of the First Amendment in defending the Good News Club's right to exercise their religion was a straightforward use of prong one of procedural polytheism, and it is primarily that aspect of the decision that compels the support of the said approach. However, Justice Stevens' dissent forces one to confront the distinction between the mere discussion of topics from a given viewpoint, and the forwarding of a particular worldview in a way that resemble religious proselytizing. Though I suggest, and still maintain, that the nature of religious belief is such that if a test were to be constructed that failed to protect speech whose specific purpose is the forwarding of a particular worldview, that religious expression would be severely curtailed, this result is not a necessary extension of procedural polytheism. A judge adopting procedural polytheism may not agree with the characterization of religious discussion that I advance in defense of the ruling. They may instead believe that just as a distinction can be made between a public policy discussion and a political rally, a similar distinction can be made, and properly identified, between a discussion on ethics with religious content and a religious service. If it were observed that these two categories could be properly delineated, procedural polytheism would be friendly to such a distinction. However, this is an empirical question that does not yet possess a definitive answer.

A second case pointing to the areas within procedural polytheism where there may be some disagreement is *Reynolds. Reynolds* dealt with a Utah Territory statute that outlawed polygamous marriages, which the claimant argued infringed his right to freely exercise his Mormon religious beliefs. Based on the interest the state possessed in regulating marriage and avoiding the negative externalities of poly-marriage, I argued that procedural polytheism suggested a concurrence (the tone and language used in the majority opinion trivialized the claimant's religious beliefs in a way that likely increased, rather than placated, religious divisiveness). Yet, the balance struck between the state interest and Reynolds' free-exercise interest is not a necessary result of the application of procedural polytheism. This point is worth stressing. Though procedural polytheism suggests a broad conception of religious liberty, one may have just as easily applied procedural polytheism to *Reynolds* and found that the state interest in regulating marriage did not overwhelm Reynolds' right to marry multiple women. What would guide a judge in this case would be their personal, or the Court's general, jurisprudence with regards to the analogous right implicated by the facts of the case. Thus, if a justice conceived of the right to privacy as encompassing the right to marry more than one person, procedural polytheism would compel the justice to rule in Reynolds' favor.

There remains, however, one issue that has not yet been address though it has simmered beneath each case's discussion. That is, each case addressed in chapter four possessed a set of facts that had an analogous right that was at least plausibly connected to the issue faced by the Court. In these cases, the extent to which procedural polytheism extends or diminishes the protection afforded by the free-

exercise clause is dependent upon the extent to which the identified analogous right offers protection. What if, instead, a fact pattern did not possess any clear analogous right. One can conceive of this situation as having a *purely religious* activity that is neither clearly expression, nor clearly encompassed by privacy rights (or any other right discussed in this essay). In this hypothetical example, would there be any substance inherent in the free-exercise clause itself that would offer protection? The answer, of course, would depend on the facts of this hypothetical situation. It is admittedly difficult for this writer to conceive of a situation wherein *no* constitutional rights outside of the free-exercise of religion are implicated.

One case that comes close to this ideal-type is *Sherbert v. Verner*, which dealt with the issue of whether an individual can have their unemployment compensation benefits revoked on account of their refusal work on their religion's day of rest. What allowed procedural polytheism to reach a firm conclusion was the state's willingness to allow exemption from the general duty of working on Sunday during times of national emergency. Suppose, instead, that the state of South Carolina possessed no such discriminatory exemption for Sunday worshippers. If this were the case, procedural polytheism would have a more difficult, though not impossible, time of protecting the right to freely exercise religion. If one were to observe the all facts of *Sherbert* save the Sunday worshipping exemption, South Carolina's interest in prohibiting Adell Sherbert from worshipping her religion on Saturday would be somewhat stronger. However, whether absent this Sunday worshipper exemption would doom Adell Sherbert's free-exercise claim is left up to the judge's estimation of the state's interest in prohibiting recipients of unemployment benefits from missing

any day of the seven-day work week (not merely the prohibition of missing Saturday in particular, as noted in chapter four).

The scope of this thesis has been necessarily limited to only half of the protections granted to religion by the First Amendment. Little word has been said, so far, regarding how procedural polytheism should apply (if at all) to issues relating to establishment clause concerns. What had originally motivated this inquiry into the Court's religious freedom jurisprudence was the question of whether the constitutional definition of religion should be consistent between the free-exercise and establishment clauses. While an initial effort to justify a practicable, single definition of religion under both clauses failed, this failure led me to focus specifically on the free-exercise clause. The failure to find a workable definition that would prevail under both clauses stemmed from the historical tendency by the Court for the two definitions to diverge.[29] Their unwillingness to form one coherent definition of religion suggested two things: first, that the Court feels that the Constitution does not compel them to apply the definition formed under the free-exercise clause to cases involving establishment concerns (and vice versa); and second, that perhaps the Court's *inability* to find one definition suggests that the business of defining religion is inherently difficult, and perhaps flawed. These facts militate against an extended discussion or justification of the use of procedural polytheism in establishment clause cases. I do not insist that it be used for

[29] Under the free-exercise clause, early cases such as *Reynolds* (1878) and *Minersville* (1940) suggest a narrow definition of religion while later free-exercise cases such as *Yoder* (1972) and *Dale* (2000). Conversely, early establishment clause cases such as *Engel* (1962) dealt with explicit uses of prayer in schools while *Wallace* (1985) recognized the risk of establishment clause violation in the mere mandating of a moment of silence.

establishment clause cases; indeed it is difficult to imagine its application. However, I do not mean to foreclose further inquiries into the use of the methods put forth in this essay to establishment clause litigation.

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[i] Marty, Martin E. *Modern American Religion*. Vol. 3. Chicago: The University of Chicago Press, 1986. pp. 216
[ii] Ibid.
[iii] Ibid.
[iv] Minersville School District v. Gobitis. 310 U.S. 586
[v] United States Congress. *Pledge of Allegiance to the Flag; Manner of Delivery*. 1.
[vi] Douglas Laycock has noted his criticism here in Congressional Testimony: http://judiciary.house.gov/Legacy/222308.htm
[vii] Justice Scalia, in a dissent, argues that the Lemon Test is an invalid part of Court Jurisprudence: http://www.law.cornell.edu/supct/html/historics/USSC_CR_0482_0578_ZD.html (Edwards v. Aguillard 482 U.S. 578)
[viii] Carter, Stephen L. *The Culture of Disbelief*. New York: Harper Collins, 1993. pp. 108
[ix] Ibid.
[x] Ibid. 128
[xi] Davis v. Beason 133 U.S. 333 (1890).
[xii] Ibid.
[xiii] Ibid.
[xiv] Stephen Carter advances this argument in *The Culture of Disbelief*
[xv] Carter 41
[xvi] Sager, Christopher L. Eisgruber and Lawrence G. *Religious Freedom and the Constitution*. Cambridge: Harvard University Press, 2007. pp. 48
[xvii] Ibid. 89
[xviii] Ibid. 91
[xix] Minersville School District v. Board of Education 310 U.S. 586 (1940)
[xx] Ibid.
[xxi] Ibid.
[xxii] Finn, John et. al. *Constitutional Law, Essays, Cases and Comparative Notes*. Lanham: Rowman & Littlefield Publishers, Inc, 2004. pp. 854
[xxiii] West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943)
[xxiv] Finn 874
[xxv] Employment Division v. Smith 494 U.S. 872 (1990)
[xxvi] Ibid.

[xxvii] Eisgruber and Sager 92
[xxviii] Ibid.
[xxix] Finn 858
[xxx] Wisconsin v. Yoder 406 U.S. 205 (1972)
[xxxi] Ibid.
[xxxii] Ibid.
[xxxiii] "Developments in the Law: Religion and the State." *Harvard Law Review* 100 (1987): 1631
[xxxiv] Ibid. 1735
[xxxv] Edwards v. Aguillard; 482 U.S. 578
[xxxvi] http://www.talkorigins.org/faqs/edwards-v-aguillard/amicus1.html
[xxxvii] Finn 862
[xxxviii] Sherbert v. Verner 374 U.S. 398
[xxxix] Ibid.
[xl] Ibid.
[xli] Kurland 22
[xlii] Dubay, Tim. "Guide to Pastafarianism." http://www.venganza.org/flash/guidetopastafarianismpreloaded.swf. Accessed 2-6-2008 at 4:30pm.
[xliii] Kurland, Phillip. *Religion and the Law of Church and State and the Supreme Court*. Chicago: University of Chicago Press, 1961. pp. 18
[xliv] Weber, Paul. *Equal Separation*. Westport: Greenwood Press, 1990. pp. 20
[xlv] Ibid. 9
[xlvi] Ibid. 40
[xlvii] Sager, Christopher L. Eisgruber and Lawrence G. *Religious Freedom and the Constitution*. Cambridge: Harvard University Press, 2007. pp. 101
[xlviii] Ibid. 91
[xlix] Guliuzza, Stephen. *Over the Wall: Protecting Religious Expression in the Public Square*. Albany: State University of New York Press, 2000. pp. 36
[l] Levy, Leonard W. *The Establishment Clause*. Second Edition ed. United States: The University of North Carolina Press, 1994. pp. 223
[li] Ibid. 11
[lii] Ibid. 10
[liii] Ibid. 3
[liv] Cogan, Neil H., ed. *The Complete Bill of Rights*. New York: Oxford University Press, 1997. pp. 73
[lv] Levy 75
[lvi] Ibid. 32
[lvii] Ibid. 76
[lviii] Van Orden v. Perry. Oyez Podcast
[lix] Edwards v. Aguillard; 482 U.S. 578
[lx] "Developments in the Law: Religion and the State." *Harvard Law Review* 100 (1987): 1629
[lxi] Guliuzza 138
[lxii] Ibid. 140

[lxiii] Ibid. 142
[lxiv] Ibid. 142
[lxv] Hall, Kermit L., ed. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 2005. pp. 95
[lxvi] Boy Scouts of America v. Dale. 530 U.S. 640 (2000)
[lxvii] Ibid.
[lxviii] Widmar et. al. v. Vincent et. al. 454 U.S. 263 (1981)
[lxix] Ibid.
[lxx] Ibid.
[lxxi] Ibid.
[lxxii] Ibid.
[lxxiii] Ibid.
[lxxiv] Guliuzza 145
[lxxv] Ibid. 145
[lxxvi] Reynolds v. United States (1878) 98 U.S. 145
[lxxvii] Ibid. 249
[lxxviii] Ibid. 251
[lxxix] Ibid. 250
[lxxx] Boy Scouts of American v. Dale 530 U.S. 640 (2000)
[lxxxi] Sherbert v. Verner (1963) 374 U.S. 398. pp 965
[lxxxii] Ibid. 971
[lxxxiii] Ibid. 972
[lxxxiv] Ibid. 970
[lxxxv] Speiser v. Randall 357 U.S. 513 (1958)
[lxxxvi] Bowen v. Roy 476 U.S. 693 (1986)
[lxxxvii] Ibid. 742
[lxxxviii] Bowen v. Roy Oral Arguments http://www.oyez.org/cases/1980-1989/1985/1985_84_780/argument/ Accessed 2-18-2008
[lxxxix] Bowen v. Roy (1986) 476 U.S. 693. pp. 742
[xc] Ibid. 742
[xci] Bowen v. Roy Oral Arguments http://www.oyez.org/cases/1980-1989/1985/1985_84_780/argument/ Accessed 2-18-2008
[xcii] Bowen v. Roy (1986) 476 U.S. 693. pp. 744
[xciii] Ibid. 745
[xciv] Ibid. 746
[xcv] Ibid. 749
[xcvi] Good News Club, et al. v. Milford Central School (2001) 533 U.S. 98. pp. 151
[xcvii] Ibid. 160
[xcviii] Ibid. 162
[xcix] Ibid. 183
[c] Ibid. 178
[ci] State of Wisconsin v. Jonas Yoder. 406 U.S. 205. pp. 15
[cii] Ibid. 24
[ciii] Ibid. 25
[civ] Ibid. 23

[cv] Ibid. 23
[cvi] Ibid. 42
[cvii] Ibid. 23
[cviii] Employment Division, Department of Human Resources of Oregon, et al. v. Alfred L. Smith et al. 494 U.S. 872. pp. 876
[cix] Justice Scalia's Majority opinion Ibid. 885
[cx] Ibid. 890
[cxi] Ibid. 886
[cxii] Ibid. 890
[cxiii] Ibid. 895
[cxiv] Ibid. 911
[cxv] Ibid. 906
[cxvi] Minersville v. Gobitis. 310 U.S. 586.
[cxvii] Smith 890
[cxviii] Laycock, Douglas. "Peyote, Wine and the First Amendment." *The Christian Century*, October 4th, 1989. 876
[cxix] Ibid.
[cxx] Ibid.
[cxxi] The Legal Root: State by State Comparison of Peyote Statutes Peyote Foundation, 2000 [cited 3/26/2008 2008].
[cxxii] "Religious Freedom Restoration Act" 42 U.S.C. § 2000bb
[cxxiii] City of Boerne v. Flores (1997) 521 U.S. 507
[cxxiv] Gonzales v. O Centro Espírita Beneficente União do Vegetal (2006) 126 S.Ct. 1211
[cxxv] "Developments in the Law: Religion and the State." *Harvard Law Review* 100 (1987): 1631
[cxxvi] Palko v. Connecticut. 302 U.S. 319 (1937): 325

Works Cited

United States Congress. *Pledge of Allegiance to the Flag; Manner of Delivery*. 1.

"Developments in the Law: Religion and the State." *Harvard Law Review* 100 (1987): 1606-781.

United States Congress. *Religious Freedom Restoration Act*. Chapter 21B.

The Legal Root: State by State Comparison of Peyote Statutes. 2000. In, Peyote Foundation. (accessed 3/26/2008, 2008).

Berg, Michael W. McConnell John H. Garvey and Thomas C. *Religion and the Constitution*. New York: Aspen Law & Business, 2002.

Carter, Stephen L. *The Culture of Disbelief*. New York: Harper Collins, 1993.

Cogan, Neil H., ed. *The Complete Bill of Rights*. New York: Oxford University Press, 1997.

Eastland, Terry, ed. *Religious Liberty in the Supreme Court*. Washington D.C.: Ethics and Public Policy Center, 1993.

Finn, John et. al. *Constitutional Law, Essays, Cases and Comparative Notes*. Lanham: Rowman & Littlefield Publishers, Inc, 2004.

Greenawalt, Kent. *Religion and the Constitution*. 2 vols. Vol. 1. Princeton: Princeton University Press, 2006.

Guliuzza, Stephen. *Over the Wall: Protecting Religious Expression in the Public Square*. Albany: State University of New York Press, 2000.

Hall, Kermit L., ed. *The Oxford Companion to the Supreme Court of the United States*. New York: Oxford University Press, 2005.

Kurland, Phillip. *Religion and the Law of Church and State and the Supreme Court*. Chicago: University of Chicago Press, 1961.

Laycock, Douglas. "Peyote, Wine and the First Amendment." *The Christian Century*, October 4th, 1989 1989, 876.

Levy, Leonard W. *Blasphemy*. New York: Alfred A. Knopf, Inc., 1993.

———. *The Establishment Clause*. Second Edition ed. United States: The University of North Carolina Press, 1994.

Long, John J. Patrick and Gerald P., ed. *Constitutional Debates on Freedom of Religion: A Documentary History*. Westport: Greenwood Press, 1999.

Marty, Martin E. *Modern American Religion*. Vol. 3. Chicago: The University of Chicago Press, 1986.

Sager, Christopher L. Eisgruber and Lawrence G. *Religious Freedom and the Constitution*. Cambridge: Harvard University Press, 2007.

Volokh, Eugene. *The First Amendment and Related Statues, Problems, Cases and Policy Arguments*. 2nd ed. Westbury: Foundation Press, 2005.

Weber, Paul. *Equal Separation*. Westport: Greenwood Press, 1990.

Cases Cited

Bowen v. Roy 476 U.S. 693 (1986)

Boy Scouts of America v. Dale. 530 U.S. 640 (2000)

Davis v. Beason 133 U.S. 333 (1890).

Edwards v. Aguillard 482 U.S. 578 (1987)

Employment Division v. Smith 494 U.S. 872 (1990)

Good News Club, et al. v. Milford Central School 533 U.S. 98 (2001)

Minersville School District v. Board of Education, 310 U.S. 586 (1940)

Palko v. Connecticut. 302 U.S. 319 (1937)

Sherbert v. Verner 374 U.S. 398 (1963)

Speiser v. Randall 357 U.S. 513 (1958)

Van Orden v. Perry 545 U.S. 677 (2005)

West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943)

Widmar et. al. v. Vincent et. al. 454 U.S. 263 (1981)

Wisconsin v. Yoder 406 U.S. 205 (1972)