Pensees on Religious Freedom

By Nathan Oman*

INTRODUCTION

Oliver Wendell Holmes once declared, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[1] At the opening of the twenty-first century, constitutional protection for the free exercise of religion in the United States is anemic at best[2]. Scholars much abler than I have suggested ways in which the doctrinal intricacies of the religion clauses can be navigated[3]. However, if Holmes is correct, what I take to be the problem of American religious liberty jurisprudence may stem from the "actual feelings . . . of the community." If that is the case, then a more robust protection for religion will require more than sophisticated constitutional and doctrinal analysis.

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[1] OLIVER WENDELL HOLMES, THE COMMON LAW 36 (Back Bay Books, 1963) (1881).

[2] "Under the Free Exercise Clause, the impact of [the Supreme Court's current emphasis on] formal neutrality s clearly detrimental, because it limits the protection of religiously motivated conduct." Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 36 (2000) (citations omitted). *See also* Part I *infra*.

[3] *See, e.g.*, MICHAEL S. ARIENS AND ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY (1996) (a massive treatment of religious liberty jurisprudence) *and* 1 CHESTER JAMES ATINIEAU, MODERN CONSTITUTIONAL LAW, 2D ED. §§1.00-14.03 (1997) (discussing the doctrinal balancing of First Amendment freedoms against other interests).

This note will argue that current anemia of American religious jurisprudence reflects the fact that none of the current arguments for religious liberty can actually justify a robust concept of religious freedom[4]. Referring on the concept of liberty generally, Friedrich A. Hayek wrote:

> If old truths are to retain their hold on men's minds, they must be restated in the language and concepts of successive generations. What at one time are their most effective expressions gradually become so worn with use that they cease to carry a definite meaning. The underlying ideas may be as valid as ever, but the words, even when they refer to problems that are still with us, no longer convey the same conviction.[5]

I believe that something like this has happened with the concept of religious freedom, and this note will offer a possible re-justification for this important facet of liberty based on the arguments of Blaise Pascal[6].

This note is primarily concerned with the Free Exercise Clause[7]. My goal is to justify a special protection for private religious conduct. Thus, while my arguments might have implications beyond the issue of private religious conduct, I will not address issues such as school prayer or government use of religious symbolism, which generally are questions under the Establishment Clause[8]. Rather I will seek to partially answer a question posed by Michael J. Perry in a recent article:

> The sovereignty of the free exercise and nonestablishment norms over every branch and level of American government – in particular their sovereignty over state government as well as the national government – is now . . . a constitutional bedrock in the United States. For us *fin de siecle* Americans . . . an important question is: Why is it a good thing, for us Americans – if indeed it is a good thing – that government may neither prohibit the free exercise of religion nor establish religion?[9]

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[4] *See* Part II *infra*.
[5] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 1 (1960).
[6] *See* Parts III and IV *infra*.
[7] U.S. CONST. Amend. I, cl. 2.
[8] U.S. CONST. Amend. I, cl. 1.
[9] Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siecle *Sketches*, 75 IND. L.J. 295 (2000).

I.

In 1990, the Supreme Court handed down its decision in *Employment Division v. Smith*[10]. *Smith* dealt with an apparently narrow legal issue. Two Oregon men were dismissed from their jobs as a state drug counselor because they tested positive for the use of peyote, a hallucinogen made from cactus plants[11]. The men then applied for unemployment benefits from the state[12]. However, under Oregon law someone whose unemployment results from illegal activity can not collect benefits[13]. The men sued. They were members of the Native American Church, which uses peyote as a sacrament[14]. Because the original Oregon law criminalized the exercise of his religion, he argued that he should be exempted from the law under the Free Exercise Clause[15]. However, the state argued that since the Oregon law did not specifically target the religious use of peyote, it did not violate the First Amendment. The question before the Court was whether or not the Free Exercise Clause required that a neutral law that applied equally to everyone had to be set aside in those cases where it burdens the practice of someone's religion[16]. The Court ruled that it did not[17].

At its heart *Smith* is about the question of whether or not the free exercise of religion can be understood as a separate and independent right protected under the Constitution. In its decision, the Court in effect ruled that it was not. Under post-*Smith* jurisprudence the Free

[10] 494 U.S. 872 (1990).
[11] *Id.* at 874.
[12] *Id.* at 874.
[13] *Id.* at 874 (citing the relevant Oregon laws).
[14] *Id.* at 874.
[15] *Id.* at 874.
[16] *Id.* at 878.
[17] *Id.* at 890.

Exercise Clause is only viable in claims against laws specifically targeting religious practice[18]. This, in effect, makes "free exercise of religion" into a subspecies of the Equal Protection Clause[19]. The state cannot use religion to single out some group for different treatment. Religion has thus become akin to a "suspect classification," [20] like race or ethnicity[21]. Put another way, *Smith* says that the "free exercise of religion" is not about personal freedom at all. Instead, the Free Exercise Clause simply forbids some form of illegitimate religious discrimination by the state[22]. What *Smith* disallows is the notion that there is some distinctive and exclusive right available only to religion under the First Amendment. Indeed, Justice Scalia made this point explicit when he classified previous rulings granting special rights under the Free

[18] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding a law specifically forbidding religious animal sacrifice to be unconstitutional).
[19] U.S. CONST. AMEND. XIV, § 1.
[20] *See* John H. Garvey, *All Things Being Equal*, 1996 BYU L. REV. 587 (1996) (defending the idea of free-exercise as a non-discrimination principle) *and* William P. Marshall, *What is the Matter with Equality: An Assessment of Religion and Non-religion in First Amendment Jurisprudence*, 75 IND. L.J. 194 (2000) (defending the Court's use of equality to understand religious freedom).
[21] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that laws using racial classifications are subject to strict judicial scrutiny).
[22] It is worth noting that forbidding religious discrimination cannot be justified on the same basis as forbidding racial discrimination. "Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications," United States v. Virginia 11 S.Ct. 2264, 2276 (1996). Religion, however, can be thought of as a kind of conduct based on specific beliefs, *see* Reynolds v. United States, 98 U.S. 145 (1879) (holding that the Free Exercise Clause did not extend to religiously motivated behavior); *see also* discussion *infra* text accompanying notes 53-59. As such, it is not innate in the same sense that race is, and it is far easier to foresee circumstances in which one might have some rational basis for interfering with religion.

Exercise Clause as really involving a hybrid between free exercise and some other constitutionally protected right[23].

The alternative to *Smith* would be an understanding of the Free Exercise Clause that grants it some specific and unique content. Prior to *Smith* the Court had attempted this in *Sherbert v. Verner*[24]. In a fact situation remarkably similar to *Smith*[25], the Court ruled that the state could not burden religious practice – even with neutral and generally applicable laws – unless it could show some especially compelling reason for doing so. Under the *Sherbert* regime religionists could claim a special protection for their religion under the Free Exercise Clause. Unlike *Smith*, *Sherbert* provided this protection independent of any other formal or substantive claim. A religious plaintiff did not need to show that a given law unfairly targeted her religion, or that it violated some other constitutional right (such as free speech). She only needed to show that the law in question burdened the exercise of her religion. In short *Sherbert* concluded that the Free Exercise Clause provided protection for religious practice *as religious practice* rather than as a surrogate for something else (speech, equal protection, etc.). This is a far cry from *Smith*, where the Court ruled that the state of Oregon could *criminalize* the central

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[23] "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . ." Employment Division v. Smith, 494 U.S. 872, 881 (1990) (internal citations omitted).

[24] 374 U.S. 398 (1963).

[25] In *Sherbert* an unemployed Seventh Day Adventist refused to take a job because it required that she work on Saturday – the Seventh Day Adventist Sabbath, *Id.* 399. A state law required that she accept any proffered job as a condition for unemployment benefits, *Id.* 400-401. When the state refused to grant her benefits because of her religious refusal to take the Saturday job, she appealed, arguing that the state regime violated her right to the free exercise of her religion, *Id.* 400-401. The Supreme Court agreed, *Id.* 410.

sacrament of the Native American Church without running afoul of *any* constitutionally protected liberties[26].

None of this is new. The last ten years has seen a stream of commentary criticizing and defending both *Smith* and the congressional legislation that *Smith* has spawned[27]. What has become evident recently is a new pessimism among the proponents of an independent Free Exercise Clause. The central problem for these theorists is to find a plausible and rhetorically powerful justification for religion specific rights unavailable to non-religious citizens. Some theorists are beginning to conclude that such a justification is not possible. For example, Professor Frederick Gedicks, who undoubtedly would like a more robust constitutional protection of religious practice, has advocated abandoning the notion of an independent Free Exercise Clause altogether. He writes, "My thesis is that . . . various justifications [for an independent content for the Free Exercise clause] are no longer plausible, and thus can no longer account for religious exemptions. In the face of increasing scrutiny and growing criticism, these justifications no longer persuasively explain why religious people are constitutionally

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[26] *See supra* text accompanying notes 10-17.

[27] For an assessment of the immediate academic reaction to *Smith*, *see* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VIRGINIA L. REV 1407 (1992), 1409. The late solicitor general Rex E. Lee's response is representative. He summarized the content and effect of *Smith*:

> The majority stunned nearly every student of constitutional law by announcing a quite different approach to the adjudication of free exercise cases: So long as the state's laws are generally applicable...they are not rendered unconstitutional because they infringe on religious belief or practice.

Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 17, 85 (1993). For an assessment of the Religious Freedom Restoration Act *see* Neal Devins, *How Not to Challenge the Court*, 93 WILLIAM AND MARY L. REV. 645 (1998).

entitled to exemptions from laws that burden their religious practices, but non-religions people are not . . . ."[28]

II.

A brief survey of some of the more prominent justifications for religious liberty shows the problems that Professor Gedicks alludes to. Ultimately these justifications fail in one of three ways. First, some arguments beg the question by asserting the necessity of religious freedom without offering any normative justification for why religious freedom *should* be protected[29]. Second, some arguments fail to provide any justification for religious liberty *per se*[30]. Since these arguments work equally well to justify protections for non-religious forms of personal activity, they cannot serve to justify religious liberty under the Free Exercise Clause in those cases where protection is unavailable to non-believers. Finally, some arguments simply fail to justify religious freedom in precisely those situations where it is most likely to run up against the dictates of the state[31].

Some theorists have sought to justify unique religious protections by appeals to history or the constitutional text. Professor Douglas Laycock has insisted that regardless of how one justifies religious liberty, there is no arguing with the fact that the text of the first amendment on its face extends special protection to the free exercise of religion. He writes, "'Because the Constitution says so, and because our liberties depend on maintain the authority of the

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[28] Frederick Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.REV. 555, 556 (1998).
[29] *See* text accompanying notes 32-37 *infra*.
[30] *See* text accompanying notes 38-58 *infra*.
[31] *See* text accompanying notes 53-59 *infra*.

Constitution's guarantees,' should be sufficient reason to vigorously protect religious liberty."[32] Other scholars have argued that in addition to the constitutional text, the historical intent of its framers require a more robust protection for religious liberty than the Court now seems willing to provide[33]. These arguments boil down to an appeal to authority: if the plain text of the Constitution demands it and the framers intended it, then we should grant greater protection for religious liberty.

These arguments run into the same kinds of problems that appeals to authority always run into: the legitimacy of the authority. Ultimately, appeals to the plain meaning of the constitutional text or the historical intent of its framers, rest on a certain approach to legal hermeneutics. Not only must one define what the framers' intention actually was, one must also justify why that intent should be dispositive. Likewise, appeals to text must justify a robust interpretation of a particular constitutional clause in the face of the fact that many constitutional provisions are not legally enforceable[34]. Professor Gedicks points out, "It does not follow from the enumeration of religious exercise among the rights protected by the First Amendment that religious exemptions are constitutionally required. . . . The mere fact that the free exercise right is enumerated in the constitutional text does not mean that holders of the right are constitutionally

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[32] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996).

[33] Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). For a critique of McConnell's method *see* Mark V. Tushnet, *The Rhetoric of Free Exercise*, 1993 BYU L. REV. 117 (1993).

[34] For example, the Constitution guarantees to each state a "Republican form of government," U.S. CONST. Art. IV, § 4, but this is not necessarily a legally or judicially enforceable right, Baker v. Carr, 369 U.S. 186 (1962) (declining to create a judicial remedy for the Enforcement Clause). *See also* Gedicks *supra* note 28, at 559 (discussing reasons why the Court declines to enforce certain constitutional protections).

entitled to be excused from complying with government action that incidentally burdens the right."[35] Professor Gedicks argues that there are a host of pretexts by with which courts can avoid explicit constitutional guarantees[36]. Yet even if one does not adopt Professor Gedicks cynical attitude towards constitutional hermeneutics, the initial problem of providing the kind of re-justification envisioned by Hayek remains. Textual and historical arguments simply do not grapple head on with the issue of *justifying* religious liberty.

Other theorists have offered a more sophisticated argument based on the insights of Alexis DeToqueville. DeToqueville saw two great dangers within the structure of American democracy. The first danger is the simple problem of tyranny by the majority[37]. The second danger is the radical individualism inherent in America's classical liberal foundations[38]. DeToqueville's fear was that American individualism would atomize people, destroying the sense of community upon which democracy depends. The solution, said DeToqueville, is a rich set of mediating institutions that acted as a check on both an overweening government captured by a single majority and a centrifugal individualism[39]. Scholars such as Professor Stephen L. Carter have argued that religion should be afforded protection because it provides just such

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[35] Gedicks, *supra* note 28, 559-50.
[36] Gedicks, *supra* note 28, 559.
[37] *See* Marvin Zetterbaum, *Alexis De Toqueville*, *in* HISTORY OF POLITICAL PHILOSOPHY 768 (Leo Strauss et al. eds., 3d ed. 1987) (characterizing De Toqueville's position as "left to its own devices democracy is actually prone to the establishment of tyranny, whether of one over all, of many over few, or even of all over all.")
[38] *See* Zetterbaum, *supra*, 764-68 (summarizing De Toqueville's fears regarding American individualism).
[39] *See* Zetterbaum, *supra*, 774-75 (discussing the importance of voluntary associations in De Toqueville's thought).

powerful mediating institutions[40]. However, upon closer examination this argument also turns out to provide no ground for offering special protections to religion. Political scientists have identified the benefits of mediating institutions with what they call "social capital."[41] This "social capital" is the trust and mutual commitment that makes communal life successful. However, it is provided equally well, they demonstrate, by institutions such as soccer leagues and the Lions Club. Thus, theorists such as Professor Carter who would justify religious freedom with this argument fail to show why religion should be protected but bowling clubs should not[42].

Another argument for religious freedom is that it should be protected as a part of some kind of constitutionally recognized personal autonomy. The Supreme Court has announced that "at the heart of liberty is the right to defines one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[43] It seems plausible to think that religion could be protected under such a broad view of human autonomy. Thus, Professor Lawrence Tribe, for example, claims that the religion clauses of the First Amendment protect "rights of religious autonomy."[44] Yet this approach has several problems. It seems to identify freedom of religion

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[40] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 134-35 (1993).

[41] *See* EDWARD C. BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY (1967) (discussing the role of social institutions in the political development of Southern Italy; widely regarded as the seminal work on the subject); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) (revisiting the themes of Banfield's book in the context of Nothern Italy); *and* ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (applying the theory of "social capital" to American civic life).

[42] One might argue that bowling clubs should be protected under the Freedom of Association Clause, U.S. CONST. Amend. I, cl. 5, for precisely the reason that they do provide "social capital." If this is the case, then religious freedom is simply subsumed as a subset of yet another constitutional right.

[43] Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 832 (1992).

[44] LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1154 (2D ED. 1988).

with a generalized right of "freedom of conscience."[45] To the extent that such a right to personal autonomy has been found in the constitution it has come from the right to privacy that lurks in the penumbras of various provisions of the Bill of Rights and the Fourteenth Amendment rather than within the Free Exercise Clause[46]. Furthermore such a right rests purely with the individual. Yet religion is most often a communal endeavor, and it is often the corporate rather than the personal manifestations of religion that are seeking protection.

Dean Kathleen Sullivan has offered another justification for religious freedom. According to Dean Sullivan, the Free Exercise and Establishment Clauses form a single cohesive unit that establishes a "secular public order." The purpose of the religion clauses, says Dean Sullivan, is to provide a mechanism for the resolution of public moral disputes. This mechanism ends "the war of all sects against all," which Dean Sullivan argues is the default position in the absence of such a secular public order. She writes, "Establishment of a civil public order was the social contract produced by religious truce."[47] The existence of this civil public order provides the background within which all political and legal questions must be solved. She thus argues for "the exercise of religious liberty insofar as compatible with the establishment of the secular public order."[48]

Not surprisingly, Dean Sullivan is sharply critical of attempts to accommodate government flirtations with religion by weakening the Establishment Clause. More interestingly,

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[45] The authors of the First Amendment seemed to have specifically considered—and rejected—such a constitutional provision. *See* McConnell, *supra* at note 33**, at ??-??**.
[46] Griswald v. Connecticut, 381 U.S. 479 (1965) (declaring the existence of a constitutional right to privacy).
[47] Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U CHI L REV 195, 196 (1992).
[48] Sullivan, *supra*, 201.

she also faults the Court for weakening the protections available under the Free Exercise Clause. She even singles out the kind of facially neutral laws at issue in *Smith* for particular concern[49]. She thus seems to believe that her "secular public order" rationale provides some basis for a more robust understanding of religious liberty. Unfortunately, upon closer examination her concern for religious liberty turns out to be either without basis or simply a proxy for some other constitutional concern.

One suspects that part of Dean Sullivan's concern about religious liberty comes from a textualism similar to Professor Laycock's[50]. She insists that the attempts to accommodate public displays of religion are illegitimate because, among other things, "the Establishment Clause cannot be mere surplusage."[51] A similar desire to save the constitutional text might account for a more robust reading of the Free Exercise Clause. If this is the case, Sullivan's concern for religious liberty seems to flow from some unstated constitutional hermeneutic rather than any theory of religious liberty *per se*.

Alternatively, Dean Sullivan argues for religiously based exemptions from facially neutral laws because to not do so, "entrenches de facto discrimination against minority religions."[52] She points out that mainstream religions are likely to obtain exemptions through the political process, and that the Free Exercise Clause serves to level the playing field constitutionally for minorities which lack the same political muscle. However, Dean Sullivan's position seems at least facially inconsistent with her overriding theory of the religion clauses. If constitutional

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[49] Sullivan, *supra*, 214.
[50] *See* text accompanying notes 32-36 *infra*.
[51] Sullivan, *supra*, 205.
[52] Sullivan, *supra*, 216.

exemptions are analogous to legislative exemptions and are required in the name of non-discrimination, the question of justifying religious liberty remains. A non-discrimination principle would be equally consistent with no exemptions at all. Furthermore, it seems that legislative exemptions would run afoul of the robust Establishment Clause demanded by Dean Sullivan's secular public order. The question remains, "Why should we want religious exemptions, legislative or constitutional?" Dean Sullivan does not have an answer.

Finally, some have sought to justify religious freedom with the idea that self-government requires some basic level of civic morality in order to survive, and that religion is uniquely suited to provide this virtue. This idea has deep roots within American republicanism. In 1780, the Commonwealth of Massachusetts adopted a constitution to replace its defunct colonial charter. John Adams was the principle drafter of the document, which has the distinction of being "the oldest written constitution still governing in the world."[53] Article III of the constitution's "Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts" opined that:

> [T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and . . . these cannot be generally diffused through a Community, but by the institution of the public Worship of God, and of public instructions in piety, religion and morality[54].

Many of the founders shared Adams's view that religion is a source of the civil virtue that makes

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[53] Mary Newman and Robert Faulkner, *The Making of the Constitution*, *in* SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS, THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS ix (1981).

[54] MASS. CONST. Part I, Art. 3 *repealed by* Amend. XI. (original punctuation and capitalization preserved).

democratic government possible[55].

This justification is problematic on several fronts. First, it requires that the government act to create some level of official orthodoxy of belief – a proposition that is at odds with most generally accepted interpretations of the Establishment and the Free Speech Clauses of the First Amendment[56]. Furthermore, such an attitude is ultimately condescending to religion, reducing it to the kind of "noble lie" that Plato argued elites should use to control the ignorant *demos*[57]. But perhaps most damning from the point of view of a religious freedom partisan, the notion of civic virtue provides no basis for protecting precisely the kind of religion that is most likely to be subject to state sanction – minority faiths with idiosyncratic and iconoclastic beliefs. The opening chapter of American free exercise jurisprudence powerfully illustrates this point. The first case in which the Court squarely faced the issue of the Free Exercise Clause came when nineteenth century Mormons claimed an exemption from anti-bigamy laws that burdened the practice of plural marriage[58]. For the Mormons plural marriage was a religious principle, but to the rest of Victorian America it was the height of immorality *and for that reason* it had to be

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[55] *See* RICHARD VETTERLLI AND GARY BRYNER, IN SEARCH OF THE REPUBLIC: PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT (1996) (presenting in depth the importance of religion as a guarantor of civic virtue in the thought of the founders).

[56] "If there is any fixed star in our constitutional constellation, it is that no official high or petty can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act faith therein." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[57] *See* PLATO, REPUBLIC 378c (1992) (discussing the importance of telling only socially useful stories about the gods in the ideal city and banning all others).

[58] Reynolds v. United States, 98 US 145 (1879) (holding that religiously inspired polygamy was not protected under the Free Exercise Clause).

destroyed by the state[59]. The Mormon example illustrates that it is precisely religious conduct that violates majority norms of morality that is most likely to draw government sanctions.

All these arguments ultimately fail because, while they provide some justification for religious freedom, they do not provide any independent content for the Free Exercise Clause. To the extent that they are constitutionally cognizably it is always under provisions other than the Free Exercise Clause. They have the virtue of appealing to generalized norms, but they cannot provide a sufficient justification for religious freedom as a genuinely unique protection for religion.

III.

The arguments offered by the founding generation give us some clue of how we might construct a justification for religious freedom. Professor Daniel O. Conkle has observed that:

> The substantive idea of religious freedom was firmly rooted not in secular philosophy, but rather in theology. Thus for the Founders, the central justification for religious liberty was distinctly religious . . . . [This] justification was based on the combination of two theological principles: first, that religious duties are more important than secular duties, and second, that individuals must undertake their religious duties voluntarily, not under legal compulsion[60].

While the theological arguments advanced by members of the founding generation may no longer have the same rhetorical force, the choice of starting points is useful.

Theology is a word that can have many meanings. The word itself comes from two Greek roots. The first—*theos*—means "god" or "divine," while the second—*logos*—means "reason" or "discussion." It can be dogmatic, setting forth the doctrines of a particular religion

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[59] *See* B. COLLIN MANGRUM AND EDWIN FIRMAGE, ZION IN THE COURTS: A LEGAL HISTORY OF THE LATTER-DAY SAINTS, 1830-1900 151-59 (1988) (discussing the ways in which Victorian moral sensibilities accounted for federal persecution of the Mormons).

in a coherent and orderly fashion. It can be apologetic, seeking to provide rational justifications for a particular religious position. It can be exegetical, taking some authoritative text as a premise and rationally working out the implications. However, theology can also simply refer to rational discussion of religion. In this understanding, the line between theology and other forms of rational discussion is blurred. I would suggest that if we are to offer an adequate account of religious liberty it must begin in this kind of thoughtful discussion of religion itself.

Current justifications of religious freedom fail because they do not take religion seriously on its own terms. No Muslim believes the he should make a pilgrimage to Mecca in order to raise the general level of civic virtue. He does it because his faith that "there is no God but Allah and Mohammed is his Prophet" teaches that only by completing the *hadj* can he qualify for entry into paradise[61]. Likewise, Orthodox Jews are not interested in creating mediating institutions but in faithfully fulfilling the conditions of the covenant God made with Moses and Israel on Mount Sinai[62]. Buddhist temples are not factories for the production of social capital but places where people attempt to follow the example of Buddha to nirvana[63]. Christian churches are not expressions of autonomous individuals attempting to define "the mystery of human life." They are meetings of "fellow citizens with the saints, and of the household of God"

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[60] Daniel O. Conkle, note 2 *supra*, 3.

[61] *See* A.J. Wensinck, *Hadjjdj: iii – The Islamic Hadjdj s.v., in* 3 ENCYCLOPEDIA OF ISLAM 36-37 (B. Lewis, et al. eds., 1979) (discussing the religious significance of the pilgrimage to Mecca for a Muslim).

[62] *See* E.E. Urbach, *Torah s.v., in* 14 THE ENCYCLOPEDIA OF RELIGION 556-65 (Mircea Eliade, ed. 1987) (discussing the religious significance of the Pentatuach and God's covenant with Israel for Judaism).

[63] *See* Michael W. Meister and Nancy Stienhardt, *Temple: Buddhist Temple Compounds s.v., in* 14 THE ENCYCLOPEDIA OF RELIGION 373-80 (Mircea Eliade, ed. 1987) (discussing the history and religious significance of Buddhist temples).

seeking salvation through Jesus Christ the Son of God[64]. In short, none of the arguments offered in favor of religious liberty have anything to do with the ultimate concerns that are at the heart of religious belief. They simply do not take such concerns seriously.

Of course, it is difficult to discern precisely how the law can take such claims seriously without creating the kind of official orthodoxy that is anathema to the other provisions of the First Amendment. However, this seems to be precisely what an independent content for the Free Exercise Clause requires. The seventeenth century French philosopher Blaise Pascal provides us with a model of how this might be done. Pascal was at the center of the new scientific thinking that included such figures as Kepler, Descartes, and Newton. Among his other accomplishments, Pascal was the first person to develop a programmable computer which used mechanical gears to compute mathematical equations. At the same time, he was deeply religious, allying himself with a radical religious sect in France know as the Jansenists. He combined religious faith with a keen awareness of the position of such contemporary intellectual skeptics as Montaigne. Pascal is thus perfectly situated to provide an account of religion that is coherent for our religiously skeptical public sphere. In his *Pensees*, he sought ways of religiously appealing to honest doubters and skeptics with arguments that they would find persuasive. One of the results was what has come to be known as Pascal's Wager. Pascal articulate his position thus:

> Let us then examine this point, and say, "God is, or He is not." But which side shall we incline? Reason can decide nothing here. This is an infinite chaos which separated us. A game is being play at the extremity of this infinite distance where heads or tails will turn up. What will you wager? . . . . "The true course is not to wager at all" [you might say]. Yes; but you must wager. It is not optional. You are embarked. Which will you

[64] Ephesians 2:19 (King James Version).

> choose then? . . . . Let us estimate these two chances. If you gain, you gain all; if you lose, you lose nothing. Wager, then, without hesitation that He is.[65]

Pascal's argument is ingenious for at least two reasons. First, unlike the traditional "proofs" for God's existence, such as the argument from design or the ontological argument, it is not based on any specific religious or metaphysical claim[66]. It assumes the open-mindedness of its audience rather than some shared premise. It requires only that they are willing to admit that God might or might not exist. Second, it is not an argument for the existence of God *per se*. Ultimately, the argument is not about establishing a proposition at all. Rather it is a way of making the decision of whether or not to pursue the religious life. Pascal is attempting to show that the choice in favor of the religious life is what decision theorists call the "dominant position." Formally stated a dominant position is at least as good as all other possible outcomes, and under some conditions it is better than any other possible outcome[67]. Pascal is less concerned with *orthodoxy* (right belief) that with *orthopraxis* (right conduct). This emphasis on conduct rather than belief is also useful in the legal arena where the central question is how the state should act.

A legal analogy to Pascal's Wager can be constructed in favor of a unique right to the free exercise of religion. If we take as given that the state cannot establish an official orthodoxy

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[65] Blaise Pascal, *The Wager, in* PHILOSOPHY OF RELIGION: SELECTED READINGS 63-64 (Michael Peterson, et al. ed. 1996).

[66] Modern philosophers argue that Pascal actually smuggles unstated metaphysical assumptions into his argument. Since, I am only interested in Pascal's Wager as an analogy, such fine philosophical points are, for my purposes, irrelevant. *See "Pascal's Wager" s.v., in* SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY (1994) (discussing briefly Pascal's hidden metaphysical assumptions).

[67] *See "Dominance" s.v., in* SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY (1994).

on religious issues, then it follows that the state must adopt a peculiar attitude *ex ante* on religious questions. Generally, we speak in terms of government neutrality, but this is not always the most useful way of talking about the issue. A better word might be "openness." The state must take a genuinely open position on questions of religion. It cannot affirm the truth or falsity of any particular religion or of religion in general without violating the prohibition against state sponsored orthodoxy. This means that from the point of view of the state all religious propositions might or might not be true. Generally this openness is legally irrelevant, but when the issue of religious exemptions from neutral laws of general applicability arises, the state's official openness must come into play. Like the skeptic in Pascal's Wager, the state must "must wager. It is not optional. [It] is embarked."

All religions claim to offer their adherents something of ultimate value – salvation, nirvana, entrance to paradise, righteousness before God, etc.. These are real and important goods for believers. Indeed, the long history of believers willing to give up life, liberty and property for their faith demonstrates that people place value on these ultimate goods that is every bit as concrete as the value they place on more commonplace goods protected by the law. On a purely monetary note donations to religious institutions total in the millions of dollars annually. Furthermore, these goods are potentially valuable to seekers who, while they do not yet adhere to any given faith, are looking for ultimate truth and value. The state cannot affirm the value of any of these ultimate claims, *but it also cannot dismiss them as valueless*. From the point of view of the government, all religious claims must be treated as potentially valuable[68].

[68] It is easy to mistakenly pyschologize this argument. One might characterize the harm suffered by the believer as some negative psychological reaction to state coercion. This *not* the

From this it follows that religious freedom is the dominant position for the state to take. Granting an exemption from neutral laws might or might not result in allowing citizens access to the ultimate goods promised by religion. If it turns out that the rituals of Buddhist temples do not in fact grant their followers the promised nirvana, nothing is lost. However, if the state, under the aegis of neutrality, denies a believer access to such rituals, and it turns out to be the case that such rituals do in fact provide the promised result, then the state has perpetrated a very great wrong on its citizens. Thus, proponents of freedom can argue that given the constitutionally required openness of the state towards questions of religious truth, the state should side with freedom of religion in the interest of forestalling massive potential evils.

IV.

Obviously there are objections that can be raised to this argument. The most obvious one is that religiously granted exemptions may, in fact, result in some harm. Therefore, the objector could argue, the state should forestall such harms by refusing to grant the religious exemption. Clearly, a claim of religious liberty – like any other claim of a right – cannot be

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argument I am making. The potential value of letting someone attend mass is *not* (under my theory) that it will confer some psychological benefit on a Catholic believer. Rather the potential value is that communion will actually cleans the believer of sin and literally give her access to Paradise. *See* "Holy Communion" s.v. *in* CATHOLIC ENCYCLOPEDIA (1917) ("The doctrine of the Church is that Holy Communion is morally necessary for salvation . . ."). Likewise, the potential wrong of burdening communion is *not* some psychological damage. It is the danger of hell-fire and damnation.

There are, however, some who have argued that religion should be protected because to violate it causes some unique psychological harm. *See, e.g.,* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom,* 7 J. CONTEMP. LEGAL ISSUES 275 (arguing that burdening religious belief gives rise to especially grievous psychological harms). Professor Gedicks makes the error of labeling such alleged psychological results as "Transcendent Consequences," Gedicks *supra* at note 28, at 562. However, these purely subjective effects

absolute. Traditionally, proponents of religious liberty have provided for a safety valve by advocating a "compelling state interest" test[69]. Yet perhaps a concept used in free speech cases – "a clear and present danger"[70] – would be a better way of considering the question. In those cases, the Court has reasoned that the potential benefits of freedom of speech are so great, that it can be violated only when there is an immediate and actual danger[71]. It is easy to see how this balancing of potential and actual would fit quite nicely with the theory of religious freedom articulated above. The great *potential* benefits of religious freedom could be negated by some *imminent, actual* wrong. Under these conditions, religious freedom would cease to be the dominant position for the state to take.

Another objection that can be raised is that by entertaining the possibility that religious claims are actually true, the state is establishing religion within the meaning of the Establishment Clause. This approach is problematic for two reasons. First, the state is not positively affirming the truth of religious claims. It is only willing to acknowledge the possibility that the claims could be true. However, this carries with it an equal willingness to acknowledge that the claims could

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are *not* what I am referring to in this essay as "ultimate goods" or "ultimate values." Rather, I am using these terms as a catch-all for soteriological or eschatological concepts.

[69] *See* Sherbert v. Verner, *supra* at note 24, at 406 (considering "whether some compelling state interest . . . justifies the substantial infringement of the appellant's First Amendment right."). The legislative attempt to reverse *Smith* – The Religious Freedom Restoration Act – added a "least restrictive means" qualifier to this test, *see* 42 U.S.C. § 2000bb-1(b)2, *held unconstitutional by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[70] *See* Schnenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) (upholding the sedition convictions of anti-draft leaflet distributors because of the "clear and present danger" to national security).

[71] *See, e.g.*, New York Times, Co. v. United States, 403 U.S. 713 (1971) (holding that there was no "clear and present danger" permitting a ban on the publication of embarrassing government documents) *and* Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (holding that a court could not order a ban on publication of material related to a pending trial).

be false. Second, if the state is refuses to grant a unique claim of free exercise to the religious believer, there are two possible explanations of the state's behavior. Either, the state is taking that the position that their religious claims are false (and therefore the believer suffers no "real" harm), or the state is willfully interfering with the believer's pursuit of some ultimate good in favor of its non-essential immediate goals. The first alternative is precisely what the First Amendment uncontroversially prohibits (an official orthodoxy), while the second alternative is manifestly unjust.

It might be argued that the gamble in favor of religious freedom is only justified in the case of certain kinds of religious claims. If the justification for religious exemptions is based on the possibility that such exemptions might lead to the ultimate good promised by that religion, then it seems to follow that only situations in which the religious doctrines teach that the ultimate good is implicated should enjoy protection. While this argument is theoretically sound, its application would be impossible without the violation of the Establishment Clause. In order for the state to protect only soteriologically important religious tenants, it would require that the state interpret the theology and doctrines of any religion claiming constitutional protection[72]. Furthermore, the state would then back up its interpretation with coercion, since the application or non-application of any given law would hinge on how a government official understands religious doctrine. This, in effect, would let the state hi-jack its citizens' theology, imposing a state-sponsored interpretation of doctrine as a condition for legal protection.

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[72] "In 'quintessentially religious' matters . . . . the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (holding that sexual discrimination statutes could not apply to 'associate pastors') (internal citations omitted).

CONCLUSION

Ultimately, this Pascalian understanding of the Free Exercise Clause does two things. First, it allows for a genuinely religious understanding of the Free Exercise Clause. It engages religion on its own terms, understanding the value of religion from within the perspective of religious believers. At the same time, it requires that the state genuinely refuse to take a position on the truth or falsity of religious claims. This gives genuinely independent content to the Free Exercise Clause without recourse to a narrow, textualism or some other constitutional provision or argument. A Pascalian First Amendment calls the bluff of the easy rhetoric of classical liberal neutrality and tolerance[73]. Many opponents of a robust understanding of religious liberty resent the claim often leveled against them that they are really advocating a state-sponsored irreligion. In many cases the accusation is unfair and unjustified. However, the burden is on them to show that they can deny the claims for an independent Free Exercise Clause without *de facto* treating the religious belief behind those claims as false. To the extent that the state is genuinely neutral towards religion, it must acknowledge that the claims of religion *might* be true. It is within this context of taking religion seriously without accepting it that religious freedom makes sense as a unique right.

[73] *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION (1690) (the classic text setting forth the liberal notion of religious tolerance).