The Power of Religion In A Secular Society

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ABSTRACT

Even though many would deny the power and influence of religion in this day and age and opine for freedom from religion, this article seeks to persuade the reader that law and religion are interdependent and that religion is an important element in our secular society. Through an exploration of the religious dimensions of law and the legal dimensions of religion as well as an analysis of selected U. S. Supreme Court cases in the areas of criminal law, unemployment compensation, conscientious objector status, education, and the contraceptive mandate, this essay seeks to demonstrate how religious beliefs have influenced judicial decisions that have had vast impact on contemporary American life. We will also examine an instance where the High Court restricted the influence of religion and one where the Justices had to step in to protect a religious belief and practice many found repulsive and offensive. These cases have been controversial, but in this writer’s opinion, they were correctly decided because a society without religious moorings is a society without meaning or purpose.

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Law helps to give society the structure, the gestalt, it needs to maintain inner cohesion; law fights against anarchy. Religion helps to give society the faith it needs to face the future; religion fights against decadence.
- Harold J. Berman

I. INTRODUCTION

To paraphrase novelist D.H. Lawrence’s opening in Lady Chatterley’s Lover, “ours is essentially a secular age, but many refuse to acknowledge it. Our religious wars have ended, and now we wander about in a bewildering secular world.” Even though many would deny the power and influence of religion in this day and age and opine for freedom from religion, this article seeks to persuade the reader that law and religion are interdependent and that religion is an important element in our secular society. A stellar example is the U.S. Supreme Court’s decision in the Hobby Lobby case, where in a 5-4 decision, the Justices held that as applied to closely held corporations, the Department of Health & Human Services (HHS) regulations imposing the contraceptive mandate violated the Religious Freedom Restoration Act (RFRA). Through an exploration of the religious

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2 D.H. LAWRENCE, LADY CHATTERLEY’S LOVER (Signet Books; 1959). Originally published in 1928, Lawrence began his controversial novel with the statement “Ours is essentially a tragic age, so we refuse to take it tragically. The cataclysm has happened, we are among the ruins …” Id. at 5.

“Secularism” derives from the Latin word saeculum, referring to time. The “temporal” is contrasted with the “eternal” and by implication, the worldly with the religious. See THE DICTIONARY OF BIBLE AND RELIGION (1986), William H. Gentz (General Editor) at 949. For contemporary works proclaiming ours a secular age, see generally CHARLES TAYLOR, A SECULAR AGE (2007); MICHAEL WARNER & JONATHAN VANANTWERPEN, VARITIES OF SECULARISM IN A SECULAR AGE (2013); and JAMES CARROLL, CHRIST ACTUALLY: THE SON OF GOD FOR THE SECULAR AGE (2014). For a conservative critique of what Berman terms the “secular religion” of contemporary liberal democracy (Id. at 69) that embraces same sex marriage, abortion, contraception, and euthanasia, see ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES, Law, Religion, And Morality In Crisis (2001).

dimensions of law and the legal dimensions of religion as well as an analysis of selected U. S. Supreme Court cases in the areas of criminal law, unemployment compensation, conscientious objector status, education, and the contraceptive mandate, this essay seeks to demonstrate how religious beliefs have influenced judicial decisions that have had a vast impact on contemporary American life. We will also review an instance where the High Court restricted the influence of religion and one where the Justices had to step in to protect a religious belief and practice many found repulsive and offensive. These cases have been and continue to be controversial, but in this writer’s opinion, they were correctly decided because a society without religious moorings is a society without meaning or purpose.

II. INTERACTION OF LAW AND RELIGION

In 1971, the Lowell Lectures on Theology delivered at Boston University sought to explain how law and religion in Western societies are interdependent. The presenter spoke of “law and religion in the broadest sense – of law as the structures and processes of allocation of rights and duties in a society and of religion as society’s intuitions of and commitments to the ultimate meaning and purpose of life.” Before we examine his presentation, a few comments on the nature of religious belief in general are in order.

While definitions of religion vary, it is recognized that a common thread uniting all belief systems that can be termed “religious” is that they are in some way connected with “the eternal,”...
Eastern and Western Thought (1980) at 488.

whether that is understood as an eternal Being outside man – God, or as the eternity of man’s own being – immortality.\textsuperscript{14} Again, it is possible for a religion to be strictly godless, as in the case of early Buddhism, which recognizes neither God nor Absolute, yet is nonetheless a religion and is acknowledged as such.\textsuperscript{15} In all religions there are, in different proportions, three main ingredients – faith, a desire to ‘belong’ and a desire for ‘escape’.\textsuperscript{16}

\textit{Faith} – This means either belief in the ‘mission’ of a certain individual or group – prophet, incarnate god or church – or assent to a particular interpretation of existence, which enjoys the authority of antiquity or of human sages of proved experience. Faith in a personal god expresses itself in practical worship. Faith in a given interpretation of existence finds its practical application in the schooling of the mind and body in an effort to realize the spiritual state that this interpretation of existence claims is man’s spiritual goal.\textsuperscript{17}

\textit{Desire to ‘belong’} – While this is not a specifically religious phenomenon, it is present, to a greater or lesser degree, in all religions and can manifest itself in many ways. At its simplest it is the desire to be incorporated into a spiritual society and to become integrated within it, as a part of the body is in the body itself. Alternatively, as in nature mysticism, it may express itself as a merging in the ‘all’. In its extreme form, this merging in the ‘all’ is transcended, and the individual, by the act of casting off individuality, becomes, or believes he becomes, \textit{identical} with the ‘all’.\textsuperscript{18}

\textit{Desire to ‘escape’} – While present in all religions, it is on the matter of that from which escape is sought that religions so profoundly disagree. The Christian seeks release from the bondage of sin; the Buddhist seeks release from human existence as such. Islam, on the other hand, accepts this world as God’s creation and field of operation, but nevertheless has been unable wholly to resist the pressure of its own mystics who turned their backs on this world entirely.\textsuperscript{19}

One commentator, writing mainly of the Abrahamic traditions of the West, but with perceptive comparisons to Buddhism, explains religion in terms of belief in an agency or power that
transcends the immanent order – by which he means the operations of the natural world.\(^{20}\) For this observer, religion relates to “the beyond,” to an otherworldly order of things, but not in just any way. He posits three specific dimensions. First, religion asserts that there is some higher good or ultimate end beyond ordinary human flourishing. Second, it includes the possibility of personal transformation, to insure that the higher good is achieved. This, in turn, involves the existence of a transformative and transcendent power. Third, the religious account of our possible transformation involves a sense of human life extending beyond “this life.”\(^{21}\)

\textit{A. Religious Dimensions of Law}\\

The Lowell presenter cautioned against viewing law and religion in purely dictionary terms, remarking that law is more than a body of rules laid down by legislators and religion more than a system of beliefs relating to the supernatural.\(^{22}\) He declared that

\begin{quote}
Law is not only a body of rules; it is people legislating, adjudicating, administering, negotiating – it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life – it is a shared intuition of and commitment to transcendent values. [emphasis in original]\(^{23}\)
\end{quote}

Commenting that in some societies (ancient Israel, for example) the law, the Torah, is the religion,\(^{24}\) he pointed out that even in societies that make a sharp distinction between law and religion (the U.S., for example), the two need each other. Law to give religion its social dimension and religion to give law its spirit and direction as well as the sanctity it needs to command respect.\(^{25}\) Where the two are separate, the law tends to degenerate into legalism and religion into religiosity.\(^{26}\) They share four elements: ritual, tradition, authority and universality.\(^{27}\) These elements symbolize man’s effort to reach out to a truth beyond himself, thus connecting the legal order of a society to its beliefs in an ultimate, transcendent reality, while at the same time giving sanctity to legal values and reinforcing people’s legal emotions.\(^{28}\) These “emotions” include:

\begin{quote}
[T]he sense of rights and duties, the claim to an impartial hearing, the aversion to inconsistency in the application of rules, the desire for equality of treatment, the very feeling of fidelity to law and its correlative, the abhorrence of illegality.\(^{29}\)
\end{quote}

\(^{20}\) \textit{See} \textit{TAYLOR, supra} note 2, at 15, cited in \textit{RUSSELL BLACKFORD, FREEDOM OF RELIGION AND THE SECULAR STATE} (2012) at 6. \\
\(^{21}\) Blackford, \textit{Id.} citing \textit{Taylor} at 15-20. \\
\(^{22}\) Berman, \textit{supra} note 1, at 23-24. \\
\(^{23}\) \textit{Id.} at 24. \\
\(^{24}\) \textit{Id.} In many Islamic societies, the opposite is true, i.e., religion \textit{is} the law. Saudi Arabia and Qatar come immediately to mind. \\
\(^{25}\) \textit{Id} at 25. \\
\(^{26}\) \textit{Id.} \\
\(^{27}\) \textit{Id.} citing \textit{Huston Smith, THE RELIGIONS OF MAN} (1958), pp. 90-92, and substituting “universality” for Smith’s “concept of God’s sovereignty and grace.” \textit{Id.} at 145-46. \\
\(^{28}\) \textit{Id.} \\
\(^{29}\) \textit{Id.}
Calling into question the prevailing social science view of law as “secular-rational” and that judicial decisions are never “final” but depend on circumstance (are not divine or True), he mentioned that even advocates of this point of view admit that it can eventually lead to less respect for law and a greater willingness to become a lawbreaker.\(^{30}\) After all, obedience to law cannot come from fear of punishment alone, but must be rooted in the belief that law is fair and just.\(^{31}\) Law should not be viewed as simply a body of rules, but rather understood as “an active, living human process, then it will involve – as religion involves – man’s whole being, including his dreams, his passions, his ultimate concerns.”\(^{32}\) He elaborated on the elements that law shares with religion:

**Ritual** - ceremonial procedures that symbolize the objectivity of law;

**Tradition** - language and practices handed down from the past that symbolize the continuity of law;

**Authority** - reliance upon written or spoken sources of law that are considered to be decisive in themselves and that symbolize the binding power of law;

**Universality** - the claim to embody universally valid concepts or insights that symbolize the law’s connection with an all-embracing truth.\(^{33}\)

These elements are present in all legal systems, just as they are in all religions. They furnish the context in which every society’s legal rules are enunciated and from which they derive their legitimacy.\(^{34}\)

Finally, he asked us to remember the contributions to Western jurisprudence made by the Christian church.\(^{35}\) These are the principles of:

- Civil disobedience
- Law reform in the direction of greater humanity
- Coexistence of diverse legal systems
- Conformity of law to a system of morals
- Sanctity of property and contract rights based on intent
- Freedom of conscience
- Legal limitations of the power of rulers
- Responsibility of the legislature to public opinion
- Predictability of the legal consequences of social and economic actions
- Priority of state interests and public welfare

While many are regarded today as “self-evident truths,” they are in fact “historical achievements created mainly out of the experience of the Christian church in the various ages if its

\(^{30}\) *Id.* at 28.


\(^{32}\) *Id.* at 31.

\(^{33}\) *Id.*

\(^{34}\) *Id.*

\(^{35}\) *Id.,* at 72.
B. Legal Dimensions of Religion

Just as law has religious dimensions, so too does religion have legal dimensions. The Lowell presenter remarked that law is not only a matter of social utility, but is also “fundamentally a part of the ultimate meaning and purpose of life, a matter involving man’s whole being, including not only his reason and will but also his emotions and faith.” While law and religion are two different dimensions of human experience, each is a dimension of the other. They stand or fall together. In every religion there is and must be a legal element – indeed two legal elements: one relating to the social processes of the community sharing the particular religious faith, the other relating to the social processes of the larger community of which the religious community is a part.

When the presenter referred to “law” in this context, he had in mind not only the broad moral principles of the Ten Commandments, but also the secular law of impartial adjudication of disputes, judicial review of the constitutionality of governmental acts, the rule that a person who negligently injures another should compensate for the harm that is caused, the presumption of innocence, the right of a person arrested by the police to have a judicial determination of the lawfulness of his detention, the interpretation of contracts according to the intent of the parties, the principle of equal protection regardless of race or creed, the concept of good faith – and a host of other legal institutions, practices, rights, rules, concepts and values.

He asserted that every one of these practices and rights has its source in the moral order of the universe as that moral order has been culturally and historically experienced. Furthermore, as regards the American legal tradition, he declares that every one of these principles is biblical in justification if not in origin.

Let us now turn to U.S. Supreme Court decisions where the power of religion trumped federal and state law. We will also examine a pivotal case where religious belief and practice had to give way to a compelling state interest.

36 Id. These “ages” are “the underground church of the first centuries, the theocratic state-church of Byzantium and the early Middle Ages in the West, the independent transnational visible corporate church of the later Middle Ages, the invisible Lutheran church within the nation, the congregational church of Calvinism, and increasingly today the church of the private individual.” Id. at 73.
37 Id.
38 Id. at 77.
39 Id. at 78. Berman recognizes that in some societies, like those of ancient Israel and Islam, law and religion are identified with each other. Id.
40 Id at 79-80.
41 Id. at 94-95.
42 Id. at 95.
43 Id.
44 Employment Division v. Smith, 494 U.S. 872 (1990), infra Section III E.
III. RELIGION CONFRONTS THE LAW

A. Ballard – Criminal Prosecution for Misrepresentation Of Religious Belief or Experience

In *U.S. v. Ballard*, the Supreme Court, in a 5-4 decision, reversed and remanded the conviction of two leaders of a religious movement known as “I AM” for fraudulently seeking and collecting donations on the basis of religious claims that the defendants themselves did not believe. Disagreeing with the Court of Appeals, the High Court held that the question of whether the defendants’ claims about their religious experiences were actually true should not have been submitted to a jury.

Defendends Guy Ballard and Edna Ballard were indicted and convicted for using, and conspiring to use, the mails to defraud. The indictment charged a scheme to defraud by organizing and promoting the “I Am” movement through the use of the mails. The charge was that certain designated corporations were formed, literature distributed and sold, funds solicited, and memberships in the “I Am” movement sought "by means of false and fraudulent representations, pretenses and promises." Eighteen false representations were charged that included their alleged religious doctrines or beliefs which were set forth in the first count. Among the representations the defendants were alleged to have made was the following:

that [the defendants] had, by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did falsely represent to persons intended to be defrauded that the three designated persons had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases, and did further represent that the three designated persons had in fact cured either by the activity of one, either, or all of said persons, hundreds of persons afflicted with diseases and ailments.

After each representation, the indictment alleged that the defendants “well knew” the representations were false. The trial judge instructed the jury that they were not to be concerned with the truth or falsity of the representations but rather the “good faith” of the defendants in asserting them. The jury convicted them but the Circuit Court of Appeals reversed, holding that limiting the

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46 *Id.* at 86.
47 *Id.* at 79.
48 *Id.* at 80.
49 *Id.* at 82.
jury to deciding only their “good faith” was error. Rather the jury should have been able to decide
the truth of falsity of their claims.\textsuperscript{50} The Supreme Court reversed the Court of Appeals and remanded
the case to the trial court.\textsuperscript{51}

Justice Douglas, writing for the Court, held that the truth or veracity of defendants’ religious
doctrines or beliefs should not have been submitted to the jury because the First Amendment
precludes such an action.\textsuperscript{52} Quoting \textit{Watson v. Jones}, he writes: “The law knows no heresy, and is
committed to the support of no dogma, the establishment of no sect.”\textsuperscript{53} He declares that the First
Amendment has two aspects. It not only "forestalls compulsion by law of the acceptance of any
creed or the practice of any form of worship," but also "safeguards the free exercise of the chosen
form of religion."\textsuperscript{54} He announces that freedom of thought embraces the right to maintain theories of life and of death and of the hereafter which
are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution.
Men may believe what they cannot prove. They may not be put to the proof of their religious
doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible
to others.\textsuperscript{55}

Continuing, he remarks:

Yet the fact that they may be beyond the ken of mortals does not mean that they can be
made suspect before the law. Many take their gospel from the New Testament. But it
would hardly be supposed that they could be tried before a jury charged with the duty of
determining whether those teachings contained false representations. The miracles of
the New Testament, the Divinity of Christ, life after death, the power of prayer are deep
in the religious convictions of many. If one could be sent to jail because a jury in a
hostile environment found those teachings false, little indeed would be left of religious
freedom.\textsuperscript{56}

Reinforcing the constitutional principle of the separation of church and state, he declares
that “Man's relation to his God was made no concern of the state.”\textsuperscript{57} Commenting on the
diversity of mankind’s religious views, he warns that the state must not become the arbiter
of religious truth:

The religious views espoused by respondents might seem incredible, if not preposterous,
to most people. But if those doctrines are subject to trial before a jury charged with finding
their truth or falsity, then the same can be done with the religious beliefs of any sect. When
the triers of fact undertake that task, they enter a forbidden domain. The First Amendment
does not select any one group or any one type of religion for preferred treatment. It puts them

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 83.
\item \textsuperscript{51} \textit{Id.} at 88.
\item \textsuperscript{52} \textit{Id} at 86. The trial judge had ruled that the court could not inquire whether defendants’ statements were true, but
\item \textsuperscript{53} \textit{Id} at 86. The trial judge had ruled that the court could not inquire whether defendants’ statements were true, but
\item \textsuperscript{54} \textit{Id.} citing \textit{Cantwell v. Connecticut}, 310 U.S. 296, 303 (1940).
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} at 87.
\item \textsuperscript{57} \textit{Id.}
\end{itemize}
Consequently, the Court held a jury cannot evaluate the truth or falsity of religious claims.

Believing that the indictment should be dismissed, Justice Jackson dissented. Warning that judicial inquiry into the truth of people’s religious beliefs could easily “degenerate into religious persecution,” he writes that he would “dismiss the indictment and have done with this business of judicially examining other people's faiths.” He remarks that he could “see in the [I AM movement] teachings nothing but humbug, untainted by any trace of truth,” but that did “not dispose of the constitutional question whether misrepresentation of religious experience or belief is prosecutable; it rather emphasizes the danger of such prosecutions.” He notes that while the trial judge withheld from the jury the truth or falsity of defendants’ claims, he did allow the jury to determine if they knew them to be untrue, and if they did, they could be convicted. He found this result difficult to reconcile with “our traditional religious freedoms” and expressed deep concern about any judicial inquiry into the sincerity of people’s religious experiences.

If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand, and are almost certain not to believe, him.

Reflecting on the sincerity of religious beliefs and asking a jury to determine whether someone honestly believes he or she has undergone a religious experience, he comments:

All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credibility than is invoked by representations of secular fact in commerce. Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop’s fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches, and even more difficult to say how far it is reliance upon a teacher’s literal belief which induces followers to give him money.

But Justice Jackson does maintain that certain types of religious fraud are prosecutable. As he explains:

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59 Id. at 92.
60 Id. at 95.
61 Id.
62 Id. at 92.
63 Id.
64 Id.
65 Id. at 93.
66 Id. at 94.
I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as, for example, if one represents that funds are being used to construct a church when in fact they are being used for personal purposes.\(^67\)

Considering that individuals often give money to false religious prophets whom the law does not and should not prosecute, he declares that this “is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.”\(^68\)

After the case was retried, the Ballards were convicted a second time, and once more appealed to the Supreme Court. Again their conviction was reversed, this time because women were intentionally excluded from the jury.\(^69\)

Thus even the law’s sanctions must contend with the power of religion so that any criminal prosecution of religious fraud must take Ballard into account.

We next turn to decisions where religious conscience collided with the dictates of unemployment compensation law.

B. Sherbert & Frazee - A Hobbesian Choice: Employment Or Religious Conscience

Adell Sherbert, a member of the Seventh-Day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. Unable to obtain other employment because she would not work on Saturday, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act, which provided that a claimant is ineligible for benefits if they have failed, without good cause, to

\(^{67}\) Id. at 95.

\(^{68}\) Id at 95.

accept available suitable work when offered. The State Commission denied her application on the ground that she would not accept suitable work when offered, and the State Supreme Court sustained its action. She then appealed to the U.S. Supreme Court, which held that the statute abridged her right to the free exercise of her religion, in violation of the First Amendment, made applicable to the states by the Fourteenth Amendment.

Justice Brennan, writing for the Court, stated that the government may not regulate religious beliefs; it may not compel affirmation of a repugnant belief; it may not penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities. Finally, it may not employ the taxing power to inhibit the dissemination of particular religious views. Remarkably that her religiously based conduct does not involve any action prohibited by the state, the Court states that “if the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a ‘compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .’ ” The Court then goes on to conclude that the state’s disqualification for benefits imposes a burden on the free exercise of Sherbert’s religion. The Court remarks that it not “fostering the ‘establishment’ of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.” Finally, the Court examines whether there is a “compelling state interest” that justifies burdening Sherbert’s free exercise of religion. A majority of the Justices conclude there is no such interest. Furthermore, the Justices find that to justify burdening the free exercise of religion in this situation would require more than a “showing merely of a rational relationship to some colorable state interest…; in this highly sensitive constitutional area, ”only the gravest abuses, endangering

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71 Id. at 410. For cases holding that the Government may not put an employee in the predicament of choosing between fidelity to religious beliefs and access to public benefits, see Hobbie v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136 (1987), and Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707 (1981).
72 Id. at 402 citing Cantwell v. Conn., 310 U.S. at 303.
74 Id. citing Fowler v. Rhode Island, 345 U.S. 67 (1953).
76 Id. at 404 citing NAACP v. Button, 371 415, 438 (1963).
77 Id.
78 Id. at 409. Interestingly enough, Justice Stewart, in his Concurring Opinion, concludes that the Court’s decision does constitute recognition of an Establishment of Religion. “To require South Carolina to so administer its laws as to pay public money to the appellant under the circumstances of this case is thus clearly to require the State to violate the Establishment Clause as construed by this Court.” Id. at 415. Such a “double-barreled dilemma” [quoting Stewart, J. at 413] has not gone unnoticed by legal commentators. See LOUIS FISHER & KATY J. HARRIGER, AMERICAN CONSTITUTIONAL LAW (10th ed.) Vol. 2 (Paperback) (Carolina Academic Press, Durham, NC; 2013): “These Clauses – the Establishment Clause and the Free Exercise Clause – sometimes overlap and compete. Satisfying one may violate the other. If Congress grants a tax exemption for church property, is that establishment of religion? Taxing the property, however, would interfere with free exercise.” Id. at 565.
79 Id. at 406.
paramount interests, give occasion for permissible limitation."\(^{80}\) They conclude that no such danger or abuse has been presented in this case. To quote:

> No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund, but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here, because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance.\(^{81}\)

Therefore the Court was unmoved by South Carolina’s concern that everyone who doesn’t want to work on Saturday if it’s a job requirement will quit and be able to collect unemployment benefits by claiming to be a Seventh-Day Adventist.\(^{82}\) It noted that it’s decision was in accordance with many state court opinions that granted benefits to persons who were physically available for work but unable to find suitable employment solely because of a religious prohibition against Saturday work.\(^{83}\)

Twenty-six years later, in 1989, the High Court took *Sherbert* one step further, ruling that the denial of unemployment compensation benefits to an appellant on the ground that his refusal to work on Sunday was not based on tenets or dogma of an established religious sect, but rather on a sincere, personal, religious belief, violated the Free Exercise Clause of the First Amendment.\(^{84}\)

William Frazee refused a temporary retail position offered him by Kelly Services because the job would have required him to work on Sunday. Frazee told Kelly that, as a Christian, he could not work on "the Lord’s day." Frazee then applied to the Illinois Department of Employment Security for unemployment benefits claiming that there was good cause for his refusal to work on Sunday. His application was denied. Frazee appealed the denial of benefits to the Department of Employment Security's Board of Review, which also denied his claim. The Board of Review stated: "When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and non-compelling and does not render the work unsuitable."\(^{85}\) The Board of Review concluded that Frazee had refused an offer of suitable work without good cause. The Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, affirmed, finding that the agency's decision was "not contrary to law nor against the manifest weight of the evidence," thereby rejecting Frazee's claim based on the Free Exercise Clause of the First Amendment.\(^{86}\)

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\(^{80}\) *Id.* citing Thomas v. Collins, 323 U.S. 516, 530 (1945).

\(^{81}\) *Id.* at 407.

\(^{82}\) *Id.*


\(^{85}\) *Id.* at 831.

\(^{86}\) *Id.*
A unanimous Supreme Court reversed, pointing out that Sherbert,\textsuperscript{87} Thomas and Hobbie,\textsuperscript{88} rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question, not on the consideration that each of them was a member of a particular religious sect or on any tenet of the sect forbidding such work. While membership in a sect would simplify the problem of identifying sincerely held beliefs, the Court rejected the notion that one must be responding to the commands of a particular religious organization to claim the protection of the Free Exercise Clause. The sincerity or religious nature of appellant's belief was not questioned by the courts below, and was conceded by the State, which offered no justification for the burden that the denial of benefits placed on appellant's right to exercise his religion. Simply because Sunday work has become a way of life did not constitute a state interest sufficiently compelling to override a legitimate free-exercise claim, the Justices reasoned, since there is no evidence that there would be a mass movement away from Sunday employment if appellant succeeded on his claim.\textsuperscript{89}

Accordingly, we note that in Sherbert and Frazee the High Court drew upon the power of religious conviction to overcome the strictures of unemployment compensation law, which, if applied without the Court’s intervention, would have deprived the individuals of public benefits and forced them to choose between fidelity to their religious convictions or a livelihood.

Let’s now examine the role of religious belief in determining conscientious objector\textsuperscript{90} status.

\textbf{C. Seeger & Welsh – Conscientious Objector Status Without a Belief in a Supreme Being}

A dramatic example of the power of religion involves the government’s treatment of conscientious objectors, i.e., persons who refuse military service because it conflicts with their religion.\textsuperscript{91} Noteworthy examples are U.S. v. Seeger\textsuperscript{92} and Welsh v. U.S.\textsuperscript{93} In Seeger, the U.S. Supreme Court ruled that the exemption from the military draft for conscientious objectors could not be reserved only for those professing conformity with the moral directives of a Supreme Being, but also for those whose views on war derived from a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those who had routinely gotten the exemption”\textsuperscript{94}

\textsuperscript{87} Supra note 71.
\textsuperscript{88} Supra note 72.
\textsuperscript{89} Id. at 832-35.
\textsuperscript{90} A conscientious objector (CO) is an "individual who has claimed the right to refuse to perform military service" on the grounds of freedom of thought, conscience, and/or religion. See \textit{https://en.wikipedia.org/wiki/Main_Page#cite_note-1} (last visited Sept 04, 2015).
\textsuperscript{91} Conscientious objector status can also be obtained on the grounds of conscience or belief in non-violence, although courts usually compare such reasons to religious objections. See Welsh v. U.S., 398 U.S. 333 (1970) infra. Section III C.
\textsuperscript{93} 398 U.S. 333 (1970).
\textsuperscript{94} Id. at 165-66. See Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (Adams, J., concurring). Relying on Seeger, Judge Adams concludes that "the modern approach looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.' " Id. at 207.
The Court interpreted the Universal Military Training and Service Act\(^95\) that exempted from combat persons who objected to participation "by reason of religious training and belief." The Act defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [excluding] essentially political, sociological or philosophical views or a merely personal moral code."\(^96\) Despite Congress' apparent intent to limit the exemption to objections based on traditional religious beliefs, the Court held that this definition applied to Seeger who had stated that "he preferred to leave the question as to his belief in a Supreme Being open," and that his objection was based on a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."\(^97\) The Court held that "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views."\(^98\) The Court then held that the test for "belief in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."\(^99\) The Court offered no insight as to the meaning of "occupying a place in the life of the possessor parallel to that filled by the orthodox belief in God" especially given the differences in content and strength of various religious convictions.

The Court expanded Seeger in Welsh v. United States,\(^100\) where a plurality of the Justices ruled that a person may be classified as a conscientious objector even when they do not affirm or deny belief in a Supreme Being.\(^101\) Let’s briefly review the facts in Welsh.

Elliott Welsh was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces in violation of 50 U.S.C.App. § 462(a), and was sentenced to imprisonment for three years. One of his defenses to the prosecution was that § 6(j) of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form." After finding that there was no religious basis for petitioner's conscientious objector claim, the Court of Appeals affirmed the conviction.\(^102\) The High Court granted certiorari chiefly to review the contention that Welsh's conviction should be set aside on the basis of the Court's decision

\(96\) Id. Compare Blackford, supra note 20, at 109-114 (arguing that religiously-based conscientious objector status for health care workers should be limited and narrowly construed).
\(97\) 380 U.S. at 166.
\(98\) Id. at 165.
\(99\) Id. at 165-66. See Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (Adams, J., concurring), supra note 94. See also Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981); see also Kent Greenawalt, Religion as a Concept in Constitutional Law, 72 CAL. L. REV. 753 (1984) ("the Supreme Court's broad statutory construction of religion [in Seeger and Welsh] . . . has led other courts and scholars to assume that the constitutional definition of religion is now much more extensive than it once appeared to be"). Id. at 760-61.
\(100\) 398 U.S. 333 (1970).
\(102\) 404 F.2d 1078 (1968).
in Seeger. Without passing upon any constitutional arguments, the Court voted to reverse the conviction because of its fundamental inconsistency with Seeger.\textsuperscript{103}

The Justices noted the similarity between Seeger and Elliot Welsh. Both were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but, when their ideas did fully mature, both made application to their local draft boards for conscientious objector exemptions from military service under § 6(j) of the Universal Military Training and Service Act. That section then provided, in part:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.\textsuperscript{104}

In filling out their exemption applications, both Seeger and Welsh were unable to sign the statement that, as printed in the Selective Service form, stated, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." Seeger could sign only after striking the words "training and" and putting quotation marks around the word "religious." Welsh could sign only after striking the words "my religious training and." On those same applications, neither could definitely affirm or deny that he believed in a "Supreme Being," both stating that they preferred to leave the question open. But both Seeger and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a "still, small voice of conscience"; rather, for them, that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, "[t]he government concedes that [Welsh's] beliefs are held with the strength of more traditional religious convictions."\textsuperscript{105} But, in both cases, the Selective Service System concluded that the beliefs of these men were in some sense insufficiently "religious" to qualify them for conscientious objector exemptions under the terms of § 6(j). Seeger's conscientious objector claim was denied solely because it was not based upon a belief in a relation to a Supreme Being as required by § 6(j) of the

\textsuperscript{103} 398 U.S. at 335.

\textsuperscript{104} 62 Stat. 612. An amendment to the Act in 1967, subsequent to the Court's decision in the Seeger case, deleted the reference to "Supreme Being" but continued to provide that "religious training and belief" does not include "essentially political, sociological, or philosophical views, or a merely personal moral code." 1 Stat. 104, 50 U.S.C.App. § 456(j) (1964 ed., Supp. IV).

\textsuperscript{105} 404 F.2d at 1081.
Act, while Welsh was denied the exemption because his Appeal Board and the Department of Justice hearing officer could find no religious basis for the registrant's beliefs, opinions and convictions. Both Seeger and Welsh subsequently refused to submit to induction into the military, and both were convicted of that offense.\textsuperscript{106}

The Justices then comment that having decided in \textit{Seeger} that all religious conscientious objectors were entitled to the exemption, they then faced the more serious problem of determining which beliefs were "religious" within the meaning of the statute.\textsuperscript{107} The Court concludes that "[t]he task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, \textit{in his own scheme of things}, religious." (Emphasis added).\textsuperscript{108} The Court notes that reference to the registrant's "own scheme of things" was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether the beliefs play the role of a religion and function as a religion in the registrant's life.\textsuperscript{109} It’s test for determining whether a conscientious objector's beliefs are religious within the meaning of § 6(j) was:

\begin{quote}
\textellipsis\  a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.\textsuperscript{110}
\end{quote}

The Justices stress that what is necessary under \textit{Seeger} for a registrant's conscientious objection to all war to be "religious" within the meaning of § 6(j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.\textsuperscript{111} The High Court goes on to say that

\begin{quote}
if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by God" in traditionally religious persons.\textsuperscript{112}
\end{quote}

The Court then concludes:

\begin{quote}
Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under § 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions.\textsuperscript{113}
\end{quote}

Therefore it is quite clear from both \textit{Seeger} and \textit{Welsh} that the touchstone of these significant decisions is religious conviction, whether or not it encompasses a belief in God or a Supreme Being. They amply demonstrate the power of religion in our secular society. Let’s now turn to examine its power in the field of education.

\begin{footnotes}
\footnotetext[106]{398 U.S. at 335-39. [quotations omitted].}
\footnotetext[107]{Id. at 338.}
\footnotetext[108]{Id. at 339, citing 380 U.S. at 185.}
\footnotetext[109]{Id.}
\footnotetext[110]{Id. citing 380 U.S. at 176.}
\footnotetext[111]{Id. at 339-40.}
\footnotetext[112]{Id. at 340.}
\footnotetext[113]{Id.}
\end{footnotes}
D. Yoder – The Amish & Public Education Collide

Members of the Old Order Amish religion and the Conservative Amish Mennonite Church, were convicted of violating Wisconsin's compulsory school attendance law (which requires a child's school attendance until age 16) by declining to send their children to public or private school after they had graduated from the eighth grade. The Amish provide continuing informal vocational education to their children designed to prepare them for life in the rural Amish community. They sincerely believe that high school attendance is contrary to the Amish religion and way of life, and that they would endanger their own salvation and that of their children by complying with the law. The State Supreme Court sustained their claim that application of the compulsory school attendance law to them violated their rights under the Free Exercise Clause of the First Amendment, and the state appealed.114

The U.S. Supreme Court affirmed the decision of the Wisconsin Supreme Court, holding that a State's interest in universal education is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment,115 and the traditional interest of parents with respect to the religious upbringing of their children so long as they "prepare them for additional obligation."116 The Justices prefaced their decision with a detailed description of the Amish religious values, way of life, and philosophy of education and how it relates to the upbringing of their children.117 The Court pointed

114 Id. at 205.
117 Id. at 209-213. Since the Court thought it worthwhile to include such information in detail in its Opinion, it is worth quoting here:

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century, who rejected institutionalized churches and sought to return to the early, simple, Christian life deemphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith. Id. at 209-10.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung*, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community. Id. at 210.

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an
out that “however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.” But, the Court remarked 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.” The Justices conclude that their impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal "learning through doing," a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society. *Id.* at 210-11.

Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs, with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing," rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith -- and may even be hostile to it -- interposes a serious barrier to the integration of the Amish child into the Amish religious community. Dr. John Hostetler, one of the experts 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. *Id.* at 211-12.

The Amish do not object to elementary education through the first eight grades as a general proposition, because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible. they have established their own elementary schools, in many respects like the small local schools of the past. In the Amish belief, higher learning tends to develop values they reject as influences that alienate man from God. *Id.* at 212.

On the basis of such considerations, Dr. Hostetler testified that 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. The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. He described their system of learning through doing the skills directly relevant to their adult roles in the Amish community as "ideal," and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society. *Id.* at 212-13.

118 *Id.* at 215.
119 *Id.*
refusal to send their children to public school beyond the eighth grade is grounded not in personal preference but rather in fundamental religious belief. Thus, they conclude, the burden shifts to the State to prove that “its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way.” Wisconsin offered two justifications for its system of compulsory education. To quote:

...some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society.

The Court found both justifications wanting. It determined that Amish education was sufficient to prepare a child for living in the Amish agrarian society, and that the Amish’s education did not end at the eighth grade level, as the State contended, but rather continued, albeit as vocational education suitable for allowing the child to flourish in the Amish community. Regarding the State’s contention that the Amish child would be at a disadvantage if they left the Amish community with only a eighth grade education, the Justices countered with:

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Thus the Amish were allowed to continue their practice of withdrawing their children from public education after the eighth grade as a free exercise of religion. Though the decision has its critics, it highlights the power of religion.

E. Smith – The Power of Religion Has Limits

So far in this essay we have examined cases where the power of religion has swept away all before it. But its power does have its limits, as it should in a society that is a constitutional democracy, not theocracy. Its frontier was first reached in 1878 when the Supreme Court decided Reynolds v. U.S. Reynolds, a member of the Church of Jesus Christ of Latter Day Saints (Mormons) was arrested and charged with polygamy, which violated the territorial law of Utah. Among Reynolds's defenses was the claim that he was acting in accordance with the dictates of his

120 Id. at 216.  
121 Id.  
122 Id. at 221.  
123 Id. at 222.  
124 Id. at 224.  
125 Id.  
126 Id. at 224-25.  
127 Blackford, supra note 20, at 161 (Yoder was “wrongly decided”). See also Justice Douglas’ comments disagreeing with the Court's conclusion that the “matter is within the dispensation of parents alone.” 406 U.S. at 241.  
128 98 U.S. 145 (1878).  
129 He was sentenced to two years at hard labor and ordered to pay a fine of $500. 98 U.S. at 150-51.
religion and the territorial law infringed upon his free exercise rights. The High Court was not persuaded, announcing that it could not be seriously argued that the free exercise of religion allowed such practices, otherwise

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. Government could exist only in name under such circumstances.

Moving to 1990 and Employment Division v. Smith, where two men were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. The State of Oregon denied their applications for unemployment compensation under a state law disqualifying employees discharged for work-related "misconduct." Holding that the denials violated respondents' First Amendment free exercise rights, the State Court of Appeals reversed. The State Supreme Court affirmed, but U.S. Supreme Court vacated the judgment and remanded for a determination whether sacramental peyote use is proscribed by the State's controlled substance law, which makes it a felony to knowingly or intentionally possess the drug. Pending that determination, the Court refused to decide whether such use is protected by the Constitution. On remand, the State Supreme Court held that sacramental peyote use violated, and was not excepted from, the state law prohibition, but concluded that that prohibition was invalid under the Free Exercise Clause.

The U.S. Supreme Court reversed, holding that the Free Exercise Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. The Justices further held that the use of the law could not be evaluated under the balancing test set forth in Sherbert v. Verner, whereby governmental

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130 He argued before the District Court "that it was the duty of male members of said church, circumstances permitting, to practice polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and, among others, the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members hereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished and that the penalty for such failure and refusal would be damnation in the life to come."

131 Id. at 161. The issue of polygamy or what some refer to as “plural marriage,” is again before the courts.


132 Id. at 166. Scalia, J. would cite this very phase 112 years later in Employment Division v. Smith, 494 U.S. 872, 879 (1990) upholding a state statute criminalizing the use of peyote against a free exercise of religion challenge brought by Native Americans who used it as a sacrament in their religious practices.


134 Id.


actions that substantially burden a religious practice must be justified by a "compelling governmental interest." They declared that the balancing test was developed in a context -- unemployment compensation eligibility rules -- that lent itself to individualized governmental assessment of the reasons for the relevant conduct. They found the test inapplicable to an across-the-board criminal prohibition on a particular form of conduct. A holding to the contrary, they concluded, would create an extraordinary right to ignore generally applicable laws that are not supported by "compelling governmental interest" on the basis of religious belief. Nor could such a right be limited to situations in which the conduct prohibited is "central" to the individual's religion, since that would enmesh judges in an impermissible inquiry into the centrality of particular beliefs or practices to a faith.137

Justice Scalia, writing for the Majority, commented that the application of the “compelling interest” test, if it is to be applied at all, must be

applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference,"and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.138 [citation omitted]

He continues by reciting a litany of laws that would require constitutionally required religious exemptions from civic obligations of all kinds, including compulsory military service139, the payment of taxes,140 health and safety regulations such as manslaughter and child neglect laws,141 compulsory vaccination laws,142 child labor laws,143 and animal cruelty laws.144

He concludes by saying that a legislative exemption for use of peyote is always available but not constitutionally required.145 Indeed, in response to this decision, the U.S. Congress passed the Religious Freedom Restoration Act (RFRA).146 It provides that governments may substantially burden a person’s religious exercise only if they demonstrate a compelling interest and use the least

137 Id. at 886-87.
138 Id. at 888.
144 494 U.S. at 888-89, referencing Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 723 F.Supp. 1467 (S.D.Fla.1989). Ironically, three years later the High Court would invalidate the City of Hialeah’s prohibition against certain types of animal slaughter on Free Exercise grounds. See Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993), infra III G.
145 494 U.S. at 890. Following up on the Court’s suggestion, in 1994 Congress passed legislation legalizing the use of peyote by Native Americans for ceremonial purposes. No Indian may be penalized or discriminated against for such use, the denial of benefits under public assistance programs. See 108 STAT 3125 (1994) and Fisher & Harriger, supra note 78, at 588-89.
restrictive means of furthering that interest.\textsuperscript{147} But RFRA did not survive constitutional muster. In \textit{City of Boerne v. Flores},\textsuperscript{148} the High Court ruled that Congress had exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment in enacting the law,\textsuperscript{149} and in \textit{Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal}\textsuperscript{150} the Court held that RFRA applies only to the federal government.

One writer commenting on the decision concludes that perhaps Oregon’s law was too broad and that the legislature should have taken a “narrower approach – for example, it could exempt small doses, require licensing, or restrict availability to minors.”\textsuperscript{151} After the decision, Congress enacted legislation that legalized the use of peyote by Native Americans for ceremonial purposes.\textsuperscript{152}

\begin{center}
\textbf{F. Hobby Lobby – Religion Challenges the Contraceptive Mandate}
\end{center}

The U.S. Supreme Court decision implementing the power of religion is \textit{Burwell v. Hobby Lobby Stores, Inc., et al}, the Supreme Court ruled that as applied to closely held corporations, the Department of Health & Human Services (HHS) regulations imposing the contraceptive mandate violated RFRA.\textsuperscript{153}

The “contraception mandate” results from the Patient Protection and Affordable Care Act (the "ACA") and related regulations.\textsuperscript{154} Under rules effectively written by an entity called the "Institute of Medicine," corporations like Hobby Lobby had to purchase employee health insurance plans that included coverage for "[a]ll Food and Drug Administration [("FDA")] approved contraceptive methods, sterilization procedures, and patient education and counseling" — including so-called emergency contraceptives such as Plan B and Ella — "for all women with reproductive capacity, as prescribed by a provider."\textsuperscript{155} This is known as the “contraception mandate” and it permitted no exception for individuals like the owners of Hobby Lobby, who believe that supporting the use of certain contraceptives is morally reprehensible and contrary to God’s word.\textsuperscript{156} If their company refused to submit to the offending regulations, it would have been subject to a "regulatory tax" — a penalty or fine — that would have amounted to a substantial sum that would have rapidly destroyed their business and the jobs that went with them.\textsuperscript{157}

\textsuperscript{147} \textit{See} Fisher & Harriger, \textit{supra} note 78, at 588.
\textsuperscript{148} 521 U.S. 507 (1997) (affirming denial of church’s request for a building permit to expand its property in a historic district). In response to this decision, Congress passed “Son of RFRA” [114 STAT 803 (2000)] that offers religious groups protection in land-use disputes, such as the zoning issues involved in \textit{Flores}. \textit{See} Fisher & Harriger, \textit{supra} note 78, at 589.
\textsuperscript{149} Fisher & Harriger, \textit{Id}.
\textsuperscript{150} 546 U.S. 408 (2006).
\textsuperscript{151} Blackford, \textit{supra} note 20, at 97.
\textsuperscript{152} \textit{See supra} note 145.
\textsuperscript{153} 573 U.S. ___ (2014), 134 S. Ct. 2751. The decision has many critics. \textit{See supra} note 3.
\textsuperscript{155} \textit{See} 77 Fed. Reg. 8725 (Feb 15, 2012).
\textsuperscript{156} 724 F.3d at 392.
\textsuperscript{157} \textit{Id}, fn 4. The exemptions encompass "grand-fathered" plans, which are plans that were in existence on March 23, 2010, \textit{see} 45 C.F.R. \$147.140 and "religious employers," \textit{see} 45 C.F.R. \$134.130 (a)(1)(iv)(B). Additionally, the
The controversy arose because although the law exempts “religious organizations” from the contraceptive mandate, it applied to for-profit companies like Hobby Lobby even though they are completely owned by very few individuals. (Religious organizations are usually non-profit 501(c)(3) organizations.) Therefore, the question became do for-profit companies have rights under the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA)? The Circuits had split on the issue, with the 10th Circuit holding they did and the 3rd Circuit ruling they didn’t, with one dissenting Judge agreeing with the 10th Circuit. The Supreme Court answered in the affirmative.

HHS argued that companies could not sue because they are for-profit corporations, and their owners couldn’t sue either because the regulations apply only to the companies. The high Court rejected this argument noting that such a reading of the law would “leave merchants with the difficult choice of giving up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as corporations.” It maintained that RFRA’s text showed that Congress intended the statute to provide very broad protection for religious liberty, never intending to put merchants to such a choice. Congressional drafters employed the familiar legal fiction of including corporations within RFRA’s definition of “persons,” but “the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them,” said the Court.

The Court commented that nothing in RFRA suggested a congressional intent to depart from the Dictionary Act definition of “person,” which “include[s] corporations, . . . as well as individuals,” and noted that it had entertained RFRA and free-exercise claims brought by nonprofit corporations. It rejected that notion that for-profit corporations cannot exercise religion, remarking “The corporate form alone cannot explain it because RFRA indisputably protects nonprofit corporations. And the profit making objective of the corporations cannot explain it because the Court has entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants.” It mentioned that “Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the “exercise of

ACA requirement to provide employer sponsored health insurance to employees is entirely inapplicable to employers that have fewer than 50 employees. See 26 U.S.C. §4980H(a), (c)(2)(A).

159 114 STAT 803 (2000); see supra note 157.
160 723 F.3d 1114 (2013).
161 724 F.3d 377 (2013).
162 See Dissent of Jordan, C.J., 724 F.3d. at 389.
164 Id.
165 Id. citing 1 U. S. C. §1.
166 Id. citing Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U. S. 418 (2006) (after the government seized a shipment of sacramental tea containing a Schedule 1 substance, the Court held that it failed to meet its burden under RFRA that barring the substance served a compelling government interest.)
It also declared that the case of *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, suggested for-profit corporations could exercise religion.

The Court pointed out that the contraceptive mandate required Hobby Lobby owners to engage in conduct that seriously violated their sincere religious belief that life begins at conception, and that if they and their company refused to provide contraceptive coverage, they could face economic consequences of about $475 million annually.

The Justices next addressed HHS’s argument that the connection between what the objecting parties must do and the end that they find to be morally wrong was too attenuated because it is the employee who will choose the coverage and contraceptive method she uses. The high Court replied that

… RFRA’s question is whether the mandate imposes a substantial burden on the objecting parties’ ability to conduct business in accordance with their religious beliefs. The belief of the Hahns [Hobby Lobby owners] …implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable.

The Court stated that its “narrow function . . . is to determine” whether the plaintiffs’ asserted religious belief reflected ‘an honest conviction,’ … and there is no dispute here that it does.

Finally, the Court concluded that although the interest in guaranteeing cost-free access to the challenged contraceptive methods was a compelling governmental interest, the Government had failed to show that the contraceptive mandate is the least restrictive means of furthering that interest. Furthermore, it reasoned the Government had failed to satisfy RFRA’s least restrictive-means standard because HHS had not shown it lacked other means of achieving its desired goal without imposing a substantial burden on the exercise of religion, e.g. the Government could assume the cost of providing the contraceptive coverage objected to by Hobby Lobby.

### G. Lukumi Babalu – Animal Sacrifice as Religious Practice

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168 *Id.* citing Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. at 877. See supra III E.

169 366 U. S. 617 (1961) (holding that a kosher butcher store had to abide by state law preventing them from selling on Sunday because the legislative history of the law was civil, not religious, since it protected the public by guaranteeing one day in seven to provide a period of rest and quiet, thereby promoting the health, peace and good order of society).


171 *Id.*


173 *Id.*

174 *Id.*

175 *Id.*
Up to this point in our review we have examined decisions where religion acted as a shield against governmental action. However, in Church of Lukumi Babalu Aye v. Hialeah religion acted as a sword to invalidate a state edict. The case concerned municipal ordinances directly aimed at prohibiting a particular religious practice the authorities found repugnant and distasteful. It is to this case we now turn.

The Church of the Lukumi Babalu Aye practiced the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries, and are cooked and eaten following all Santeria rituals except healing and death rites. After the church leased land in the city of Hialeah and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, many enactments and resolutions, one of which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices. Other ordinances incorporated Florida's animal cruelty laws and broadly punished "whoever . . . unnecessarily or cruelly . . . kills any animal," and has been interpreted to reach killings for religious reasons; one that defined "sacrifice" as "to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption," and prohibited the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempted "any licensed [food] establishment" if the killing is otherwise permitted by law; another prohibited the sacrifice of animals, and defined "sacrifice" in the same manner as the prior ordinance; yet another defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouses, but included an exemption for "small numbers of hogs and/or cattle" when exempted by state law. The Church filed suit under 42 U.S.C. 1983, alleging violations of their rights under, inter alia, the Free Exercise Clause of the First Amendment. Although acknowledging that the foregoing ordinances are not religiously neutral, the District Court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest, because any more narrow restrictions would be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed.

By a 9-0 vote, the U.S. Supreme Court reversed. It prefaced its ruling with a depiction of the history, background, and tenets of the Santeria religion. The Opinion, delivered principally by Justice Kennedy, began by delivering a rebuke to the Hialeah City Fathers:

177 Id. at 520-21.
178 Id. at 521.
179 Id. at 524-25. Since the Court thought it worthwhile to include such information in its Opinion, it is worth quoting here:

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called orishas, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments. [citations omitted] Id. at 524.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the orishas. The basis of the Santeria religion is the nurture of a personal relation with the orishas, and
Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events, the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.

The Court continues by describing the Santeria religion, the arrival of the Church of Lukumi in Hialeah and their efforts to secure the necessary licenses and permits to operate, the "great concern regarding the possibility of public ritualistic animal sacrifices" expressed by residents, the actions of the City Council in passing numerous resolutions regarding animal sacrifice, and the proceedings in the District Court and Court of Appeals. It presented the general proposition that a law which is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. The Court remarks that neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. Moreover, a law failing to satisfy these requirements must be justified by a compelling governmental interest and narrowly tailored to advance that interest. The Court determines that the ordinances under review fail to satisfy the Smith requirements.

one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament ... it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. [citations omitted] Id. at 524-25.

According to Santeria teaching, the orishas are powerful, but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals. [citations omitted] Id. at 525

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today. [citations omitted] Id.

Id. at 524.
Id. at 527. It must be noted that the city and the courts below never questioned the sincerity of the Church to conduct animal sacrifices for religious reasons. Id. at 531. It is well to remember that animal sacrifices are not unique to the Santeria religion. As Justice Kennedy points out, the Old Testament is replete with animal sacrifices. Id. at 524-25 citing 14 Encyclopaedia Judaica 600, 600-605 (1971). See also THE ENCYCLOPEDIA OF THE JEWISH RELIGION (1965) Edited by R. J. ZWI WERBLOSKY & GEOFFREY WIGODER at 338.

Id. at 526-531. The District Court concluded that compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice" accomplished by the ordinances. Id. at 530 citing 723 F. Supp. 1467, 1487 (SD Fla. 1989). The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph per curiam opinion. Id. citing 936 F.2d 586 (1991).

Id. at 531 citing Employment Division v. Smith, 494 U.S. 872 (1990), supra Section III F.

Id.

Id. at 531-32.

Id. at 532.
After reviewing the record that led to the passage of the many ordinances the city passed once they realized Santeria was going to operate within their borders, the Court concludes that they were passed specifically to target the Church. To quote:

"The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria. Resolution 87-66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and, on this record, it cannot be maintained, that city officials had in mind a religion other than Santeria."

Although the Court concedes that the purpose of the ordinances could be unrelated to religious animosity, for example, the suffering or mistreatment of sacrificed animals and health hazards from improper disposal, it nevertheless decides that their design was to accomplish a "religious gerrymander," an impermissible attempt to target the Santeria religion and their religious practices. Examining a definition of "sacrifice" provided by one of the ordinances, the Justices determine that "the definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter." Deciding not to consider whether differential treatment of two religions is itself an independent constitutional violation, the Court comments that it suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few, if any, killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the orishas [spirits], not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

After reviewing the remaining ordinances and determining that they specifically targeted the Santeria religion, and referencing the public comments directed against it, the Court determines that they were not neutral. To quote:

"In sum, the neutrality inquiry leads to one conclusion: the ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances, by their own terms, target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion."

187 Id. at 534-35.
189 Id. at 536.
190 Id.
191 Id. at 542.
The Court next turns to the second requirement of the Free Exercise Clause, i.e., that laws burdening religious practice must be of general applicability. After finding that the ordinances are underinclusive as regards promoting public health and preventing cruelty to animals,\(^{192}\) it said that:

…each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances have “every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers], but not upon itself.” This precise evil is what the requirement of general applicability is designed to prevent.\(^{193}\)

With the Court finding that Hialeah’s ordinances violated the Free Exercise rights of the adherents of the Santeria religion, they were allowed to practice their faith in the manner they have been doing for many years. One observer maintains that this case is an example of religious persecution\(^{194}\) and believes it, along with \textit{Smith}, is “correctly decided.”\(^{195}\)

IV. THE POWER OF RELIGION

Religion has always been with us. As one writer remarked, “The history of religion is coterminous with the history of mankind.”\(^{196}\) To give the reader a proper understanding of the importance of this concept, it is worthwhile to recall the comments of a respected authority on the subject:

All religions say in one way or another that man does not, and cannot, stand alone. He is vitally related with and even dependant on powers in Nature and Society external to himself. Dimly or clearly, he knows that he is not an independent center of force capable of standing apart from the world.\(^{197}\)

Although belief in God in the higher religions has sometimes led men to think meanly of the world around them, in the faith that they are pilgrims and strangers here on earth, and heaven is their home, this belief is far from typical of men’s religions in general; it is in fact a special sort of belief produced under special conditions. The general attitude is that the relation between man and his world is organic and vital, not accidental and external. If the outer face of Nature is sometimes mistrusted, it is usually in the name of something deeper within that is assigned a higher degree of reality.\(^{198}\)

The power of religion is so strong that it exerted its influence even in primitive societies.\(^{199}\)

No matter how highly one may regard law, it cannot answer questions regarding the ultimate meaning and purpose of our lives. As one observer noted:

\(^{192}\) Id. at 543-45.
\(^{193}\) Id. at 545-46 citing Florida Star v. B.J.F., 491 U.S. 524, 542 (1989).
\(^{194}\) See Blackford, \textit{supra} note 20, at 98.
\(^{195}\) Id. at 99.
\(^{196}\) Reese, \textit{supra} note 13, at 488.
\(^{197}\) JOHN B. NOSS, MAN’S RELIGIONS (3rd ed. 1963) at 2.
\(^{198}\) \textit{Id.}
\(^{199}\) One observer has enumerated the common features of primitive religions: recognition of the sacred; expression of anxiety in ritual; inextricable intermingling of religion and magic; belief in mana (dynamism); animism; veneration and worship of spirits; recognition of high gods; types of magic; divination; taboo; purification rites; sacrifice; mythology; attitudes toward the dead: ancestor worship; and totemism. \textit{Id.} at 14-31.
Social justice, equality, due process of law – and also personal honesty, decency, love of neighbor – enormously desirable as they are, will not necessarily create the mystery and beauty and sense of ultimate purpose without which life is impoverished.\textsuperscript{200}

For most people, only religion can provide meaning to their lives. Furthermore, in American society, law and religion support each other. Very often religion furnishes the moral justification for law.\textsuperscript{201} It has been observed that the Founding Fathers who drafted the First Amendment to the U.S. Constitution\textsuperscript{202} would almost certainly agree that the law could not survive the disappearance of religious faith in America.\textsuperscript{203} One commentator reflecting on this viewpoint has written:

It was partly for that reason (and not only to protect civil liberties) that they forbade the enacting of any law prohibiting the “free exercise” of religion. At the same time, they were concerned lest the government should prefer one set of religious beliefs or practices over another, or, for that matter, religious beliefs over irreligious beliefs, and so, by the clause forbidding any “establishment” of religion, they prohibited government aid to religion – not all kinds of government aid, but those kinds which could be considered an “establishment.”\textsuperscript{204}

Of course, tension exists between law and religion, a tension recognized in our constitutional doctrine of the separation of church and state – a doctrine that protects the religious liberties of minorities while at the same time protecting the political power of the majority.\textsuperscript{205} To be sure, tension is present within law and religion, a tension between their structural and spiritual elements. Within law, the tension between justice and mercy,\textsuperscript{206} between the general rule and its application in the exceptional case; within religion, the tension between ecclesiastical institutions and the freedom of the spirit to move where it pleases.\textsuperscript{207} But it is precisely these tensions that provide the freedom for religion to exercise its influence on our society while at the same time our giving society independence from its influence.

V. CONCLUSION

The cases we have reviewed give us a glimpse into the power of religion in our society. Although we live in a secular world, the impact of religion on our lives cannot be doubted. A healthy community needs the civilizing influence of religion. Otherwise it is in danger of being cast adrift in a sea of ever-changing fads and trends that can only result in a spiritually impoverished citizenry and a government without any direction or purpose. In such an environment, it is only fair to ask how long democracy can endure.

\textsuperscript{200} Berman, \textit{supra} note 1, at 134-35.
\textsuperscript{201} See CHRISTOPHER DAWSON, RELIGION AND CULTURE (1948), cited in Berman, \textit{supra} note 1, at 174, fn. 1.
\textsuperscript{202} The amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Constitution, amend 1.
\textsuperscript{203} Berman, \textit{supra} note 1, at 140.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.} at 136.
\textsuperscript{206} One is reminded of Portia’s famous “The quality of mercy” speech in Shakespeare’s MERCHANT OF VENICE where she advocates tempering justice with mercy. \textit{See} Act IV, Scene 1.
\textsuperscript{207} Berman, \textit{supra} note 1, at 137.