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John M. Kang

ARTICLES

Deliberating the Divine

ON EXTENDING THE JUSTIFICATION FROM TRUTH TO RELIGIOUS EXPRESSION

John M. Kang[†]

The justification from truth represents the most prominent basis of legal support for the right of free speech.[1] President Lee Bollinger at Columbia University, a First Amendment scholar and a former law school dean at the University of Michigan, has stated that the search for truth is

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[†] Assistant Professor of Law, St. Thomas University, Miami (jkang@stu.edu). B.A., University of California, Berkeley; J.D., University of California, Los Angeles; M.A., Ph.D., University of Michigan, Ann Arbor. I would like to thank the following people who have either read the manuscript or discussed some of the ideas therein with me, although none should be understood as necessarily endorsing anything in the Article: Monsignor Andy Anderson, Steve Clark, Lauren Gilbert, Dan Gordon, Brad Joondeph, Jeremy Paul, and Kim Smith. Amanda Bell and Damaris Rosich-Schwartz provided research assistance. Lynn Bridgers, Don Herzog, and Lenora Ledwon helped me with secondary sources, and Scott E. Page kindly gave me access to the galley proofs for his then forthcoming book on diversity and deliberation. I presented a version of this Article at the 2006 meeting of the Association for the Study of Law, Culture and Humanities at Syracuse University. This Article is for Jung Won Kwak, with whom I have argued many times about truth, religious and otherwise.

[1] *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) ("The most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth."). The First Amendment scholar Frederick Schauer has also commented: "Throughout the ages many diverse arguments have been employed to attempt to justify a principle of freedom of speech. Of all these, the predominant and most persevering has been the argument that free speech is particularly valuable because it leads to the discovery of truth." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15 (1982). C. Edwin Baker also writes: "Marketplace notions are not the only strains to be heard in the chorus of Court pronouncements on the first amendment. . . . Nevertheless, the marketplace theory dominates; and its rejection would have major implications for first amendment interpretation." C. Edwin Baker, *Scope of the First Amendment: Freedom of Speech*, 25 UCLA L. REV. 964, 973-74 (1978); *see also infra* notes 2-3 and accompanying text.

the "dominant value" of free speech in our contemporary democracy.[2] He explains:

> In today's discourse about free speech, the dominant value associated with speech is its role in getting at the truth, or the advancement of knowledge. Speech is the means by which people convey information and ideas, by which they communicate viewpoints and propositions and hypotheses, which can then be tested against the speech of others. Through the process of open discussion we find out what we ourselves think and are then able to compare that with what others think on the same issues. The end result of this process, we hope, is that we will arrive at as close an approximation of the truth as we can.[3]

In the passage, the justification from truth appears to be underwritten by a degree of agnosticism or a temporary suspension of belief regarding normative matters, that is, ideas

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[2] LEE C. BOLLINGER, THE TOLERANT SOCIETY 45 (1986).

[3] *Id.* Thomas Emerson explains:

> [F]reedom of expression is an essential process for advancing knowledge and discovering truth. An individual who seeks knowledge and truth must hear all sides of the question, consider all alternatives, test his judgment by exposing it to opposition, and make full use of different minds. Discussion must be kept open no matter how certainly true an accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous. Conversely, the same principle applies no matter how false or pernicious the new opinion appears to be; for the unaccepted opinion may be true or partially true and, even if wholly false, its presentation and open discussion compel a rethinking and retesting of the accepted opinion.

THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785-86 (2d ed. 1988) (discussing the potential for speech to contribute to truth).

Of course, the justification from truth is not without its critics. Stanley Ingber remains skeptical about the basic assumptions inherent in the justification from truth. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 1. His criticisms deserve the kind of careful replies that would take me outside the scope of this Article, although I do address some of the objections. C. Edwin Baker also writes that the "hope that the marketplace leads to truth, or even to the best or most desirable decision, becomes implausible" given that, among other things, the economic and social resources necessary to spread one's ideas are not distributed equally in society. Baker, *supra* note 1, at 974, 978. For more criticisms of the justification from truth, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12-17 (1989); *see also infra* notes 112-125 and accompanying text.

For the moment, however, perhaps it will suffice to say that the justification from truth is the dominant view in the Supreme Court with regard to the right of free speech. Even critics of the justification from truth feel compelled to acknowledge this fact. Professor Baker thus declares that the "marketplace of ideas theory consistently dominates the Supreme Court's discussions of freedom of speech." BAKER, *supra* note 1, at 7 (footnote omitted). In this Article, I work from the premise that the search for truth is the dominant justification for the right of free speech in the Supreme Court, and I examine the ways in which it can be applied to religious expression.

about what is right and wrong.[4] The right of free speech under this justification is not logically tied to any particular substantive outcome of public discourse. The right is, as a formal matter, only committed to a process whereby we "communicate viewpoints and propositions and hypotheses, which can then be tested against the speech of others."[5] Under this justification from truth, we value the right of free speech not principally for the speaker's sake but for that of the audience. For it is the audience that wishes to be exposed to viewpoints and ideas about which they can deliberate.[6]

The justification from truth possesses a majestic and rich history in both Western political theory as well as federal Supreme Court cases, and it has enlisted the considerable powers of figures like John Stuart Mill and Oliver Wendell Holmes, Jr.[7] So attractive has been the justification that it has been conscripted by judges in the areas of political speech,[8] commercial speech,[9] and even pornography.[10] Curiously,

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[4] Similarly, Bollinger has suggested that the toleration demanded of us by the First Amendment requires "a willingness to compromise and a willingness even to accept total defeat. . . . Democracy, like literature, it may be said, requires a kind of suspension of disbelief." BOLLINGER, *supra* note 2, at 117. Frederick Schauer has also stressed the fallibilism of the justification of truth by clarifying that the justification seeks "knowledge," which can be provisional as opposed to "certainty" which cannot. SCHAUER, *supra* note 1, at 16, 18.

[5] BOLLINGER, *supra* note 2. Robert Post offers a similar treatment of public discourse and the First Amendment. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 277-78 (1995). Frederick Schauer also argues that according to the argument from truth, "[o]pen discussion, free exchange of ideas, freedom of enquiry, and freedom to criticize . . . are necessary conditions for the effective functioning of the process of searching for truth." SCHAUER, *supra* note 1, at 15.

[6] Perhaps the most well known presentation of this view in the legal literature comes from Alexander Meiklejohn's justification for free speech in a democracy. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-27 (Kennikat Press 1972) (1948); *see also* OWEN FISS, THE IRONY OF FREE SPEECH 2-3 (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18-20 (1993).

[7] *See infra* Part I.

[8] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (urging a judicial attitude toward political speech that has faith in "the power of reason as applied through public discussion"), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444; Gitlow v. New York 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (advocating that competing political perspectives "should be given their chance and have their way"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (defending political speech on the view that "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

[9] *See* Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 95 (1977) (rejecting a prohibition on commercial speech that tries to achieve "its goal by restricting the free flow of truthful information"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976) (justifying commercial speech on

however, it has made relatively little ingress into the area of religious expression, as the subject of either the Court's jurisprudence[11] or the scholarly literature.[12] I believe that the

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the premise that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them").

[10] *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331 (7th Cir. 1985) (arguing that the government should permit a diversity of viewpoints about pornography and that "the government may not restrict speech on the ground that in a free exchange truth is not yet dominant").

[11] The Court has offered a glimmer of what an extension of the justification from truth to religious expression might look like. Justice Roberts for the Court in *Cantwell v. Connecticut* provided just two sentences:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

310 U.S. 296, 310 (1940). So, too, Justice Black wrote only brief remarks alluding to the justification from truth in his majority opinion in *Marsh v. Alabama*, 326 U.S. 501 (1946), in which he rejected a company town's efforts to preclude Jehovah's Witnesses from entering the town and distributing leaflets to the company workers: "To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored." *Id.* at 508. For further discussion of *Marsh*, see *infra* notes 286-294 and accompanying text.

The Supreme Court has traditionally framed the right of religious expression in terms of whether a government statute violates a person's right to religious conscience or belief. *See* Lee v. Weisman, 505 U.S. 577, 597 (1992) (rejecting a state-sanctioned religious exercise "in which the student was left with no alternative but to submit"); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488; Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (The "[c]ourt has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15-16 (1947) (arguing that neither the state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another"); United States v. Ballard 322 U.S. 78, 86 (1944) (citation omitted) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It 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."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion . . . ."); *Cantwell*, 310 U.S. at 303 ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."); Watson v. Jones, 80 U.S. 679, 728 (1871) ("In this country the full and free right to entertain any religious belief, to practice any

religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.").

Law professors have also commented on the view that the Supreme Court's religion clauses are used to protect the right of religious belief and conscience. Laurence Tribe explains:

> Allocating religious choices to the unfettered consciences of individuals under the free exercise clause remains, in part, a means of assuring that church and state do not unite to create the many dangers and divisions often implicit in such an established union. Similarly, forbidding the excessive identification of church and state through the establishment clause remains, in part, a means of assuring that government does not excessively intrude upon religious liberty. Thus the Supreme Court has frequently recognized that "the two clauses may overlap."

TRIBE, *supra* note 3, at 1156-57 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)); *see also* DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 128-33, 141-49 (1986) (arguing that the Supreme Court's interpretation of the religion clauses reflect a Western tradition of protecting the right to conscience); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1643 (1989) ("The core value of the religion clauses is liberty of conscience in religious matters, an ideal which recurs throughout American history from the colonial period of Roger Williams to the early national period of the Founders."); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 676-77 (2002) ("For the Framers, the [Establishment] Clause was understood to protect religious conscience, and so the answer was straightforward: religion deserved special protection from alliance with government because, more than other forms of action or belief, religion required free choice to be meaningful." (footnote omitted)); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398 (2002) ("In the time between the proposal of the Constitution and of the Bill of Rights, the predominant, not to say exclusive, argument against established churches was that they had the potential to violate liberty of conscience."); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 492 (2006) ("Whatever may be true about the Establishment Clause, the Free Exercise Clause seemed a natural way to protect liberty of religious conscience."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1480-99, 1511-13 (1990) (arguing that the original understanding of the free exercise clause was based exclusively on the right of religionists to be faithful to their consciences); Jay Alan Sekulow, James Matthew Henderson, Sr., & Kevin E. Broyles, *Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351, 387 (1995) ("Under the equality understanding, the Establishment Clause protects every citizen's right to make voluntary choices regarding religion by forbidding the government from using its power to join the marketplace of ideas on the side of any belief, regardless of whether it favors or disfavors religion."); Rodney K. Smith & Patrick A. Shea, *Religion and the Press: Keeping First Amendment Values in Balance*, 2002 UTAH L. REV. 177, 202 ("The Establishment Clause limitation protects against a particular religion or group of religions commandeering the state in a manner that infringes on the liberty of conscience of others" and the "free exercise limitation, in turn, protects the right to act upon one's religious conscience unless, in the words of James Madison, 'the preservation of equal liberty, and the existence of the State be manifestly endangered.'").

[12] Professor William P. Marshall has offered a suggestive but underdeveloped and at times problematic argument for applying the justification from truth to religious expression. William P. Marshall, *Truth and the Religion Clauses* 43 DEPAUL L. REV. 243, 244, 255-60 (1994). In this Article, I will sometimes explicitly mention our

justification from truth, given its heuristic power, deserves to be applied to religious expression, and I try to offer a robust account of what that would look like.[13] In Part I, I distinguish what I call the minimalist and deliberative approaches of the justification from truth. The former, I argue, lacks the insistence on deliberation over a diversity of viewpoints that defines the latter. For this reason, I recommend the application of the deliberative version to religious expression. I clarify in Part II what challenges, if any, religious expression might present for the justification from truth given that the justification has been generally applied to secular speech. In Part III, I urge the merits of applying the deliberative version of the justification from truth by enlisting examples from religious conversion.

I begin in Part IV the needful work of explaining how the Supreme Court has provided a long line of case law that can be conscripted to bolster my efforts to extend the justification from truth to discourses pertaining to religion. The Court has applied the justification from truth to political speech and commercial speech based partly on the assumption that politics and commerce are such important subjects that the audience deserves access to a diversity of viewpoints and ideas. So, too, the Court has also concluded, as I show in Part IV, that religion is at least as important as politics and commerce, a conclusion that has provided a path for me to extend the justification from truth to religion. I explain in Part V that the religion clauses, as interpreted by the Court, forbid the state from invading the privacy necessary for individuals to weigh competing religious perspectives, and, accordingly, the Court has afforded the legal means by which people may, without undue interference from the state, deliberate about a diversity of viewpoints and ideas about religion. In Part VI, I apply the justification from truth to a set of test cases to demonstrate how it can be used: cases involving proselytism, unemployment benefits, the flag salute, religious

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differences; other times I will simply offer, for efficiency's sake, my own competing argument without referencing his. For instance, he does not differentiate between the two versions of the justification from truth. I consider the distinction crucial and explain why, albeit with only a passing reference to the fact that he makes no such distinction. *See infra* Part I. For an example of where I explicitly address our differences, see *infra* Part VI.C.1.

[13] This does not mean that I necessarily seek to preempt other justifications for religious speech. My chief aim is to describe in detail one plausible justification for it which has been given relatively little attention.

fundamentalism, and the teaching of creation science. I conclude in Part VII.

Before I begin making a case for applying the justification from truth to religious expression, I should more fully define the justification. I can begin by borrowing from Professor Frederick Schauer's definition of the justification from truth:

> Throughout the ages many diverse arguments have been employed to attempt to justify a principle of freedom of speech. Of all these, the predominant and most persevering has been the argument that free speech is particularly valuable because it leads to the discovery of truth. Open discussion, free exchange of ideas, freedom of enquiry, and freedom to criticize, so the argument goes, are necessary conditions for the effective functioning of the process of searching for truth. Without this freedom we are said to be destined to stumble blindly between truth and falsehood. With it we can identify truth and reject falsity in any area of human enquiry.[14]

This account of the justification from truth is a standard one and is relatively uncontroversial as far as the faithfulness of its description. But there is disagreement about what qualifies as truth and what are the expectations for free speech to help the audience arrive at it.

This disagreement has organized itself in the Supreme Court's jurisprudence around two dominant approaches to the justification from truth: the minimalist approach and the deliberative approach. I will explain both approaches in the next section.

I. DELIBERATION IS AT THE CORE OF THE JUSTIFICATION

In this section, I will summarize and assess what I call the Supreme Court's minimalist and deliberative approaches to secular free speech, and then I will argue in Section III that the latter approach is more likely to help us arrive at better conclusions about religious truth. The minimalist approach does not assume that deliberation over competing viewpoints is necessary or perhaps even useful for arriving at the truth. By contrast, the deliberative approach, as its name suggests, values such deliberation.

The history of the justification from truth in the United States Supreme Court finds its initial form in the minimalist approach and the topic of its consideration in political speech.

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[14] SCHAUER, *supra* note 1, at 15.

And the minimalist approach, like other significant modes of thought in American jurisprudence, begins for the Court with the towering authority of Oliver Wendell Holmes, Jr. Representative is his dissent in *Gitlow v. New York*.[15] Gitlow was, in the words of the Supreme Court, "a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of 'moderate Socialism.'"[16] The lower court convicted him of "advocacy of criminal anarchy," a decision upheld by the Supreme Court, which found that Gitlow's speech posed a "clear and present danger" that could be lawfully prohibited.[17] Dissenting, Holmes first summarized the position of Justice Sanford who wrote the majority opinion: "It is said that this manifesto was more than a theory, that it was an incitement."[18] But according to Holmes, Sanford's description was unduly expansive because "[e]very idea is an incitement."[19] Every idea, he announced, "offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[20] And Holmes wrote that the "only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason."[21]

These remarks probably appear to afford great protection for free speech, but the logic of Holmes's opinion, when carefully considered, presents a troubling upshot. While Holmes felt that the subversive speech in this case "had no chance of starting a present conflagration," he nonetheless asserted that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[22] Notice the breezy, if indifferent, attitude of the statement. According to Holmes, the "only meaning of free speech" is that people be permitted to hear a particular perspective, not that they mull over it or compare it with other

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[15] 268 U.S. 652 (1925).
[16] *Id.* at 655.
[17] *Id.* at 654, 671-72.
[18] *Id.* at 673.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 673.

options.[23] On offer by Holmes is a formulation of the justification from truth that does not insist on the usefulness of deliberation and, accordingly, it also does not insist on a diversity of viewpoints, for deliberation is the "consideration and discussion of the reasons for and against a measure by a number of councilors."[24] Holmes's version of the justification from truth is perfectly willing to ascribe political legitimacy to a superficial conclusion derived from glossing over a set of numbingly similar ideas and viewpoints.[25]

While the justification from truth, on Holmes's account, need not logically require deliberation, conclusions that are drawn without the benefit of seriously weighing competing arguments are potentially unsound because they have failed to withstand meaningful scrutiny. The nineteenth-century

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[23] *Gitlow*, 268 U.S. at 673; *see also* SUNSTEIN, *supra* note 6, at 26 ("In all his writings on free speech, Holmes pays little attention to the appropriate conditions under which free trade in ideas will ensure truth, a gap that is probably attributable to his skepticism about whether truth, as an independent value, is at issue at all."). Some scholars have ascribed Holmes's experience in the Civil War to his seeming apathy or skepticism concerning the existence of objective truths. *See* BOLLINGER, *supra* note 2, at 162 (arguing that Holmes's contempt for intolerant men is "in part the product of Holmes's experience as a soldier in the Civil War—that belief is a straight road to killing one another").

[24] 4 OXFORD ENGLISH DICTIONARY 414 (J. A. Simpson & E. S. C. Weiner eds., 1989).

[25] Some scholars have awkwardly associated Holmes with the philosophers John Stuart Mill and John Milton in that all three are said to be dedicated to the justification from truth. Stanley Ingber, for example, writes:

> Scholars and jurists frequently have used the image of a "marketplace of ideas" to explain and justify the first amendment freedoms of speech and press. Although this classic image of competing ideas and robust debate dates back to English philosophers John Milton and John Stuart Mill, Justice Holmes first introduced the concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*.

Ingber, *supra* note 3, at 2-3 (footnotes omitted). Similarly, William Marshall explains:

> According to seminal case law interpreting the Speech Clause, freedom of expression promotes truth by fostering a "marketplace of ideas" which enables truth to ultimately prevail over falsity. The source of this theory is traditionally thought to be a famous passage from John Milton's work *Areopagitica*. . . . The source of the truth rationale in First Amendment doctrine in turn may be found in Justice Oliver Wendell Holmes's classic dissent in *Abrams v. United States* . . . .

Marshall, *supra* note 12, at 256-57 (footnotes omitted). These associations between Holmes, on the one hand, and Milton and Mill, on the other, can be somewhat misleading. For Milton and Mill offered a distinctly different version of the justification from truth than the one announced by Holmes. Specifically, the former emphasized the need for deliberation over a diversity of viewpoints whereas the latter two did not. *See infra* note 27 and accompanying text (discussing Mill); *see also infra* Part III.B.1 (discussing Milton).

English philosopher John Stuart Mill is helpful on this score.[26] Mill offered four arguments for why a diversity of ideas and viewpoints is essential for arriving at close, albeit provisional, approximations of the truth:

> First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Second, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Third, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.[27]

In proffering these arguments, Mill does not suggest that a diversity of views will necessarily lead to truth but that a paucity of them will almost surely doom us to half-truths and ignorance.

While Holmes's minimalist approach to the justification from truth is absent Mill's insights, the emphasis on deliberation over a diversity of viewpoints does find root in a different version of the justification from truth, what I call the deliberative approach. This approach tries to use the law to foster and protect a diversity of viewpoints, and it expects people to deliberate about them to arrive at better conclusions about truth.

While he is certainly not the only person in history to have advocated the deliberative approach, Justice Louis Brandeis, Holmes's good friend and frequent interlocutor, is

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[26] The Supreme Court justices have sometimes explicitly invoked Mill as authority for their use of the justification from truth. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); Holder v. Hall, 512 U.S. 874, 900 (1994); Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 189 (1973) (Brennan J., dissenting); Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 392 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 272, 279 (1964); Poe v. Ullman, 367 U.S. 497, 514-15 (1961) (Douglas, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 151 (1959) (Black, J., dissenting); Jordan v. De George, 341 U.S. 223, 241 (1951).

[27] JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 53-54 (Stefan Collini ed., Cambridge Univ. Press 1995) (1859).

one of the first on the Supreme Court to do so.[28] Brandeis joined some of Holmes's memorable First Amendment opinions and vice versa,[29] but the former advanced a decidedly different justification from truth. Most importantly, while Holmes had advocated a marketplace of ideas where consumers act, and perhaps act impulsively, on their varied and subjective preferences, Brandeis envisions a world where free speech can theoretically enlighten civil society. The difference between Holmes and Brandeis is most evident in the latter's concurrence in *Whitney v. California*.[30] Brandeis wrote, "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary."[31] Implicit here is the aspiration that people will bring to bear their deliberative faculties to adduce the truth. By contrast, Holmes had remarked in *Abrams v. United States* that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[32] Missing in this formulation of the justification from truth is the insistence that people deliberate about an issue at any length.[33] Read straightforwardly, the only thing that Holmes's position requires is that the idea "get itself accepted in the competition of the market," even if the idea commends its merits through little more than cheap emotional pleas and a busy swirl of sound bites. Furthermore, Holmes does not define what constitutes a properly functioning market or even that he requires the market to be functioning

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[28] For considerably earlier intimations of the deliberative approach in a religious setting, see John Milton's work discussed *infra* Part III.B.1.

[29] *E.g.*, Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

[30] 274 U.S. 357, 372 (1927) (Brandeis & Holmes, JJ., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[31] *Id.* at 375.

[32] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[33] Cass Sunstein makes the following remarks about Holmes's account of the justification from truth:

> Truth itself is defined by reference to what emerges through "free trade in ideas." For Holmes, it seems to have no deeper status. The competition of the market is the governing conception of free speech. On his view, politics itself is a market, like any other. Holmes does not appear to place any special premium on political discussion.

SUNSTEIN, *supra* note 6, at 25.

properly.[34] He thus fails to explain if the justification from truth can, for example, reduce the volume of speech by financially powerful groups that can drown out their competitors' voices, or if the state may limit a parade of salacious gossip about celebrities' lives in favor of more substantial information about the countless pressing issues in politics and social welfare.

Unlike Holmes, Brandeis justifies free speech as a way to help people arrive not simply at any conclusion about truth, but at a more deliberative, more informed—and hence presumably better—conclusion. His attitude is encapsulated in these statements: "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[35] Accordingly, Brandeis writes that "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."[36] So too: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[37] The references to "full discussion" and "more speech" would seem to suggest the importance of a diversity of viewpoints in the search for truth whereby "the deliberative forces should prevail over the arbitrary."[38]

The landmark case of *New York Times v. Sullivan*[39] captures the spirit of the deliberative approach. In that case, the *Times* had run an advertisement declaring that peaceful

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[34] Sunstein writes: "In all his writings on free speech, Holmes pays little attention to the appropriate conditions under which free trade in ideas will ensure truth, a gap that is probably attributable to his skepticism about whether truth, as an independent value, is at issue at all." *Id.*

[35] *Whitney*, 274 U.S. at 376. For useful discussions of the Brandeis opinion, see generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988) and JOHN RAWLS, POLITICAL LIBERALISM 351-56 (1993). Justice Frankfurter subsequently announced a similar observation:

> The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge.

Dennis v. United States, 341 U.S. 494, 550 (1951).

[36] *Whitney*, 274 U.S. at 377.

[37] *Id.*

[38] *Id.* at 375.

[39] 376 U.S. 254 (1964).

efforts at civil rights reform in Montgomery, Alabama and elsewhere were being met "by an unprecedented wave of terror by those who would deny and negate [the Constitution]."[40] The advertisement did not mention who specifically was responsible for such terror, but one L. B. Sullivan, a city official responsible for the Montgomery police, argued that he was falsely depicted and sued the *Times* for libel. An Alabama jury awarded what was then an exorbitant sum for libel in the amount of $500,000.[41] The Alabama Supreme Court affirmed.[42] The United States Supreme Court reversed the Alabama Supreme Court in one of its most important First Amendment decisions. Justice Brennan for the Court held that a public official like Sullivan was subject to an "actual malice" standard, whereby he could recover damages for libel only if he could show that the defendant had made a false statement regarding the public official acting within his official capacity and that the statement had been made "with knowledge that it was false or with reckless disregard of whether it was false or not."[43] Merely publicizing some factual inaccuracy was thus insufficient to establish liability, and even doing so "negligently" (that is, below the standard of responsibility for a reasonable person) was not enough.[44] While the Court thus made public officials remarkably vulnerable in the realm of public discourse, it did so in order to ensure that "public issues should be uninhibited, robust, and wide-open, and that [public discourse] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[45] The diversity of

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[40] *Id.* at 256.

[41] *Id.*

[42] N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 52 (1962), *rev'd*, 376 U.S. 254 (1964).

[43] *Sullivan*, 376 U.S. at 280.

[44] *Id.* at 262. The Court clarified this aspect in *St. Amant v. Thompson*:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. 727, 731 (1968).

[45] *Sullivan*, 376 U.S. at 270; *see also* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18-20 (1965) (relating the argument that the First Amendment right of free speech is grounded in the people's right of access to competing perspectives for purposes of deliberation about self-government).

viewpoints and ideas that the Court expected to be generated by the protectiveness of the *New York Times* rule would presumably help the audience arrive at better conclusions about the truth.

A similar logic animates *Red Lion Broadcasting Co. v. FCC*.[46] In *Red Lion*, a radio station had personally attacked a writer, calling him a liar and a communist.[47] The writer sought a right of reply under the personal attack rule of the FCC's Fairness Doctrine.[48] In turn, the radio station argued that the right of reply violated the First Amendment because it impermissibly coerced the station to give air time to those whom the station had refused.[49] Justice White for the Court upheld the personal attack rule because it was necessary for people in a democracy to hear different sides of an issue. He wrote that the

> people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately

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[46] 395 U.S. 367 (1969). Owen Fiss has commented on the connection between *Sullivan* and *Red Lion*:

> *Sullivan* sought to enhance the capacity of the press to report widely and fully on matters of public importance by shielding the press from a form of state action—libel judgments—that might otherwise discourage such reporting. The Fairness Doctrine [as construed by *Red Lion*] also sought to broaden the coverage of the press, to make certain that the all-powerful broadcast medium covered issues of public importance and gave listeners or viewers all sides of the story. In upholding that doctrine and the power of the FCC to regulate the press for the purpose of broadening public debate, *Red Lion* affirmed the very same values proclaimed by *Sullivan*.

FISS, *supra* note 6, at 58.

[47] *Red Lion*, 395 U.S. at 371-72.

[48] The rule states:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

Id. at 373-74 (quoting 47 C.F.R. § 73.1920(a) (1996)).

[49] *Id.* at 386.

> prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.[50]

The dedication to maintaining a marketplace of ideas helps to justify the Court's familiar prohibition against viewpoint discrimination and, to a lesser degree, content discrimination. To quote the Court, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[51] The Court would therefore prohibit the government from permitting speakers to criticize the Republican Party but not the Democratic party, for this would amount to discrimination against a person's political viewpoint. In fact, the Court would also probably prohibit the government from punishing any discussion of politics because the government would be punishing people for the content of their speech. As the Court explains, "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[52]

But the justification from truth in its deliberative form is not exclusive to political speech. It also applies to commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[53] established the Court's recognition that commercial speech deserves First Amendment protection. The case relies on the principle that consumers should have access to diverse information that will help them arrive at better conclusions about truth. Virginia's legislature had passed a statute that restricted pharmacists from advertising or publishing, inter alia, the prices of the drugs that they sold.[54] A group of consumers challenged the statute as violating their First Amendment right to receive information about drug prices, especially given that drug prices in Virginia, "for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality."[55] Justice Blackmun for the Court struck down the statute as unconstitutional. He offered the following justification:

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[50] *Id.* at 390.

[51] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

[52] *Id.* at 96 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)).

[53] 425 U.S. 748 (1976).

[54] *See* VA. CODE ANN. § 54-524.35 (1974).

[55] *Va. State Bd. of Pharmacy*, 425 U.S. at 754.

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.[56]

To this pressing interest by drug consumers, Blackmun added a more general reason:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.[57]

Of course, the state may sometimes regulate commercial speech to ensure the safety of the consumers, but Blackmun explained that in this instance the statute was "highly paternalistic."[58] Here, he concluded, we should assume that the information "is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[59] Phrased more directly in terms of the deliberative approach, Blackmun's justification for protecting commercial speech presupposes that consumers are likely to make better decisions if they have access to competing advertisements.

Blackmun's opinion, like the opinions of the other justices that I examined, turns on cases in which the First Amendment's right of free speech is front and center. But the justification in its deliberative form is present elsewhere, too, and a most conspicuous place is the Court's college and

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[56] *Id.* at 763.

[57] *Id.* at 765 (citations omitted).

[58] *Id.* at 770.

[59] *Id.*

university affirmative action cases. While the Supreme Court in these cases focused mostly on the Fourteenth Amendment's Equal Protection Clause rather than the First Amendment's right of free speech, what deserves attention is that the Court's support of affirmative action in this context is premised on creating conditions that will be favorable for the exchange and deliberation of diverse ideas and viewpoints.

This thesis was first offered in Justice Powell's plurality opinion in *Regents of University of California v. Bakke*.[60] In that case, the University of California, Davis Medical School reserved a number of admissions seats for those candidates who belonged to certain racial groups.[61] Justice Powell rejected this policy as violating the Fourteenth Amendment's Equal Protection Clause.[62] He subjected the quota policy to strict scrutiny because it contained a suspect classification in race.[63] Under strict scrutiny, the medical school was required to show that there existed a compelling government interest for its policy and that the policy's means were necessary.[64] After rejecting three of the four justifications presented by the medical school as failing to demonstrate a compelling government interest for the racial quota, Powell accepted as a compelling government interest the university's goal of furthering a diversity of viewpoints on its campus. He wrote:

> The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.[65]

Powell elaborated on this point:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional

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[60] 438 U.S. 265, 312 (1978) (Powell, J., concurring).

[61] *Id.* at 289.

[62] *Id.* at 309-10 (Powell, J., concurring).

[63] "We have held that in 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" *Id.* at 305 (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1973) (footnotes omitted)).

[64] *Id.*

[65] *Id.* at 311-12.

> interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.[66]

To explain how this exchange of ideas might occur, Justice Powell quoted from an article by President William Bowen of Princeton University:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, "People do not learn very much when they are surrounded only by the likes of themselves."[67]

One finds in this passage a reiteration of the justification from truth. For the diversity of viewpoints helps students "to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world."[68]

In the subsequent cases of *Grutter v. Bollinger*[69] and *Gratz v. Bollinger*,[70] the Court reaffirmed Justice Powell's signal

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[66] *Id.* at 313.

[67] *Id.* at 312 (quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Wkly., Sept. 26, 1977, at 9); *see also* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"). For a similar treatment, see the Court's opinion in *Sweezy v. New Hampshire*:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. 234, 250 (1957).

[68] *Bakke*, 438 U.S. at 313 n.48 (Powell, J., concurring).

[69] Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

[70] Gratz v. Bollinger, 539 U.S. 244, 271 (2003).

appreciation for the value of promoting a diversity of viewpoints in colleges and universities. *Grutter* involved a challenge to the admissions policy of the University of Michigan Law School, which took race into consideration, and *Gratz* involved a similar challenge to the admissions policy of Michigan's College of Letters, Science, and the Arts, which also accepted racial minority status as a positive factor, albeit, to the Court's chagrin, much more heavily than did the law school.[71] While the Court upheld the law school's policy and rejected the college's policy, it endorsed in both cases Powell's aspiration to create a diversity of viewpoints in colleges and universities. In *Gratz*, the Court rejected the admissions policy of the College of Letters, Science, and the Arts because, in the Court's view, instead of trying to promote a diversity of viewpoints, it was an obvious attempt at social engineering by giving disproportionate advantages to members of certain racial groups.[72] In *Grutter*, the Court stated that it "endorses Justice Powell's view that student body diversity is a compelling state interest in the context of university admissions."[73] In fact, there was a sustained concurrence by Justice O'Connor that built upon Powell's reasoning. She wrote:

> [T]he Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes. The Law School's claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people,

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[71] *Id.* at 253-54; *Grutter*, 539 U.S. at 314-17.

[72] Chief Justice Rehnquist, writing for the majority, explained:

> Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. . . . Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African-American, and student C would receive up to 5 points for his "extraordinary talent."

Gratz, 539 U.S. at 273 (citation and footnote omitted).

[73] *Grutter*, 539 U.S. at 307.

> cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.[74]

As the passage suggests, *Grutter*, along with most of the other cases that I have examined, stands for the proposition that a diversity of viewpoints and ideas is more likely than their paucity to lead to truth. The cases suggest, then, that the deliberative approach is more likely than the minimalist approach to help the audience arrive at better conclusions about the truth.

But all of the cases that I have examined thus far concerned secular speech. The question remains: Is the deliberative approach a better alternative than the minimalist approach in helping people to make more justifiable conclusions about *religious* truth? I make the case that it is in Parts II and III.

II. COMPARING SECULAR AND RELIGIOUS SPEECH

Before I directly discuss whether a diversity of viewpoints and ideas concerning religion can lead to more justifiable conclusions about religious truth, I will first offer what I think are easier examples outside of religion. Using these easier examples, I will explain later what is potentially different about religion, and thus, what adjustments, if any, should be made in applying to religion the deliberative version of the justification from truth.

The work of political scientist Scott Page is a good place to begin to think about how a diversity of viewpoints and ideas can help people to arrive at better conclusions about some truth.[75] Page argues that we should imagine different viewpoints and ideas as "tools" by which we can arrive at better approximations about the truth.[76] He suggests that we are more likely to arrive at accurate conclusions if we possess a

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[74] *Id.* at 308 (O'Connor, J., concurring).

[75] *See generally* SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007).

[76] Page calls his argument the "diversity conjecture" and holds that "diversity leads to better outcomes." *Id.* at 4.

diversity of mental tools with which we can examine an issue.[77] Among the tools are "diverse perspectives" that are "ways of representing situations and problems."[78] "Informally speaking, perspectives represent solutions to a problem. When we say that people have diverse perspectives, we mean that they see or envision the set of possibilities differently."[79]

As an example, Page uses directions to the venerable Zingerman's Delicatessen in Ann Arbor, Michigan:

> Isabelle, an Ann Arbor resident, might represent a location relative to her home—"To get to Zingerman's, go down State Street and take a left in front of the big Catholic Church." Her brother, Nicky, might represent those same locations using a mental map of city streets—"Zingerman's sits on the corner of Kingsley and Detroit." Given their perspectives, Nicky would prove far more capable of telling a visitor how to get from Zingerman's to the Brown Jug, another Ann Arbor landmark.[80]

We can embellish this example. Elise, a graphic artist, might believe that Zingerman's is a little difficult to spot without a good illustration and so may draw the orange façade of the building that houses it. Or, Samson, who is blind, might tell you that when his roommate drives him there, Samson knows that he is getting close to Zingerman's because about five hundred feet from the deli, the smooth asphalt suddenly changes to a bumpy brick road with a couple of small potholes. These examples are not meant to imply that one perspective is better than another, but to suggest that someone looking for directions to Zingerman's is likely to find a diversity of perspectives to be more useful than just one.[81] And notice how one perspective builds on another: Isabelle's perspective would get you started on State Street and past the big Catholic Church; then Nicky's would help you to locate Kingsley Street; then as you keep going on Kingsley, you notice that Samson was right and that the asphalt has changed to an uneven brick road; and then you notice near Detroit Street the only orange brick building. And there you are at Zingerman's.

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[77] *Id.* at 9-11.

[78] *Id.* at 7.

[79] *Id.*

[80] *Id.*

[81] This is probably why Google and Yahoo print out driving directions that contain both maps and written directions. http://maps.google.com/maps and http://maps.yahoo.com/index.php (both last visited Feb. 23, 2007).

But different perspectives can help us with more than driving directions. They can help us with something as formalistic as math, too. Professor Page offers this example from an IQ test[82]:

> In each sequence, replace the X with the unique number that makes the sequence logically consistent.
>
> *Sequence 1*: 1 4 9 16 X 36
>
> *Sequence 2*: 1 2 3 5 X 13
>
> *Sequence 3*: 1 2 6 X 1,806

The first sequence is a sequence of squares.[83] "The square of 1 equals 1, the square of 2 equals 4, and so on. The missing number is 25."[84] But the perspective in Sequence 1—the sequence of squares—cannot help us with Sequence 2. That requires a different perspective:

> The perspective that makes sense of this sequence is to recognize each number as the difference of the two that follow it. The first number equals the third number minus the second (1 = 3 – 2), the second number equals the fourth minus the third (2 = 5 – 3), and so on. It follows that the fifth should be such that it minus the fourth number, 5, equals the third number, 3. Therefore, the missing number is 8.[85]

Sequence 3 is much harder than Sequences 1 and 2: How is it possible to go from the small numbers of 1, 2, and 6 and then jump suddenly to the large number of 1,806? Page responds, "We can find the answer by combining the perspectives developed to solve the first two sequences."[86] To wit:

> First, apply the perspective used in the second sequence: Look at the differences between numbers. The difference between the first two numbers equals 1 (2 – 1 = 1). The difference between the second two numbers is 4 (6 – 2 = 4). This suggests a pattern. That pattern is the perspective used to solve the first sequence: squares. Each number differs from the number after it by an amount equal to its square $1 = 2 - 1^2$, and $2 = 6 - 2^2$. This idea seems cute, but it doesn't seem as though it will get us to 1,806. And yet it does. Using this rule, the next number would be 42, $6 = 42 - 6^2$, and the number after 42 would be (guess what) 1,806: $42 = 1{,}806 - 42^2$ ($42^2 = 1{,}764$).

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[82] PAGE, *supra* note 75, at 42.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 43.

> Combining our two perspectives, we can make sense of the third sequence.[87]

There are more examples of times when a diversity of perspectives helped people to better discern the truth. During World War II, Britain vexed over how to crack the Nazi's secret code by which, among other things, German submarines were communicating with each other to track and destroy Ally supply ships.[88] Realizing that a team of expert cryptographers was inadequate to solve the code, the British government sought to exploit what Page has called the diversity of perspectives.[89] It assembled a motley group in Bletchley Park:

> Many of the people brought to Bletchley Park—Brits, Americans, Poles, Aussies—had training we might think appropriate for code breaking. These included mathematicians . . . , engineers, and cryptographers. But other people working in secrecy in the James Bond-like trappings of Room 40 and Hut 8 had been trained as language experts, moral philosophers, classicists, ancient historians, and even crossword puzzle experts.[90]

The end result was that the diverse lot twice cracked the Nazi code.[91]

In private industry, there is the example of InnoCentive.[92] In 2001, Alpheus Bingham, the vice president of Eli Lilly, created a website called InnoCentive where large pharmaceutical companies could post problems for anyone, not just scientists who specialize in drugs, to solve for a monetary reward.[93] "Solvers included dentists from the Far East and physicists from the Midwest."[94] By 2005, "more than eighty thousand solvers had registered[,]"[95] hailing "from more than 170 countries and span[ning] the scientific disciplines."[96] These nonexperts solved nearly one-third of the problems,[97] an impressive number considering that their services were typically sought by "a company like Proctor and Gamble, which

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87 *Id.*
88 *Id.* at 3.
89 *Id.*
90 *Id.*
91 *Id.* at 4.
92 *Id.* at 1.
93 *Id.*
94 *Id.*
95 *Id.* at 2.
96 *Id.*
97 *Id.*

has nine thousand people as its R&D staff and spend nearly two billion dollars a year on research and development."[98]

Similarly, the discovery of the structure of DNA was achieved by an unlikely team whose members held perspectives that differed sharply from each other's and from those of others deemed experts in the field. Francis Crick and James Watson would eventually win the Nobel Prize for their discovery, but their intellectual backgrounds would not have suggested they would.[99] For Crick's training did not focus solely on biology but also on physics and chemistry; perhaps because of his diverse interests, he had never earned a Ph.D.[100] Watson did have a Ph.D., but it was in zoology with an emphasis on the study of birds.[101] These unorthodox backgrounds were not debilitating to their research and in fact "[h]istorians of science assign credit to . . . their diverse skills."[102]

Such stories of diverse perspectives are telling, but are the lessons gleaned from them useful for my topic of religious truth? I believe they are, but I should now explain their limitations and thus begin to outline how a diversity of viewpoints and ideas should be properly understood in the context of religious truth.

All of the examples from Page that I have used involve people trying to solve puzzles which admit of answers that are formally logical, as in the mathematical sequence and the cracking of the Nazi code, or they are empirically testable, as in the InnoCentive website and the directions to Zingerman's. But questions about a truth concerning religion are not generally amenable to formal logic or empiricism. This is so for at least two reasons. First, religion deals with questions of moral value, whereas all of the examples that I have borrowed from Page deal with questions of fact.[103]

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98 PAGE, *supra* note 75, at 2.

99 *Id.* at 29.

100 *Id.*

101 *Id.*

102 *Id.*

103 The zoologist Stephen Jay Gould explains:

> I do not see how science and religion could be unified, or even synthesized, under any common scheme of explanation or analysis; but I also do not understand why the two enterprises should experience any conflict. Science tries to document the factual character of the natural world, and to develop theories that coordinate and explain these facts. Religion, on the other hand, operates in the equally important, but utterly different, realm of human purposes, meanings, and values—subjects that the factual domain of science might illuminate, but can never resolve. Similarly, while scientists must

Second, religion tends to rest on faith in the existence of a Higher Being or Beings whose very definition resists and transcends the properties of formal logic and empirical reality.[104] So Charles Darwin wrote six months after his *Origin of Species*[105] and after the death of his beloved daughter:

> There seems to me too much misery in the world . . . . On the other hand, I cannot anyhow be contented to view this wonderful universe, and especially the nature of man, and to conclude that everything is the result of brute force. I am inclined to look at everything as resulting from designed laws, with the details, whether good or bad, left to the working out of what we may call chance. Not that this notion at all satisfies me. I feel most deeply that the whole subject is

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> operate with ethical principles, some specific to their practice, the validity of these principles can never be inferred from the factual discoveries of science.

STEPHEN JAY GOULD, ROCKS OF AGES: SCIENCE AND RELIGION IN THE FULLNESS OF LIFE 4-5 (1999). On the other end of the spectrum from Gould is the self-styled agnostic Keith Ward, an ordained minister of the Church of England as well as a theology professor at Oxford. Yet the latter's remarks are largely consistent with the former's:

> Modern science begins with the ejection of purpose, value and significance from the universe. This is one main reason why the "scientific worldview" fails to deal with all aspects of reality. The "disenchantment of nature," the stripping away of all personal properties from the mechanisms of nature, was important to the birth of modern science.

KEITH WARD, PASCAL'S FIRE: SCIENTIFIC FAITH AND RELIGIOUS UNDERSTANDING 116 (2006).

[104] Here, it is worth considering the following examples in which religious founders have discovered God:

> The founders of all the great religious traditions are said to have experienced "knowing" in the form of revelations which guided or confirmed them in their mission. Moses talked with Jehovah, Christ heard the voice of God at his baptism, Mohammed was visited by the Angel Gabriel. Even the Buddha, whose enlightenment is reported as arising from his own Buddha nature rather than from heavenly grace, is described in the early Pali text, the *Ariyapariyesana Sutta*, as having overcome his reluctance to teach others the way to enlightenment—teachings which he considered lay beyond their understanding—only in response to the repeated appeals from Brahma, one of the supreme gods, who came down from heaven for this very purpose. Other, lesser figures, have also claimed knowledge conveyed through divine revelation, sometimes with consequences that have changed the whole course of human history as in the case of Joan of Arc's voices and St. Paul's experiences on the road to Damascus.

DAVID FONTANA, PSYCHOLOGY, RELIGION, AND SPIRITUALITY 21 (2003). Keith Ward also observes that religions "can differ greatly from one another, but a central, if not absolutely universal, theme is the existence of a supernatural realm in relation to which some form of human fulfillment can be found." KEITH WARD, THE CASE FOR RELIGION 21 (2004).

[105] CHARLES DARWIN, THE ORIGIN OF SPECIES (Julian Huxley ed., Signet Classics 2003) (1859).

> too profound for the human intellect. A dog might as well speculate on the mind of Newton.[106]

Thus, Darwin acknowledged the existence of a higher being beyond comprehension by the human mind.

True, scientific theories like evolution do challenge biblical accounts of human origins and do possess empirically testable properties.[107] Yet such theories, even if accurate, cannot logically begin to refute the existence of a Higher Being who has made such evolution possible.[108] Moreover, some

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[106] Quoted in GOULD, *supra* note 103, at 35-36. So, too, the theologian Keith Ward also explains:

> What scientists deal with is the measurable, predictable and regular operation of objects, as such objects exercise their natural powers in interaction with other objects . . . . What science cannot do is prove that no other sorts of reality exist, or prove that physical objects only ever act in the predictable and regular ways with which science deals.
>
> There are, then, very real limits to science. This is not a matter of things science cannot yet do but might one day do. It is a matter of the limits science imposes upon itself, in confining itself to public observation, repeatability, law-like regularity and measurability. One extreme form of the scientific worldview is the belief that this is the only sort of knowledge there is and the only sort of reality there is. But that could not be a scientific statement, since it is meta-scientific, a statement about what science is and deals with.
>
> Perhaps there are other sorts of reality than the public and physical, and perhaps even the public and physical contains supra-scientific elements. Most religious views do take that alternative view. In doing so, they do not conflict with science. They conflict with reductive materialism, with the belief that nothing exists except matter.

WARD, *supra* note 103, at 127.

[107] *See infra* Part VI.C.2.

[108] Pope John Paul II, for instance, believed that evolution and Catholicism were conceptually compatible. He wrote: "[M]y predecessor [Pope] Pius XII had already stated [in 1950] that there was no opposition between evolution and the doctrine of the faith about man and his vocation." Quoted in GOULD, *supra* note 103, at 80-81. John Paul also declared:

> The Bible itself speaks to us of the origin of the universe and its make-up, not in order to provide us with a scientific treatise but in order to state the correct relationships of man with God and with the universe. Scared Scripture wishes simply to declare that the world was created by God, and in order to reach this truth it expresses itself in the terms of the cosmology in use at the time of the writer. The Sacred Book likewise wishes to tell men that the world was not created as the seat of the gods, as was taught by other cosmogonies and cosmologies, but was rather created for the service of man and the glory of God. Any other teaching about the origin and make-up of the universe is alien to the intentions of the Bible, which does not wish to teach how the heavens were made but how one goes to heaven.

Pope John Paul II, Address to the Pontifical Academy of Science (Oct. 1981) *quoted in* Michael Ruse, *Introduction to The Creationist Challenge*, *in* BUT IS IT SCIENCE? THE PHILOSOPHICAL QUESTION IN THE CREATION/EVOLUTION CONTROVERSY 225, 225 (Michael Ruse ed., 1996) [hereinafter BUT IS IT SCIENCE?]. And, perhaps surprisingly,

religionists may refuse altogether to entertain the theory of evolution because they are adamantly confident that the epistemic resources of faith alone can answer questions about the meaning of human existence.[109]

Religious truth, then, unlike the truths that were sought by Watson and Crick or the Bletchley Park code breakers, does not necessarily lend itself to the possibility of universal assent.[110] While everyone knows that a given number is X in a mathematical sequence or that we have arrived at the orange brick building that is Zingerman's, we have fundamental differences about whether we have found God or

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Charles Darwin also believed that evolution did not logically dislodge the existence of a god. The philosopher of science Michael Ruse, an authority on the evolution debate, has remarked:

> Given that religion provided such a barrier to evolutionism for everyone else, why should it have been no barrier to Darwin? Remember, this was a young man who [during his college years] had intended to be a parson, no less . . . . [U]ltimately Darwin did not see religion and evolution in conflict! Rather, at the time of becoming an evolutionist and indeed right through the period until after the writing of the *Origin* [*of the Species*], Darwin was quite happy to hold simultaneously to his scientific beliefs and to some rather lukewarm kind of belief in a creator.

MICHAEL RUSE, DARWINISM DEFENDED: A GUIDE TO THE EVOLUTION CONTROVERSIES 26-27 (1982) [hereinafter RUSE, DARWINISM DEFENDED]. More strongly, Ruse writes: "Can a Darwinian be a Christian? Absolutely! Is it always easy for a Darwinian to be a Christian? No, but whoever said that the worthwhile things in life are easy?" MICHAEL RUSE, CAN A DARWINIAN BE A CHRISTIAN? THE RELATIONSHIP BETWEEN SCIENCE AND RELIGION 217 (2001). The psychologist Gordon Allport similarly believes that religion and the empirical demands of psychology need not be mutually exclusive:

> As every reader knows, modern empirical psychology initially separated itself sharply from religion. "Psychology without a soul" became its badge of distinction and of pride.
>
> . . . .
>
> At the same time there is inherent absurdity in supposing that psychology and religion, both dealing with the outward reaching of man's mind, must be permanently and hopelessly at odds. As different as are science and art in their axioms and methods they have learned to co-operate in a thousand ways—in the production of finer dwellings, music, clothing, design. Why should not science and religion, likewise differing in axioms and method, yet co-operate in the production of an improved human character without which all other human gains are tragic loss?

GORDON W. ALLPORT, THE INDIVIDUAL AND HIS RELIGION: A PSYCHOLOGICAL INTERPRETATION v-vi (1950).

[109] *See infra* Part VI.C.2 (discussing "scientific creationism" and its logical defects). Stephen Jay Gould observes that such rejection of evolution constitutes "a marginal belief among all major Western religions these days, and a doctrine only well developed within the distinctively American context of Protestant church pluralism." GOULD, *supra* note 103, at 130.

[110] The term "universal" however will be qualified later. *See infra* notes 112-125 and accompanying notes.

gods or His or Her or Its or Their Message or whether there is any message at all to be found.[111] When we conceive a diversity of viewpoints and ideas in the context of religion, it is therefore important to realize that we should not realistically expect some collective "a-ha!" moment when all parties converge on an indisputable answer.

Given this condition, the justification from truth would seem an inappropriate fit for religious expression, at least if we accept the characterization of the justification by some scholars. For the justification from truth, according to these scholars, must logically presuppose that there are "objective truths" which can theoretically admit of uniform agreement. Consider Professor Stanley Ingber's account of the justification from truth, which he subsequently used to criticize the justification's entire enterprise:

> In order to be discoverable, however, truth must be an objective rather than a subjective, chosen concept. Consequently, socioeconomic status, experience, psychological propensities, and societal roles should not influence an individual's concept of truth. If such factors do influence a listener's perception of truth, the inevitable differences in these perspectives caused by the vastly differing experiences among individuals make resolution of disagreement through simple discussion highly unlikely. And if the possibility of rational discourse and discovery is negated by these entrenched and irreconcilable perceptions of truth, the dominant "truth" discovered by the marketplace can result only from the triumph of power, rather than the triumph of reason.[112]

These needlessly austere expectations for the justification from truth merit a response.

Ingber assumes that the justification from truth promises to render truths devoid of "socioeconomic status,

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[111] The psychologist David Fontana has stated, "Beliefs and practices vary so much between the major traditions that any attempt at defining religion can never be wholly successful." FONTANA, *supra* note 104, at 6. He continues, "Individual religions not only differ considerably from each other in their understanding both of God or the gods and of the soul . . . but also in a number of other important ways." *Id.* at 7. Indeed, for Fontana, the differences among religions "are so extreme that we may again question whether all the traditions concerned should come under the one category of religion . . . ." *Id.* at 8. *See generally* KEITH WARD, GOD: A GUIDE FOR THE PERPLEXED (2002) (discussing the differences in religious beliefs among various religions throughout Western history); OUR RELIGIONS (Arvind Sharma ed., 1993) (discussing the differences among Hinduism, Buddhism, Confucianism, Taoism, Judaism, Christianity, and Islam); HUSTON SMITH, THE WORLD'S RELIGIONS: OUR GREAT WISDOM TRADITIONS (1991) (discussing the differences in religious meaning among Hinduism, Buddhism, Confucianism, Taoism, Islam, Judaism, Christianity, and the "primal religions").

[112] Ingber, *supra* note 3, at 15 (footnotes omitted).

experience, psychological propensities, and societal roles." But this expectation, taken straightforwardly, is completely implausible on its face. For there is no such truth. Even in science, a field where one might anticipate only the cold objectivity of facts, we encounter resistance to a conception of truth that presumes the unassailability of its epistemology. Indeed, as Thomas Kuhn has remarked in his famous work on the history of science, the ostensibly objective truths that are the products of science are necessarily influenced by the contingencies of culture, experience, and personal idiosyncrasies.[113] Accordingly, Kuhn is reluctant to ascribe "objective truth" to any particular scientific discovery. He offers the example of how Galileo's description of motion differed from that of the Aristotelian physicist:

> Since remote antiquity most people have seen one or another heavy body swinging back and forth on a string or chain until it finally comes to rest. To the Aristotelians, who believed that a heavy body is moved by its own nature from a higher position to a state of natural rest at a lower one, the swinging body was simply falling with difficulty. Constrained by the chain, it could achieve rest at its low point only after a tortuous motion and a considerable time. Galileo, on the other hand, looking at the swinging body, saw a pendulum, a body that almost succeeded in repeating the same motion over and over again ad infinitum. And having seen that much, Galileo observed other properties of the pendulum as well and constructed many of the most significant and original parts of his new dynamics around them. From the properties of the pendulum, for example, Galileo derived his only full and sound arguments for the independence of weight and rate of fall, as well as for the relationship between vertical height and terminal velocity of motions down inclined planes. All these natural phenomena he saw differently from the way they had been seen before.[114]

In explaining Galileo's "discovery," Kuhn points to those very contingencies in perspective that Ingber finds so troubling:

> Why did that shift of vision occur? Through Galileo's individual genius, of course. But note that genius does not here manifest itself in more accurate or objective observation of the swinging body. Descriptively, the Aristotelian perception is just as accurate. When Galileo reported that the pendulum's period was independent of amplitude for amplitudes as great as 90°, his view of the pendulum led him to see far more regularity than we can now discover there. Rather, what seems to have been involved was the exploitation by

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[113] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996).

[114] *Id.* at 118-19 (footnote omitted).

> genius of perceptual possibilities made available by a medieval paradigm shift. Galileo was not raised completely as an Aristotelian. On the contrary, he was trained to analyze motions in terms of the impetus theory, a late medieval paradigm which held that the continuing motion of a heavy body is due to an internal power implanted in it by the projector that initiated its motion.[115]

Galileo's experience and training, as influenced by the contemporary views of his society, caused him to adopt a new scientific theory that replaced what had long been understood to be truth.

Thus, even in science, a field that we conventionally associate with objective truths, there are disagreements engendered by what Ingber identified as "experience, psychological propensities, and societal roles." The result is one that is disheartening for those who long for "objective truths" that are invulnerable to debate. Kuhn explains:

> To the extent, as significant as it is incomplete, that two scientific schools disagree about what is a problem and what a solution, they will inevitably talk through each other when debating the relative merits of their respective paradigms. In the partially circular arguments that regularly result, each paradigm will be shown to satisfy more or less the criteria that it dictates for itself and to fall short of a few of those dictated by its opponent.[116]

What Kuhn suggests in the passage is that any given scientific discipline has already predetermined what sorts of "truth" it seeks to find simply by defining the tests and methods that will be employed. With this in mind, I need to revisit this statement by Professor Ingber: "And if the possibility of rational discourse and discovery is negated by these entrenched and irreconcilable perceptions of truth, the dominant 'truth' discovered by the marketplace can result only from the triumph of power, rather than the triumph of reason."[117] The logic of scientific discovery described by Kuhn suggests that "reason" does not (and cannot) exist outside the particular scientific theory or paradigm which constitutes it, and that there is no universal, overarching scientific theory that can settle their disputes as a matter of principle.[118]

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[115] *Id.* at 119 (footnote omitted).

[116] *Id.* at 109-10.

[117] Ingber, *supra* note 3, at 15 (footnote omitted).

[118] Kuhn explains:

But surely we should not therefore condemn science as ineffectual in helping us to arrive at better conclusions about the truth. That is, we can sensibly argue that the justification from truth should underwrite the legal right to scientific discourse. Similarly, we should not condemn non-scientific speakers in the marketplace of ideas because they also lack an overarching objective truth waiting to be discovered. Recall the Court's application of the justification from truth to race-based affirmative action in college admissions. Justice Powell, writing a plurality opinion in *Bakke*, quoted from President William Bowen of Princeton that the purpose of a college education is not necessarily to find some ultimate truth but to be exposed to the truths of others, which can challenge and enrich one's understanding.[119] There is no expectation that students will learn "objective" truths from engaging those who are different from them. What is hoped is that students will "learn from their differences" and "stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." It is quite unlikely that the students will, after meeting or living with those who are different, arrive at the same conclusions about cultural truths or arrive at conclusions that others will necessarily regard as admirable. The affirmative action policy, according to the Court, is meant simply to provide for conditions where students are encouraged to acquire information about others' worldviews and to deliberate about them, especially in relation to their own.

> When paradigms enter, as they must, into a debate about paradigm choice, their role is necessarily circular. Each group uses its own paradigm to argue in that paradigm's defense.
>
> The resulting circularity does not, of course, make the arguments wrong or even ineffectual. The man who premises a paradigm when arguing in its defense can nonetheless provide a clear exhibit of what scientific practice will be like for those who adopt the new view of nature. That exhibit can be immensely persuasive, often compellingly so. Yet, whatever its force, the status of the circular argument is only that of persuasion. It cannot be made logically or even probabilistically compelling for those who refuse to step into the circle. The premises and values shared by the two parties to a debate over paradigms are not sufficiently extensive for that. As in political revolutions, so in paradigm choice—there is no standard higher than the assent of the relevant community.

KUHN, *supra* note 113, at 94.

[119] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (Powell, J., concurring) (quoting William Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY. Sept. 26, 1977, at 9).

A similar understanding of the justification from truth informs other cases that I have discussed. In *Whitney*, Justice Brandeis protected the public's right to speech that was subversive of the state, but he did not make it contingent on the public being able to arrive at the objectively correct conclusion that such speech was dangerous and unpersuasive.[120] Instead, he protected it because he believed that deliberation by the public was a valuable end in itself. He stated, "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary."[121] Justice Brennan in *New York Times* also did not stipulate that the public would necessarily arrive at the objectively correct conclusion about libel or politics or racism.[122] All that he wanted was for the public to deliberate seriously over a diversity of competing viewpoints: "[P]ublic issues should be uninhibited, robust, and wide-open, and . . . [public discourse] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[123] Similarly, in *Virginia State Board of Pharmacy*, Justice Blackmun could not possibly be sure that the consumers would arrive at some unequivocal truth regarding whether brand name drugs were better than cheaper generic substitutes.[124] But, again, the point was not to ensure that the public finds some objective truth but that they make informed decisions borne of deliberation over an array of competing advertisements. So Justice Blackmun explained, "It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."[125] All that the justification can be expected to do under such circumstances is to generate a diversity of viewpoints and ideas and to afford the audience the time and resources to deliberate about them in a meaningful fashion. "Truths" about politics, economic theory, and affirmative action are inherently

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[120] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444.

[121] *Id.*

[122] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[123] *Id.* at 270; *see also* William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 15 (1965).

[124] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976).

[125] *Id.*

contestable, but this conclusion should not cause us to cease trying to argue about these things, as if, since there are no unequivocal truths, it is useless to even deliberate about them. Similarly for religion, we should explore competing and alternative arguments even though the possibility of arriving at a steady parade of objectively agreeable answers is quite unlikely.

III. THE MERITS OF A DIVERSITY OF VIEWPOINTS AND IDEAS CONCERNING RELIGION

In urging the merits of a diversity of viewpoints and ideas concerning religion, I want to sketch my arguments, for reasons that I explain below, from the categories of religious conversion and biblical exegesis.

A. Skepticism and the Supernatural

The subject of conversion brings to the fore the merits of how a diversity of viewpoints and ideas can help people to arrive at better conclusions about the truth. For conversion is the radical adoption of some new religious truth and the complete abandonment of some other conception of truth.[126] Is such conversion more justified if based on deliberating over a

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[126] Lewis Rambo defines conversion as

> change from the absence of a faith system . . . to another, or from one orientation to another within a single faith system. It will mean a change of one's personal orientation toward life, from the haphazards of superstition to the providence of a deity; from a reliance on rote and ritual to a deeper conviction of God's presence; from belief in a threatening, punitive, judgmental deity to one that is loving, supportive, and desirous of the maximum good. [Conversion also means] a spiritual transformation of life, from seeing evil or illusion in everything connected with "this" world to seeing all creation as a manifestation of God's power and beneficence; from denial of the self in this life in order to gain a holy thereafter; from seeking personal gratification to a determination that the rule of God is what fulfills human beings; from a life geared to one's personal welfare above all else to a concern for shared and equal justice for all. [Conversion means too] a radical shifting of gears that can take the spiritually lackadaisical to a new level of intensive concern, commitment, and involvement.

LEWIS R. RAMBO, UNDERSTANDING RELIGIOUS CONVERSION 2 (1993); *see also* Richard Travisano, *Alternation and Conversion as Qualitatively Different Transformations*, *in* SOCIAL PSYCHOLOGY THROUGH SYMBOLIC INTERACTION 594, 594 (Gregory P. Stone & Harvey A. Farberman eds., 1970) (defining conversion as "a radical reorganization of identity, meaning, life"); Max Heirch, *Change of Heart: A Test of Some Widely Held Theories about Religious Conversion*, 83 AM. J. SOC. 653, 673-74 (Nov. 1977) (defining conversion as "the process of changing a sense of root reality" and "a conscious shift in one's sense of grounding").

diversity of viewpoints and ideas or is it more justified if based on dismissing those options? I want to argue for the former. In Part III.A.1, I examine the case of a young Japanese student and in Part III.A.2, that of the great Protestant leader Martin Luther, as examples of radical religious conversions in which the subject did not deliberate over a diversity of viewpoints. Without denying the validity of the divine intervention as recounted in these two conversion experiences, I suggest that a deliberative approach might have provided for them more justified conclusions.

1. From Divine Emperor to Holy Father

The most famous instance of conversion in the Bible is that of Saul of Tarsus.[127] Saul began as a relentless persecutor of Christians but later converted to Christianity. In the Bible, we are told that Saul never had to search for religious truth; it came searching for him. Here follows the relevant biblical passage:

> Meanwhile, Saul was still breathing out murderous threats against the Lord's disciples. He went to the high priest and asked him for letters to the synagogues in Damascus, so that if he found any there who belonged to the Way, whether men or women, he might take them as prisoners to Jerusalem. As he neared Damascus on his journey, suddenly a light from heaven flashed around him. He fell to the ground and heard a voice say to him, "Saul, Saul, why do you persecute me?"
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> "Who are you, Lord?" Saul asked.
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> "I am Jesus, whom you are persecuting," he replied. "Now get up and go into the city, and you will be told what you must do."[128]

When a light from heaven flashes around you and you find yourself having a literal conversation with God, you probably know that you are being treated to something special by way of religious truth.[129] So it is no surprise that Saul converted instantly to Christianity.[130] Later, Saul would

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[127] *The Acts* 9 (New International Version).

[128] *Id.* at 1-6.

[129] This type of experience, where a person suddenly converts to a faith because of some divine intervention, is sometimes called a "Damascus Road" conversion. John Lofland & Norman Skonovd, *Conversion Motifs*, 20 J. SCI. STUD. RELIGION 373, 377 (1981).

[130] The Bible tells us:

> Saul spent several days with the disciples in Damascus. At once he began to preach in the synagogues that Jesus is the Son of God. All those who heard

consummate the conversion process by rejecting his identity as Saul of Tarsus (the enemy of Christ) and becoming Paul the Apostle (the servant of Christ).[131] John Lofland and Norman Skonovd call this "mystical" conversion and, in their view, it "has in a sense functioned as the ideal of what conversion should be in the Western world."[132]

Yet ideal and practice are not the same thing: If you are like me—and I suspect that you probably are—you have not been blessed with dazzling heavenly lights and you have not found yourself having a conversation with God, where God talks back in coherent full sentences, gives traveling instructions, and tells you that he will get back to you later.[133] By saying this, I do not mean to offer myself as validation for the snide skepticism that has figured in what one prominent law professor has rebuked as the "culture of disbelief."[134] My statement is instead meant to suggest that our faiths are often mediated by books, sermons, culture, conversations (with other human beings, not God), and other ordinary earthly experiences. Therefore, unlike Paul, we will probably never be absolutely sure that we are in possession of some immaculate divine truth. This is why I believe that deliberation over diverse viewpoints and ideas is crucial, or at least very useful, for helping people to ascertain whether their religious beliefs are rooted in truth or whether they are principally the products of their culture, their parents, their psychological conditions, or some other non-religious source.

Here, it is worth considering Mill's observation about the provisional nature of beliefs. Many claims, Mill declares, have been subject to revision and rejection, and "other ages, countries, sects, churches, classes, and parties have thought,

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> him were astonished and asked, "Isn't he the man who raised havoc in Jerusalem among those who call on this name? And hasn't he come here to take them as prisoners to the chief priests?" Yet Saul grew more and more powerful and baffled the Jews living in Damascus by proving that Jesus is the Christ.

The Acts 9:19-22 (New International Version) (footnotes omitted).

[131] RAMBO, *supra* note 126, at 145.

[132] Lofland & Skonovd, *supra* note 129, at 377; *see also* RAMBO, *supra* note 126, at 145 ("Many scholars consider Paul's conversion to be the paradigm of the sudden conversion in Christianity.").

[133] Lewis Rambo writes after an extensive study of conversion that "[f]or most people, conversion is not so dramatic or intense [as for Saul]." RAMBO, *supra* note 126, at 145.

[134] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 3 (1993).

and even now think, the exact reverse" of what Mill's nineteenth century Englishmen accepted as the truth.[135] Mill continues that "it never troubles [the ostensibly infallible] that mere accident has decided which of these numerous worlds is the object of his reliance, and that the same causes which make him a Churchman in London, would have made him a Buddhist or a Confucian in Pekin [sic]."[136] According to this view, the claim of infallibility cannot be sustained given that much of our knowledge is the product of historical and cultural contingency. This is not to suggest that all answers are necessarily equally bad (or good), but that no one should consider personal views to be presumptively entitled to a claim of infallibility.

Consider this example. There are no identifying names and no source is cited as reference in the passage that follows, but I think the example will suffice for my purposes. Walter Farrell, a Catholic priest, relates the story of a non-Christian Japanese man who came to realize soon after World War II that his belief in the divinity of the Japanese Emperor was false and that Christianity was the only religious truth:

> In a recent issue of one of our national magazines there is an interesting account of a young Japanese student's experiences during World War II. He was in his second year at Tokyo University when war broke out and "swept along on the surging wave of patriotism, (he) enlisted in the Submarine Corps of the Japanese Imperial Navy." . . .
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> "At this time," the young man writes, "I believed with all my heart in the divinity of the Emperor. To die for him was the supreme glory of the Japanese fighting man. To sacrifice one's life in the Imperial service was undoubted assurance of an eternal reward."[137]

But the young man's chance to die for the Emperor never arrived. Japan surrendered to the United States, and the young man surrendered to Christianity:

> A short time after we stood and listened to the Emperor declare over the radio in his own voice that he was not divine. This denial of his heavenly origin and attributes was almost more than I could bear. Lost in my thoughts, I wandered through the debris. My most frightening nightmares were nothing compared with the crushing loneliness and fear that I felt in my heart.

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[135] MILL, *supra* note 27, at 21.

[136] *Id.*

[137] Walter Farrell, *Introduction* to VINCENT V. HERR, RELIGIOUS PSYCHOLOGY 13-14 (1966).

> I don't know how long I wandered aimlessly through the streets. My first moment of awareness came when I heard the laughter of a group of children who were leaving the remains of a bombed-out building. The knowledge that anyone could laugh happily in such circumstances piqued my curiosity. After much hesitation, I approached the ruined building and entered.
>
> The first words I heard were, "Jesus Christ, true God and true man, loved us before we came to be, and died for each one of us that we may save our souls."
>
> At the sight of Christ on the cross, my empty heart was filled and I was overwhelmed by what I now know to be the power of grace. In that moment of discovery, I felt the reality of Christ and His love.[138]

The account here broadly parallels Paul's conversion on the Damascus Road in that the Japanese student's experience was also rather instantaneous and, hence, suggestive of the miraculous in its revelations.

But there are differences, too. Whereas we are told that Paul was able to receive his religious truth through the unmediated voice of God and accompanied by a portentous spectacle of heavenly lights, the young Japanese man's acquisition of truth might have been less straightforward. After all, the latter never heard the voice of God or saw heavenly lights. All that was offered to him was the laughter of children, another human being's declaration that Christ was the Lord, and some kind of artistic representation of Jesus on the cross. None of these things, without considerable embellishment, is divine or supernatural.[139] Therefore, how did the young man know that his sudden turn to Christianity was not a reaction to non-religious stimuli? As Lewis Rambo has suggested in his extensive study of conversion, motives for conversion "are not simple and single."[140] Instead, he explains:

> Context is the integration of both the superstructure and the infrastructure of conversion, and it includes social, cultural, religious, and personal dimensions. Contextual factors shape avenues of communication, the range of religious options available, and people's mobility, flexibility, resources, and opportunities. These factors have a direct impact on who converts and how conversion

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[138] *Id.* at 14.

[139] While a concept of religion need not require that a person experience something supernatural, the concept would seem to presuppose the existence of the supernatural at the core of any religion. *See* WARD, *supra* note 104, at 21 ("Religions can differ greatly from one another, but a central, if not absolutely universal, theme is the existence of a supernatural realm in relation to which some form of human fulfillment can be found.").

[140] RAMBO, *supra* note 126, at 140.

> happens. People can often be induced, encouraged, prevented, or forced to either accept or reject conversion on the basis of factors external to the individual.[141]

Let us examine these different factors, or to employ Professor Page's terminology from Part II, perspectives, in the context of the Japanese student's conversion.[142] Is it possible that stunning political changes, rather than Jesus, may have caused the young man to believe that Christianity was the truth? There is at least a plausible case to be made. First, the young man's conversion experience differs from that of Paul's because the former never experienced anything like the supernatural intervention that caused the latter's conversion. True, the catastrophe of war is no prosaic event, but it is not supernatural like heavenly lights and the voice of God. And then there is the matter of the Japanese student's horrific realization that his Emperor was merely a political prop meant to reinforce an ideology of patriotism. The young man saw around him further evidence of Japan's failures in the random debris and bombed-out buildings, testaments to American domination. Emperor worship had been literally discredited by a country whose emblematic religion is Christianity. It was an apt situation for Professor Rambo's observation that "[d]uring a severe crisis, the deficiencies of a culture become obvious to many people, thus stimulating interest in new alternatives."[143] And specifically, "the perceived strength of a colonial power is a crucial variable."[144] These circumstances raise questions about the young man's conclusion that Christianity is the religious truth: Was it influenced unduly by the literal collapse of the Japanese nation and the perceived dominance of the United States? We do not know for sure, but it would seem desirable for the Japanese convert to have considered these other factors so that he may have arrived at a more accurate conclusion about his new found truth, just as it is desirable in the interests of finding religious truth that he have had access to a greater diversity of viewpoints before he accepted the belief that the Japanese Emperor was God incarnate.[145]

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[141] *Id.* at 20-21.

[142] Rambo divides the factors into those that derive from "macrocontext" or "microcontext." *Id.* at 20-22. For me, the categories seem too interdependent and porous, and I thus avoid introducing them.

[143] *Id.* at 41.

[144] *Id.*

[145] One thing that comes to my mind with regard to the Japanese student's conversion is religion's power of consolation, especially after traumatic events like war.

There are other perspectives concerning religion that are external to religion itself but which can potentially help a person to assess the legitimacy of her prospective religious beliefs. For example, did the young man consider the perspective that his family, not his epiphany, is principally responsible for his religious disposition?[146] The founder of psychoanalysis, Sigmund Freud, posits in his *The Future of an Illusion* that those individuals inclined toward religions like Christianity and Emperor-worship are less interested in the religion per se than in a desire for a strong father figure who can lay to rest the individual's relentless anxiety about the uncertainty of life.[147] Freud begins his argument in the following manner.[148] He first describes man's perception of nature as the antithesis of order and safety as represented by civilization.[149] For nature in Freud's view symbolizes a world where death is inevitable and the promise of an afterlife is altogether uncertain; it is also a world ruled by forms of suffering that are absent moral meaning and distributed arbitrarily.[150] In their attempt to comprehend these powerful and mysterious forces, people seek the "humanization of

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The philosopher of science Richard Dawkins argues that this power causes many people to believe illogically that God in fact exists. He writes:

> It is time to face up to the important role that God plays in consoling us; and the humanitarian challenge, if he does not exist, to put something in his place. Many people who concede that God probably doesn't exist, and that he is not necessary for morality, still come back with what they often regard as a trump card: the alleged psychological or emotional *need* for a god.
>
> . . . .
>
> The first thing to say in response to this is something that should need no saying. Religion's power to console doesn't make it true. Even if we make a huge concession; even if it were conclusively demonstrated that belief in God's existence is completely essential to human psychological and emotional well-being; even if all atheists were despairing neurotics driven to suicide by relentless cosmic angst—none of this would contribute the tiniest jot or tittle of evidence that religious belief is true. It might be evidence in favour of the desirability of convincing yourself that God exists, even if he doesn't.

RICHARD DAWKINS, THE GOD DELUSION 352 (2006).

[146] The Yale psychologist Joel Allison has suggested that "sudden and dramatic conversion" within a male divinity student might be attributable to the student's desire to substitute a weak father for a divine one that can offer firm judgment and guidance. Joel Allison, *Religious Conversion: Regression and Progression in an Adolescent Experience*, 8 J. SCI. STUD. RELIGION 23, 24, 28, 30, 32 (1969).

[147] SIGMUND FREUD, THE FUTURE OF AN ILLUSION (James Strachey ed., W.D. Robson-Scott trans., Anchor Books 1964).

[148] *Id.* at 22.

[149] *Id.*

[150] *Id.* at 20-21.

nature."[151] As helpless children, Freud argues, people identify their fathers as the embodiment of nature in its scariest forms; at the same time, the father comes to represent a protection against the unknown.[152] This same anthropomorphism was evident in a person's understanding of God. Freud elaborates this view:

> In the function [of protection] the mother is soon replaced by the stronger father, who retains that position for the rest of childhood. But the child's attitude to its father is colored by a peculiar ambivalence. The father himself constitutes a danger for the child, perhaps because of its earlier relation to its mother. Thus it fears him no less than it longs for him and admires him. The indications of this ambivalence in the attitude to the father are deeply imprinted in every religion . . . . When the growing individual finds that he is destined to remain a child forever, that he can never do without protection against strange superior powers, he lends those powers the features of belonging to the figure of his father; he creates for himself the gods whom he dreads, whom he seeks to propitiate, and whom he nevertheless entrusts with his own protection. Thus his longing for a father is a motive identical with his need for protection against the consequences of his human weakness. The defense against childish helplessness is what lends its characteristic features to the adult's reaction to the helplessness which he has to

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[151] FREUD, *supra* note 147, at 22.

[152] Freud explained:

> Impersonal forces and destinies cannot be approached; they remain eternally remote. But if the elements have passions that rage as they do in our own souls, if death itself is not something spontaneous but the violent act of an evil Will, if everywhere in nature there are Beings around us of a kind that we know in our own society, then we can breathe freely, can feel at home in the uncanny and can deal by psychical means with our senseless anxiety. We are still defenseless, perhaps, but we are no longer helplessly paralyzed; we can at least react. Perhaps, indeed, we are not even defenseless. We can apply the same methods against these violent supermen outside that we employ in our own society; we can try to adjure them, to appease them, to bribe them, and, by so influencing them, we may rob them of a part of their power. A replacement like this of natural science by psychology not only provides immediate relief, but also points the way to a further mastering of the situation.
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> For this situation is nothing new. It has an infantile prototype, of which it is in fact only the continuation. For once before one has found oneself in a similar state of helplessness: as a small child, in relation to one's parents. One had reason to fear them, and especially one's father; and yet one was sure of his protection against the dangers one knew. Thus it was natural to assimilate the two situations . . . . [A] man makes the forces of nature not simply into persons with whom he can associate as he would with his equals—that would not do justice to the overpowering impression which those forces make on him—but he gives them the character of a father.

Id. at 24.

> acknowledge—a reaction which is precisely the formation of religion . . . .[153]
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> . . . .
>
> As we already know, the terrifying impression of helplessness in childhood aroused the need for protection—for protection through love—which was provided by the father; and the recognition that this helplessness lasts throughout life made it necessary to cling to the existence of a father, but this time a more powerful one. Thus the benevolent rule of a divine Providence allays our fear of the dangers of life; the establishment of a moral world-order ensures the fulfillment of the demands of justice, which have so often remained unfulfilled in human civilization; and the prolongation of earthly existence in a future life provides the local and temporal framework in which these wish-fulfillments shall take place. Answers to the riddles that tempt the curiosity of man, such as how the universe began or what the relation is between body and mind, are developed in conformity with the underlying assumptions of this system. It is an enormous relief to the individual psyche if the conflicts of its childhood arising from the father complex—conflicts which it has never wholly overcome—are removed from it and brought to a solution which is universally accepted.[154]

In this way, God serves as a means to resolve an individual's most intimate familial crises.

Perhaps it is unrealistic to expect the young Japanese man in our example to have read Freud. But it would seem useful if the young man had considered something like the Freudian perspective, especially given the former's unswerving dedication to the supreme patriarchal figure of his Japanese Emperor-God and then his equally unswerving and stunningly abrupt dedication to another supreme patriarchal figure, the Christian Holy Father. And if we may add perspectives, as Professor Page does in his examples involving mathematical sequences, is it possible that the perspective derived from the trauma of war compounded the perspective derived from one's desire for an omnipotent father figure? Freud, after all, describes an existence that, without the psychological consolations of an invented divine father, would lead many to trudge along in lives that failed to offer redemptive meaning for their endless sufferings. According to the Freudian account, the Japanese Emperor Father gave the young man a purpose for and meaning to his military sacrifice during the severe uncertainties of war, while the Christian Holy Father supplied

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[153] *Id.* at 35.

[154] *Id.* at 47-48.

a purpose for and meaning to the devastation and terror that he had experienced at the hands of the Americans.

The absolute obedience that the young man exercised toward these two divinely powerful patriarchal figures would seem to recall the intriguing remarks of Freud's fellow psychoanalyst Erich Fromm. Whereas Freud's *Future of an Illusion* did not deal explicitly with political issues, Fromm's *Psychoanalysis and Religion* does.[155] Fromm invokes a political reference to the Fuhrer-worshipping fascism of World War II Germany, an example that should call to mind the Emperor-worshipping fascism that organized the nation of the young Japanese man. Fromm explains that, like fascism, "authoritarian religions" require that the individual surrender power to some "transcending man."[156] In surrendering, a person relinquishes his independence and integrity as an individual but acquires a sense of being protected by some supernatural power of which he has, in a sense, become a part.[157] Authoritarian religion is thus not unlike authoritarian political regimes such as the one commanded by the fascist Emperor to whom our Japanese student had initially pledged his utter obedience: "Here the Fuhrer or the beloved 'Father of His People' or the State or the Race or the Socialist Fatherland becomes the object of worship; the life of the individual becomes insignificant and man's worth consists in the very denial of his worth and strength."[158]

By saying this, Fromm does not mean in any way to condemn Christianity,[159] but means rather to shed light on a particular kind of psychological disposition. Given the young Japanese student's swift shift in obsession from one divine

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[155] *See generally* ERICH FROMM, PSYCHOANALYSIS AND RELIGION (Yale Univ. Press 1950).

[156] *Id.* at 35.

[157] *Id.*

[158] *Id.* at 36.

[159] Unlike Freud, Fromm believes that religion could have ameliorative moral effects on both the individual and society. For example, Fromm praises the ethos of early Christianity:

> That early Christianity is humanistic and not authoritarian is evident from the spirit and text of all Jesus' teachings. Jesus' precept that "the kingdom of God is within you" is the simple and clear expression of nonauthoritarian thinking. But only a few hundred years later, after Christianity had ceased to be the religion of the poor and humble peasants, artisans, and slaves . . . and had become the religion of those ruling the Roman Empire, the authoritarian trend in Christianity became dominant.

Id. at 48.

father figure to another, it would have been useful for him, in the interests of truth, if the young man had deliberated about Freud's and Fromm's psychological perspectives, as there is no indication in the quoted passage that he did.[160]

2. From Repressive Father to Holy Father

Even the conversion experiences of the most famous of religious figures can be described in psychoanalytic terms in a way that questions whether they have found religious truth. Erik Erikson's classic study of Martin Luther is a good example.[161] Luther would eventually become the founder of Lutheran Protestantism, but as a young man he had resigned himself to the insistent expectations of his coal miner father, Hans, who longed for his talented son to gain entrance into the profitable and respectable world of lawyers and their professional class.[162] But something would change all that. One night, so the official story goes, a "bolt of lightning struck the ground near him, perhaps threw him to the ground, and caused him to be seized by a severe, some say convulsive, state of terror."[163] Luther felt as if he was "completely walled in by the painful fear of a sudden death" and before he knew it, "he had called out, 'Help me, St. Anne . . . . I want to become a monk.'"[164] And so he did: "On his return . . . he told his friends that he felt committed to enter a monastery. He did not inform his father."[165]

Luther's rejection of his father's authority was not quite complete, however, for the young man continued to live in dread of his father's power and authority. Hans was a

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[160] In making these suggestions, I do not mean to suggest that religious beliefs necessarily harbor some psychological malady. Instead, I am inclined to agree with the conclusions of psychologist Gordon Allport:

> Many personalities attain a religious view of life without suffering arrested development and without self-deception. Indeed it is by virtue of their religious outlook upon life—expanding as experience expands—that they are able to build and maintain a mature and well-integrated edifice of personality. The conclusions they reach and the sentiments they hold are various, as unique as is personality itself.

ALLPORT, *supra* note 108, at viii.

[161] *See* ERIK H. ERIKSON, YOUNG MAN LUTHER: A STUDY IN PSYCHOANALYSIS AND HISTORY (Norton 1958).

[162] *Id.* at 50, 56.

[163] *Id.* at 91.

[164] *Id.* at 91-92.

[165] *Id.* at 92.

vindictive and harsh father who routinely threatened and bullied his son Martin. Worse, Hans rationalized his abuse as the moral righteousness of an upright judge of character.[166] After a lifetime of intimidation, Martin believed that he could not resist his father without emasculating him; on the other hand, Martin did not believe that he could obey his father without emasculating himself.[167] He was stuck in a terrible paradox.[168]

Erikson proposes that Martin was able to resolve this dilemma by turning to what he perceived as a higher father—a Holy Father—to whom the young man had to submit as a matter of authority. The evidence on offer begins with the recognition that Martin's conversion, like that of the Japanese student, was impelled by a set of nonsupernatural events, not the divine intervention that defined Paul's experience on the Damascus Road. First, Christ himself had spoken to Paul and others had witnessed it.[169] But Martin never had any witnesses and he never claimed to have seen or heard anything supernatural.[170] Professor Erikson writes,

> We must say, therefore, that while Paul's experience must remain in the twilight of biblical psychology, Martin can claim for his conversion only ordinary psychology attributes, except for his professed conviction that it was God who had directed an otherwise ordinary thunderstorm straight toward him.[171]

Notwithstanding these pedestrian renderings of Luther's religious experience, the storm and the lightning, from a psychoanalytic perspective, were useful symbolic resources to resolve the problems with his father:

> There remains one motive which God and Martin shared at this time: the need for God to match Hans, within Martin, so that Martin would be able to disobey Hans and shift the whole matter of obedience and disavowal to a higher, and historically significant, plane. It was necessary that an experience occur which would convincingly qualify as being both exterior and superior, so that

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166 ERIKSON, *supra* note 161, at 92.

167 *Id.* at 67.

168 *Id.*

169 *Id.* at 93.

170 *Id.* at 92.

171 *Id.* at 94. Erikson qualifies that he does not mean to reduce Martin's beliefs to mere psychology: "We are not in the least emphasizing the purely psychological character of the matter in order to belittle it: Martin's limited claims, coupled with a conviction which he carried to the bitter end, show him to be an honest member of a different era." *Id.*

> either Hans would feel compelled to let his son go (and that, remember, he never could and never would do) or that the son would be able to forswear the father and fatherhood. For the final vow would imply both that Martin was another Father's servant, and that he would never become the father of Hans' grandsons. Ordination would bestow on the son the ceremonial functions of a spiritual father, a guardian of souls and a guide to eternity, and relegate the natural father to a merely physical and legal status.[172]

Again, as in my discussion of the Japanese student, I cannot say with certainty that Luther's religious conversion is without justification. My aim is rather to invite consideration of an alternative perspective in psychoanalysis in order to enrich our deliberative possibilities for arriving at the truth of some religious belief.[173]

In the next section, I sketch examples of people who deliberated about different religious perspectives in order to arrive at a more justifiable conclusion about truth.

B. Deliberation Over a Diversity of Viewpoints and Ideas

I want to sketch in this section two perspectives on the uses of deliberation for purposes of discovering religious truth. One is by the Protestant philosopher John Milton in his *Areopagitica*, a pamphlet he wrote in 1644 to challenge Parliament's censorship against certain religious books. What makes Milton's argument intriguing for my purposes is that it is derived from a perspective that is itself religious. On the other hand, the second figure to whom I turn is Thomas Jefferson, a man whose skepticism about religion could never be confused with Milton's religious zeal. I discuss Jefferson's letter to his nephew in which the former president outlines his arguments for the sort of deliberation that I am commending. By offering the arguments of the faithful Milton and the skeptical Jefferson, it is my hope that the reader will gain a fuller sense of the merits of deliberation for the discovery of truths pertaining to religion.

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[172] *Id.* at 94-95. For a similar conclusion regarding the conversion experiences of some contemporary theology students, see Allison, *supra* note 146.

[173] I do not, therefore, agree with Freud's adamant declaration that it would be an illusion "to suppose that what science cannot give us we can get elsewhere." FREUD, *supra* note 147, at 92. I am inclined to sympathize with Erikson's more modest understanding of the relationship between psychoanalysis and religion. ERIKSON, *supra* note 161, at 21 (arguing that psychoanalysis and religion pursue different objectives and that neither one need not logically take priority over the other).

1. A Perspective of the Faithful: The Case of John Milton

I began this Article with a discussion of Justices Holmes and Brandeis as the forerunners of the justification from truth within the American judicial context. Yet while both justices restricted their discussion to secular speech, the most famous argument in Western culture for what contemporaries style the justification from truth was offered by the deeply religious John Milton, who sought to employ the justification to support religious, not secular, speech.[174] Furthermore, unlike Holmes and Brandeis, Milton's version of the justification from truth is underwritten almost entirely by religious arguments.[175] Professor Vincent Blasi has therefore wisely cautioned contemporaries against conscripting *Areopagitica*, Milton's famous defense of religious speech, as a straightforward defense of expression generally.[176] Consider what is surely the most widely cited quotation from *Areopagitica*. Milton declares with an optimism seemingly bordering on the naïve: "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter."[177] As anyone today knows, however, there is no guarantee that truth will win in a battle with falsehood. Therefore, to make serviceable Milton's oft-quoted line, it is useful to consult the context. Milton is confident that truth will prevail over falsehood because God is on the side of truth. Milton's declaration is less a prediction about psychology than a faith in divine providence. He "knows" that truth will prevail because God wills that it should.[178]

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[174] JOHN MILTON, AREOPAGITICA 6 (Cambridge Univ. Press 1918) (1644).

[175] *See* Vincent Blasi, Milton's *Areopagitica* and the Modern First Amendment, Ralph Gregory Elliot First Amendment Lecture (Mar. 1995), *available at* http://www.law.yale.edu/documents/pdf/Milton.pdf.

[176] *Id.*; *see also* Francis Canavan, *John Milton and Freedom of Expression*, 7 INTERPRETATION 50 (1978).

[177] MILTON, *supra* note 174, at 58.

[178] Milton writes: "For who knows not that Truth is strong next to the Almighty; she needs no policies, no stratagems, nor licencings to make her victorious . . . ." *Id.* at 59. He also elaborates:

> For when God shakes a Kingdome with strong and healthful commotions to a general reforming, 'tis not untrue that many sectaries and false teachers are then busiest in seducing; but yet more true it is, that God then raises to his own work men of rare abilities, and more then common industry not only to look back and revise what hath bin taught heretofore, but to gain further and go on, some new enlightened steps in the discovery of truth. For such is the order of God's enlightening his Church, to dispense and deal out by degrees his beam, so as our earthly eyes may best sustain it.

But if Milton is confident in the broad outlines of God's plans, he nonetheless urges humans themselves to do their part and deliberate over religious truth. For "God uses not to captivate [a man] under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser . . . ."[179] And being one's own chooser involves having to choose in a world where good and evil are mutually constitutive.[180]

In fact, according to Milton, man's knowledge of good begins with his knowledge of evil. He explains that Adam ate the forbidden fruit and thus at once acquired knowledge of both good and evil, and it was only by knowing evil that he came to know good, and vice versa.[181] Instead of dodging the spectacles of evil, then, a dutiful Christian must vigorously seek them out so as to refine his conception of that which is divine and good:

> He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring Christian. I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, where that immortal garland is to be run for, not without dust and heat.[182]

Here, Milton's rhetoric of virtue, while situated squarely in religious discourse, resonates with the language of Justice Brandeis in *Whitney*, because both men identify as a threat to the discovery of truth a passive audience that is indifferent to the obligations of deliberation, whether those obligations derive

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Id. at 61-62. When necessary, I have for clarity's sake silently modernized Milton's spelling and grammar.

[179] *Id.* at 19.

[180] Milton writes:

> Good and evil we know in the field of this World grow up together almost inseparably; and the knowledge of good is so involved and interwoven with the knowledge of evil, and in so many cunning resemblances hardly to be discerned, that those confused seeds which were imposed on *Psyche* as an incessant labor to cull out, and sort asunder, were not intermixed.

Id. at 19-20.

[181] Milton explains:

> It was from out of the rind of one apple tasted, that the knowledge of good and evil as two twins cleaving together leapt forth into the World. And perhaps that is that doom which Adam of knowing good and evil, that is to say of knowing good by evil. As therefore the state of man now is; what wisdom can there be to choose, what continence to forbear without the knowledge of evil?

Id. at 20.

[182] *Id.*

from religion, as they did for Milton, or, in Brandeis's case, from the civic requirements of democracy. And in the following passage, Milton sounds like the nineteenth century pragmatist Mill, who argued that even false ideas can help the audience to refine and confirm its assumption of truth:

> Since therefore the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger scout into the regions of sin and falsity than by reading all manner of tracts, and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read.[183]

Notwithstanding (or, I suppose, because of) Milton's staunch faith in Christianity, the above passage is impressive in its open-mindedness. It goes beyond his earlier argument that good is mutually constitutive of evil. Here, Milton broadens his purview of the acceptable by urging his readers to reflect on "all manner of tracts" and "all manner of reason" and to raid a "promiscuous" stock of books. In this way, as much as Milton abhorred what he perceived as the intolerance of the Catholics of his day,[184] his disposition bears a resemblance to that of the Catholic Church. The Catholic Church provides another example of the benefit of the deliberative approach to religious truth: the use of the devil's advocate. Consider once again Mill's defense of a diversity of viewpoints and ideas. While generally considered to be the bastion of secular enlightenment, Mill's *On Liberty* contains the telling example of the Catholic Church's use of the devil's advocate, an example that is all the more interesting because of Mill's jaundiced reference to the Catholic Church as the "most intolerant of churches":[185]

> The most intolerant of churches, the Roman Catholic Church, even at the canonization of a saint, admits, and listens patiently to, a "devil's advocate." The holiest of men, it appears, cannot be admitted

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[183] MILTON, *supra* note 174, at 21.

[184] Despite his tolerance for religious diversity, Milton refused to tolerate Catholics for he felt that they refused to tolerate anyone else: "I mean not tolerated Popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpated, provided first that all charitable and compassionate means be used to win and regain the weak and the misled . . . ." *Id.* at 60.

[185] MILL, *supra* note 27, at 24.

> to posthumous honours, until all that the devil could say against him is known and weighed.[186]

This passage can be read for the proposition that even if a priest feels himself called by God to advocate a nominee for sainthood, both the priest-advocate and those priests in the audience can benefit from deliberation over different viewpoints. Indeed, the original name of the "devil's advocate" was the "general promoter of the faith," for it was the devil's advocate who urged Catholics to carefully deliberate about whether a candidate for sainthood was worthy of their religious faith.[187]

I have conscripted Milton's ideas as well as the devil's advocate of the Catholic Church to show that even religionists can benefit enormously from a deliberative approach to religious truth. In the next section, I offer an example from a secular perspective, that of Thomas Jefferson.

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[186] *Id.*

[187] 4 New Catholic Encyclopedia 705 (2d. ed. 2003).

> The Promoter of the Faith was entrusted with opposing the claims of the patrons of the cause and those of the "saint's advocate," thereby earning for himself the easily misunderstood title of "devil's" advocate. In actual fact, he was rather the advocate of the Church, which must be extremely severe in the investigation directed to establish whether or not a baptized person is truly qualified to be beatified or canonized. Statistical data on such causes clearly show that several processes, apparently very promising at the beginning, had to be abandoned later because of difficulties, raised by the promoter of the faith, that could not be satisfactorily answered. In these cases, the critical and seemingly negative work of the promoter of the faith undoubtedly had a great positive value, inasmuch as it prevented the Church from pronouncing a certain and favorable judgment on the life and works of a person without possessing unquestionable proof. The function of the promoter of the faith proved itself most useful in the processes that were successfully concluded. Not only did he guarantee that the proceedings were conducted according to law, but the objections raised by him . . . compelled the patrons of the cause to perform an ever more profound and complete examination of the person in question.

Id. at 705-06. Especially interesting is how the Catholic Church, like Milton, views deliberation as logically conducive to discovering the divine:

> Consequently, [the promoter of the faith's] activity contributed to the effort of presenting the servant of God in his true image, so that the faith may come to know the Christian richness of his soul and look on him as a person selected by God for the Church and worthy of beatification and canonization.

Id. at 706.

2. Skepticism Toward Religion: The Case of Thomas Jefferson

A diversity of perspectives concerning the nature of religion can help people to arrive at more justifiable conclusions about religious truth. While he is generally remembered as the President of the United States, Thomas Jefferson was a thoughtful student of religion, and his arguments deserve to be considered because he illustrates how a diversity of viewpoints can be used to analyze the integrity of a faith from a perspective outside the religious canon. During his presidency, Jefferson was condemned by some religionists as a stubborn atheist,[188] but he took religious faith quite seriously and insisted that people's religious choices should be respected, especially if they were the product of careful deliberation over competing viewpoints, including competing viewpoints that were grounded in those modes of logic and deduction characteristic of secular enlightenment inquiry. A sustained explanation of his position is found in his letter to Peter Carr, his nephew. Jefferson writes to him:

> Your reason is now mature enough to examine this object [of religion]. In the first place, divest yourself of all bias in favor of novelty and singularity of opinion. Indulge them in any other subject rather than that of religion. It is too important, and the consequences of error may be too serious. On the other hand, shake off all the fears and servile prejudices, under which weak minds are servilely crouched. Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason, than that of blindfolded fear.[189]

Striking in the passage is its employment of those tropes that structured Justice Brandeis's *Whitney* concurrence: reason, fear and courage.[190] Like Brandeis, Jefferson contrasts reason, which does not come naturally but must be propelled by courage, against prejudice, which is a byproduct of fear. Reason, as Jefferson conceives it, resembles Brandeis's

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[188] So write Adrienne Koch and William Peden: "The financial bigwigs of New York and New England still feared and opposed [Jefferson]; nor had reactionary and orthodox churchmen completely abandoned their habit of tongue-lashing the 'Atheist.'" Adrienne Koch & William Peden, *Introduction* to THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON xxxv (Adrienne Koch & William Peden eds., Random House 1993) (1944) [hereinafter THE LIFE].

[189] Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), *in id.* at 399.

[190] *See* Whitney v. California, 274 U.S. 357, 376 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444; *see also* Blasi, *supra* note 35.

conception in that it is meant to evoke a posture of critical inquiry, not necessarily a deeper philosophical commitment that rejects religion or considers reason incompatible with religion. Indeed, the lens of reason could, according to Jefferson, theoretically steer its possessor to admit the existence of God.[191]

We are afforded an example of the importance Jefferson placed on deliberation in his discussion of the book of Joshua in the Christian Bible. He admonishes Carr:

> But those facts in the Bible which contradict the laws of nature, must be examined with more care, and under a variety of faces. Here you must recur to the pretensions of the writer to inspiration from God. Examine upon what evidence his pretensions are founded, and whether that evidence is so strong, as that its falsehood would be more improbable than a change in the laws of nature, in the case he relates. For example, in the book of Joshua, we are told, the sun stood still several hours. Were we to read that fact in Livy or Tacitus, we should class it with their showers of blood, speaking of statues, beasts, etc. But it is said, that the writer of that book was inspired. Examine, therefore, candidly, what evidence there is of his having been inspired.[192]

Although the trajectory of his discussion appears to discount the veracity of the biblical miracles, Jefferson ultimately remains agnostic, accepting his own advice to Carr to "divest yourself of all bias in favor of novelty and singularity of opinion."[193] So he tells Carr that the account of the sun standing still for several hours is "entitled to your inquiry, because millions believe it."[194] "On the other hand," Jefferson qualifies,

> you are astronomer enough to know how contrary it is to the law of nature that a body revolving on its axis, as the earth does, should have stopped, should not, by that sudden stoppage, have prostrated animals, trees, buildings, and should after a certain time have

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[191] Jefferson writes:

> Do not be frightened from this inquiry by any fear of its consequences. If it ends in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise, and the love of others which it will procure you. If you find reason to believe there is a God, a consciousness that you are acting under his eye, and that he approves you, will be a vast additional incitement . . . . If that Jesus was also a God, you will be comforted by a belief of his aid and love.

Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), *in* THE LIFE, *supra* note 188, at 397, 400.

[192] *Id.* at 399.

[193] *Id.*

[194] *Id.*

> resumed its revolution, and that without a second general prostration.[195]

Jefferson takes a similarly skeptical but non-preemptive approach of bringing to Carr's attention the competing views regarding whether Jesus was actually the Son of God.[196]

True, many people will reject this sort of counsel to deliberate, and I am sure that many people believe that we attain religious truths by way of things like the heavenly lights and the literal conversation with God that transformed Paul on the Damascus Road. But as one who has yet to be blessed with such extraordinary experiences, I find useful a measured skepticism, whether it be of the sort associated with Jefferson or Milton, toward the discovery of some truth regarding religion.

With this observation, I devote my time in the subsequent sections to outlining the legal dimensions of extending the justification from truth to religious expression.

IV. IMPORTANCE OF RELIGION IN THE SUPREME COURT

The Supreme Court in *New York Times* reasoned that the public's right to a diversity of political speech was warranted partly by the formal assumptions of democracy. Similarly, in *Virginia State Board of Pharmacy*, the Court reasoned that the public's access to a diversity of commercial speech was warranted partly by the people's desire for less expensive prescription drugs. If we are to extend the justification from truth and its attendant insistence on a diversity of views, we should clarify the ways in which religion, like democratic politics and consumer consumption, warrants application of the justification. It is my intent to show that religion, according to the Supreme Court, occupies or *can*

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[195] *Id.*

[196] Jefferson advises Carr:

> You will next read the New Testament. It is the history of a personage called Jesus. Keep in your eye the opposite pretensions: 1, of those who say he was begotten by God, born of a virgin, suspended and reversed the laws of nature at will, and ascended bodily into heaven; and 2, of those who say he was a man of illegitimate birth, of a benevolent heart, enthusiastic mind, who set out without pretensions to divinity, ended in believing them, and was punished capitally for sedition, by being gibbeted, according to the Roman law, which punished the first commission of that offence by whipping, and the second by exile, or death *in furea* . . . .

Id. at 399-400.

occupy a place in a person's life that is theoretically at least as important as democratic politics or consumer consumption.

In *New York Times* and *Virginia State Board of Pharmacy*, the Supreme Court appears to believe that the audience is entitled to hear a diversity of viewpoints and ideas for speech that is either political or commercial because there is something worthy, even compelling, about being presumptively well-informed in the arena of democratic politics or commercial consumption. Yet if politics or commercial consumption represents a potentially important endeavor where a person can benefit from access to a diversity of viewpoints and ideas, so too does religion. For while democratic politics and commercial consumption are important, it is hard to justify why religion is somehow less important in people's lives. The very idea of religion, after all, presupposes a set of beliefs about an individual's deepest moral convictions, the meaning of her existence, the origins of her creation, and the possibility of afterlife.[197] And this premise is shared by not just religionists or students of divinity. It finds support in a domain that is hardly an exemplum of religiosity—the legal canon of the Supreme Court. There, religion is defined as a source of one's profoundest meditations about the meaning of life as well as the highest moral authority. Such characterization goes beyond suggesting that religion should be viewed as at least as important as politics or commercial consumption in a person's life. It suggests also that religionists deserve a right of autonomy that is free from undue state regulation, and this autonomy in turn implies that people should be able to get access to religious expression, including a diverse array of expression, to make better approximations about some religious truth.

Even as the Supreme Court has ruled against particular religious practices, it has consistently recognized the signal importance of religion as an abstract idea. Justice Frankfurter,

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[197] Professor Marshall offers apt statements:

> Religion is concerned centrally with the understanding of a transcendent reality that explains and defines human existence. Whether God exists, for example, is very much the question of what is transcendent truth. Similarly, even for those religions which do not use a godhead, the essential religious question of understanding one's place in the universe is indivisible from the question of what is truth.

Marshall, *supra* note 1, at 16. The psychologist Erich Fromm has also written that for all major religions "man's obligation to search for the truth is an integral postulate." FROMM, *supra* note 155, at 19.

although deciding against a claim for exemption by Jehovah's Witnesses in *Minersville School District v. Gobitis*, nonetheless asserted, "Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief."[198] More emphatically, Justice Jackson in overturning Frankfurter's opinion announced in *West Virginia State Board of Education v. Barnette*, "One's right to . . . freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[199] Yet the Court's recognition of religion as a significant enterprise deserving of constitutional protection preceded the twentieth century opinions of Justices Jackson and Frankfurter. In an early example from the nineteenth century, even as he rejected the Mormon's arguments, Justice Field for the Court stated in *Davis v. Beason* that the term "'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[200]

United States v. Seeger[201] encapsulates for the contemporary Supreme Court the concept of religion as addressing ultimate questions and as constitutive of a comprehensive worldview. The *Seeger* Court defined religion by way of statutory interpretation rather than the First Amendment, and thus we are not afforded a direct statement about religion's constitutional meaning. However, the discussion in *Seeger* is still profitable because it represents the closest attempt by the Court at a sustained definition of religion. Daniel Seeger was convicted for refusing induction into the armed forces. His refusal was not straightforward, though. On the one hand, he sought under section 6(j) of the Universal Military Training and Service Act an exemption for those who "by reason of their religious training and belief are conscientiously opposed to participation in war in any form . . . ."[202] On the other hand, Seeger "preferred to leave the

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[198] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 593 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[199] *Barnette*, 319 U.S. at 638.

[200] Davis v. Beason, 133 U.S. 333, 342 (1890).

[201] 380 U.S. 163 (1965).

[202] *Id.* at 164-66.

question as to his belief in a Supreme Being open."[203] While Seeger harbored a "skepticism or disbelief in the existence of God," he did "not necessarily mean lack of faith in anything whatsoever."[204] Instead, his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[205] The Court was thus confronted with deciding whether the term "religious belief" in section 6(j) of the federal statute was capacious enough to accommodate Seeger's views. Although this task necessitated statutory interpretation, it also permitted the Court an opportunity to make indirectly some telling remarks about the meaning of religion in the First Amendment.

In interpreting the statute's reference to "religious belief," the Court spoke of the need to embrace "the ever-broadening understanding of the modern religious community," but one common thread among these religions, according to the Court, was an engagement with an ultimate being or some metaphysical truth from which derived the highest moral duties. Justice Clark for the *Seeger* Court quoted the dissenting opinion of Chief Justice Hughes in *United States v. Macintosh*.[206] It was Hughes, Clark wrote, who "enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that 'in the forum of conscience, duty to a moral power higher than the state has always been maintained.'"[207] According to Clark, the Congressional statute at issue in *Seeger* "adopted almost intact the language of Chief Justice Hughes in United States v. Macintosh," which stated that the "essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[208] With these premises in mind, Clark permitted under section 6(j) "all sincere religious beliefs

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[203] *Id.* at 166.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 169 (quoting United States v. Macintosh, 283 U.S. 605 (1931)).

[207] *Id.* at 169-70 (quoting *Macintosh*, 283 U.S. at 633).

[208] *Id.* at 175 (quoting *Macintosh*, 283 U.S. at 633-34). So, too, Justice Clark believed that Congress "must have had in mind the admonitions of the Chief Justice when he said in the same opinion that even the word 'God' had myriad meanings for men of faith: '[P]utting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty." *Id.* at 175-76 (quoting *Macintosh*, 283 U.S. at 634). *Seeger* referred to religion as involving the "fundamental questions of man's predicament in life, in death or in final judgment and retribution." *Id.* at 174.

which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[209] This is a striking claim, for I suspect that no one on the Court would say that participation in politics or commercial consumption makes all else "subordinate" or is that "upon which all else is ultimately dependent."

Also worth considering is the Court's discussion of the theologian Paul Tillich. The Court quoted with approval the following passage from one of Tillich's books:

> And if that word (God) has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, of what you take seriously without any reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God . . . .[210]

In the passage, the definition of religion need not be restricted to a standard Western Christian model. But according to both Tillich and the Court it does have to speak to an individual's greatest existential concerns: the "depths of your life, of the source of your being, or your ultimate concern, of what you take seriously without any reservation." Again, we cannot similarly announce that, as a general matter, voting for a mayoral or even a presidential candidate or buying cheaper prescription drugs goes to the "depths of your life, of the source of your being, or your ultimate concern, of what you take seriously without any reservation."

The Supreme Court expanded its definition of religion in *Welsh v. United States*.[211] Like *Seeger*, this case finds the Court having to grapple with the terms of section 6(j) of the Universal Military Training and Service Act. But unlike Seeger, who at least professed the possibility that he might be considered religious under section 6(j), Elliot Welsh flatly disclaimed any belief in God.[212] His moral resistance to war was instead formed by "reading in the fields of history and sociology."[213] Yet the Court concluded that Welsh's morals were sufficiently analogous to the statute's definition of religion, partly because the Court of Appeals decided that Welsh's beliefs were

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[209] *Seeger*, 380 U.S. at 176.

[210] *Id.* at 187 (quoting PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)).

[211] 398 U.S. 333 (1970).

[212] *Id.* at 341.

[213] *Id.*

analogous to "the strength of more traditional religious convictions . . . ."[214] Again, what I wish to stress is how the Court views religion as an important and even paramount moral enterprise, for Welsh would not have been permitted an exception under section 6(j) had he merely asserted that he sincerely held moral beliefs against war that bore no structural correspondence to religion.[215] In this way, the concept of conscientious objector status illustrates how religious expression under some circumstances appears to draw greater constitutional protection than secular speech alone. Given that according to the Supreme Court religion is analogous to and expressive of our deepest moral convictions, it seems reasonable to suggest that the right of free exercise should be justified in part by the right of people to have access to religious expression.[216]

V. HOW THE RELIGION CLAUSES PROMOTE DELIBERATION

If deliberation over a diversity of views is a potentially useful means to arrive at the truth about religion or a particular religion, does the Constitution afford the means by which people can so deliberate? I believe it does. Specifically, the two religion clauses, especially when read together, forbid the state from invading the privacy that one needs in order to weigh competing religious perspectives.[217]

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[214] *Id.* at 337.

[215] Here, it is worth considering Chief Justice Burger's majority opinion in *Wisconsin v. Yoder* where he distinguished the constitutional status of religious expression and secular speech:

> Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (footnote omitted).

[216] Or, stated differently, if commercials for five different brands of toothpaste can be justified by the Court in terms of informing the audience, surely we could say the same for religious expression.

[217] Professor Marshall has made a complementary argument but he argues that the religion clauses forbid the state to monopolize a truth concerning religion. Marshall, *supra* note 12, at 255-60. I make the different argument that the clauses tend to promote a diversity of viewpoints. In this way, I am inclined to believe that he

A. The Free Exercise Clause

In order to deliberate on a diversity of viewpoints concerning religion, one needs a legal space that is sufficiently free from state interference, whether that interference manifests itself as informal coercion or formal penalties. The Free Exercise Clause provides protection against such interference. For inherent in the Free Exercise Clause is a commitment to a liberty of conscience, which, "as understood at American law today, embraces the freedom of the person to choose or to change religious beliefs or practices without coercion or control by government and without facing discrimination or penalties for the religious choices once made."[218] This right of freedom of conscience has been protected on both an organizational and an individual level.

On the organization level, the Supreme Court has protected the right of churches and religious corporate bodies to be shielded from states' attempts to impose their views of religion. An early iteration of this commitment was announced by the Court in *Watson v. Jones*.[219] In *Watson*, two rival Presbyterian factions in Kentucky disagreed about which should own a church.[220] One faction argued that its teachings were most consistent with the church's original intent.[221] The Court refused to adjudicate the matter based on interpretations about religious doctrine.[222] Its rationale read:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members,

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is making an argument that is conceptually similar to Holmes's version of the justification from truth while I am making an argument that is closer to the logic of Brandeis's version. For the distinction between the Holmes and Brandeis, see *supra* Part I.

[218] JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 130 (2000); *see also supra* note 11 (para. 2).

[219] 80 U.S. 679 (1871).

[220] *Id.* at 703.

[221] *Id.* at 698.

[222] *Id.* at 727-29.

> congregations, and officers within the general association, is unquestioned.[223]

While *Watson* concerned a mainstream group in the Presbyterians, *United States v. Ballard* showed a Supreme Court willing to extend the protection of religious free exercise to more exotic churches and thus signaled the Court's recognition of the value of religious diversity.[224] The leaders of a church in *Ballard* were charged with violating a federal statute that prohibited the use of the mail to conduct fraud.[225] They were said to have misrepresented themselves by way of absurd and inconsistent promises. For example, Guy Ballard, the church leader, had called himself Saint Germain, Jesus, and George Washington.[226] He also claimed to possess supernatural powers to heal those afflicted with "any diseases, injuries, or ailments."[227] In the face of these eccentric, if not absurd, claims, the Court nonetheless asserted that the Free Exercise Clause must protect even the strangest of religious beliefs. Justice Douglas remanded the case and stressed to the lower court the importance of protecting the freedom of religious belief, even those beliefs that may be "incomprehensible" to some.[228]

The Court continued to protect the free exercise rights of religious organizations in other cases by protecting the rights of their members to deliberate about their spiritual issues. In *Kedroff v. Saint Nicholas Cathedral*,[229] the Court invalidated a New York statute that sought to prevent the Russian Orthodox Church in Moscow from appointing a bishop in New York who would take possession of a Russian Orthodox church in that state.[230] The rather unusual legislative prohibition was the result of a conflict between Communist-appointed Russian Orthodox leaders and some of their American counterparts who, contrary to tradition, no longer wanted to be under the former's jurisdictional control.[231] Trying to strike a blow for patriotism, New York passed legislation

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223 *Id.* at 728-29.
224 United States v. Ballard, 322 U.S. 78, 86 (1944).
225 *Id.* at 79.
226 *Id.*
227 *Id.* at 80.
228 *Id.* at 86.
229 344 U.S. 94 (1952).
230 *Id.* at 107.
231 *Id.* at 95-108.

that sided with the American members of the church.[232] Kedroff argued that the Free Exercise Clause forbade such legislation. Justice Reed stated for the Court that in this case there is "a transfer by statute of control over churches" which therefore "violates our rule of separation between church and state."[233] The Court emphasized the "spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[234]

The Court has also sought to protect the free exercise rights of individuals. In *Cantwell v. Connecticut*, the first case in which the Court analyzed the right of religious exercise with respect to a state law, Justice Roberts wrote that the right of religious free exercise for individuals as such "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" and that "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."[235] Similarly, three years later, Justice Jackson in *Barnette* extended protection to the religious practices of Jehovah's Witnesses with the following words: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe which shall be orthodox in . . . religion, or other matters of opinion . . . ."[236]

Some of the Court's most prominent free exercise decisions involved individuals who sought exemptions from generally applicable laws in the area of unemployment benefits. *Sherbert v. Verner*[237] was one of the first of such cases. After being fired for refusing to work on Saturday, her Sabbath Day, a Seventh Day Adventist was denied unemployment benefits by a state agency.[238] Justice Brennan for the Court remanded the decision but left little doubt as to how he wanted the lower court to decide.[239] According to Brennan, "to condition the availability of benefits upon this appellant's willingness to

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232 *See Kedroff*, 344 U.S. at 97-99.

233 *Id.* at 110.

234 *Id.* at 116.

235 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

236 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

237 374 U.S. 398 (1963).

238 *Id.* at 399-401.

239 *Id.* at 402.

violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[240] The Court rendered a philosophically consonant opinion in *Thomas v. Review Board*.[241] Here, too, a person refused work because he saw it as violating his religious beliefs. After being discharged for his refusal to work building gun turrets for tanks, a Jehovah's Witness, like *Sherbert*'s Seventh Day Adventist, was denied unemployment benefits by a state agency. Chief Justice Burger for the Court found the denial to be a violation of the Free Exercise Clause. Burger explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[242]

Thomas, like *Sherbert*, stands for the proposition that the state should not impose a monopoly of truth about religion by coercing people to violate their beliefs or impairing the deliberative processes that produce them.

Yet if *Thomas* represented a high mark of contemporary judicial protection for free exercise, *Employment Division v. Smith*[243] represented a decidedly low one. Oregon had a statute that prohibited "the knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."[244] A member of the Native American Church, Alfred Smith ingested peyote, a controlled substance under the statute, as part of his religious practices.[245] Smith's employer found out and became angry, for Smith worked as a

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[240] *Id.* at 406. The Court reiterated this statement in *Hobbie v. Unemployment Appeals Commission of Florida*. 480 U.S. 136, 146 (1987) ("Here, as in *Sherbert* and *Thomas*, the State may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work.'").

[241] Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981).

[242] *Id.* at 717-18.

[243] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997) *and recognized in part by* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

[244] *Id.* at 874.

[245] *Id.*

counselor at a drug rehabilitation center and his employer felt that the activity, while performed outside the workplace, was nonetheless incompatible with the duties of a drug counselor.[246] After being fired, Smith sought but was denied unemployment benefits from the state because he "had been discharged for work-related 'misconduct.'"[247] He sued the state unemployment agency for violating his right of free exercise. The case eventually made its way to the United States Supreme Court.

Justice Scalia for the majority rejected Smith's argument and offered what many regard as a surprisingly unsympathetic view of religious liberty. He began with the relatively uncontroversial statement that the justices "have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[248] This banal pronouncement soon gave way to more elaborate and restrictive reasoning, a move foreshadowed by Scalia's resurrection of Justice Frankfurter's opinion in *Gobitis*.[249] Scalia announced a controversial interpretation of the case law by declaring that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ."[250] He also rejected the argument that the protectiveness of the *Sherbert* test should govern this case.[251]

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[246] *Smith*, 494 U.S. at 872.

[247] *Id.* at 874.

[248] *Id.* at 878-79.

[249] Scalia invoked the following language from Frankfurter's opinion:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).

Id. at 879 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

[250] *Id.* at 881. The Court decided that Oregon's prohibition on peyote was a generally applicable law that merited nothing higher than rational review, which it passed. *Id.* at 878-81.

[251] Scalia wrote:

> Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test we have, on three occasions, invalidated state

Through these two maneuvers, Scalia drew considerable criticism from other justices and legal scholars as well as from Congress.[252] It is not my aim to evaluate these criticisms but rather to clarify and underscore how Scalia's opinion, despite its reputation in some quarters as unresponsive to religionists who belong to minority faiths,[253] nonetheless rejected the view that the state may compel affirmation of some truth about religion. For he wrote:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." . . . The government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . impose special disabilities on the basis of religious views or religious status, . . . or lend its power to one or the other side in controversies over religious authority or dogma . . . .[254]

While many religionists were dismayed by Scalia's opinion, what remains clear is that *Smith* is dedicated in principle to the position that the state should permit people the space in which to deliberate about a diversity of beliefs.

B. The Establishment Clause

Like the Free Exercise Clause, the Establishment Clause also preserves a space in which the individual can, without undue state interference, deliberate about a diversity of views on religion. Explicating this position however is not a straightforward task, given that there is disagreement about

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> unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.

Id. at 883 (citations omitted).

[252] Congress, in an attempt to overturn Scalia's opinion, passed the American Indian Religious Freedom Act Amendments of 1994. Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (2000)).

[253] *See, e.g.*, CARTER, *supra* note 134, at 128-29 ("The judgment against the Native American Church [in *Smith*], however, demonstrates that the political process will protect only the mainstream religions, not many smaller groups that exist at the margins.").

[254] *Smith*, 494 U.S. at 877.

what is the proper test to adjudicate a violation of the Establishment Clause. I will not attempt to settle the debate, a job that would take me outside the aims of this Article. But I will argue that under all of the prominent judicial tests, the Court has made clear that the Establishment Clause prohibits the state from claiming a monopoly on religious truth. There are essentially three[255] prominent judicial theories for underwriting the Establishment Clause[256]: strict separation, neutrality, and accommodation.

The strict separation theory aspires to the maximum separation of church and state. Its most famous American expositor is Thomas Jefferson, who made clear his advocacy for the separation of church and state in his letter to the Danbury Baptist Association in 1802. There, he penned his famous metaphor of a "wall of a separation between church and state":

> I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.[257]

In the case law, *Everson v. Board of Education*[258] represents the single most emphatic endorsement of this strict separation theory.[259] While Justice Black wrote the majority opinion and Justice Rutledge the dissent, both subscribed to a version of strict separation that denied the state's ability to monopolize religious truth. Black initially wrote: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church."[260] What followed was an illuminating commitment to protecting opportunities for people to deliberate about a diversity of views regarding religion. Black asserted that

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[255] While some scholars might argue that there are more, mostly for purposes of convenience, I will bypass some of the subtler differences.

[256] Professor Witte has identified additional judicial theories for disestablishment: separationism, accomodationism, neutrality, endorsement, and equal treatment. WITTE, *supra* note 218, at 152-63.

[257] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *in* THE LIFE, *supra* note 188, at 307, 307.

[258] 330 U.S. 1 (1947).

[259] In *Everson*, the state permitted school boards to reimburse parents who sent their children to private schools, including Catholic schools, for the cost of transportation to and from the school. *Id.* at 16-18.

[260] *Id.* at 15.

neither the state nor the federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another."[261] By adopting this position of neutrality, one can read the Establishment Clause as affording equal opportunities for all religionists to deliberate about their faiths. Black's commitment to neutrality animated his other statements:

> [Neither state nor federal government] can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[262]

Although dissenting in the same case that contains this passage, Justice Rutledge was no less committed to the abstract proposition of strict separation, and, accordingly, his justifications can also be interpreted as supporting protection for the deliberation of diverse faiths.[263] He wrote:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[264]

This staunch commitment to separation of church and state characterized the Court's Establishment Clause jurisprudence from *Everson* to the 1980s.[265]

What has come to partly replace the strict separation approach is the neutrality approach. The neutrality approach

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[261] *Id.* at 15-16. For similar views, see, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.").

[262] *Id.* at 15.

[263] Of course, "the very fact that Justices who agreed on the governing principle could divide so sharply on the result suggests that the principle evoked by the image of a wall furnishes less guidance than metaphor." TRIBE, *supra* note 3, at 1166.

[264] *Everson*, 330 U.S. at 31-32.

[265] Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233-34 (1994) (Strict separation "became the 'official' history of the [establishment] clause until challenged by scholars and Justices in the early 1980s.").

to the Establishment Clause seeks to ensure that the state neither advances one religion over another nor advances religion over secularism or secularism over religion. In the Supreme Court, this approach has taken the form of an endorsement test, and Justice O'Connor assumed the role of one of its main articulators. In *Lynch v. Donnelly*, she began her concurring opinion with the announcement that the "Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[266] She further explained:

> Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines . . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[267]

What chiefly distinguishes the endorsement test from the strict separation test, then, is the former's commitment to social inclusion and equal citizenship.[268] Here too, however, the endorsement test, like the strict separation test, can be interpreted as an attempt to protect spaces for religionists to deliberate about a diversity of views. For no matter the view, the state is prohibited from stigmatizing, and thus coercing, people on the basis of what they choose to deliberate.

The accommodation approach, compared to the neutrality approach, is less protective of the religionist; for while the latter requires the religionist to show that the law makes her feel unwelcome, the former requires the religionist to show that the law goes further by coercing her to conform her beliefs to those privileged by the state. *Lee v. Weisman*[269] is a prime example of this approach. In that case, the principal of a public middle school invited a rabbi to deliver a

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[266] Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

[267] *Id.* at 687-88 (citation omitted).

[268] For a complementary perspective, see KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

[269] 505 U.S. 577 (1992).

nondenominational prayer at the graduation ceremony.[270] The prayer was prepared by the National Conference of Christians and Jews and was meant to be governed by a spirit of "inclusiveness and sensitivity."[271] Justice Kennedy for the Court found the prayer to violate the Establishment Clause because it had the tendency to coerce students who did not wish to participate in the prayer.[272] According to Kennedy, "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do

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[270] *Id.* at 581.

[271] *Id.* There were two prayers, an Invocation and a Benediction. The Invocation read:

> God of the Free, Hope of the Brave:
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> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> Amen.

The Benediction read:

> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> Amen.

Id. at 581-82.

[272] *Id.* at 589-94.

so.'"[273] However, there was a danger that such coercion would occur at the public school, where the state had such complete control over the graduation ceremony that the prayer became "a state-sanctioned religious exercise in which the student was left with no alternative but to submit."[274]

While there may be disagreement, as there was on the Court itself, about whether the school prayer rose to the level of coercion, what remains clear is that the Court's preoccupation with coercion under the accommodation approach reflects a strong commitment to protecting people's rights to deliberate about a diversity of religious views without undue state intervention. Thus, the Constitution's religion clauses, as interpreted by the Supreme Court, provide protections that allow for the deliberation of religious truth, thereby making the justification from truth a viable possibility in the context of religion.

VI. APPLICATIONS

Thus far, I have tried to formulate the legal foundations of the justification from truth for purposes of religious expression. Now I want to explain how this justification would possibly manifest itself in the case law. In doing so, I try to explain first how the justification would articulate its terms in a given set of case facts, and second, how the justification would serve as an adjudicative principle by deciding in favor of one party and against another. To offer as lucid of an account as possible, I begin with some relatively easy cases where the Supreme Court itself appeared to be applying a version of the justification from truth. I then move to cases where application of the justification from truth can generate new arguments for cases in which the Supreme Court relied on a different justification.

A. Religious Proselytism

I want to start with the relatively easy cases where the Supreme Court itself has at least hinted that it was applying the justification from truth to religious expression. What makes these cases so amenable to this justification is that they involve proselytizing, that is, efforts to persuade the audience

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[273] *Lee*, 505 U.S. at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[274] *Id.* at 597.

that a given religion is the truth.[275] *Cantwell v. Connecticut*[276] is an excellent example. A Jehovah's Witness named Newton Cantwell, along with his two sons, played a phonographic record in an area where "about ninety per cent of the residents are Roman Catholics."[277] The record "included an attack on the Catholic religion."[278] Cantwell asked two men walking the street whether they would be interested in hearing the record, and they acquiesced.[279] Upon hearing the record, both men "were incensed by the contents of the record and were tempted to strike Cantwell unless he went away."[280] Cantwell and his sons were charged with and convicted of invoking or inciting others to breach of the peace.[281]

Their case eventually made its way to the Supreme Court.[282] Writing for the Court, Justice Roberts overturned Cantwell's conviction by offering a justification that departed in crucial ways from the Court's standard justification for religious conscience. He wrote:

> We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.
>
> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to

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[275] The *Oxford English Dictionary* defines "proselyte" as "to cause to come over or turn from one opinion, belief, creed, or party to another; *esp*. to convert from one religious faith or sect to another." 12 OXFORD ENGLISH DICTIONARY, *supra* note 24, at 664.

[276] 310 U.S. 296, 310 (1940).

[277] *Id.* at 301.

[278] *Id.*

[279] *Id.* at 302-03.

[280] *Id.* at 303.

[281] *Id.*

[282] This was also the first Supreme Court case that made the right of free religious exercise applicable to states by incorporating the right through the Fourteenth Amendment's Due Process Clause. *See id.*

> enlightened opinion and right conduct on the part of the citizens of a democracy.[283]

What is intriguing about this opinion is Roberts's apparent suggestion that the right of religious free exercise is not simply relevant for the religionist who wishes to espouse her faith. According to Roberts, religious expression can also profit the audience: "But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[284] Here, Roberts seems to suggest that religious expression goes beyond being merely tolerated as an inevitable, if quirky, anomaly in a predominantly liberal secular culture.[285] Rather, Roberts emphasizes the positive impact of religious expression by alluding to what I have called the justification from truth.

A similar application of the justification from truth to religious expression appears in *Marsh v. Alabama*.[286] In *Marsh*, a Jehovah's Witness sought to distribute religious literature in a company town named Chickasaw.[287] The stores in the town had posted the following sign: "This Is Private Property, and Without Written Permission, No Street, or Horse Vendor, Agent or Solicitation of Any Kind Will Be Permitted."[288] After the Jehovah's Witnesses refused to comply with this sign, they were arrested for violating a state statute that made "it a crime to enter or remain on the premises of another after having been warned not to do so."[289] The Jehovah's Witnesses eventually appealed their case to the Supreme Court.[290] Justice Black for the Court phrased the issue in a way that alluded to his reliance on the justification from truth. He wrote, "Our question then narrows down to this: Can those people *who live in* or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?"[291] Tellingly, Black located the right of religious free

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283 *Cantwell*, 310 U.S. at 311.

284 *Id.* at 310.

285 So bemoans Stephen Carter. *See* CARTER, *supra* note 134, at 21-22.

286 326 U.S. 501, 508-09 (1946).

287 *Id.* at 502.

288 *Id.* at 503.

289 *Id.* at 503-04.

290 *Id.* at 503.

291 *Id.* at 505 (emphasis added).

exercise not just in the speaker but also in the audience, and thus implied that the audience has a right to hear and read religious expression, including a diversity of such expression. Black made this assumption explicit later in his opinion. After rejecting the arrests as violative of the right of free exercise, he wrote:

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.[292]

Just as Justice Roberts in *Cantwell* explained that religious expression is necessary for "citizens of a democracy" to form "enlightened opinions," Black reasoned that religious expression is important in order for people "to act as good citizens" who are "informed."[293] Cases like this involving religious proselytizing have marshaled some version of the justification from truth, although without elaborating its logic and foundations.[294] But what should we make of those cases that do not involve proselytizing? I take them up next.

B. Non-Proselytizing and No Intent to Persuade

The previous discussion might lead one to believe that the justification from truth is inappropriate for speech that does not deliberately seek to proselytize. Indeed, all of the political speech and commercial speech cases that I have discussed involved speakers who were deliberately trying to persuade others through speeches, leaflets, and the like. Yet, as I argue later, even if someone has no intent to persuade others, her speech or expression can inform an audience and stimulate deliberation. Therefore, the justification from truth should be applied to these examples as well.

When speakers have not deliberately sought to communicate a message to others, the Supreme Court, if it

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[292] *Id.* at 508.

[293] *Id.*

[294] *See, e.g.*, Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues . . . .").

wishes to protect the expression, might be tempted to apply what I call the justification from conscience. According to this justification, the Court protects the First Amendment rights of a speaker so that she may be faithful to her conscience.[295] An example of such a speaker is found in Henry David Thoreau. Thoreau urged people to accept jail confinement rather than underwrite through their taxes a government that sanctions slavery:

> I know this well, that if one thousand, if one hundred, if ten men whom I could name,—if ten *honest* men only,—ay, if *one* HONEST man, in this State of Massachusetts, *ceasing to hold slaves*, were to [refuse to pay his taxes] and be locked up in the county jail therefore, it would be the abolition of slavery in America. For it matters not how small the beginning may seem to be: what is once well done is done forever.[296]

Here, the act of civil disobedience is performed not primarily to benefit the community, for one man's lone decision to serve jail time hardly signals "the abolition of slavery in America." Rather, the dramatic gesture is meant to cleanse one's conscience.[297] It is an act to demonstrate both to the community and to one's self what one is really made of. The speech act is thus not simply expressive but also affirmative of one's moral conscience.

A similar understanding regarding the significance of speech acts informs the Supreme Court's opinion in *Cohen v. California*.[298] There, the Court reversed the prosecution of one Robert Cohen who violated a disturbance of the peace statute for wearing in a Los Angeles courthouse a jacket emblazoned with the words "Fuck the Draft."[299] Justice Harlan for the Court reasoned that the First Amendment protected Cohen's expression, and part of his justification stemmed from the view that Cohen's message contained "inexpressible emotions."[300] In thus characterizing Cohen's speech, Harlan did not appear to regard the speech as trying to convey a meaning to an audience, for the emotion in Cohen's speech was said to be

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[295] *See supra* note 11 (2d paragraph).

[296] Henry David Thoreau, *Civil Disobedience*, *in* COLLECTED ESSAYS AND POEMS 203, 212 (Elizabeth Hall Witherell ed., Library of America 2001) (1849).

[297] For related discussion, see HANNAH ARENDT, CRISES OF THE REPUBLIC 58-68 (1972).

[298] 403 U.S. 15 (1971).

[299] *Id.* at 16.

[300] *Id.* at 26.

"inexpressible." Pregnant with inexpressible emotions, the speech was better understood as trying to affirm the nonverbal passions of Cohen's conscience, and Harlan's opinion is best interpreted as an attempt to make legal space for such affirmation.

But there is an important ambivalence that complicates the assumption that *Cohen* is merely a case about affirming one's conscience. Harlan wrote that Cohen's speech also involved a "communicative function" and his profanity might have been "the more important element of the overall message sought to be communicated."[301] Furthermore, Harlan stated that the right of free speech is "designed and intended to remove governmental restraints from the arena of public discussion . . . ."[302] This sort of conceptual ambivalence is reproduced in other examples involving political speech that are partially underwritten by the justification from conscience.

Consider Thoreau's decision to go to jail rather than to pay taxes that would indirectly support slavery. As I have suggested, his jail time could not, as he claimed, amount to "the abolition of slavery in America" and is better understood as an act of moral self-fulfillment, a cleansing of his conscience. But it was more than that. For Thoreau attempted to justify, not simply to himself, but to others, his refusal to pay taxes, and he attempted to urge other men to follow his lead as a means of asserting *their* morally informed manhood against an evil state. That Thoreau's rhetoric is sometimes shrill and indignant must not obscure his desire to urge others to political action.[303]

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[301] *Id.* at 25-26 (citing Baumgartner v. United States, 322 U.S. 665, 673-74 (1944)).

[302] *Id.* at 24.

[303] An important reason why political speech tends to resist classification as nothing other than the affirmation of one's conscience is because politics is not conventionally understood as an enterprise that involves a single individual, nor one where the value of expression resides solely in the lone individual. Politics necessarily involves living and working with others, as suggested by its definition. The *Oxford English Dictionary* defines "political" as follows: "Of, belonging, or pertaining to the state or body of citizens, its government and policy . . . ." 12 OXFORD ENGLISH DICTIONARY, *supra* note 24, at 32. Also, an erstwhile definition of "politics" is given as the "public or social ethics, that branch of moral philosophy dealing with the state or social organism as a whole (*obs.*)." *Id.* These descriptions suggest an association with others, and hence a working together with them.

This concept is captured well in Aristotle's observation that "man is by nature a political animal," meaning that the human being by nature desires to live with others. ARISTOTLE, THE POLITICS 37 (Carnes Lord trans., Univ. of Chi. Press, 1984). For one "who is incapable of participating nor who is in need of nothing through being self-sufficient is no part of a city, and so is either a beast or a god." *Id.* Tellingly,

In the context of religious acts, the Court has sometimes justified the right of religious expression in terms of the justification from conscience. Consider once more *Thomas v. Review Board of the Indiana Employment Security Division*.[304] While factually quite different from the profanity of *Cohen*, the religious dimension in *Thomas* was regarded by the Court as presenting a similar question of conscience. One Eddie Thomas was a foundry worker in Indiana who was transferred from making steel sheeting to making tank gun turrets.[305] As a Jehovah's Witness, he refused to participate in activities that would contribute to war. Thomas quit his job and sought unemployment benefits.[306] The Indiana Supreme Court refused to permit the dispensing of such benefits because "'although the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was.'"[307] The confusion or doubt is quite excusable, for how could producing steel sheeting that could be added to a tank's armor differ morally from building its turret in terms of leading to its construction and hence its availability for assault? Besides, the Indiana Supreme Court could point to another Jehovah's Witness who had no qualms about making turrets.[308] Still, on appeal, Chief Justice Burger, writing for the United States Supreme Court, reversed the Indiana Supreme Court, stating that

> Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.[309]

Aristotle points to "speech" as the defining characteristic of man's status as a political animal, because "man alone among the animals has speech," and it is speech that permits us to communicate to each other the "advantageous and the harmful, and hence also the just and the unjust." *See id.* What makes speech political here is its capacity to communicate ideas to others. This is not to say that your criticizing the president while you are on a deserted island is not political speech; in terms of its content, it obviously is. It is instead to suggest that we tend to value political speech because such speech can persuade and inform an audience.

[304] 450 U.S. 707 (1981).

[305] *Id.* at 709.

[306] *Id.* at 710.

[307] *Id.* at 741 (quoting Thomas v. Review Bd. of the Ind. Employment Sec. Div., 391 N.E.2d 1127, 1133 (Ind. 1979)).

[308] *Id.* at 715.

[309] *Id.*

Here, Chief Justice Burger does not justify Thomas's expression as constitutionally protected because it is likely to persuade or cause to reflect anyone who witnesses it; Burger thus avoids the justification from truth. Burger instead justifies his decision by turning to the justification from conscience. He seems to imply that no one—including other Jehovah's Witnesses—would necessarily even understand Thomas's actions as coherent. The action is constitutionally protected, it seems, largely because it is the way that Thomas himself has come to terms with his religion.[310] It seems instinctively right to justify religious expression in terms of the justification from conscience.

On the other hand, there is something curious about justifying the right of religious expression exclusively in terms of conscience and not the justification from truth. For religious speech, like political speech, can inform and persuade its audience. And here we need not just invoke the familiar idea of religious proselytism. We can also imagine how the audience can learn from the religious expression of someone whose primary motivation is not to educate others. Recall that Chief Justice Burger justified Thomas's right of religious expression as a means of being faithful to the latter's religious conscience, but he could have just as well invoked the justification from truth. While Burger conceded that Thomas's refusal might not have been necessitated by his religion and might have been wanting in coherence, the message was nonetheless clear in its general meaning: helping to build military weapons violates the Jehovah's Witness commitment to pacifism and it is better to lose one's job than to betray God's wishes. Even if Thomas did not intend to inform or persuade others, it is possible for some to infer and reflect upon the meaning of his resistance. People may be inspired—or angered—by Thomas's religious expression, and they may come to realize, for example, that they are insufficiently serious about their own religions, or that they should not be zealous like Thomas. Either way, people might find reflecting about Thomas's religious expression to be theoretically more rewarding and intense than the sort of political speech and commercial speech that is underwritten by

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[310] This justification must logically depend on the assumption that Thomas's religious expression is a means of being faithful to his conscience, and that it does not stem from a desire to avoid strenuous or dangerous activity or to avoid being under the control of an overbearing supervisor.

the justification from truth.[311] Indeed, it seems inaccurate to classify Thomas's expression as merely religious, as if religious speech were somehow concerned only with religious topics. Thomas's speech is also pregnant with political meaning: he would prefer to lose his job than to do the government's military bidding. It is therefore not entirely clear why the Court justified Thomas's expression as simply an exercise in religious conscience. Furthermore, similar to political speech, Thomas's expression is fully capable of helping the audience to arrive at some conclusion about truth, namely, that state-sponsored violence is unacceptable to those who take seriously their religiously informed pacifism.

A similar kind of inference can be derived from *West Virginia State Board of Education v. Barnette*, a case where the Court recognized religious speech as protected by both the right of religious expression and the right of free speech.[312] As in *Thomas*, the Court relied on the justification from conscience, not truth, but the justification from truth would have been perfectly serviceable. Like *Thomas*, *Barnette* involved religionists who sought to be faithful to their consciences. The West Virginia State Board of Education had passed a resolution that required students and teachers to salute the American flag as a regular part of classroom business.[313] This rule conflicted with the religious convictions of the Barnette children who were Jehovah's Witnesses.[314]

Justice Jackson for the Court rejected as unconstitutional the compulsory flag salute, reasoning that it unjustifiably coerced the Jehovah's Witnesses into doing something that contradicted their religious consciences. The required salute, Jackson announced, "invades the sphere of intellect and spirit which it is the purpose of the First

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[311] Imagine viewing a series of dull political sound bites for a series of indistinguishable candidates or, worse, viewing a steady stream of commercials for five different kinds of light beer.

[312] Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943).

[313] *Id.* at 626.

[314] The beliefs of the Jehovah's Witnesses

> include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

Id.

Amendment to our Constitution to reserve from all official control."[315] Jackson also proclaimed, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[316] By "invading the sphere of intellect and spirit" and by "forcing citizens to confess" to practices that they find to be sinful, the compulsory flag salute punishes a commitment to one's conscience in two respects: It compels the Jehovah's Witnesses to express a meaning which directly violates their religious consciences and it prohibits them from expressing what they believe their religious consciences tell them is right.

While the Jehovah's Witness children may not have sought to convey any meaning to their classmates or to the school staff, their refusal was nonetheless clearly expressive: A close reading of the Bible should preclude responsible Jehovah's Witnesses from paying homage to any graven image of state-sponsored nationalism, and not even the threat of school expulsion should deter them. Like the case of Eddie Thomas, even if the Barnette children did not intend to inform or persuade others, it is possible for some to infer and reflect upon the meaning of their resistance. Their expression is relevant to the audience's process of deliberating about some truth, namely, that one's devotion to God must be complete and is not compatible with an extant devotion to emblems of a coerced nationalism. Thus the justification from truth could have persuasively been applied in this case, just as it could have been applied in many other cases involving non-proselytizing speech.

C. Public Elementary, Middle, and High Schools

Applying the justification from truth to the religious expression of the Barnette children, as I did previously, would seem especially apt given that schools are places that the Supreme Court has recognized as valuable, and perhaps uniquely so, for the exchange of diverse ideas and viewpoints.

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[315] *Id.* at 642.

[316] *Id.* Jackson also wrote: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634.

In *Ambach v. Norwick*, the Supreme Court spoke of "the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system . . . ."[317] This may involve recognizing public schools "as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground."[318] And in *Bethel School District v. Fraser*, the Court similarly observed that the public schools should aspire to teach the "fundamental values of 'habits and manners of civility' essential to a democratic society [which] must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular."[319]

But if the justification from truth were to be employed to defend a government law that requires public school students to learn about religious diversity, how deeply should the justification cut against a right to resist such exposure? The answer to this question obviously depends on the facts. *Mozert v. Hawkins County Public Schools* provides a usefully heuristic example where the justification would survive scrutiny.[320] In 1983, the Hawkins County School Board in Tennessee voted to require all students to take "character education" courses.[321] The purpose of the courses was "to help each student develop positive values and to improve student conduct as students learn to act in harmony with their positive values and learn to become good citizens in their school, community, and society."[322] The school board specifically intended for the courses to use a textbook published by the Holt Rinehart company in a manner that instilled critical reading.[323] Vicki Frost agreed that critical reading was important but argued that her children's First Amendment rights of free exercise were being infringed upon by being required to learn material that was "in violation of their

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[317] Ambach v. Norwick, 441 U.S. 68, 77 (1979).

[318] *Id.* (citing JOHN DEWEY, DEMOCRACY AND EDUCATION 26 (Macmillan 1929)).

[319] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (citing CHARLES A. BEARD & MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES 228 (1944)).

[320] Mozert v. Hawkins County Pub. Sch., 827 F.2d 1058, 1063-64 (6th Cir. 1987).

[321] *Id.* at 1060.

[322] TENN. CODE ANN. § 49-6-1007 (Supp. 1986).

[323] *Mozert*, 827 F.2d at 1060.

religious beliefs and convictions."[324] As a born-again Christian, Frost condemned the Holt textbook mainly because it contained "stories that develop 'a religious tolerance that all religions are merely different roads to God.'"[325] She announced, "We cannot be tolerant in that we accept other religious views on an equal basis with ours."[326] Hence, Frost essentially rejected the justification from truth as inapplicable in this instance. She insisted that she and her children were already in possession of the truth about religion and a diversity of competing religious views would only confuse and subvert her children.

Chief Judge Lively for the Sixth Circuit Court of Appeals did not agree and he provided persuasive reasons for his conclusion. He reasoned that the Supreme Court's reference to the "tolerance of divergent . . . religious views" in *Bethel School District* was a "civil tolerance, not a religious one."[327] As such, the tolerance taught by the teachers in the Hawkins County School District "does not require a person to accept any other religion as the equal of the one to which that person adheres."[328] All that it requires is "a recognition that in a pluralistic society we must 'live and let live.'"[329] Lively added that if "the Hawkins County schools had required the plaintiff students either to believe or say they believe that 'all religions are merely different roads to God,' this would be a different case."[330] But there was no evidence to suggest that the school compelled such affirmation.[331] Rather, Chief Judge Lively stated that the "only conduct compelled by the defendants was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials," and it was this "exposure to which the plaintiffs objected."[332] In other words, the Frost children were never coerced to accept the "truth" on offer in the textbook. They were theoretically free to criticize whatever ostensive truth was brought before

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[324] *Id.* at 1061.

[325] *Id.* at 1068.

[326] *Id.* at 1069.

[327] *Id.*

[328] *Id.*

[329] *Id.*

[330] *Id.*

[331] The Court noted with regard to Frost's concern "that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer. There is no evidence that any child in the Hawkins County schools was required to make such judgments." *Id.* at 1069.

[332] *Id.*

them. The justification from truth, then, is most appropriate when it invites perusal over different options, not when it compels affirmation of those options.

1. When the Majority Coerces the Minority

Lest my rendering of *Mozert* appear to evince a hidden sympathy for the state, I want to clarify that the justification from truth also prohibits the state from infringing on people's opportunities to retain the psychological resources necessary for ascertaining some truth about religion. In contrast to *Mozert*, *Lee v. Weisman*[333] represents a case in which the justification from truth would be insufficient to overcome a student's resistance to religious expression. Recall that the principal of a public middle school had asked a rabbi to give a nondenominational prayer during a graduation ceremony.[334] Though the school had sought to convey a feeling of "inclusiveness and sensitivity" through the prayer, Justice Kennedy rejected the prayer as a violation of the Establishment Clause. For in "this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit."[335] As stated before, the justification from truth is most appropriate in those settings where the audience is being challenged to consider competing or alternative viewpoints and where the audience feels comfortable enough to deliberate about those viewpoints.[336] In *Mozert*, the audience, including the Frost children, had access to a diversity of viewpoints about religion, especially those viewpoints that would have been considered culturally outside the norm for many children reared in a place like Hawkins County, Tennessee,[337] and the students were permitted and, at least in theory, even invited to challenge those viewpoints.

The facts of *Lee* are different, however. First, unlike the educational enterprise of *Mozert*, the school prayer in *Lee* was

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[333] 505 U.S. 577 (1992).

[334] *See supra* notes 270-274 and accompanying text.

[335] *Lee*, 505 U.S. at 597.

[336] *See supra* Part I.

[337] Hawkins County had a population of 53,563 in 2000, of which 60% was rural and only 3.3% comprised racial minorities. Hawkins County Industrial Board, http://www.hawkinscounty.org/development/population.html (last visited Aug. 25, 2007).

primarily, if not solely, a ceremonial event meant to enshrine a set of religious truths. The prayer was comprised of an "Invocation" and a "Benediction," and the language in both gives away the ceremonial nature of the prayer.[338] Even the part of the prayer that recognizes the importance of protecting diversity, including presumably atheism and agnosticism, is regarded as the product of God's beneficence: "For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You."[339] To be sure, the nature of the religious expression in *Thomas* and *Barnette* is similar to the prayer in *Lee* in that all three never consciously sought to educate the public. However, unlike *Lee*, the expressions in *Thomas* and *Barnette* were those of a religious minority. Whereas the prayer in *Lee* had the support of the school and the majority of the student body and the parents, the expressions in *Thomas* and *Barnette* provoked bewilderment and dismissal in the former and an angry intolerance in the latter.[340] Furthermore, the Jehovah's Witnesses in both cases provoked such responses precisely because they refused to acquiesce to the wishes of the majority and the state. Perhaps most importantly, whereas those who belonged to the mainstream religions would not have felt coerced to believe or disbelieve the meaning of the Jehovah's Witness expressions in *Thomas* and *Barnette*, those non-believers in *Lee* would have been much more likely to have felt coerced into outwardly participating in the religious ceremony.

This conclusion tends to distinguish my formulation of the justification from truth from that of Professor Marshall, who is one of the few professors to have applied the justification to the religion clauses. He argues:

> [A] search for truth rationale would undercut the religious claims of some groups that they have a constitutional right to be insulated from societal forces that affect all other ideologies. Specifically, it would suggest that . . . the fundamentalist claim in *Mozert v. Hawkins County Public Schools* [is] seriously weakened if not entirely misplaced. [For] the religious claim being advanced was that there was a free exercise right not to be exposed to ideas that would purportedly threaten the integrity of the religious community. The

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338 *See supra* note 271 and accompanying text.

339 For the full text, see *supra* note 271.

340 *See supra* Part VI.B.

> validity of this argument would be very much in doubt if the Religion Clauses were premised on a search for truth rationale.[341]

Under my approach, what makes Vicki Frost's claim in *Mozert* untenable is not that it rests on a desire to be immune from "ideas that would purportedly threaten the integrity of the religious community." The claim is untenable for other reasons: first, because it rejects participation in a setting where religionists are required to consider a diversity of viewpoints about religion; and, second, because the setting in which they are so required lasts for the duration of a single class period in a public school that is formally dedicated to broadening the social outlook of its students. Neither of these two factors was present in *Lee*. Instead, *Lee* did the opposite in consolidating familiar religious perspectives that were prepared by a mainstream religious coalition of Christians and Jews.[342] And the religious truths awaiting announcement in the school's Invocation and Benediction were not introduced in a setting of tentative inquiry like in *Mozert* but were meant to be consecrated through collective ritual.

For similar reasons, *Bowers v. Hardwick*[343] and *Harris v. McRae*[344] also cannot be underwritten by the justification from truth. Professor Marshall writes that

> the search for truth rationale supports the Supreme Court's conclusion in cases such as *Bowers v. Hardwick* and *Harris v. McRae* that there is no constitutional violation in prohibitions against sodomy or abortion, respectively, solely because those prohibitions reflect religious principles. If there are to be limitations on the role of religion in the public sphere, those restrictions must be based on something other than the substance of religious ideas.[345]

Quite true, but those restrictions would seem to inhere in the justification from truth itself, or at least the deliberative version that I defend. That is, the logic of the justification from truth, as I have defined it, contains normative restrictions on what forms of actions the state may express: actions that promote deliberation are justified, while those that undermine it are not. *Bowers* and *Harris*, like *Lee*, represent cases where the state has not produced the effect of inviting its audience to

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341 Marshall, *supra* note 12, at 267-68 (footnotes omitted).

342 *Lee*, 505 U.S. at 581.

343 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

344 448 U.S. 297 (1980).

345 Marshall, *supra* note 12, at 266-67 (footnotes omitted).

deliberate about a diversity of viewpoints or has no interest in doing so. Rather, the state in both cases was instead determined to transform its religious preferences into the force of legal sanctions.

In *Bowers*, Georgia had passed an anti-sodomy statute that its attorney general acknowledged would be applied only to homosexuals.[346] Concurring, Chief Justice Burger upheld the law as speaking to our traditional Judeo-Christian abhorrence of homosexuality.[347] If the Georgia statute were indeed prompted by such dread, it could not in my view find support from the justification from truth. For, like the school-mandated prayer in *Lee*, the anti-sodomy statute was not meant to introduce a provocative minority perspective that would induce public deliberation. The statute was meant to stifle such deliberation by simply asserting the rightness of its own religious preferences, and, worse, it wielded the threat of criminal conviction and public humiliation against those who refused to obey it.

A similar dynamic was at play in *Harris*. There, Congress passed a law prohibiting the federal government from funding abortions except to save the life of the mother or for victims of rape or incest.[348] If the law were passed to further a Christian condemnation of abortion, the statute would not be defensible under my version of the justification from truth. Analogous to the state's conduct in *Lee* and *Bowers*, the state in *Harris* had little, if any, desire to provoke deliberation about some minority perspective, nor can we seriously assume that such deliberation was the statute's probable effect. The state's aims are better described as principally administrative in placing potentially debilitating obstacles before those who seek abortions. Thus, the justification from truth should not be applied in *all* cases in which speech is religious, especially when the majority is imposing its views on the minority.

2. A Limited Diversity: Why Creation Science Can Be Excluded

I have argued for a diversity of religious viewpoints, but a boundless diversity cannot be managed in practice because

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[346] *Bowers*, 478 U.S. at 201.

[347] *Id.* at 196-97 (Burger, J., concurring).

[348] *Harris*, 448 U.S. 297, 302 (1980) (citing Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)).

there are not enough resources to accommodate them all. There are some viewpoints that must be excluded or given low priority even if they represent minority perspectives. On a certain level of abstraction, the process of ranking viewpoints is, I suppose, normatively inconsistent with the project of encouraging a diversity of viewpoints that I have espoused thus far. Yet such tension need not condemn us to utter confusion, either. The Supreme Court illustrates how one can embrace a diversity of viewpoints without affording legal protection for every single viewpoint. Even under the justification from truth as applied to secular speech, the Court has denied constitutional protection, for example, to fighting words,[349] libel,[350] and obscenity.[351] In each of these settings, the Court has stated that the speech, while bursting with meaning, possesses the sort of meaning that is incompatible with the administrative and normative priorities of civil society.[352]

Like the Court, I can provide reasons for excluding some viewpoints and, thus, preferring one conception of diversity over another. I can illustrate this practice by trying to justify the exclusion of creation science and intelligent design as meaningful scientific theories from public high schools, middle schools, and elementary schools. Whereas evolutionists believe that humans evolved from natural causes, advocates for creation science and intelligent design argue that some intelligent Being that was anterior to the existence of anything is responsible for the creation and evolution of humans.[353]

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[349] Chaplinsky v. New Hampshire, 315 U.S. 568, 568 (1942).

[350] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact.").

[351] Miller v. California, 413 U.S. 15, 15 (1973).

[352] Justice Murphy alluded to a consonant theme in *Chaplinsky*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

315 U.S. at 571-72 (footnotes omitted).

[353] Duane T. Gish, an advocate for creation science, juxtaposes his position with that of evolutionists: "Creation theory postulates . . . that all basic animal and plant types (the created kinds) were brought into being by the acts of a preexisting Being by means of special processes that are not operative today." Duane T. Gish, *Creation, Evolution, and the Historical Evidence*, *in* BUT IS IT SCIENCE?, *supra* note 108, at 266, 266. William Dembski, a believer in intelligent design, also subscribes to a similar view: "From observable features of the natural world, intelligent design infers to an intelligence responsible for those features. The world contains events, objects and structures that exhaust the explanatory resources of undirected natural causes and

Creation scientists tend to differ from believers in intelligent design in that the former sometimes assert that science can support a literal interpretation of the Bible,[354] whereas the latter claim more guardedly that science points to an intelligent Being, whose aims or values are unknowable, as the cause of the universe.[355] I dwell on their similarities, though, because there is a fatal flaw in their common premise that science points to a Higher Being as the creator of our known universe and everything in it.

To return to the Article's theme, I want to argue in this section that creation science can be rejected on the grounds of

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that can be adequately explained only by recourse to intelligent causes." WILLIAM A. DEMBSKI, INTELLIGENT DESIGN: THE BRIDGE BETWEEN SCIENCE AND THEOLOGY 107 (1999).

[354] Henry M. Morris, the Director of the Institute for Creation Research, is a good example. He states: "The Bible is the Word of God, absolutely inerrant and verbally inspired . . . The Bible gives us the revelation we need, and it will be found that all the known facts of science or history can be very satisfactorily understood within this Biblical framework." HENRY M. MORRIS, EVOLUTION AND THE MODERN CHRISTIAN 55 (1967), *quoted in* Joel Cracraft, *The Scientific Response to Creationism*, *in* CREATIONISM, SCIENCE, AND THE LAW: THE ARKANSAS CASE 138, 139 (Marcel Chotkowski La Follette ed., 1983). Elsewhere, Morris writes that creation science supports the Bible's account of Genesis and Noah's Flood. SCIENTIFIC CREATIONISM 205-08, 213 (Henry M. Morris ed., 1974).

[355] William Dembski, a proponent of intelligent design, writes:

> In the past design was a plausible but underdeveloped philosophical intuition. Now it is a robust program of scientific research. Consequently intelligent design is under no obligation to speculate about the nature, moral character or purposes of any designing intelligence it happens to infer. (Here rather is a task for the theologian—to connect the intelligence inferred by the design theorist with the God of Scripture.) Indeed this is one of the great strengths of intelligent design, that it distinguishes design from purpose. We can know that something is designed without knowing the ultimate or even proximate purpose for which it was designed.

DEMBSKI, *supra* note 353, at 107-08. Still, in other places, Dembski clearly evinces his prioritization of Christianity, and thus implies that his "scientific" endeavors are meant less to find the truth, whatever it may be, than to vindicate his religious faith:

> If we take seriously the word-flesh Christology of Chalcedon (i.e., the doctrine that Christ is fully human and fully divine) and view Christ as the *telos* toward which God is drawing the whole of creation, then any view of the sciences that leaves Christ out of the picture must be seen as fundamentally deficient.

Id. at 206 (footnotes omitted). And the self-styled creation scientist Henry Morris sometimes poses like a more dispassionate advocate of intelligent design when he writes that the purpose of "scientific creationism" "is, first, to treat all of the more pertinent aspects of the subject of origins and to do this solely on a scientific basis, with no references to the Bible or to religious doctrine." SCIENTIFIC CREATIONISM, *supra* note 354, at 3. This is the sort of promiscuous affinity between intelligent design and creation science that leads me to believe that, notwithstanding the differences in their names, their advocates are often people who share more or less the same aspirations and beliefs about their work.

employing a diversity of viewpoints to discover the truth. For it is my contention that creation science fails to contribute to a meaningful diversity of views in public schools insofar as it is presented as a legitimate or potentially legitimate statement about "science." As I will show, creation science, like libel, has the tendency to mislead the audience with false statements because it styles itself a science but contains none of the standard indicia of science. In this way, just as we may exclude libel from constitutional protection even though it may contribute to a diversity of viewpoints, so we may also exclude creation science from being taught in public elementary, middle, and high schools.

I can begin to explain my argument by turning to *McLean v. Arkansas Board of Education*.[356] In 1981, Arkansas passed the "Balanced Treatment for Creation-Science and Evolution-Science Act."[357] As its name suggests, the Act appeared to make a formal bid for a diversity of viewpoints—a "balanced treatment" of opposing perspectives—an assumption reinforced by its professed aims. In solemnly progressive tones, the statute is studded with the tropes of innocent intellectual curiosity. It makes reference to respect for different values, aspirations to epistemic neutrality, and even a desire for the "search for truth":

> This Legislature enacts this Act for public schools [with] the purpose of protecting academic freedom for students' differing values and beliefs; ensuring neutrality toward students' diverse religious convictions; ensuring freedom of religious exercise for students and their parents; guaranteeing freedom of belief and speech for students; preventing establishment of Theologically Liberal, Humanist, Nontheist, or Atheist religions; preventing discrimination against students on the basis of their personal beliefs concerning creation and evolution; and assisting students in their search for truth. This Legislature does not have the purpose of causing instruction in religious concepts or making an establishment of religion.[358]

Section 1 of the Act continues this endorsement of diversity and balance of viewpoints, requiring that public schools give "balanced treatment" to both theories of evolution.[359] Such language would imply that the Arkansas

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[356] 529 F. Supp. 1255 (E.D. Ark. 1982).

[357] Balanced Treatment for Creation-Science and Evolution-Science Act, ARK. CODE ANN. § 80-1663 (Supp. 1981).

[358] *Id.*

[359] The law reads:

legislature was merely interested in doing what I have sought to do throughout the Article: urge the merits of deliberation about a diversity of viewpoints. But upon closer inspection this conclusion is not quite right. For the statute misleadingly ascribes the characteristics of that which is properly called science to "creation science." So declares section 7(j):

> Creation-science is an alternative scientific model of origins and can be presented from a strictly scientific standpoint without any religious doctrine just as evolution-science can, because there are scientists who conclude that scientific data best support creation-science and because scientific evidences and inferences have been presented for creation-science.[360]

Section 4(a) outlined the scientific qualities of creation science:

> "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing . . . .[361]

To assess the scientific merits of this claim, Judge Overton for the district court first provided a definition of science by which they could be compared. After deliberating the expert testimony, he summarized "the essential characteristics of science":

> (1) It is guided by natural law; (2) It has to be explanatory by reference to natural law; (3) It is testable against the empirical world; (4) Its conclusions are tentative, i.e., are not necessarily the final word; and (5) It is falsifiable.[362]

The claims by creation science in *McLean* could not comport with these requirements. Most damagingly, creation science could not be justified as based on "natural law." For the Arkansas statute insists in section 4(a)(1) that the "[s]udden

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> Public schools within this State shall give balanced treatment to creation-science and to evolution-science. Balanced treatment to these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe.

Id.

[360] *Id.*

[361] *Id.*

[362] McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1267 (E.D. Ark. 1982).

creation of the universe, energy, and life" derives from "nothing," and thus insists too that a force that is anterior to nature itself has created human beings and the universe which they know. What the logic of creation science relies on, then, is an appeal to divine intervention, the only force that can create the universe out of "nothing."[363] As such, there is no way to test the conclusion that God created the universe since there is literally "nothing" to test as a proposition about physical matter.[364] Therefore, creation science, unlike conventional science, is not falsifiable.[365] For the same reason, it is not

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[363] Judge Overton explained that creation science "is not science because it depends upon a supernatural intervention which is not guided by natural law. It is not explanatory by reference to natural law, is not testable and is not falsifiable." *Id.*

[364] As Judge Overton stated: "If the unifying idea of supernatural creation by God is removed from Section 4, the remaining parts of the section explain nothing and are meaningless assertions." *Id.*

[365] The zoologist Stephen Jay Gould, a trial witness against Arkansas in *MacLean*, delivered an especially keen critique of creation science:

> "Scientific creationism" is a self-contradictory, nonsense phrase precisely because it cannot be falsified. I can envision observations and experiments that would disprove any evolutionary theory I know, but I cannot imagine what potential data could lead creationists to abandon their beliefs. Unbeatable systems are dogma, not science. Lest I seem harsh or rhetorical, I quote creationism's leading intellectual. Duane Gish, Ph.D., from his recent (1978) book, *Evolution? The Fossils Say No!* "By creation we mean the bringing into being by a supernatural Creator of the basic kinds of plants and animals by the process of sudden, or fiat, creation. We do not know how the Creator created, what processes He used, *for He used processes which are not now operating anywhere in the natural universe* [Gish's italics]. This is why we refer to creation as special creation. We cannot discover by scientific investigations anything about the creative processes used by the Creator." Pray tell, Dr. Gish, in the light of your last sentence, what then is "scientific" creationism?

STEPHEN JAY GOULD, HEN'S TEETH AND HORSE'S TOES, 253-62 (1983) (quotation on 256-57); Joel Cracraft, a science adviser to the American Civil Liberties Union who challenged the Arkansas statute describes the operations of the statute as follows:

> No longer can science construct explanatory hypotheses about events having a time dimension—to creationists, science must study only the observable, only that which can be verified in a laboratory experiment. No longer must scientific ideas, or conjectures, be subject to criticism and eventual rejection—some statements, such as those derived from revelation, are not only to be considered scientific in their content, but also impervious to criticism.

Joel Cracraft, *The Scientific Response to Creationism*, *in* CREATIONISM, SCIENCE, AND THE LAW: THE ARKANSAS CASE 138, 139 (Marcel C. La Follette ed., 1983). The philosopher of science Michael Ruse was an expert witness against Arkansas. During cross examination, Ruse responded:

> First, and most importantly, creation science necessarily looks to the supernatural acts of a Creator. According to creation-science theory, the Creator has intervened in supernatural ways using supernatural forces. Moreover, because the supernatural forces are the acts of a Creator, that is, the acts of God, they are not subject to scientific investigation or

tentative in its conclusions, as is science, but instead provides that God is the final word.[366] Creation science can thus be rejected as something that students should learn in public schools in order to enrich their knowledge of science. This is not to suggest that there is no cultural or religious value to creationism or that those who believe it are necessarily wrong. Rather, it is to suggest that an inherently religious account of the origins of the universe should be regarded as founded on its unique epistemic resources of faith, not empirical science. Or, to state the objection in terms of my discussion of scientific paradigms,[367] creation science attempts to conscript the paradigm of science to make sense of claims that are inherently resistant to the logic of science.[368]

> understanding. This nonscientific aspect of creation science emerges quite clearly from the creation-science literature I have read.

Michael Ruse, *Witness Testimony Sheet*, McLean v. Arkansas, *in* BUT IS IT SCIENCE?, *supra* note 108, at 287, 304. Ruse has made similar arguments elsewhere. *See* RUSE, DARWINISM DEFENDED, *supra* note 108, at 322 (arguing that the reliance on miracles by creation scientists "lie[s] outside of science, which by definition deals only with the natural, the repeatable, that which is governed by law"). For an argument about how Darwinism provides a heuristic of falsifiability, see Sir Karl Popper, *Darwinism as a Metaphysical Research Program*, *in* BUT IS IT SCIENCE?, *supra* note 108, at 144, 145-47.

[366] *See supra* notes 363-365 and accompanying text.

[367] See *supra* notes 113-118 and accompanying text.

[368] The theology professor Langdon Gilkey at the University of Chicago, a witness against Arkansas, explains:

> The creation-science "model" is . . . not an example of science at all; it involves a supra-natural cause, transcendent to the system of finite causes; it explains in terms of purposes and intentions; and it cites a transcendent, unique, and unrepeatable—even in principle, uncontrollable—action. It represents, therefore, logically and linguistically, a re-edition of a familiar form—that is, "natural theology," which argues that certain data point "rationally" to a philosophical/religious conclusion, namely, to the agency of a divine being.
>
> Second, the creationists fail to distinguish the question of *ultimate* origins (Where did it *all* come from?) from the quite different question of *proximate* origins (How did A arise out of B, if it did?). They ignore the (scholastic) distinction between the *primary* causality of a First Cause, with which philosophy or theology might deal, and *secondary* causality, which is causality confined to finite factors. Assuming that it is science's role to deal with the truth and, therefore, with *all* of the truth, they conclude that a scientific explanation of origins must be an *exhaustive* explanation and must be inclusive of all possible related factors or causes. If evolution theory deals with proximate origins, it must also deal with the question of ultimate origins. If, in this process, evolution theory has left out God, then it must be asserting that there is no God, or that the divine is in no way the Creator of the process of secondary causes. At the Arkansas trial, the creationists therefore interpreted the scientific witnesses' demurrals that "science does not raise the question about God at all" as meaning that science rules out the presence of God in any way.

The justification from truth, then, need not and, indeed, cannot accept every expression as equally likely to help the audience arrive at some truth.

VII. CONCLUSION

The justification from truth can boast a distinguished pedigree and its theoretical potential is, in my view, powerful. It is also, as I have shown, the dominant basis of support in the Supreme Court for the right of free speech. Curiously, the justification has gone relatively ignored in the realm of religious expression. I have tried in this Article to apply the justification to religious expression, and I have suggested that by doing so we can arrive at better conclusions about the truth.

Langdon Gilkey, *The Creationist Controversy: The Interpretation of Inquiry and Belief*, SCI., TECHNOLOGY, & HUMAN VALUES, Summer 1982, at 67, 68.