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Theory and Politics of First-Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?

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Why does the Supreme Court favor free expression over religious freedom? This judicial predilection appeared during an early spate of first-amendment cases in the 1930s and 1940s, particularly those involving Jehovah's Witnesses, and continues today. My purpose is to situate and to explain the early cases in the context of a transformation of democracy—from republican to pluralist democracy—which occurred during the 1920s and 1930s. Most briefly, republican democracy emphasized the virtuous pursuit of the common good, while pluralist democracy emphasizes widespread participation by diverse societal groups.

At the outset, a couple of caveats are in order. First, although I emphasize the relations between democracy and the first-amendment freedoms, I do not mean to suggest that democracy alone determined the conceptions of either religious freedom or free expression. Many causal factors—political, legal, cultural, and otherwise—influenced the developments of both democracy and the first-amendment freedoms, and my narrative shall draw on these other factors at appropriate points. Yet, the change in democracy—the movement from republican to pluralist democracy—provides a lens that fruitfully illuminates key elements of religious freedom, free expression, and their transformations. Second, while I focus on Supreme Court pronouncements, especially under pluralist democracy, constitutional meaning does not emanate solely from the Court. Certainly, if one seeks to understand the meanings of religious freedom and free expression, the Court is an important institution, but so are Congress, the executive, and other governmental and non-governmental bodies. Judicial decision making at the level of the Supreme Court is merely one of many formal and informal mechanisms that generate constitutional meaning. Thus, my narrative will occasionally discuss non-judicial actors and

institutions. One cannot understand religious freedom in the nineteenth century, for instance, without accounting for the de facto Protestantism then prevalent throughout American society.[1]

With these caveats in place, a thesis emerges: the transition from republican to pluralist democracy practically turned the first-amendment concepts of free expression and religious freedom on their heads (if free expression and religious freedom are understood ecumenically, as not limited to Supreme Court pronouncements).[2] Under republican democracy, constitutional theory and constitutional politics often favored religion over expression, but once pluralist democracy emerged in the 1920s and 1930s, then theory and politics consistently favored expression over religion. Free expression became a constitutional "lodestar,"[3] while the protection of religious freedom became episodic.

Constitutional theory, in this Article, means the abstract description, explanation, and justification of the governmental system, including an account of individual rights and liberties within that system. Thus, a constitutional theory might, among other things, explain the operation of democracy, the predominant conceptions of religious freedom and free expression, and the role of the courts in enforcing rights and liberties. Most constitutional theories contain both descriptive and prescriptive components. Descriptively, constitutional theories typically claim to be grounded on actual governmental and societal practices, though most theories do not account for the totality of such practices. For instance, a theory might assert that all citizens are equal, but in reality, citizens might be separated by gross disparities of wealth that generate

[1]Philip Hamburger, Separation of Church and State (2002) (focusing on Protestant-Catholic relations in nineteenth century).

[2]The Supreme Court decided so few first-amendment cases during the nineteenth century that it would be difficult to support a robust thesis about the Court's understanding of religious freedom and free expression during that time period. *Cf.*, Henry J. Abraham, Freedom and the Court 308-18, 364-76 (5th ed. 1988) (listing the Supreme Court's free exercise and establishment clause decisions). When the Court's decisions, however, are supplemented with evidence from other sources, including statements from Supreme Court justices outside the judicial context, one can reach reasonable conclusions regarding the meanings of the first-amendment freedoms during the era of republican democracy.

[3]G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech In Twentieth-century America*, 95 Mich. L. Rev. 299, 300-01 (1996).

inequalities of political power. Prescriptively, then, constitutional theories generally include a normative mandate so that actual practices, if inconsistent with the theory, should be altered to fit the theory.[4] Constitutional politics, meanwhile, refers to the political preferences or ideologies that influence the Supreme Court justices' interpretations of the Constitution, including first-amendment freedoms, and that also shape popular understandings of the Constitution. Political preferences or ideologies are determined by numerous factors, including cultural values, economic interests, religious convictions, and so on.[5]

Part I of this Article explains the transition from republican to pluralist democracy,[6] while Part II examines how the Court, through a series of cases involving Jehovah's Witnesses, struggled to explicate pluralist democracy and its implications for judicial review.[7] Part II concludes by underscoring how the justices consistently preferred free expression over religious freedom in the Witnesses cases.[8] Part III focuses on constitutional theory and constitutional politics: how do theory and politics in a pluralist democratic regime favor expression over religion?[9] Part IV, the conclusion, briefly explores how the Court still today demonstrates a preference for free expression over religious freedom.[10]

I. From Republican to Pluralist Democracy

[4]For a related description of theory that emphasizes the descriptive and prescriptive components of most theories, see Stephen M. Feldman, *How to Be Critical*, 76 Chi.-Kent L. Rev. 893, 893-94 (2000).

[5]*See* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, _ L. & Soc. Inquiry _ (forthcoming) (discussing the relation between politics and legal doctrine in Supreme Court decision making).

[6]*See infra* text accompanying notes _-_.

[7]*See infra* text accompanying notes _-_.

[8]*See infra* text accompanying notes _-_.

[9]*See infra* text accompanying notes _-_.

[10]*See infra* text accompanying notes _-_.

From the time of the constitutional framing through the early twentieth century, American governments were understood to be republican democracies.[11] The democratic element of republican democracy arose from popular sovereignty: government supposedly rested upon the consent of the governed, so sovereignty ultimately and always was grounded on the people.[12] Citizens and governmental officials were supposed to be imbued with civic virtue, which theoretically led them to pursue the common good rather than "partial or private interests."[13] Individual rights and liberties were of the utmost importance and were protected from undue governmental interference, but significantly, such rights and liberties were always subordinate to the government's power to act for the common good.[14] Put in different words, any individual right or liberty could be sacrificed for the benefit of the community.[15]

The components of republican democracy facilitated the exclusion of various societal groups from the American polity. For example, while the framers of the national Constitution sought to construct a republican democratic government, they acquiesced in the severe state governmental restrictions on suffrage. At the time, more than half the population was barred from voting. Property and wealth qualifications disqualified some white men, while women, Native Americans, and African-American slaves were typically excluded from voting through

[11]Constitution of North Carolina (1776), *reprinted in* 2 The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the United States 1409, 1409 (Ben Perley Poore ed., 2d ed. 1878) [hereinafter Poore]; Constitution of Pennsylvania (1776), *reprinted in* 2 Poore, *supra*, at 1540, 1540.

[12]Virginia Bill of Rights (1776), *reprinted in* 2 Poore, *supra* note 11, at 1908, 1908-09.

[13]Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 59 (1969) [hereinafter Wood, Creation]. The 1780 Massachusetts Constitution, for example, stated: "Government is instituted for the common good, for the protection, safety, prosperity of the people, and not for the profit, honor, or private interest of any one man, family, or class of men." Constitution of Massachusetts (1780), *reprinted in* 1 Poore, *supra* note 11, at 956, 958.

[14]James Kent explained that "private interest must be made subservient to the general interest of the community." James Kent, 2 Commentaries on American Law 276 (1827; Legal Classics Library Reprint).

[15]*See* William J. Novak, The People's Welfare (1996) (focusing on the antebellum nineteenth century and how the distinction between the common good and partial and private interests limited governmental power).

the Civil War era and afterwards.[16] Such exclusions from the polity—from "the people"—were justified in the name of republican democratic principles: these societal groups were deemed insufficiently virtuous to understand or to contribute to the common good. Thus, when large numbers of Roman Catholic immigrants began coming to the United States in the mid-nineteenth century, Protestant nativists were quick to condemn the immigrants as "unfit for citizenship."[17] Catholics, the nativists charged, lacked the civic virtue necessary for participation in American republican institutions.[18] In the 1830s, Samuel Morse tersely explained: "'Protestantism favors Republicanism,' whereas 'Popery' supports 'Monarchical power.'"[19]

Regardless of the exclusionary propensities of republican democracy, its basic parameters—the emphases on popular sovereignty, virtue, and the common good—proved remarkably resilient, lasting into the early twentieth century. Yet, the specific understandings of these concepts changed considerably during the nineteenth century. For instance, many framers believed that virtue was concentrated in an elite segment of American society, while during the early decades of the nineteenth century, a growing number of Americans began to believe that virtue was shared equally by all common people (particularly by white Protestant men).[20]

[16]Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 54-60 (2000); Rogers M. Smith, Civic Ideals 170-73 (1997); Gordon S. Wood, The Radicalism of the American Revolution 294 (1991) [hereinafter Wood, Radicalism]. Keyssar writes: "By 1790, according to most estimates, roughly 60 to 70 percent of adult white men (and very few others) could vote." Keyssar, *supra*, at 24. Gordon Wood notes, however, that at least some Americans started arguing for universal suffrage during the Revolutionary era. Wood, Creation, *supra* note 13, at 182-83. By 1825, all but three states—Rhode Island, Virginia, and Louisiana—had eliminated property and wealth restrictions. Wood, Radicalism, *supra*, at 294. Keyssar reports that during the early nineteenth century, an increasing number of states barred free African Americans from voting. Keyssar, *supra*, at 55-57.

[17]John Higham, Strangers in the Land: Patterns of American Nativism, 1860-1925, at 6 (1992 ed.).

[18]*Id*. (emphasizing how Protestants viewed Catholic traditions as contrary to American liberty); *see* Hamburger, *supra* note 1, at 234-40 (discussing relation between politics and religion).

[19]Smith, *supra* note 16, at 209 (quoting Samuel Morse) (emphasis omitted).

[20]The Republican lawyer and theorist, Tunis Wortman, explained that truth "is not a courtier whose residence is confined to palaces, nor is it always to be found in the solemn gravity of a deliberative assembly. [Truth] is to be discovered and ascertained by judgment; and

Similarly, from the Revolution until the 1820s, political parties were deemed inconsistent with republican democratic government. Political parties were viewed as factional interest groups that corruptly pursued private and partial interests rather than the common good. Partly for that reason, Thomas Jefferson and his supporters truly believed at the end of the eighteenth century that the energetic Alexander Hamilton sought to lead a political party and to create a national army for the purpose of overthrowing republican government.[21] Yet, by the 1820s and 1830s, political parties became accepted institutions in republican democracy; they were increasingly understood to be useful means for engendering political participation by the common man.[22]

While the nation survived the Civil War, republican democracy was subject to intense strains during the late-nineteenth and early-twentieth centuries. These strains appeared in a variety of realms, including the cultural, social, economic, and intellectual. For instance, during the antebellum era, science and religion were typically understood to be harmonious, but after the Civil War, many academic researchers in emergent universities aimed for a type of scientific objectivity divorced from religious beliefs.[23] Before long, a religious backlash crystallized, emphasizing a new type of fundamentalist Protestantism.[24] Meanwhile, industrialization in the

judgment is a faculty possessed in common by mankind." Tunis Wortman, A Treatise Concerning Political Enquiry, and the Liberty of the Press 49 (1800; 1970 reprint ed.); *see* Richard Hofstadter, Anti-Intellectualism in American Life (1962) (discussing the development of an anti-elitism in American society); Smith, *supra* note 16, at 201 (discussing "anti-elitist rhetoric" of Jacksonian years).

[21]Stanley Elkins & Eric McKitrick, The Age of Federalism 596-617 (1993).

[22]Edward Pessen, Jacksonian America 197-232 (rev. ed. 1985); Harry L. Watson, Liberty and Power 171-74 (1990).

[23]George M. Marsden writes that the "collapse of older theologies" led postbellum researchers to display a "passion for order, systematizing, efficiency, scientific principle, [and] personal discipline." George M. Marsden, The Soul of the American University: From Protestant Establishment to Established Nonbelief 187 (1994). On the importance of scientific authoritativeness and objectivity, see Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 16, 31 (1988); Dorothy Ross, The Origins of American Social Science 62 (1991).

[24]Sydney E. Ahlstrom, A Religious History of the American People 725-27 (1972); Martin E. Marty, Protestantism in the United States: Righteous Empire 211-12 (2d ed. 1986). Other helpful books on the history of American Christianity include the following: Jon Butler,

growing Northeastern and Midwestern cities generated tensions between those geographic areas and more agrarian regions, produced wealth disparities previously unseen in the United States, and introduced dangerous and mind-numbing factory jobs as well as bureaucratic corporate organizations.[25] The manufacturers encouraged immigration so they would have an endless supply of inexpensive laborers, but then massive immigration engendered cultural tensions as millions of Eastern and Southern Europeans flooded into this country.[26] These strains generated mass political movements such as Populism and Progressivism, which challenged republican democracy but ultimately left intact the central republican concern for pursuing the common good.[27]

The conception of American government as a republican democracy, under siege since the late nineteenth century, finally crumbled in the 1920s and 1930s. Republican democratic governments, built on agrarian economics, widespread land-ownership, and Protestant values, no longer fit the urban, industrial, and culturally diverse America that consolidated between the World Wars.[28] To be sure, old-stock Americans continued to resist urban and immigrant intrusions. A surging nativist backlash (often with Progressive support) produced Prohibition, a

Awash in a Sea of Faith: Christianizing the American People (1990); Nathan O. Hatch, The Democratization of American Christianity (1989).

[25]William E. Forbath, *The Shaping of the American Labor Movement*, 102 Harv. L. Rev. 1109, 1218-19 (1989); Richard Hofstadter, The Age of Reform 223, 231-33 (1955); William M. Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937, at 82-83 (1998).

[26]Joseph R. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement 23 (1963).

[27]Hofstadter, *supra* note 25, at 259-61; Arthur S. Link & Richard L. McCormick, Progressivism 54 (1983).

[28]*See* Anthony J. Badger, The New Deal: The Depression Years, 1933-1940, at 58 (1989) (explaining divisions within American society); William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 332 (1963) (emphasizing the participation of former political outsiders in the New Deal coalition); Robert S. McElvaine, The Great Depression 197-98 (1984) (discussing changing values in America).

religious and cultural strike against Catholics.[29] Then in 1924, the nativists managed to restrict immigration severely.[30] But with such successes, nativists became complacent, deflated by their own triumphs, even as other forces further transformed American society and culture. In the midst of 1920s' prosperity, manufacturers realized that greater profits lay not in the oppression of workers but in the conversion of those workers into consumers. With the help of the burgeoning mass media—movies, radio, and print—a consumer culture took hold. Urban immigrants, just like other Americans, were welcomed to spend their money on mass-produced, mass-marketed products.[31]

Eventually, in the political realm, conceptions of the republican common good that had long reinforced traditional American Protestant values were called into question. Emblematic of this change, the Democrats nominated Al Smith, a Catholic New Yorker, as their presidential candidate in 1928.[32] Soon, the Great Depression accelerated the transition in democracy. Whereas republican democracy had assumed a distinct separation between a private sphere of economic pursuits and a public sphere of governmental activity—governmental intrusions into the private sphere were proscribed unless for the common good—demands for governmental

[29]Prohibition represented a cultural victory for "the old middle class in American society." Gusfield, *supra* note 26, at 122. Gusfield explains that "[t]he power of the Protestant, rural native American was greater than that of the Eastern upper classes, the Catholic and Jewish immigrants, and the urbanized middle class." *Id*. at 123.

[30]E. P. Hutchinson, Legislative History of American Immigration Policy, 1798-1965, at 187-92 (1981).

[31]Gary Cross, An All-Consuming Century: Why Commercialism Won in Modern America 20-41 (2000); Lynn Dumenil, The Modern Temper 56-97 (1995); 2 Who Built America? Working People and the Nation's Economy, Politics, Culture and Society 270-87 (Stephen Brier, supervising ed., 1992). During the 1920s, "considerable headway was made—through advertising, installment purchase plans, a rising living standard, and a new emphasis on consumerism—toward weaning workers from their traditional values and remolding them into acquisitive, amoral individualists." McElvaine, *supra* note 28, at 202.

[32]Samuel Lubell, The Future of American Politics 48-55 (3d ed., revised, 1965). For an extensive statistical study of the 1928 election, see Allan J. Lichtman, Prejudice and the Old Politics: The Presidential Election of 1928 (1979).

intervention in the capitalist marketplace became commonplace in the 1930s.[33] Franklin Roosevelt successfully built his New Deal coalition by responding to these calls for relief from economic deprivation.[34] The coalition strengthened when unskilled immigrant workers, previously alienated from national politics, metamorphosed into voters, largely through the avenue of the labor movement. While labor unions had struggled before the 1930s, New Deal legislation helped unions flourish; unions added members by the millions and, in turn, mobilized workers as democratic participants (swelling support for the New Deal).[35] Massive numbers of immigrants and their children had now become part of the American polity.[36]

The rise of totalitarian governments in Europe during the 1930s helped fortify the transition to pluralist democracy in the United States. Fascists and Nazis authoritatively dictated to their populaces, arbitrarily imposed punishments, and suppressed religious, racial, and other minorities. In opposition, Americans stressed democracy, the rule of law, including constitutional rights, and the protection of minorities. These supposed components of American life and government separated *us* from *them*.[37] Thus, for instance, in *Martin v. City of Struthers*,

[33]*See* Bruce Ackerman, We the People: Foundations 116-19 (1991) (emphasizing the development of a more activist national government during New Deal).

[34]Leuchtenburg, *supra* note 28, at 331-35. "By 1934, the pattern of the early New Deal was beginning to emerge. Its distinguishing characteristic was the attempt to redres the imbalances of the old order by creating a new equilibrium in which a variety of groups and classes would be represented." *Id*. at 84.

[35]Badger, *supra* note 28, at 250; Leuchtenburg, *supra* note 28, at 147-51, 188-89, 239-41. Helpful sources on the labor movement during the New Deal include the following: Jerold S. Auerbach, Labor and Liberty (1966); Melvyn Dubofsky, The State and Labor in Modern America (1994); William E. Forbath, Law and the Shaping of the American Labor Movement (1991); Karen Orren, Belated Feudalism: Labor, the Law, and Liberal Development in the United States (1991).

[36]Badger, *supra* note 28, at 248-49. "By 1936, Franklin Roosevelt had forged a new political coalition firmly based on the masses in the great northern cities …. While old-stock Americans in the small towns clung to the G.O.P., the newer ethnic groups in the cities swung to Roosevelt, mostly out of gratitude for New Deal welfare measures, but partly out of delight with being granted 'recognition.'" Leuchtenburg, *supra* note 28, at 184.

[37]For a contemporary emphasis on the differences between American and totalitarian governments, see Clarence Dykstra, *The Quest for Responsibility*, 33 Am. Pol. Sci. Rev. 1 (1939). In 1940, Roosevelt said: "'The surge of events abroad has made some few doubters

decided during World War II, the Court struck down the conviction of a Jehovah's Witness under an ordinance proscribing door-to-door distributions of written materials.[38] In reasoning that the application of this ordinance violated the first amendment, Justice Black's majority opinion stressed that "[f]reedom to distribute information … is so clearly vital to the preservation of a free society that … it must be fully preserved."[39] Justice Murphy's concurrence, joined by Justices Douglas and Rutledge, accentuated the difference between American and totalitarian governments. "Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought."[40]

By the end of the 1930s, intellectuals were struggling to explain and to justify the new democracy that had emerged.[41] This pluralist democracy was, of course, still based on popular sovereignty—on the consent of the governed—but now citizens supposedly were to pursue their private interests. Politics was about building coalitions—interest groups—and jostling for advantages in the political arena, compromising when necessary to maximize the satisfaction of one's interests. While the ultimate goal of republican democracy had been to achieve the

among us ask: Is this the end of a story that has been told? Is the book of democracy now to be closed and placed away upon the dusty shelves of time?"" Leuchtenburg, *supra* note 28, at 348.

[38]Martin v. City of Struthers, 319 U.S. 141 (1943).

[39]*Id*. at 146-47.

[40]*Id*. at 150 (Murphy, J., concurring). Murphy added: "In these days free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance." *Id*. at 152; *see* West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 641 (1943) (contrasting United States with its "present totalitarian enemies").

[41]John G. Gunnell, The Descent of Political Theory 105, 122-23, 127-45 (1993); Edward A. Purcell, Jr., The Crisis of Democratic Theory 112-14, 138 (1973). For instance, in his presidential address to the American Political Science Association, Clarence Dykstra declared, "A paramount question which the world faces is whether responsibility can be achieved and maintained through the democratic process." Clarence Dykstra, *The Quest for Responsibility*, 33 Am. Pol. Sci. Rev. 1, 22 (1939).

common good, the ultimate goal of pluralist democracy was to participate—and to win (or at least to win as much as possible). In theory, all groups and individuals were to participate, to express their interests and values in the democratic marketplace. None were excluded merely because of their racial, religious, or ethnic status.[42] Indeed, whereas the Supreme Court itself before the 1930s almost never even mentioned democracy, the justices began to talk incessantly about democratic participation as they strove to delineate the precise contours of the new pluralist democratic regime.[43]

To be sure, the reality of pluralist democracy often did not match the theory. The theory might demand full and equal democratic participation, but the white Protestant mainstream nonetheless developed various mechanisms to thwart outsider participation, at least to some extent, and thus to maintain their own social and cultural dominance. The long struggle, lasting into the 1960s, to overcome legally protected racial discrimination, as embodied in Jim Crow laws, provides the most noteworthy example.[44] Moreover, those outsiders who managed to become full participants in the democratic system often did so at a price. In order to participate,

[42]For contemporary accounts of (pluralist) democracy, see V.O. Key, Politics, Parties, and Pressure Groups (4th ed. 1958) (first published in 1942) (emphasizing politics as the exercise of power, and discussing the role played by pressure groups in that exercise of power); David B. Truman, The Governmental Process (1951) (extensive study of the functioning and influence of political interest groups); Robert Dahl, A Preface to Democratic Theory (1956) (explaining democratic theory from pluralist perspective). Dahl has explained:

> Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.

Robert A. Dahl, Democracy and its Critics 109 (1989) [hereinafter Dahl, Democracy].

[43]*See* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 30, 56-57 (1993) (discussing emerging importance of democracy). John Ely, perhaps more than any other legal theorist, elaborated the theoretical implications of pluralist democracy for judicial review. John H. Ely, Democracy and Distrust (1980).

[44]For detailed discussions of the Civil Rights Movement, see David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference (1986); Robert Weisbrot, Freedom Bound: A History of America's Civil Rights Movement (1990).

an individual typically needed to relinquish any strong identification with or markings of their ethnic or religious backgrounds. For instance, during the 1930s, many Jews managed to land governmental jobs, but only if they did not appear to be distinctly Jewish, according to dominant stereotypes.[45]

The transition to pluralist democracy had numerous important implications for American society and government.[46] For instance, under republican democracy, lobbying was deemed a corrupt pursuit of partial or private interests contrary to the common good. A legal encyclopedia neatly summarized the general attitude toward lobbying: "Public policy requires that all legislators should act solely … with an eye single to the public interest, and the courts universally hold illegal all contracts for services which involve … the exercise of sinister or personal influences upon the legislators to secure their votes in favor of a legislative act."[47] Yet during the 1930s, with the onset of pluralist democracy, lobbying by special interest groups became an accepted means of political participation.[48]

Of great significance for the development of first-amendment freedoms, the transition from republican to pluralist democracy disrupted the institutional practices of judicial review, particularly in relation to constitutional rights. As a general matter, under republican democracy,

[45]Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 224-32 (1976); Stephen M. Feldman, Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State 213-14 (1997) [hereinafter Feldman, Please Don't]; *see* Robert A. Burt, Two Jewish Justices: Outcasts in the Promised Land 39 (1988) (emphasizing how Felix Frankfurter minimized his specifically Jewish background to facilitate professional success).

[46]In legal thought, the post-World War II "legal process" scholars built their jurisprudential theories on the foundation of pluralist democracy. For a description of the emergence of legal process, see Stephen M. Feldman, American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage 115-28 (2000) [hereinafter Feldman, Intellectual Voyage]. For examples of legal process writings, see Alexander M. Bickel, The Least Dangerous Branch (1962); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

[47]XV The American and English Encyclopaedia of Law 969 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900).

[48]Lynn Dumenil, The Modern Temper 49-51 (1995).

courts had reviewed governmental actions by determining whether a disputed action was either for the common good—and therefore permissible—or for partial and private interests—and therefore impermissible.[49] For instance, in an 1829 Tennessee Supreme Court case, Judge John Catron, who would eventually sit on the United States Supreme Court, explained that "[t]he right to life, liberty and property, of every individual must stand or fall by the same rule or law that governs every other member of the body politic."[50] Thus, Catron continued, "every partial or private law, which directly proposes to destroy or affect individual rights … is unconstitutional and void."[51] In 1851, Chief Justice Lemuel Shaw of Massachusetts elucidated the state police power by emphasizing that individual rights, including especially the right to own property, must be subordinated to legislative actions in pursuit of "the common good and general welfare."[52]

In short, the basic principles of republican democracy, particularly the distinction between the common good and partial or private interests, structured the practice of judicial review. Thus, when pluralist democracy supplanted republican democracy, the structure or framework for reviewing governmental actions collapsed; the purpose of judicial review blurred. Under pluralist democracy, the government no longer was required to pursue the common good; rather, citizens sought to pursue their private interests through various governmental mechanisms, including legislation. How, then, were courts to review the legitimacy—the constitutionality—of governmental actions?

In one realm at least, the answer to this conundrum was clear. From 1937 onward, with pluralist democracy solidifying, courts were to defer to legislative regulations of the economic marketplace. The courts would, in effect, rubber stamp all reasonable economic regulations

[49]Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence 51-55 (1993). For examples, see *State Bank v. Cooper*, 10 Tenn. 599 (1831); *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825); *Goshen v. Stonington*, 4 Conn. 209, 221 (1822).

[50]Vanzant v. Waddel, 10 Tenn. 260 (1829) (Catron, J.).

[51]*Id*.

[52]Commonwealth v. Alger, 61 Mass. 53, 7 Cush. 53, 84-85 (1851).

rather than questioning whether the action was for the common good.[53] But Justice Stone's famous footnote four in *Carolene Products* questioned whether such deference was appropriate when legislation either infringed liberties protected by the Bill of Rights, including free expression and religious freedom, restricted participation in democratic processes, or discriminated against "discrete and insular minorities."[54] Nonetheless, one might reasonably argue that the Court has never articulated a framework for reviewing governmental actions under pluralist democracy as theoretically elegant as the one used under republican democracy, distinguishing the common good from partial or private interests. I do not mean to suggest, however, that the theoretical elegance of republican democratic judicial review rendered it simple in application—it was not—nor do I suggest that the Court refrained from exercising its power of judicial review under pluralist democracy.[55] To the contrary, the Court has, in some contexts, continued to assert its power vigorously, including sometimes in the realm of first-amendment freedoms. Even so, within the pluralist democratic regime, the Court has struggled to justify its exercise of judicial power and to identify when specific governmental actions violated constitutional guarantees.

[53]West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). In cases of economic regulation:

> the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

[54]United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). During Stone's earlier career as the Dean of Columbia Law School, he became renowned as a defender of the free-speech rights of faculty. The Oxford Companion to the Supreme Court of the United States 838-39 (Kermit Hall ed., 1992).

[55]With regard to the difficulty of resolving cases under republican democratic judicial review, one need only remember the controversies of the *Lochner* era. Lochner v. New York, 198 U.S. 45 (1905); *see* Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998) (discussing the repudiation of *Lochner* era reasoning from the perspective of legal doctrine); William E. Leuchtenburg, The Supreme Court Reborn (1995) (discussing the repudiation of *Lochner* era reasoning from the perspective of politics).

II. The Jehovah's Witnesses Cases

The Court decided numerous cases during the 1930s and 1940s involving Jehovah's Witnesses.[56] These cases swirled around the uncertainties of the blossoming pluralist democracy and its implications for judicial review. The significance of pluralist democracy for first-amendment freedoms, in particular, stood at the center of the Court's flag-salute cases: *Minersville School District v. Gobitis*,[57] and *West Virginia State Board of Education v. Barnette*.[58] *Gobitis*, decided in 1940, arose because the local school board in Minersville, Pennsylvania, required teachers and students each day to salute the flag and recite the pledge of allegiance. The Gobitis children, aged twelve and ten, "had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of scripture."[59] Since they refused to participate in the daily flag-salute ceremony, the children were expelled. The Gobitis family argued that this penalty violated the children's constitutional rights to both free exercise of religion and free expression.[60]

The Court rejected both claims and upheld the expulsions. Justice Frankfurter, writing the majority opinion, reasoned that the best means for maintaining democracy was to nurture a democratic culture. Democracy must be "ingrained in a people's habits and not enforced against

[56]Helpful sources on the Jehovah's Witnesses and their judicial cases include the following: Peter Irons, The Courage of Their Convictions 13-35 (1988); Eric Michael Mazur, The Americanization of Religious Minorities: Confronting the Constitutional Order 28-61 (1999); Shawn Francis Peters, Judging Jehovah's Witnesses (2000); Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, *in* Constitutional Law Stories 433 (Michael C. Dorf ed., 2004); William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. Cin. L. Rev. 997 (1987).

[57]310 U.S. 586 (1940), *overruled*, West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943).

[58]319 U.S. 624 (1943).

[59]Minersville School Dis. v. Gobitis, 310 U.S. 586, 592 (1940).

[60]Gobitis was actually a misspelling of the family's name. Blasi & Shiffrin, *supra* note 56, at 436 n.15.

popular policy by the coercion of adjudicated law."[61] The Court therefore should generally defer to the results of the legislative process—regardless of the substance of those results—"so long as the remedial channels of the democratic process remain open and unobstructed."[62] Even if the legislature had impinged on first-amendment freedoms, unless the justices identified some defect in the democratic process, the Court was to defer to the legislative judgment.[63] Indeed, from Frankfurter's viewpoint, the Court's deference to democracy was likely to generate exactly those types of political debates that would propagate democratic culture.[64]

Justice Stone's *Gobitis* dissent articulated a different relationship between pluralist democracy and first-amendment freedoms. Stone initially noted that the suppression of minority rights should no longer be justified by reference to the republican democratic common good. "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of … the public good, and few which have not been directed, as they are now, at politically helpless minorities."[65] But, of course, Frankfurter had not relied on republican democracy to reject the constitutional claims; to the contrary, Frankfurter had elaborated the scope of judicial review under pluralist democracy.

[61]Minersville School Dis. v. Gobitis, 310 U.S. 586, 599 (1940), *overruled*, West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943).

[62]*Gobitis*, 310 U.S. at 599.

[63]*See* Ely, *supra* note 43, at 73-104 (explaining the Court's role in policing the democratic process).

[64]Frankfurter wrote:

> Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Gobitis, 310 U.S. at 600.

[65]*Id*. at 604 (Stone, J., dissenting).

Thus, Stone proceeded to critique the democracy-reinforcing argument of Frankfurter.[66] In particular, Stone criticized Frankfurter's assertion that the Court should defer to "the legislative judgment 'as long as the remedial channels of the democratic process remain open and unobstructed.'"[67] Stone, to be clear, did not object to the Court refusing to defer when the democratic process is obstructed, but he believed that the Court must do more to police democracy.[68] Citing his *Carolene Products* footnote four, Stone added that "prejudice against discrete and insular minorities may tend to curtail the operation of [democratic processes]" and thus should spur "a searching judicial inquiry into the legislative judgment."[69] To reinforce this conclusion, Stone reasoned that "freedom of mind and spirit," which would encompass free expression and religious freedom, is prerequisite to democracy itself.[70] So, according to Stone, "free government" was the goal, but preservation of the first-amendment freedoms was integral to achieving that goal.[71]

Spurred partly by the Court's *Gobitis* decision and partly by fears of impending war, school boards across the nation quickly imposed flag-salute requirements.[72] More significant, innumerable vigilante attacks were unleashed against Jehovah's Witnesses in retribution for their supposed disloyalty, as evidenced by their refusal to salute the flag.[73] The Court announced the *Gobitis* decision on June 3, 1940, and by June 20, the Department of Justice already had reports

[66]When John Ely articulated his constitutional theory grounded on pluralist democracy, he called it "representation-reinforcement." Ely, *supra* note 43, at 101-02, 181.

[67]*Gobitis*, 310 U.S. at 605-06 (Stone, J., dissenting).

[68]Ely identified the Court's role as "policing" the democratic or representative processes. Ely, *supra* note 43, at 102.

[69]*Gobitis*, 310 U.S. at 606 (Stone, J., dissenting).

[70]*Id*. at 606.

[71]*Id*.

[72]McAninch, *supra* note 56, at 1019.

[73]Peters, *supra* note 56, at 72-95; McAninch, *supra* note 56, at 1018-21.

of literally hundreds of such attacks.[74] Perhaps in response to these events, the Court soon reconsidered the flag-salute issue.

In another case involving Jehovah's Witnesses, *West Virginia State Board of Education v. Barnette*, the Court overruled *Gobitis* and held that a compulsory flag-salute violated the first amendment.[75] The *Barnette* opinions again revolved around the meaning of pluralist democracy and its implications for free expression and religious freedom. Justice Jackson's majority opinion asserted that the point of the first amendment was to categorically withdraw free expression and religious freedom from the vagaries of pluralist democracy.[76] Because pluralist democracy is grounded on consent of the governed, the Bill of Rights precludes the government from coercing such consent.[77] Free government cannot exist without first-amendment freedoms.

This time Frankfurter found himself in dissent. He reiterated that his primary concern was to promote democracy: "The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process."[78] And once again, he stressed the need to promote

[74]McAninch, *supra* note 56, at 1019 & n.147.

[75]West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943). Justice Jackson's draft majority opinion referred to the vigilante attacks against Jehovah's Witnesses, but Justice Stone convinced him to delete such references because they suggested that the Court was overruling *Gobitis* for political reasons. Blasi & Shiffrin, *supra* note 56, at 451.

[76]Jackson wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 638 (1943).

[77]Jackson wrote: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *Id*. at 641.

[78]*Id*. at 650 (Frankfurter, J., dissenting).

democratic culture as the best means for preserving democracy. The judicial enforcement of individual rights was likely, in the end, to undermine democracy.

> Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.[79]

During these early years of uncertainty, with the justices debating the contours of pluralist democracy and the parameters of judicial review, the Court in effect experimented with different approaches for resolving concrete first-amendment disputes. For a brief period, the Court reasoned that certain constitutional rights, including free expression and religious freedom, were preferred freedoms.[80] As such, the justices explained, these rights deserved special judicial protection. In many cases, though, the Court treated constitutional rights as values or interests that were to be balanced against other interests, particularly governmental interests, within the pluralist democratic regime.[81] "Decision as to the lawfulness of the conviction demands the

[79]*Id*. at 670-71.

[80]For instance, in 1943, the Court stated that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); *see* Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (using preferred freedoms language); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 Pol. Res. Q. 623, 640-45 (1994) (discussing the rise of the preferred freedoms approach). Previously, Chief Justice Stone had written in dissent: "The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position." Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting). For a discussion of the demise of the preferred freedoms terminology, see G. Edward White, The Constitution and the New Deal 149-52 (2000).

[81]*E.g.*, Martin v. City of Struthers, 319 U.S. 141, 143-44 (1943); *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987) (exploring and criticizing the emergence of the balancing test in constitutional law).

weighing of two conflicting interests," the Court reasoned in *Cantwell v. Connecticut*.[82] "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged."[83] But, the Court immediately added, "The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders."[84] Despite such language, suggesting an evenhanded weighing of interests, the Court would sometimes skew the balance against the government, especially if the invoked constitutional right was either free expression, religious freedom, or both.[85] The justices themselves acknowledged their struggles to harmonize the judicial protection of constitutional rights with pluralist democracy. Writing in *Barnette*, Justice Jackson understatedly lamented: "[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence."[86]

Significantly, while the Court's opinions often linked free expression and religious freedom—for instance, in the preferred freedoms cases—the Court consistently showed greater solicitude for free-expression than free-exercise claims. This judicial favoring of expression over religion emerged most clearly in several of the Jehovah's Witnesses cases. Members of the Witnesses often sought to fulfill their religious obligations by disseminating information regarding religion through some inexpensive means, such as the distribution of leaflets or books

[82]310 U.S. 296, 307 (1940).

[83]*Id*.

[84]*Id*.

[85]*E.g.*, Schneider v. State, 308 U.S. 147, 161-62 (1939) (striking down convictions for distributing handbills by applying balancing test that favored free expression). In some of these cases, especially in the realm of free exercise, the Court would reason that the governmental action could be upheld only if it was necessary to achieve a compelling governmental interest or purpose. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

[86]West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 639 (1943).

on street corners or door-to-door. Such individuals were convicted for numerous criminal violations including breach of the peace and refusing to pay a license fee.[87] Because of the nature of their actions, these defendants would argue that both free expression and free exercise shielded their actions from governmental punishment. The Court, however, consistently refused to uphold the free-exercise claims in isolation. The Court would, on the one hand, find the defendant's actions unprotected or would, on the other hand, find the actions protected because of either free expression alone or a combination of free expression and religious freedom.[88] Without the support of free expression, a religious freedom claim inevitably failed.[89]

[87]Murdock v. Pennsylvania, 319 U.S. 105 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[88]*See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943) (striking down conviction by relying solely on free expression); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (refusing to recognize the religious character of the defendant's action and then rejecting the free speech claim because of fighting words doctrine). Mazur explains:

> Most of the decisions rendered by the justices rely on the role and significance of the First Amendment right to free speech alongside—but just as often *rather than*—the other First Amendment right to free exercise of religion. From the beginning, the religious free exercise argument was less persuasive than the free speech argument. All of the cases denied a full hearing by the Court from 1937 to 1940 relied solely on religious free exercise grounds, whereas three of the five that received a full hearing during that same period and that relied in part or wholly on free speech arguments were decided in favor of the Witnesses.

Mazur, *supra* note 56, at 50 (emphasis in original).

[89]*Cantwell v. Connecticut*, 310 U.S. 296 (1940), is one case that might be interpreted as relying solely on free exercise, at least to strike down a conviction on one of the (information) counts. At one point, the Court writes:

> The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Id. at 306-07. But throughout the opinion, and indeed in the quoted passage, the discussion of religious freedom is consistently intermingled with references to free expression. While unclear, I tend to agree with Mazur's conclusion that the Court's decision "took special note of the free speech arguments offered by the Witnesses, affirming their plausibility as significant in the decision." Mazur, *supra* note 56, at 50.

The justices demonstrated the distinct judicial treatment of free-expression and religious-freedom claims in the two flag-salute cases.[90] In *Gobitis*, Frankfurter's majority opinion began by focusing on religious freedom: "We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment."[91] Indeed, referring to free exercise as a "precious right,"[92] Frankfurter articulated a seemingly broad vision of religious freedom:

> 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. Propagation of belief—or even of disbelief in the supernatural—is protected, whether in church or chapel, mosque or synagogue, tabernacle or meetinghouse. Likewise the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in government.[93]

Nonetheless, Frankfurter immediately qualified the individual right to religious freedom by reasoning that it must be tempered by a recognition of societal interests.[94] Most important, Frankfurter explained, the right to free exercise does not relieve the individual from obeying laws of general applicability. "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

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

[91]*Gobitis*, 310 U.S. at 592-93.

[92]*Id*. at 593.

[93]*Id*.

[94]"But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men." *Id*.

responsibilities."[95] In this case, then, the Court concluded that the Gobitis children, despite their religious convictions, should not be relieved from their obligation to participate in the flag-salute ceremonies. Thus, only after emphasizing but ultimately rejecting the free exercise claim did Frankfurter turn to free speech. He quickly disposed of this claim by reasoning that a societal interest in national unity outweighed the interest in free expression.[96] The daily flag ceremonies, the School Board had decided, instilled in the school children the desired commitment to national unity.

When the Court reconsidered the flag-salute issue in *Barnette*, the Witnesses' attorney, like the attorneys in *Gobitis*, stressed religious freedom. Regardless, Justice Jackson's majority opinion in *Barnette* relied almost exclusively on free expression.[97] Jackson mentioned the clear and present danger test and, somewhat obscurely, a balancing approach as relevant to free-speech issues,[98] but in the end, he apparently interpreted the first-amendment protection of free

[95]*Id*. at 594-95.

[96]*Id*. at 595.

[97]Brief for Appellees, West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943) (1942 Term, No. 591), *reprinted in* 40 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 39, 65-137 (Philip B. Kurland & Gerhard Casper eds., 1975); Brief for Respondents, Minersville School Dis. v. Gobitis, 310 U.S. 586 (1940) (1939 Term, No. 690), *reprinted in* 37 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 367, 381-99 (Philip B. Kurland & Gerhard Casper eds., 1975); Blasi & Shiffrin, *supra* note 56, at 437-38. Jackson reasoned:

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

Barnette, 319 U.S. at 634-35.

[98]Jackson explicitly refers to the clear and present danger test. *Barnette*, 319 U.S. at 633. The reference to balancing is ambiguous:

> The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

expression as being absolute, at least in the circumstances of that case. "[N]o 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. If there are any circumstances which permit an exception, they do not now occur to us."[99]

To the *Barnette* Court, the flag salute was undoubtedly "a form of utterance."[100] Moreover, not only was the flag salute a type of expression, it was *political* expression. The government used the flag ceremony precisely "as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks."[101] But in the United States, Jackson emphasized, government was by the consent of the people—a consent that the government itself could not coerce.[102] Poignantly underscoring this point about the relation between the government and political speech, the Court alluded to contemporary world events: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[103]

So, the *Barnette* Court overruled *Gobitis* and held that a compulsory flag salute violated freedom of expression. But why did the *Gobitis* Court stress religious freedom when it rejected the first-amendment claims, while the *Barnette* Court almost exclusively focused on free expression when it repudiated forced flag salutes? More generally, why did the justices consistently favor free-expression over religious-freedom claims?

Id. at 630-31.

[99]*Id*. at 642; *see* Thomas I. Emerson, The System of Freedom of Expression 29 (1970) (discussing the different tests invoked in Jackson's opinion).

[100]*Barnette*, 319 U.S. at 632.

[101]*Id*. at 633.

[102]"We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *Id*. at 641.

[103]*Id*.

III. Favoring Free Expression Over Religious Freedom

A. Constitutional Theory

If anything, republican democracy seemed to favor religion (read: Protestantism) over expression. As a general matter, courts would review governmental actions within the regime of republican democracy to determine whether the actions were for the common good or for partial and private interests. Because individual rights and liberties were generally subordinate to the common good, it followed that the government possessed the power to punish speech or writing if such punishment would further the common good.[104] And criminal punishment would presumably be for the common good if the speech or writing had a bad tendency or likely pernicious consequences. This theoretical justification for a narrow concept of free expression elucidates the legal doctrine that prevailed in most states through the nineteenth century. Free speech and a free press were deemed crucial rights or liberties, yet individuals were responsible for their abuses. Thus, in the context of criminal or seditious libel prosecutions, the concern for the common good engendered the truth-conditional doctrine, first articulated by Judge James Kent in *People v. Croswell*.[105] Under this approach, truth was a defense to a charge of criminal libel but only if the defendant published for good motives and justifiable ends. If the published material was either false, or true but with bad tendencies, then it was criminally punishable.[106] Given this theory and doctrine, courts generally were unprotective of free expression under republican democracy.

In the realm of religion, however, the government—including the courts—tended to be supportive. More precisely, the government (the state and national governments, that is)

[104]James Wilson was one of the first constitutional theorists to justify the suppression of speech and writing because of the principles of republican democracy. James Wilson, II The Works of James Wilson 279-80, 287, 313, 393-97 (James DeWitt Andrews ed., 1895 ed.).

[105]People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

[106]For examples of free-expression cases where the courts used the truth-conditional or bad tendency terminology, see Moody v. State, 94 Ala. 42 (1892); People v. Most, 128 N.Y. 108 (1891); Commonwealth v. Morris, 3 Va. 176 (1811); Commonwealth v. Clap, 4 Mass. 163 (1808).

nurtured mainstream Protestantism but not other religions.[107] In republican democratic terms, Protestantism supposedly imbued citizens with virtue and shaped their understanding of the common good. As George Washington declared in his *Farewell Address*, "religion and morality are indispensable supports … . of the duties of men and citizens."[108] Thus, throughout the nineteenth century, leading jurists, such as Joseph Story and James Kent, deemed Christianity to be part of the common law.[109] Story, a Harvard law professor as well as a Supreme Court justice, considered himself a strong advocate for religious liberty.[110] Regardless, in 1833, Story declared that "it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects."[111] Even after the Civil War, when many jurisprudents turned to a

[107]The first-amendment religion clauses initially were, in a sense, jurisdictional: the national government would leave issues of religion to the state and local governments. The national government, in other words, would not interfere with freedom of conscience, and official establishments would arise, if at all, only from sundry choices made at the local or state level–not at the national level. Feldman, Please Don't, *supra* note 45, at 164-67; Leonard W. Levy, The Establishment Clause: Religion and the First Amendment 66-67, 83-84, 108-09 (1986) [hereinafter Levy, Establishment Clause]. Given that the state governments (as well as the national government) were conceptualized as republican democracies, the theoretical relation between religion and government therefore emerged most clearly at the state level.

[108]Washington's Farewell Address (Sept. 17, 1796), *reprinted in* I Documents of American History 169, 173 (Henry Steele Commager ed., 9th ed. 1973).

[109]Morton Borden, Jews, Turks, and Infidels 31, 98-103 (1984); Naomi W. Cohen, Jews in Christian America: The Pursuit of Religious Equality 55-56 (1992); Frederic Cople Jaher, A Scapegoat in the New Wilderness: The Origins and Rise of Anti-Semitism in America 139 (1994); *cf.* Perry Miller, The Life of the Mind in America 195-96 (1965) (acknowledging that some jurists denied that Christianity was part of the common law); Stuart Banner, *When Christianity was Part of the Common Law*, 16 L. & Hist. Rev. 27 (1998) (questioning the significance of nineteenth-century declarations that Christianity was part of the common law); B.H. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 Yale L.J. 659 (1930) (tracing the notion that Christianity is part of the common law to Lord Coke).

[110]For a summary of Story's broader jurisprudential views, see Feldman, Intellectual Voyage, *supra* note 46, at 81-82; Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vand. L. Rev. 1387, 1414-17 (1997).

[111]Joseph Story, 3 Commentaries on the Constitution of the United States 723 (1991; originally published in 1833). David Hoffman, professor of law at the University of Maryland, wrote: "The purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every christian nation. The christian religion is a part of

more positivist than natural law orientation, Thomas Cooley explained: "[We are not precluded] from recognizing … in the rules prescribed for the conduct of citizens, the patent fact that the prevailing religion in the States is Christian."[112] Unsurprisingly, then, numerous states enforced the Christian Sabbath of Sunday as common-law doctrine (and some states enacted Blue Laws).[113] As late as the beginning of the twentieth century, police arrested tens of thousands of Jews for violating such laws.[114] Moreover, religious minorities, especially Jews, Catholics, and Mormons, lived in many states with the threat that overt repudiation of mainstream Protestantism might provoke a prosecution for blasphemy. A Delaware court, upholding a blasphemy conviction in 1837, explained that it had "been long perfectly settled by the common law, that blasphemy against the Deity in general, or a malicious and wanton attack against the christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable."[115]

the law of the land, and, as such, should certainly receive no inconsiderable portion of the lawyer's attention." David Hoffman, A Course of Legal Study 65 (2d ed. 1846).

[112]Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 471 (Da Capo Press ed. 1972) (reprint of 1st ed. 1868). Cooley, though, tended to equivocate more than premodern jurisprudents like Story about Christianity being part of the common law. *Id*. at 471-78; *see* Feldman, Intellectual Voyage, *supra* note 46, at 101-06.

[113]Borden, *supra* note 109, at 111-25.

[114]Cohen, *supra* note 109, at 110-11; Lawrence M. Friedman, A History of American Law 587 (2d ed. 1985); Irving Howe, World of Our Fathers 362 (1976).

[115]State v. Chandler, 2 Del. 553, 555 (1837). According to a South Carolina court, "[a]ll blasphemous publications, carrying upon their face that irreverent rejection of God and his holy religion, which makes them dangerous to the community, have always been held to be libels, and punishable at common law." City Council of Charleston v. Benjamin, 33 S.C.L. 508 (1848) (conviction of Jewish defendant for violating Sunday law). For additional cases where prosecutions for blasphemy were approved, see Commonwealth v. Kneeland, 37 Mass. 206 (1838); Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824) (approving blasphemy statute but overturning indictment on technical grounds); People v. Ruggles, 8 Johns. R. 290 (N.Y. 1811); *cf*., Perry v. Perry, 1 Barb. Ch. 516 (1846) (reasoning that the use of blasphemous language was probative of violent action); Leonard W. Levy, Blasphemy 400-23 (1993) (discussing state blasphemy cases from pre-Civil War America).

With the transition from republican to pluralist democracy in the 1920s and 1930s, however, this favoring of (Protestant) religion over expression was reversed. In the first "explicit" free speech win in the Supreme Court,[116] decided in 1931, the Court expressly grounded the protection of expression on the operation of democracy: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[117] From this point forward, the Court not only became more protective of free expression but also elaborated a theoretical rationale for broad protection based on pluralist democracy.

In 1937, the Court reiterated "the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people."[118] The protection of free expression was "imperative" because it provided "the very foundation of constitutional government."[119] Pluralist democracy, as the justices elaborated it, accepted diversity rather than attempting to suppress it within the confines of a culturally homogeneous common good. Free expression, therefore, did not need to be constrained to preserve "the existing order;"[120] the justices had "no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[121] By the 1940s, the Court was emphasizing that "[t]he vitality of civil and political institutions in our society depends on

[116]Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America 167 (1988).

[117]Stromberg v. California, 283 U.S. 359, 369 (1931). In an earlier case that seemed to raise free-speech issues, the Court upheld the defendant's claim to constitutionally protected liberty, but the opinion focused exclusively on due process and did not discuss free expression. Fiske v. Kansas, 274 U.S. 380, 386-87 (1927).

[118]De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

[119]*Id*.

[120]West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

[121]*Id*. at 641.

free discussion,"[122] and that a strong conception of free expression was consequently a "fixed star in our constitutional constellation."[123]

In sum, if the hallmark of pluralist democracy is, as the Court reasoned, the full and open participation by diverse individuals and groups in governmental processes, then free expression must be expansively protected. Political participation cannot be open to and fair for all citizens unless each individual is theoretically able to express his or her interests and values in the democratic marketplace. Such freedom of expression, it might be said, is prerequisite to the operation of pluralist democracy. Not coincidentally, in 1948, Alexander Meiklejohn definitively articulated the self-governance rationale—the theoretical grounding of free expression on pluralist democracy.[124] "The principle of the freedom of speech springs from the necessities of the program of self-government," Meiklejohn wrote.[125] "It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[126] And most constitutional scholars still maintain that the demands of democratic self-governance require an expansive core of protected political speech and writing and that free expression is therefore a constitutional "lodestar."[127] One scholar, for instance, recently proclaimed that "[t]he heart of a free society is the right—and in fact the duty—of the citizens to discuss politics and to criticize the government."[128]

[122]Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[123]West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

[124]Alexander Meiklejohn, Free Speech: And its Relation to Self-Government 25-27, 45-46 (1948).

[125]*Id*. at 26.

[126]*Id*. at 26-27.

[127]White, *supra* note 3, at 300-01.

[128]Paul Finkelman, *Speech, Press, and Democracy*, 10 Wm. & Mary Bill Rts. J. 813, 813 (2002).

The theoretical ties between religious freedom and pluralist democracy have never been so distinct or compelling. While many agree that free expression is integral to democracy—a right "essential to the democratic process,"[129] in Robert Dahl's words—many would insist that the same is not true of religious freedom. Indeed, one might reasonably argue that deep religious convictions are in tension with a pluralist democratic regime. Pluralist democracy assumes that citizens bring diverse preexisting interests and values to the democratic arena, that citizens jostle for advantage and try to win the democratic contests, and that—and here is the problem—citizens compromise when necessary.[130] Under pluralist democracy, in other words, citizens are theorized to have preexisting interests and values, and those interests and values might be strongly held and pursued, but citizens always must be capable of accommodating the interests and values of others.[131] Yet, some religious beliefs are not merely strong, they are convictions—beliefs imbued with certitude, excluding doubt. For some individuals, such religious convictions cannot be accommodated to other interests and values in the democratic arena. One does not compromise, for instance, an absolute truth derived from God's will. One does not compromise, for instance, one's pursuit of eternal salvation. Religious beliefs, from this standpoint, are not readily harmonized with the processes of pluralist democracy. Partly for this reason, some theorists have argued that religious beliefs should not be relied upon in political debates or, that is, in the so-called public square. From this perspective, secular reasons should be offered in any

[129]Dahl, Democracy, *supra* note 42, at 170. "Freedom of speech … is necessary both for effective participation and for enlightened understanding; so too are freedom of the press and freedom of assembly." *Id*.

[130]*See, e.g.*, John Dewey, Freedom and Culture 175-76 (1939) (discussing the importance of negotiation in democratic processes). For the early pluralist democratic theorists, "[c]ompromise, unreflective practicality, and slow social evolution were good," while all forms of "moralistic absolutism" were bad. Purcell, *supra* note 41, at 253.

[131]*See* Dahl, Democracy, *supra* note 42, at 260 (arguing that polyarchies or pluralist democracies fail when distinctive subcultures cannot accommodate each other).

public debate because religious convictions are likely to inhibit the free and open discussion and negotiation that pluralist democracy demands.[132]

Nonetheless, some theorists have argued that religious freedom should still be protected as fully as free expression in a pluralist democracy. For instance, one might argue that religious beliefs are so central to the American people that any position that banishes religion from the public sphere inevitably blinks reality.[133] For deeply religious Americans, secular reasons cannot possibly substitute for religious convictions; for these Americans, religious beliefs constitute the core of their beings, their identities. Or, in the alternative, one might theorize that religious freedom—at least for religious minorities—should be vigorously protected because, in the words of Justice Stone's footnote four, discrimination against "discrete and insular minorities" should be impermissible in a pluralist democratic regime.[134] Purposeful discrimination against a discrete and insular (religious) minority manifests a defect in the democratic process itself.[135] Or, yet again, one might theorize that the constitutional protection of religious freedom proscribes the exclusion or diminished participation of religious groups qua religious groups within the American polity.[136]

[132]For examples, see Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, *in* Law and Religion: A Critical Anthology 69 (Stephen M. Feldman ed., 2000); Abner S. Greene, *The Incommensurability of Religion*, *in* Law and Religion: A Critical Anthology 226 (Stephen M. Feldman ed., 2000); William P. Marshall, *The Other Side of Religion*, *in* Law and Religion: A Critical Anthology 96 (Stephen M. Feldman ed., 2000). Some theorists have also addressed whether judges should rely upon their religious beliefs when deciding cases. Kent Greenawalt, Private Consciences and Public Reasons 141-50 (1995).

[133]Richard John Neuhaus, *A New Order of Religious Freedom*, *in* Law and Religion: A Critical Anthology 89 (Stephen M. Feldman ed., 2000). Daniel O. Conkle argues that fundamentalist religious views should be excluded from public debates, but that other non-absolute religious beliefs should be allowed. Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, *in* Law and Religion: A Critical Anthology 317 (Stephen M. Feldman ed., 2000).

[134]United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

[135]This theory, for all discrete and insular minorities rather than only for religious minorities, has been most fully developed by John Ely. Ely, *supra* note 43, at 148-53.

[136]Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543 (1986).

In any event, while some theorists might be persuaded by any one of these arguments (or, for that matter, by some other argument or combination of arguments), no single theoretical justification for the broad protection of religious freedom enjoys the near-universal support that is accorded to the self-governance rationale for free expression.[137] To be sure, many free-speech theorists offer additional rationales for protecting expression, but most agree that, at a minimum, political expression must be protected because it is integral to pluralist democracy.[138] Many would agree that, without free expression, "the democratic process does not exist,"[139] but a similar assertion for religious freedom would likely provoke widespread dissent. In short, the importance of free expression to a pluralist democratic regime is readily apparent, but the same is not true of religious freedom.

B. Constitutional Politics

Theory is one thing, but its application is another. Whatever theoretical outlooks the various justices held, they implemented those theories from within their respective political horizons (moreover, the justices' political views undoubtedly contributed to their theoretical preferences in the first place).[140]

Under republican democracy, the predominant legal doctrine for determining the scope of free expression was the *Croswell* truth-conditional standard. Published material was criminally punishable if it was either false, or true but with bad tendencies.[141] In those instances when an

[137]Even an avowed religious believer can acknowledge problems when religious beliefs are invoked in the public sphere. *E.g.*, Michael J. Perry, *Liberal Democracy and Religious Morality*, *in* Law and Religion: A Critical Anthology 115 (Stephen M. Feldman ed., 2000).

[138]Emerson summarizes three philosophical rationales in addition to self-governance: self-fulfillment, search for truth, and societal stability. Thomas I. Emerson, The System of Freedom of Expression 6-7 (1970).

[139]Dahl, Democracy, *supra* note 42, at 170.

[140]For a discussion of the relation between politics and legal doctrine in Supreme Court decision making, see Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, _ L. & Soc. Inquiry _ (forthcoming).

[141]Moody v. State, 94 Ala. 42 (1892); Commonwealth v. Morris, 3 Va. 176 (1811); Commonwealth v. Clap, 4 Mass. 163 (1808).

individual was being prosecuted, courts consistently deemed that the defendant's expression was unprotected as either false or likely to produce a bad tendency. After all, the mere fact that the defendant was being prosecuted demonstrated that at least some governmental actors believed the speech to be harmful or bad. For instance, in an 1879 federal prosecution for mailing obscene materials, the court approved a definition of obscenity based on bad tendencies. Material was deemed obscene "if it would have a tendency to suggest impure and libidinous thoughts in the minds of those open to the influence of such thoughts, and thus deprave and corrupt their morals, if they should read such matter."[142] In an 1891 New York prosecution, *People v. Most*, the State convicted the defendant under an unlawful assembly statute for making a threat in concert with two other persons.[143] In the context of a volatile political situation and in front of a sympathetic audience, Most had "denounced the murderers of … 'friends and comrades,' and threatened revenge."[144] In upholding the conviction, the court reasoned that the government could protect against expression with a bad tendency. "Nor is it … an answer to the indictment that the threats related to acts not presently to be done, but to be performed at some future time, when affairs were ripe for the revolution predicted," the court explained.[145] "The main purpose of the common law and of the statute relating to unlawful assemblies, is the protection of the public peace."[146] Unsurprisingly, in the Supreme Court's first twentieth-century free-expression cases, the justices generally approved the bad tendency approach as well.[147]

[142]United States v. Bennett, 24 F.Cas. 1093, 1103-04 (C.C.S.D.N.Y. 1879).

[143]People v. Most, 128 N.Y. 108 (1891).

[144]*Id*. at 114.

[145]*Id*. at 115.

[146]*Id*.

[147]Frohwerk v. United States, 249 U.S. 204, 208-09 (1919); Fox v. Washington, 236 U.S. 273, 277 (1915); Patterson v. Colorado *ex rel.* Attorney General, 205 U.S. 454, 462 (1907).

Politics influenced free expression in another manner, outside of the courts' judicial interpretations of legal doctrine. In particular, the bad tendency standard coexisted with two competing traditions: a tradition of dissent and a tradition of suppression. Both these traditions not only had roots reaching back before the American Revolution to colonial times, but both traditions also had been repeatedly manifested through official and unofficial channels. During the Revolutionary era, for instance, American Patriots consistently declared the importance of dissent in opposition to British rule and law. "There is nothing so fretting and vexatious; nothing so justly terrible to tyrants, and their tools and abettors, as a free press," proclaimed Samuel Adams in the *Boston Gazette*.[148] Yet, those same American Patriots were quick to suppress the views of British Loyalists or Tories, who were scared into silence, driven out of town, or tarred and feathered.[149] Significantly, the tradition of suppression as well as the narrow nineteenth-century legal definition of free expression fit closely with the exclusionary component of republican democracy, which supposedly justified the denial of individual rights to large groups of the population, such as women and African Americans. The suppression of speech and writing, for individuals in these groups, was merely one aspect of their diminished liberty and participation in the polity.

During the middle decades of the nineteenth century, many disputes involving free expression were centered in forums other than the courts. Invocations of the traditions of dissent and suppression were consequently more important than citations to legal authorities and doctrine. In these years, the competing traditions repeatedly clashed within the crucible of slavery and abolition. Slavery was the political issue that drove nineteenth-century actors, that forced one confrontation after another, until the final confrontation of the Civil War.[150] Hence,

[148]Leonard W. Levy, Emergence of a Free Press 67 (1985) (quoting Samuel Adams, *Boston Gazette* (March 14, 1768)).

[149]Wilbur H. Siebert, The Loyalists of Pennsylvania 22 (1920) (describing treatment of Philadelphia Tories in 1775).

[150]*See* Michael Kent Curtis, Free Speech, "The People's Darling Privilege:" Struggles for Freedom of Expression in American History (2000) (discussing free-expression disputes from antebellum period).

while Americans cared about free expression, through most of these antebellum conflicts free expression was a rhetorical tool to be used for political advantage. For example, in the mid-1830s, the American Anti-Slavery Society initiated a petition drive, flooding Congress with petitions signed by thousands of abolitionists. In effect, the abolitionists sought to invoke the tradition of dissent, of speaking one's mind, through the right of petition. Slaveholders, though, were quick to seek suppression; Southern congressional leaders managed to impose a gag-rule in the House that barred the presentation of abolitionist petitions.[151]

Turning to religion under republican democracy, the last official state church establishment ended in 1833,[152] but most Americans continued to understand religious freedom from a largely Protestant vantage. In 1853, clergyman and professor Bela Bates Edwards epitomized this viewpoint: "Perfect religious liberty does not imply that government of the country is not a Christian government."[153] Alexis de Tocqueville had observed that "[i]n the United States, Christianity itself is an established and irresistible fact."[154] James Bryce, in 1888, likewise discerned that "Christianity is in fact understood to be, though not the legally established religion, yet the national religion."[155] Unsurprisingly, then, many states explicitly

[151]William Lee Miller, Arguing About Slavery (1996).

[152]Levy, Establishment Clause, *supra* note 107, at 38-61.

[153]Robert T. Handy, A Christian America 49 (2d ed. 1984) (quoting Bela Bates Edwards, 1 Writings of Bela Bates Edwards 490 (Boston 1853)); *accord* Philip Schaff, *Church and State in the United States* (1888), *reprinted in* Church and State in American History 151 (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987).

[154]Alexis de Tocqueville, 2 Democracy in America 6 (Henry Reeve text, revised by Francis Bowen, edited by Phillips Bradley; Vintage Books ed. 1990). Tocqueville added that, in America, "from the beginning, politics and religion contracted an alliance which has never been dissolved;" American government and Protestantism thus flowed together "in one undivided current." For that reason, Tocqueville concluded, "there is no country in the world where the Christian religion retains a greater influence over the souls of men than in America." 1 Tocqueville, *supra*, at 300, 302-03, 308.

[155]James Bryce, 2 The American Commonwealth 698-704 (3d ed. 1894), *reprinted in* Church and State in American History 154, 156 (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987). Bryce added that Americans "deem the general acceptance of Christianity to be one of the main sources of their national prosperity and their nation a special object of the Divine favour." *Id.*

limited the civil rights of non-Christians, often long after the state-established churches had been eliminated. In the early 1800s, for example, Jews could practice law in only four states, Pennsylvania, Virginia, South Carolina, and New York.[156] Numerous states, through much of the nineteenth century, restricted public office holding so as to favor Protestants in particular or Christians in general.[157]

For approximately the first 150 years of the nation's existence, the Supreme Court infrequently decided cases related to religion, whether under the free exercise clause, establishment clause, or otherwise. When the occasional case involving religion reached the Court, the justices' legal pronouncements typically manifested the Protestant nature of American culture and society.[158] In 1844, for instance, the Court decided *Vidal v. Girard's Executors*.[159]

[156]Jaher, *supra* note 109, at 121.

[157]Constitution of Maryland (1776), *reprinted in* 1 Poore, *supra* note 11, at 817, 820; Final Form of the "Jew Bill" (1826), *reprinted in* The Jews of the United States, 1790-1840, A Documentary History 53, 53 (Joseph L. Blau & Salo W. Barron eds., 1963). This bill was incorporated in the Maryland Constitution of 1851. *See* Constitution of Maryland (1851), *reprinted in* 1 Poore, *supra* note 11, at 837, 839.

Constitution of North Carolina (1776), *reprinted in* 2 Poore, *supra* note 11, at 1409, 1413-14; *see* Amendments to the Constitution of 1776, *reprinted in* 2 Poore, *supra* note 11, at 1415, 1418 (allowing all Christians to hold office); Constitution of North Carolina (1868), *reprinted in* 2 Poore, *supra* note 11, at 1419, 1430 (this Constitution still barred "all persons who shall deny the being of Almighty God"); Borden, *supra* note 109, at 42-50.

Constitution of Connecticut (1818), *reprinted in* 1 Poore, *supra* note 11, at 258, 264.

Constitution of New Hampshire (1792), *reprinted in* 2 Poore, *supra* note 11, at 1298-1301, 1308-09 (the amendments were framed by a convention in 1876 and ratified by the people on March 13, 1877). New Hampshire was the last state to eliminate its religious test or restriction on public officeholding. *See* Borden, *supra* note 109, at 32.

Frederic Cople Jaher writes: "Between the 1780s and 1830s these restraints [on public officeholding] were eliminated except in New Jersey, North Carolina, Rhode Island, and New Hampshire, and were absent from the fundamental charters of newly admitted states. From 1789 to 1792, for example, Delaware, Pennsylvania, South Carolina, and Georgia . . . enfranchised Jews." Jaher, *supra* note 109, at 121.

[158]One reason that few cases reached the Court was that it had held in 1845 that the religion clauses did not apply against the state governments at all. Permoli v. City of New Orleans, 44 U.S. (3 How.) 589 (1845); *see also* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (fifth amendment takings clause does not apply against states).

[159]43 U.S. (2 How.) 127 (1844).

Girard had bequeathed his sizable estate for the purpose of creating a school for orphans and impoverished scholars. Girard's will, however, included the following limitation: "[N]o ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose . . . within the premises . . . of the said college."[160] The will was challenged as being hostile to Christianity and therefore contrary to the common law of Pennsylvania, where Girard had resided. In upholding the validity of the will, the Court acknowledged that "Christianity [is] a part of the common law of the state [of Pennsylvania in the sense] that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."[161] The Court did not see any tension between, on the one hand, having the state common law encompass Christianity and, on the other hand, having a state constitution that included disestablishment and free exercise clauses. As if to underscore even further how the hegemonic Protestant culture shaped the American understanding of religious freedom, the Court turned to an additional, though hypothetical, issue: whether a devise "for the propagation of Judaism, or Deism, or any other form of infidelity" would contravene the common law.[162] In refusing to decide this issue, since it was not raised by the facts, the Court nonetheless suggested that such a devise might impugn or repudiate Christianity and thus might be unenforceable.[163] Moreover, the Court added that "[s]uch a case is not to be presumed to exist in a Christian country."[164]

When the Court considered the rare religion case challenging federal activity, most often brought under the free exercise clause, the justices upheld the governmental action as

[160]*Id*. at 133.

[161]*Id*. at 198.

[162]*Id*. at 198.

[163]*Id*. at 199.

[164]*Id*. at 198.

constitutional. Put in different words, the beliefs and practices of religious outsiders were inevitably found subordinate to the common good of the mainstream Protestant polity. In *Reynolds v. United States*, decided in 1878, Reynolds challenged his criminal conviction for committing polygamy in a federal territory.[165] A Mormon, Reynolds contended that he was religiously obligated to follow polygamy and that the conviction therefore violated the free exercise clause. The Court not only rejected the first amendment claim and upheld Reynolds's conviction, but in doing so, the Court also closely followed Protestant doctrine. Protestant denominations generally stress that salvation turns solely on faith or belief in Christ and is unrelated to this-worldly conduct or action. Predictably, then, the Court too emphasized a distinction between beliefs and actions. According to the Court, Congress could not constitutionally pass laws that would infringe on religious beliefs and opinions–since such laws would interfere with Protestant salvation–but for the good of society, Congress could restrict actions, even if those actions were supposedly related to religious beliefs.[166]

Nearly fifteen years later, the justices considered a federal statute that proscribed entering contracts with aliens to encourage their immigration.[167] Despite this statutory prohibition, a church had contracted for an English citizen to come to America as the church's rector and pastor. In *Church of the Holy Trinity v. United States*, the Court held that the federal statute did not prohibit this particular contract because the Congress of the United States, a Christian nation, could not have intended to prohibit contracting with Christian ministers. After all, the Court reasoned, "this is a Christian nation."[168] Congressional intent was to prohibit the importation of

[165]98 U.S. 145 (1878).

[166]*Id*. at 164-67; *see* Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 Ohio St. L.J. 713 (1993) (emphasizing the importance of the distinction between belief and conduct in the Court's free exercise cases). For another case upholding a restriction against polygamy, see Davis v. Beason, 133 U.S. 333 (1890). The Court there wrote: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States . . . ." *Id*. at 341.

[167]Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

[168]*Id*. at 471.

cheap and unskilled laborers–many of whom were non-Christians–because they were disrupting the American labor market.[169] The Court concluded with an incredulous rhetorical question: "[S]hall it be believed that a congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?"[170]

Just as with free expression, of course, politics also shaped religious freedom outside of judicial contexts and legal pronouncements. Non-Protestants typically enjoyed far more liberty in the United States than they had in their homelands. In this sense, there was a popular tradition of religious dissent. Jews, for instance, left Eastern Europe in droves partly because they faced government-sponsored pogroms in their countries of origin.[171] In this nation, they rarely had to endure overt governmental suppression or violence. This tradition of dissent, though, was perhaps most evident within Protestantism itself. Because of the lack of state-sponsored churches, Protestants readily switched from one church to another and, with amazing frequency, especially during the Second Great Awakening of the nineteenth century, created new Protestant sects and denominations.[172]

But this tradition of dissent was counterbalanced by a vigorous tradition of suppression. During the early nineteenth century, for instance, the most prominent American Jew was Mordecai Noah, the American consul to Tunis from 1813 to 1815. Newspapers belittled Noah by referring to him with antisemitic epithets like "Hooked Nose" and "Shylock."[173] Eventually, the Secretary of State, James Monroe, dismissed Noah from his post because "the Religion

[169]*Id*. at 463-71.

[170]*Id*. at 471.

[171]Paul Johnson, A History of the Jews 356-67 (1987).

[172]Butler, *supra* note 24, at 236-56; Hatch, *supra* note 24, at 9, 163-67.

[173]Jaher, *supra* note 109, at 135-36.

which you profess [is] an obstacle to the exercise of your consular functions."[174] The tradition of suppression was manifested more violently in the case of the Mormons. Joseph Smith, Jr., founded the Mormon movement in upstate New York in the midst of the Second Great Awakening. In the *Book of Mormon*, which Smith wrote, he incorporated the history of European colonization of America into Christian eschatology; Mormonism, that is, was to supplant mainstream Christianity, just as early Christianity had been intended to supplant Judaism (according to the New Testament).[175] Given such religious views, many Americans feared that Mormonism threatened the predominant forms of Protestantism as well as republican democracy.[176] Persecution of the Mormons, unsurprisingly, was common and often violent, forcing Smith's followers to move from state to state as they sought refuge. From New York, Smith went to Ohio, where he was eventually dragged from his house to be tarred and feathered. Smith moved on to Jackson County, Missouri, where mob violence again forced him to flee, this time to northern Missouri. Further violence led the Mormons next to Illinois, where Smith was arrested, then in June 1844, murdered while he was awaiting trial.[177] Finally, Smith's successor, Brigham Young, led the community to the Great Salt Lake area, where they established the autonomous State of Deseret, only to become embroiled with the federal government in legal struggles that would stretch on for decades.[178]

The force of politics on the conceptions of free expression and religious freedom changed with the transition from republican to pluralist democracy. The republican democratic principles of civic virtue and the common good had long facilitated the exclusion of various societal groups

[174]Johnson, *supra* note 171, at 367 (quoting James Monroe); *see* Howard M. Sachar, A History of the Jews in America 45-46 (1992) (discussing the dismissal of Noah).

[175]Ahlstrom, *supra* note 24, at 501-02; Butler, *supra* note 24, at 242-43; Hatch, *supra* note 24, at 114-16.

[176]Ahlstrom, *supra* note 24, at 557.

[177]*Id*. at 505-06.

[178]*Id*. at 506-07; Mazur, *supra* note 56, at 69-89.

from fully participating in the American polity. Groups, such as immigrant laborers, were either excluded or discouraged from participating supposedly because they lacked the virtue necessary to understand or contribute to the common good—a concept that typically embodied the interests and values of old-stock Americans, particularly Protestant elites.[179] Given this exclusionary aspect of republican democracy, the denial or suppression of specific individual rights, such as religious freedom, was often only part of a societal group's more comprehensive political subjugation. The courts, from this perspective, merely reinforced the exclusionary tendencies of republican democracy. But the transition from republican to pluralist democracy undermined the traditional justifications for oppressing societal outsiders or, to use Ran Hirschl's term, "peripheral groups."[180] After all, the crux of pluralist democracy was participation: all groups and individuals, in theory, were to participate, to express their interests and values in the democratic marketplace. One did not need to demonstrate democratic worthiness by endorsing Protestant-tinged conceptions of virtue and the common good.

One reason, of course, for the emergence of pluralist democracy was the actual expanding political power within the American polity of outsider or peripheral groups, such as Irish Catholics, Eastern European Jews, and laborers in general—a burgeoning power that undergirded the New Deal. The flowering of this outsider political power, within the framework

[179]I do not mean to suggest that Protestant elites always consciously sought to link the common good to their own interests and values. To the contrary, these elites might have sincerely believed that they had correctly specified the common good, but of course, their perceptions of the common good were tacitly shaped by their own interests and values. In other words, the common good might correspond with the Protestant elite's interests and values regardless of whether the elite *consciously* sought this correspondence. For an example of this type of phenomenon, see Linda Gordon's description of a 1904 adoption dispute in a small Arizona mining town. The white citizens genuinely believed that they acted for the common good when they prevented Mexican-American families from adopting white children (Irish Catholic New Yorkers). Yet, these citizens clearly acted in a manner conducive to their own interests and values; many of the citizen-protest leaders eventually adopted the children themselves. Linda Gordon, The Great Arizona Orphan Abduction 159-60 (1999).

[180]Ran Hirschl, *The Political Origins Of Judicial Empowerment Through Constitutionalization: Lessons From Four Constitutional Revolutions*, 25 Law & Soc. Inquiry 91, 95-96 (2000) [Hirschl, Political Origins]; Ran Hirschl, *Looking Sideway, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. Rich. L. Rev. 415, 432 (2000) [hereinafter Hirschl, Looking].

of the pluralist democratic regime, further threatened the status and power of old-stock Americans. The Protestant old-stock elite, in fact, were forced to retreat from their former hegemonic position—that retreat was part of the transition to pluralist democracy—but they refused to surrender either willingly or completely to the outsiders. Rather, they sought, in a sense, to retrench: forced to retreat, they searched for positions where they could fortify and thus protect their dominant (though no longer hegemonic) interests and values. One such position of fortification was in the courts.[181]

During the 1930s, the Protestant old-stock elite turned to the judicial enforcement of constitutional rights as a potential bulwark against the majoritarian threat posed by the (pluralist) democratic empowerment of peripheral groups. In other words, old-stock Americans sought "the constitutionalization of rights"—the designation of their own interests and values as constitutional rights enforceable through the courts.[182] When their interests and values were constitutionalized as judicially sanctioned rights, they were effectively protected from the vagaries of the democratic processes—democratic processes that now included peripheral groups and that therefore dangerously encompassed the interests and values of those previously excluded outsiders.[183] To be sure, during the Progressive and early New Deal eras, old-stock

[181]*See generally* Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988) (arguing that liberal reforms simultaneously transformed yet legitimated racist social structures).

[182]Hirschl, Political Origins, *supra* note 180, at 96, 99, 103.

[183]Hirschl writes:

> [T]he process of judicial empowerment through the constitutionalization of rights may accelerate when the hegemony of ruling elites in majoritarian decision-making arenas is threatened by "peripheral" groups. As such threats become severe, hegemonic elites who possess disproportionate access to and influence upon the legal arena may initiate a constitutional entrenchment of rights in order to transfer power to the courts. This process of conscious judicial empowerment in relatively open, rule-of-law polities is likely to occur when the judiciary's public reputation for political impartiality and rectitude is relatively high and when the courts are likely to rule, by and large, in accordance with the cultural propensities of the hegemonic community. In other words, judicial empowerment through the constitutional fortification of rights may provide an efficient institutional way for hegemonic sociopolitical forces to preserve their hegemony and to secure their policy preferences even when majoritarian decision-making processes are not operating to their advantage.

elites had sought to protect their economic interests through judicial review, an effort that produced some of the famous *Lochner*-era decisions, such as *Adkins v. Children's Hospital*, holding that a minimum wage law violated liberty of contract.[184] But even when the old-stock elites were forced to retreat in 1937—when economic regulation became subject to mere rational basis review[185]—they still sought to protect their interests and values through the judicial enforcement of other rights and liberties, including free expression and religious freedom. This strategy contributed to the judicial invigoration of first-amendment freedoms.

It was not coincidental, then, that in the 1940s the Protestant-controlled Supreme Court incorporated the religion clauses to apply against state and local governments through the due process clause.[186] By this time, American Catholics constituted the largest Christian group in the nation; the total number of Protestants still far outnumbered Catholics, but Catholics nonetheless outnumbered the largest Protestant denomination.[187] A judicially invigorated establishment clause, now applicable against state and local governments, provided Protestant refuge from the potential reach of Catholic political power within the pluralist democratic regime. For example,

Id. at 95.

[184]261 U.S. 525 (1923). Other examples include the following: United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

[185]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[186]Everson v. Board of Education, 330 U.S. 1 (1947) (incorporating establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating free exercise clause). On the makeup of the Supreme Court, see Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. Pa. J. Const. L. 222, 232 & n.41 (2003). Helpful sources on Protestant-Catholic relations and their implications for the Supreme Court's religion-clause decisions include the following: Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121 (2001); John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279 (2001).

[187]Feldman, *supra* note 186, at 226-27. In fact, the Roman Catholic Church had already become "America's largest Christian church by mid-nineteenth century," and it continued its growth into the twentieth century. Robert T. Handy, A History of the Churches in the United States and Canada 312 (1977).

in cases challenging governmental aid to nonpublic (predominantly Catholic) schools, the Supreme Court invalidated the governmental action nearly twice as often as it upheld the action.[188] Wherever Catholic and Protestant interests and values diverged, the religion clauses offered a judicially enforceable mechanism that Protestants could invoke to prevent or retard the imposition of Catholic views through democratic processes.[189]

But not all constitutional rights are created equal. The Supreme Court justices did not (and do not) treat all claims for the protection of individual rights similarly. In fact, the Court favored free expression over religious freedom claims partly because of the status of the claimants vis-à-vis the justices and the Protestant mainstream. Significantly, while many claimants in first-amendment cases from the 1930s and 1940s were outsiders, the salience of such claimants as outsiders varied with the particular context of each case.[190] In other words, the

[188]*See* Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, & Mark V. Tushnet, Constitutional Law 1494-1503 (2d ed. 1991) (listing cases); Jeffries & Ryan, *supra* note 186, at 288-89 (emphasizing Supreme Court's determination to inhibit aid to parochial schools). Jeffries and Ryan write:

> [A] ban against aid to religious schools was supported by the great bulk of the Protestant faithful. With few exceptions, Protestant denominations, churches, and believers vigorously opposed aid to religious schools. For many Protestant denominations, this position followed naturally from the circumstances of their founding. It was strongly reinforced, however, by hostility to Roman Catholics and the challenge they posed to the Protestant hegemony, which prevailed throughout the nineteenth and early twentieth centuries. In its political origins and constituencies, the ban against aid to religious schools aimed not only to prevent an establishment of religion but also to maintain one.

Jeffries & Ryan, *supra* note 186, at 282.

[189]Berg, *supra* note 186, at 123-51; Jeffries & Ryan, *supra* note 186, at 312-27.

[190]*See* Lichtman, *supra* note 32, at 73-76 (stressing how the salience of prejudice against different groups of outsiders can vary over time, depending on a variety of conditions). Helpful social science resources on ingroup-outgroup relations and prejudices include the following: Marilynn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 Personality & Social Psychology Bulletin 475 (1991); Marilynn B. Brewer & Sherry K. Schneider, *Social Identity and Social Dilemmas: A Double-edged Sword*, *in* Social Identity Theory 169 (Dominic Abrams & Michael A. Hogg eds., 1990); Johan M.G. van der Dennen, *Ethnocentrism and In-Group/Out-Group Differentiation: A Review and Interpretation of the Literature*, *in* The Sociobiology of Ethnocentrism 1 (Vernon Reynolds, Vincent Falger, & Ian Vine eds., 1986); Samuel L. Gaertner, Jeffrey Mann, Audrey Murrell, & John F. Dovidio, *Reducing Intergroup Bias: The Benefits of Recategorization*, 57 J. Personality & Social Psychology 239 (1989); Norman Miller & Marilynn B. Brewer, *Categorization Effects on Ingroup and Outgroup Perception*, *in* Prejudice, Discrimination, and Racism 209 (John F.

degree of insider or old-stock prejudice against peripheral groups was not a constant; it fluctuated with the circumstances. Most important, then, the salience of a claimant as an outsider tended to be more intense in religious-freedom (especially free-exercise) than in free-expression cases.

Social science research demonstrates that ingroup-outgroup differentiation tends to define an individual's social identity: one's membership in significant social groups or categories largely determines personal identity, values, and perceptions.[191] Individuals "tend to perceive themselves as having similar or identical goals to members of their own group and different or opposed goals to members of other groups."[192] Even an individual's perception of self-interest

Dovidio & Samuel L. Gaertner eds. 1986) [hereinafter Miller & Brewer, Categorization]; James Sidanius, *The Psychology of Group Conflict and the Dynamics of Oppression: A Social Dominance Perspective*, *in* Explorations in Political Psychology 183 (Shanto Iyengar & William J. McGuire eds., 1993); Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* Psychology of Intergroup Relations 7 (Stephen Worchel & William G. Austin eds. 2d ed. 1986); Wolfgang Tönnesmann, *Group Identification and Political Socialisation*, *in* The Sociobiology of Ethnocentrism 175 (Vernon Reynolds, Vincent Falger, & Ian Vine eds., 1986); John C. Turner, *The Experimental Social Psychology of Intergroup Behaviour*, in Intergroup Behavior 66 (John C. Turner & Howard Giles eds., 1981).

[191]Tajfel & Turner, *supra* note 190, at 7-24; Brewer & Miller, *Beyond*, *supra* note 190, at 281-82. "[I]ngroup favoritism and outgroup hostility are seen as consequences of the unit formation between self and other ingroup members and the linking of one's identity to them." Miller & Brewer, Categorization, *supra* note 190, at 213. "[P]sychological group membership is first of all a perceptual and cognitive affair, and … an emotional involvement with the group may follow as a consequence of the perceived group membership." Tönnesmann, *supra* note 190, at 184.

For discussions of the problems of identifying group membership, see Umberto Melotti, *In-group/Out-group Relations and the Issue of Group Selection*, *in* The Sociobiology of Ethnocentrism 94 (Vernon Reynolds, Vincent Falger, & Ian Vine eds., 1986); Gary R. Johnson, Susan H. Ratwik, & Timothy J. Sawyer, *The Evocative Significance of Kin Terms in Patriotic Speech*, *in* The Sociobiology of Ethnocentrism 157, 157-59 (Vernon Reynolds, Vincent Falger, & Ian Vine eds., 1986). Law can contribute to the development of group consciousness. William N. Eskridge, *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419, 451-53 (2001).

[192]Turner, *supra* note 190, at 97. Membership in a cultural group can shape an individual's most basic emotional reactions. Hazel Rose Markus & Shinobu Kityama, *The Cultural Construction of Self and Emotion: Implications for Social Behavior*, *in* Emotion and Culture: Empirical Studies of Mutual Influence 89, 89-91 (Shinobu Kitayama & Hazel Rose Markus eds., 1994).

varies with the salience of intergroup divisions.[193] "People favor in-group members in the allocation of rewards, in their personal regard, and in the evaluation of the products of their labor."[194] Unsurprisingly, then, individuals tend to discriminate against outgroup members—often even if no tangible benefit will be realized.[195] Empirical evidence shows that "an individual will discriminate against a member of an out-group even when there is no conflict of interest and there is no past history of intergroup hostility."[196] But when tangible conflicts arise between ingroup and outgroup members, or when the outgroup's actions frustrate the ingroup, two important consequences follow. First, the conflict is likely to enhance the cohesion or solidarity among the ingroup members (as well as the cohesion among the outgroup members).[197] Second, the conflict is likely to increase the salience of the division between the groups; ingroup prejudice against the outgroup therefore is likely to intensify.[198] "When and

[193]"The self-concept is expandable and contractable across different levels of social identity with associated transformations in the definition of self and the basis for self-evaluation. When the definition of self changes, the meaning of self-interest and self-serving motivation also changes accordingly." Brewer, *supra* note 190, at 476; *accord* Brewer & Schneider, *supra* note 190, at 170 (making same point).

Even basic cognitive processes are shaped by cultural memberships. Richard E. Nisbett, Kaiping Peng, Incheol Choi, & Ara Norenzayan, *Culture and Systems of Thoughts: Holistic Versus Analytic Cognition*, 108 Psychological Rev. 291, 291-92 (2001); Hazel Rose Markus & Shinobu Kityama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 Psychological Rev. 224, 224-25, 231-35 (1991).

[194]Gaertner, *supra* note 190, at 239 (citations omitted).

[195]Tönnesmann, *supra* note 190, at 183-84. "[M]ere categorisation is sufficient to produce intergroup discrimination." Dennen, *supra* note 190, at 17. "Not objective interests but social identity may be the most predictive social psychological variable for understanding the development and resolution of intergroup conflict." Turner, *supra* note 190, at 100.

[196]Dennen, *supra* note 190, at 17. James Sidanius, who elaborates social identity theory into a social dominance theory, emphasizes that "prejudice and discrimination" are not "pathological or quasi-pathological conditions," but rather represent the normal or "default conditions" of political societies. Sidanius, *supra* note 190, at 215.

[197]Dennen, *supra* note 190, at 30.

[198]*Id*. at 9; Tönnesmann, *supra* note 190, at 184. As Johan M.G. van der Dennen writes, "[it] is the *awareness* of the existence of categories which generates the in-group response." Dennen, *supra* note 190, at 17 (emphasis added).

which group memberships become salient for the individual depend on situational factors;" explains Wolfgang Tönnesmann.[199] "[O]ne could almost say that they are 'switched on' in particular situations (like going into a ballot booth or watching a football match between two national teams), and then determine how the situation is experienced by an individual and how he reacts to the people around him."[200]

Apparently, then, one reason the Court favored free expression over religious freedom is that religion-clause claims were more likely to "switch on" the justices' ingroup (Protestant, old-stock, elite) prejudices against the outsider (peripheral, outgroup) claimant.[201] Many of the free expression and religious freedom cases from the 1930s and 1940s involved claimants from peripheral groups. Indeed, as the Jehovah's Witnesses cases reveal, the same claimant often invoked both free expression and religious freedom. But the respective claims were qualitatively distinctive. When an outsider invoked the free-expression component of the first amendment, he or she was likely to describe free expression as a principle that applies equally to all. The outsider, from this perspective, did not seek any special treatment; rather, he or she sought to be treated the same as other citizens. But when that same outsider invoked religious freedom—particularly the free-exercise component of the first amendment—the claim amounted to a request for special treatment *because* of religious *differences* (from the mainstream).[202]

[199]Tönnesmann, *supra* note 190, at 184. It should be noted that an individual can identify with several different groups, any one of which might become more salient at a particular time. *Id*. at 183.

[200]*Id*. at 184.

[201]*See id*. at 184 (discussing how the salience of group membership is "switched on" in accordance with various situations); *cf*., Kimberly A. Moore, *Xenophobia In American Courts*, 97 Nw. U. L. Rev. 1497, 1499-1501 (2003) (discussing how xenophobic prejudices influence jury decision making).

[202]In other words, religious insiders (mainstream Christians) would view free exercise claims as requests for special treatment precisely because the outsider-claimant's religion differed from mainstream Christianity's normative content. I thank Lew Schlosser for underscoring this point. *Cf*., Lewis Z. Schlosser, *Christian Privilege: Breaking a Sacred Taboo*, 31 J. Multicultural Counseling & Development 44 (2003) (emphasizing how American society propagates Christian privilege vis-à-vis non-Christian religions).

Most free-exercise claimants request a judicial exemption from a generally applicable law. In such a situation, the government has adopted a general law—not one specifically focused on religion—but this general law nonetheless interferes with the practices or beliefs of members of a minority religion. For instance, in *Goldman v. Weinberger*,[203] the Air Force had adopted a regulation prohibiting the wearing of a hat or other head covering in certain circumstances. Religious convictions, however, mandate that Orthodox Jews always keep their heads covered (by wearing, for example, a yarmulke or skull-cap). Goldman, an Orthodox Jewish Air Force officer, thus sought a free-exercise exemption so that he could follow his religious convictions while remaining in the Air Force.[204] The crux of such a free-exercise exemption claim is difference from the mainstream. Goldman would not have sought a free-exercise exemption but for the fact that Orthodox Jews, unlike most Christians, are compelled to wear head coverings. Indeed, members of mainstream religions will rarely seek a free-exercise exemption because generally applicable laws infrequently conflict with their practices or beliefs.[205] The legislators (or other law makers) either belong to or are fully aware of the mainstream religions and thus are unlikely to adopt laws that interfere with mainstream practices and beliefs. But when the religious outsider seeks a free-exercise exemption, she does so precisely because of the differences between her religion and the mainstream.

Putting this in different terms, the free-exercise (outsider) claimant necessarily places herself in conflict with the mainstream as manifested in the generally applicable law. Moreover,

[203]475 U.S. 503 (1986).

[204]The Court rejected Goldman's claim. The majority misleadingly referred to his desire to wear a yarmulke as a personal preference. *Id*. at 508.

[205]Empirical studies show that members of mainstream religions are less likely to bring free-exercise claims. James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 Am. Pol. Q. 236, 248 (1999); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 Ohio St. L.J. 491, 563-64 (2004). In the Sisk, Heise, and Morriss study, mainline Protestants were the judges in 37.3 percent of the religion cases but were the claimants in only 1.7 percent of the cases. Sisk, *supra*, at 563, 577. I thank Greg Sisk for underscoring this point for me.

the claimant's stance can potentially frustrate the (mainstream) purposes behind the general law. This type of conflict and frustration is a burr likely to prickle the salience of the Supreme Court justices' ingroup-outgroup sensibilities. Consequently, in the 1930s and 1940s, when the justices confronted a free-exercise claimant, they would have been likely to experience an intensified sense of solidarity with the other justices as Protestant insiders, even if they normally were not overly devout. Concomitantly, the justices would have perceived an increased salience of separateness from the claimant—the claimant's status as an outsider would be more distinct—and the justices therefore would have been more likely to be prejudiced against the claimant and her constitutional position. These same phenomena, moreover, could arise in establishment-clause cases, especially if the claim was framed in a manner highlighting religious divergence.[206]

Whether we care to admit it or not, religious differences can, in certain contexts, generate salient divisions among Americans—including between Supreme Court justices and litigants. Such divisions, moreover, either directly shape the justices' reactions to religious-freedom cases or otherwise influence the justices' political stances, which in turn influence the justices' applications of legal doctrines.[207] But, as a general matter, how salient were religious divisions in American society—particularly for the 1930s and 1940s? Evidence suggests an unambiguous answer: under the right (or, we might say, wrong) conditions, religious divisions predominated over other concerns. In an empirical study of the 1928 presidential election, Allan J. Lichtman identified a number of "antagonisms that allegedly sundered the nation into two Americas during the 1920s: Catholics versus Protestants, wets versus drys, immigrants versus natives, and city versus country."[208] A contemporary campaign publication unabashedly highlighted these divisions:

[206]Feldman, *supra* note 186, at 259-61.

[207]Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, _ L. & Soc. Inquiry _ (forthcoming) (explaining how the justices' political preferences influence their interpretations of legal materials).

[208]Lichtman, *supra* note 32, at 25.

> If you believe in Anglo-Saxon Protestant domination; if you believe in those principles which have made the country what it is; if you believe in prohibition, its observance and enforcement, and if you believe in a further restricted immigration rather than letting down the bars still lower, then whether you are a Republican or a Democrat, you will vote for Hoover. …[209]

The 1928 election, of course, merits special historical import because it was the first time one of the major political parties had nominated a Catholic, Al Smith, and Lichtman's study concludes that religion—the Protestant-Catholic divide—overrode all other antagonisms.[210] Lichtman is careful to underscore that the salience of Protestant anti-Catholicism varies with context.[211] In 1928, Lichtman reasons, anti-Catholicism intensified precisely because a Catholic ran for president. After 1928, anti-Catholicism persisted, but it receded to its more normal level.[212] Given this normal degree of Protestant prejudice against Catholics, the salience of anti-Catholicism could always intensify under the proper conditions. And the proper conditions would arise, as I have explained, in judicial cases involving religious freedom. The justices would occasionally, behind closed doors, reveal their religious prejudices. For example, Justice William O. Douglas passed a note to Justice Hugo Black during an oral argument complaining that "[i]f the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business."[213] Indeed, a

[209]Handy, *supra* note 153, at 176 (quoting Anti-Saloon League publication).

[210]"Religion was undoubtedly the most sensitive emotional issue of 1928." Lichtman, *supra* note 32, at 40.

[211]*Id*. at 73-76, 121. "Religion, more than any other attribute of voters, made the coalitions supporting Smith and Hoover different from those that coalesced behind candidates in earlier or in later years." *Id*. at 25.

[212]Lichtman writes that anti-Catholicism "lost its immediate salience." *Id*. at 74.

[213]The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 401 n.26 (Del Dickson ed., 2001) (discussing *Everson v. Board of Education*, 330 U.S. 1 (1947)). For discussions of additional anti-Catholic statements by various Supreme Court justices, see Berg, *supra* note 186, at 129; John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. Am. Hist. 97, 122-26 (1997). It is worth noting that the appointments of New Deal justices like

recent empirical study of religious-freedom cases in the lower federal courts from 1986 through 1995 concludes that "the single most prominent, salient, and consistent influence on judicial decisionmaking was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community."[214]

One reason, then, that the Protestant-controlled Supreme Court favored free expression over religious freedom during the 1930s and 1940s was that the religious-freedom claims were more likely than the free-expression claims to intensify the salience of the justices' separation from the claimants as outsiders. In the Jehovah's Witnesses cases, when a claimant invoked free expression, the justices could readily perceive the value of a broad principle of free expression for Protestant elites as well as for members of peripheral groups. Indeed, for Protestant elites, the development of a broad principle of free expression might be especially worthwhile given the threat of outsider political power in the emergent pluralist democratic regime. But when Jehovah's Witnesses invoked religious freedom, their own focus on religion was likely to provoke the justices' religious prejudices against the claimants as outsiders.[215] Putting this in different terms, a religious freedom claim was, most often, integrally tied to a Jehovah's Witness's status as an outsider—a member of a discrete and insular (religious) minority.[216] With a free expression claim, the claimant was still an outsider, a Jehovah's Witness, but the crux of

Douglas and Black, members of the Protestant elite, were due in part to Catholic political support for the New Deal. This irony suggests that while certain Protestants and Catholics might have a congruence of interests in some circumstances, the Protestants' anti-Catholicism can become more salient in other contexts. I thank Mark Tushnet for bringing this point to my attention.

[214]Sisk, *supra* note 205, at 614.

[215]"[T]he salience of relevant categorizations" is "an important factor" in determining "intergroup bias." Gaertner, *supra* note 190, at 246. It is worth noting that in many of these cases, a decision based on religious freedom could be construed as narrower than one based on free expression. That is, the granting of a free-exercise exemption would not sweep as broadly as the articulation of a principle of free expression, yet the justices would nonetheless rely on the broader ground of decision. Such reliance on a broader rather than narrower ground runs contrary to the usual rules of judicial decision making, thus suggesting that the justices sought to resolve these cases in ways that favored the mainstream (rather than the outsiders). I thank Alan Chen for raising this point.

[216]United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

the claim rarely was that status, as an outsider qua outsider. Consequently, Jehovah's Witnesses were more likely to emerge victorious when they stressed and the justices focused on free expression rather than religious freedom.[217]

IV. Conclusion

During the 1920s and 1930s, the Supreme Court confronted and contributed to a transition from republican to pluralist democracy. The hallmark of republican democracy had been the virtuous pursuit of the common good. Governmental actions for partial or private interests were impermissible. Under pluralist democracy, though, the republican democratic principles, virtue and the common good, were supplanted; from the pluralist democratic standpoint, they had been a facade for Protestant old-stock interests and values and, as such, had been used to impede or prevent the participation of peripheral groups in the American polity. Under pluralist democracy, all individuals and groups supposedly were to participate, to express their interests and values through democratic institutions. Politics was about building coalitions, jostling for advantages, compromising when necessary, and generally seeking to maximize the satisfaction of one's interests.

As the Court encountered the emerging pluralist democratic regime in the 1930s and 1940s, both constitutional theory and constitutional politics contributed to the development of individual rights and liberties. On the one hand, first-amendment freedoms in general were invigorated, but on the other hand, the justices favored free expression over religious freedom. The developing theory of pluralist democracy readily justified an expansive concept of free expression. An individual could not be a full and equal democratic participant unless she could freely gather information about political issues and unrestrainedly express her interests and

[217]Religious freedom encompasses both free exercise and anti-establishment claims. Free exercise claims almost always accentuate the religious differences of the claimant, while establishment clause claims can accentuate difference to a greater or lesser extent, partly depending on how the claim is framed. My analysis suggests that an establishment clause claim has a better chance for success if the claimant underscores his or her religious similarities to the mainstream (rather than differences). *See* Feldman, *supra* note 186, at 238-61 (discussing strategies of Jewish organizations in Supreme Court briefs).

values in the democratic arena. Yet, the theoretical relationship between pluralist democracy and religious freedom seemed more ambiguous. While numerous theories could be offered to justify the protection of religious freedom, no single theory enjoyed widespread support. Partly for this reason, the justices imbued free expression rather than religious freedom with the greater vitality.

Constitutional politics further contributed to this preference for expression over religion. As the pluralist democratic regime solidified, the Protestant old-stock elite, aided by the Protestant-controlled Supreme Court, constitutionalized their interests and values, particularly in first-amendment freedoms, so as to form a bulwark against the emergent political power of peripheral groups. But through this constitutionalization of rights, the justices differentiated free expression and religious freedom. When a case highlighted the outsider-claimant's difference from the mainstream—as would happen often in religious-freedom cases—the justices were less likely to uphold the constitutional claim. Meanwhile, in those cases where the Court upheld the first-amendment claim, the justices were most likely to view the claimants' practices as similar to mainstream practices and interests. For example, in *Martin v. City of Struthers*, the Court invalidated an ordinance proscribing door-to-door distributions of written materials as applied to a Jehovah's Witness.[218] Focusing on free expression, Justice Black's majority opinion emphasized how the Witnesses' method, the door-to-door distribution of literature, resonated with mainstream practices.

> The widespread use of this method of communication by many groups espousing various causes attests its major importance. … Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. [As] every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support. …

[218]319 U.S. 141 (1943).

If the Court were occasionally to find the actions of a peripheral group to be protected under the first amendment, these types of actions—fitting so harmoniously with the interests, values, and practices of the mainstream—were ideal.[219]

Finally, while the Court's treatment of free-expression and religious-freedom claims over the last half-century has been anything but consistent, the Court today clearly favors free expression over religious freedom.[220] In *Employment Division, Department of Human Resources v. Smith*,[221] decided in 1990, the Court considered the appropriate test for free-exercise challenges to laws of general applicability. The Court expressly rejected the strict scrutiny test, which required the government to show that its action was necessary to achieve a compelling governmental interest. Instead, the Court held that the "political process" should effectively determine the scope of free-exercise rights.[222] The Court, however, articulated three exceptions, when strict scrutiny would be appropriate: first, if the government intentionally discriminates

[219]In *Murdock v. Pennsylvania*, the Court struck down a license fee as applied to Jehovah's Witnesses who were distributing written materials door-to-door. 319 U.S. 105 (1943). Justice Douglas's majority opinion linked free expression and religious freedom, and in doing so, he accentuated how the Witnesses' practices harmonized with mainstream traditions. "We do not intimate or suggest in respecting [the Witnesses'] sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment," Douglas explained. *Id*. at 109. "We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an *age-old type of evangelism* with as high a claim to constitutional protection as the more orthodox types." *Id*. at 110 (emphasis added).

The justices, moreover, seemed especially apt to uphold free-expression claims when the disputed speech or writing attacked a peripheral group. For example, in *Near v. Minnesota*, only the second clear free-speech victory, the Court found the disputed writings, which were laced with antisemitic diatribes, to be protected. 283 U.S. 697 (1931). In *Cantwell v. Connecticut*, the Court found speech attacking the Catholic religion to be protected. 310 U.S. 296 (1940).

[220]Patrick M. Garry, *Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 Wake Forest L. Rev. 361 (2004); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71 (2001).

[221]494 U.S. 872 (1990).

[222]*Id*. at 890.

against religion;[223] second, if the case involves the denial of unemployment compensation;[224] and third, if the case involves a "hybrid" claim, where free exercise is combined with some other constitutional right.[225] "The only decisions," the Court wrote in explaining the hybrid-claims exception, "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, such as freedom of speech and of the press."[226] Because the first two exceptions will be triggered only rarely, the hybrid-claims exception now appears to be the primary means for invoking heightened judicial scrutiny.

Thus, while the current Court, as a general matter, rigorously protects free expression, typically presuming that speech is protected unless it falls into a category of low-value expression, religious freedom will most often be subject to the whims of the political process—unless a free-exercise claim can be conjoined with another constitutional claim, particularly free expression.[227] Free exercise, as so interpreted, is a second-class constitutional right. Standing alone, it is unlikely to trigger heightened judicial scrutiny; in most instances, courts will merely defer to legislative judgments. Predictably, subsequent to *Smith*, cases involving religion have often been construed to raise free-expression issues, thus better justifying heightened scrutiny.[228]

[223]*Id*. at 877-78; *e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating an animal cruelty law that had been interpreted to punish killings for religious reasons).

[224]*Smith*, 494 U.S. at 883; *e.g.*, Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989) (holding unconstitutional the denial of unemployment benefits to a Christian who refused to work on Sundays but did not belong to established church or sect).

[225]*Smith*, 494 U.S. at 882*; see* Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 41 (1990) (discussing *Smith* exceptions).

[226]*Smith*, 494 U.S. at 881.

[227]In *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002), the Court also downgraded the level of scrutiny to be applied in most establishment-clause cases. Feldman, *supra* note 186, at 261-65.

[228]Good News Club v. Milford Central School, 533 U.S. 98 (2001); Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v.

Perhaps unsurprisingly, given the theoretical uncertainties surrounding religious freedom under pluralist democracy, the *Smith* Court justified its holding by underscoring problems inherent to a legal order under a pluralist democratic regime.[229] "Any society adopting [a strict scrutiny test to determine the constitutionality of a general law] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs," the Court explained.[230] "Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence," the Court continued, "we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[231] In other words, exactly because pluralist democracy rests on the inclusion of diverse societal groups within the American polity, the right to religious freedom must be narrowed. Otherwise, the Court reasoned, government would be hamstrung; nearly every general law would interfere with the practices or beliefs of some obscure religious group—or so the Court suggested. Of course, as even the *Smith* Court acknowledged, this approach to religious freedom favors the mainstream—a familiar result from

Center Moriches Union Free School District, 508 U.S. 384 (1993). A similar pre-*Smith* case is *Widmar v. Vincent*, 454 U.S. 263 (1981); *see* Garry, *supra* note 220, at 385-88 (discussing cases favoring free expression over religious freedom).

An empirical study concludes that, after *Smith*, lawyers shifted their strategies so as to emphasize the expressive components of religious-freedom claims. "Before *Smith*, free speech arguments were raised in only 12.9% of the cases we studied that involved claims for religious accommodation, while the proportion of cases framed as involving expressive rights more than doubled to 28.7% after *Smith*." Sisk, *supra* note 205, at 570.

[229]I do not mean to suggest that the reasons for the Court favoring free expression over religious freedom are the same today as in the 1930s and 1940s. There are overlaps, but there are also differences. For instance, the Court today is more religiously diverse than it has ever before been, yet the evidence suggests that nowadays the degree of religiosity of a justice often matters more than his or her religious affiliation. A conservative Protestant justice, consequently, is more likely to have views consonant with a conservative Catholic justice than with a liberal Protestant justice. Feldman, *supra* note 186, at 272-73; Sisk, *supra* note 205, at 579-81.

[230]*Smith*, 494 U.S. at 888.

[231]*Id*.

the vantage of constitutional politics. "[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," the Court explained plaintively, "but that unavoidable consequence of democratic government must be preferred."[232]

[232] *Id*. at 890. One thing that did not change during the transition from republican to pluralist democracy was that the predominant understanding of religious freedom favored the religious mainstream. Yet, the nature of religious freedom, including its relation to free expression, otherwise changed in many ways and for many reasons, including the increased religious diversity of the nation and the increased number of religious-freedom cases to reach the Supreme Court during the twentieth century.