

FROM *YODER* TO *YODA*: MODELS OF TRADITIONAL, MODERN, AND POSTMODERN RELIGION IN U.S. CONSTITUTIONAL LAW

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I. INTRODUCTION

The Supreme Court and its commentators have been struggling for over a century to find an adequate definition or characterization of the term "religion" in the First Amendment.¹ It has turned out to be a particularly tricky endeavor, one that has stumped both the Court and its commentators. By the 1990s, a significant section of the academy has given up on the endeavor entirely, others have declared that looking for a single definition that gives the essential characteristics of religion is not useful, and a third group has turned to a wealth of interdisciplinary sources. The appearance of deep incoherence in the religion-related decisions by the Court in the past decade is often cited as the reason for the continuing move to definition in the legal academy.² In 1993, Congress took the unusual step of setting out some of its own thoughts on the subject in the Religious Freedom Restoration Act,³ which was struck down by the Court at the end of its 1997 term in *City of Boerne v. Flores*.⁴

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1. The Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..." U.S. CONST. amend. I. The first consideration of the term "religion" by the United States Supreme Court was in *Reynolds v. United States*, 98 U.S. 145 (1878). "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted." *Id.* at 162.

2. See *infra* notes 10–14.

3. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. 1993)).

4. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). See discussion *infra* part V.

This Article takes an entirely different approach. Based on an analysis of the actual language used by the Supreme Court to characterize religion, this Article argues that the Court takes a common-sensical approach to each religion brought before it. The Justices as a unit look at the particular fact pattern of the religion case and characterize it in a way that is close to both the popular culture and the scholarly views of religion of the period. As a consequence, the opinions of the Court are in large part determined by the stereotypical characterization presented to the Justices of the particular religion involved.

In one sense, this is not a particularly surprising finding. The Justices are members of society, and "religion" is not formally defined in the First Amendment. In another sense, however, this form of analysis is unusual because it bypasses most of the current legal academic discussion in this area. It is not based on either the legal distinctions between free exercise and establishment clause jurisprudence or on the usefulness of the three-pronged test that animates both the case law and the legal commentary. Instead, this form of analysis asks whether the members of the Court find this particular religion to be a traditional religion, a modern citizenship religion, or a New Age postmodern religion.

A. *The Current Incoherence of Religion Clause Jurisprudence*

Such a leap into subtextual model-building and analysis would seem foolhardy were the legal scholarship in this area more coherent.⁵ A brief history of the Court and the academy's approach to these issues is necessary at this point to explain the current incoherence and the need for a new approach.

In its religion clause jurisprudence,⁶ the Court understandably has been

5. There have been other calls for a more complex view of the religion clause. For example, Alan E. Brownstein in *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 173 (1990), states that "[a] new approach is required that forthrightly describes the multifaceted nature of religion itself...."

6. A brief overview of religion clause jurisprudence is necessary to provide a background for the current claims of doctrinal incoherence and the arguments over definition. In the area of doctrine, the Court has divided the clause into two separate areas, Free Exercise and Establishment Clause jurisprudence. A belief-conduct dichotomy in *Reynolds v. United States*, 98 U.S. 145 (1878), was the first major doctrinal position taken by the Court on the Free Exercise clause, and it remained intact for over fifty years through its decision in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), which applied the Free Exercise clause to the states through the Fourteenth Amendment. In 1963, in *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), the Court signaled that it was switching to a new balancing test, the burden placed on the citizen's religious liberty versus the state's compelling interest in regulation. Through the 1980s, claimants under the Free Exercise clause generally lost as the courts found most claims to fall into special exemption categories such as the military, prisons, and federal lands. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986); *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981). But see *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals*

reluctant to provide all-inclusive definitions of religion⁷ not tailored to the immediate context of the case before it.⁸ On a few, now famous, occasions, the Court has launched into larger statements about the nature of religion in the United States ("We are a religious people whose institutions presuppose a Supreme Being...")⁹ but such expositions are usually understood as rhetorical buttressing for a proposed test to be used by the federal courts. Academic commentators have written a host of articles proposing, commenting on, and decrying definitions of religion.¹⁰ Some argue that we need a single, specific definition; Jesse Choper, for example, has proposed a belief in "extratemporal consequences" as the sign of a religious consciousness.¹¹ Some state that we need a particular type of definition—

Comm'n of Fla., 480 U.S. 136 (1987); *Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In 1990, the Court shifted to a neutrality test in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Reacting strongly to the Court's position, Congress enacted the Religious Freedom Restoration Act in 1993, rejecting the new neutrality test and requiring the Court to return to the balancing test language of *Sherbert*. In its 1997 term, the Court used separation of powers reasoning to reject this statute as exceeding congressional power.

In Establishment Clause jurisprudence, the Court began with a strict separation theme, *Everson v. Board of Educ. of the Ewing Township*, 330 U.S. 1 (1947), moved on to an accommodation theme, *Zorach v. Clauson*, 343 U.S. 306 (1952), and then in the early 1960s to a neutrality test, *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963). In 1971, in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), the Court enunciated what has become the well-known three-pronged test for neutrality under the Establishment Clause—secular purpose, secular effect, and minimal entanglement. Although it has not been overruled, the *Lemon* test has been roundly criticized and ignored in later opinions. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976).

7. The Court currently appears to be taking a stance against a singular test in the area of religion that could be understood as a stance against a singular, all-inclusive definition. For example, in her concurrence in *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994), Justice O'Connor states that "a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause..." should not be the approach of the Court.

8. "Context" is used in two senses here. In the first sense, it refers to doctrinal contextualization: context means the particular half of the religion clause—Free Exercise or Establishment—into which the case falls; the subject matter of the case itself; the current tests, statutes, and precedents that apply in the area. The second sense of context refers to the social, historical, political, legal, and religious landscape in which the case occurred. In this sense, creating a definition of religion that works for a Utah Territorial Court in the late 1870s will be different from creating a definition for a draftee in the 1960s, *United States v. Seeger*, 380 U.S. 163 (1965), or a Native American who uses peyote as a part of his church services in the 1990s, *Employment Div. v. Smith*, 494 U.S. 872 (1990).

9. *Zorach*, 343 U.S. at 313.

10. A recent review of the law review material on definitions of religion is in Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994).

11. Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597–601. He also outlines the nine criteria that an adequate definition should have including being specific and understandable, fulfilling the several goals of the religion

a functional or analogic or criterion-based or statutory approach to religion¹²—while others argue that a single definition is not possible or advisable.¹³ Other scholars have begun to use interdisciplinary sources from anthropology, sociology, psychology, and religious studies to create definitions.¹⁴

clause, and encompassing what we generally think of as religious. See also Jesse H. Choper, *Dangers to Religious Liberty from Neutral Government Programs*, 29 U.C. DAVIS L. REV. 719 (1996); and *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991). Examples of other proposed unitary definitions are the "ultimate concern" definition from *United States v. Seeger*, 380 U.S. 163, 187 (1965), which has been advocated in some law reviews, for example, M. Elizabeth Bergeron, "*New Age*" or *New Testament?: Toward a More Faithful Interpretation of "Religion,"* 65 ST. JOHN'S L. REV. 365, 371–85 (1995). For the "non-rational, transcendent reality" definition, see Craig A. Mason, Note, "*Secular Humanism*" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to *Mozert v. Hawkins County Public Schools and Smith v. Board of School Commissioners*, 63 WASH. L. REV. 445 (1988). Laurence H. Tribe weighed in for a two-fold definition of religion, one for the Free Exercise Clause and one for the Establishment Clause in the first version of his casebook, AMERICAN CONSTITUTIONAL LAW § 14-6, at 828 (1st ed. 1978), but then rejected the idea as "a dubious solution" in LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1186 (2d ed. 1988).

12. For functional definitions, see Ben Clements, Note, *Religion and the State*, 100 HARV. L. REV. 1606, 1623–24 (1987); Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989). For an analogic approach, see Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 757–58. For criterion-based definitions, see Choper, *Defining "Religion" in the First Amendment*, *supra* note 11, and Feofanov, *supra* note 10. See also Judge Adams' criterion-based test in *Malnak v. Yogi*, 592 F.2d 197, 207–10 (3d Cir. 1979) and *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981). For a statutory definition, see the IRS 14-point test for a church, see Jerome Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301, 304 (1978); and Bruce J. Casino, "*I Know It When I See It*": *Mail Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113 (Sum. 1987).

13. Freeman states that the search for a singular definition is impossible because there are no common traits shared by all religions. George C. Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1548, 1565 (1983). While a single definition is arguably not possible, more than one definition also presents difficulties. One of the first to make this point was Justice Rutledge who, dissenting in *Everson*, stated that the term religion in the First Amendment "does not have two meanings." *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 32 (1947). Judge Arlin Adams makes a similar point in *Malnak*, 592 F.2d at 211–12. As to the fact that the Court has avoided defining religion, Smith considers this advisable. "One might wisely hope that this situation will continue." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 298 (1987).

14. See James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23 (1995); C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL'Y 167 (1994). Sommerville states that "[f]or purposes of my historical study I distilled a definition of religion from standard anthropological and sociological treatments, to see religion as *that which gives access to supernatural powers or to the presence of such powers.*" *Id.* at 171

More recently, there has been a move from articles that focus on a specific definition or case decisions to general topics such as the appropriateness of religious beliefs in legal decision-making and the use of personal religious narratives. A fairly new group has begun to coalesce at conferences—Blumoff calls them the “New Religionists,” while Teitel calls them the “Critical Religion Theorists”—to speak and write about the injection of religion into legal discourse.¹⁵ Addressing liberalism and the lack of religion in the public sphere, their scholarly arguments take several forms: the increasing secularity of the public sphere as general morals decline,¹⁶ secularity as an insufficient basis for making political decisions,¹⁷ the problems with the increase of the administrative state into the realm of religion,¹⁸ the exclusion of religious or moral discourse from the law,¹⁹ our diminished understanding of religion,²⁰ the lack of a holistic viewpoint,²¹ and

(emphasis in original). Daniel O. Conkle has divided religious traditions into three procedural types: fundamentalists, religious modernists and religious reconcilers in terms of their orientation toward society, law, and politics. He concludes that religious reconcilers will be the best at reintroducing religion into legal discourse. See Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1 (1993/1994).

15. Theodore Y. Blumoff, *The New Religionists' Newest Social Gospel: On the Rhetoric and Reality of Religions' "Marginalization" in Public Life*, 51 U. MIAMI L. REV. 1 (1996); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 754 (1993). Another scholar cites both Stephen Carter and President Clinton for the “new infusion of religion into American politics,” pointing out that Clinton has stated publicly that he likes Carter’s book, *THE CULTURE OF DISBELIEF*, and has “promoted [it] almost shamelessly.” Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347, 348, 350 (1995).

16. Hon. Arlin M. Adams, *Recent Decisions by the United States Supreme Court Concerning the Jurisprudence of Religious Freedom*, 62 U. CIN. L. REV. 1581, 1598 (1994). Adams cites Harold Berman for the proposition that religion is necessary to the foundation of the state. “People will desert institutions that do not seem to them to correspond to some transcendent reality in which they believe—believe in with their whole beings, and not just believe about, with their minds.” (emphasis in original) (citing HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 73 (1974)).

17. See Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990), and Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 398 (1985). See also MICHAEL J. PERRY, *LOVE AND POWER* (1991) (arguing for the connection between the religio-moral consensus and political values such as human rights).

18. See Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEG. ISSUES 407 (Fall 1996) (arguing that the government should not judge religious practices or tenets).

19. See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?* 27 LOY. L.A. L. REV. 147 (1993).

20. See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977 (arguing for “religion as a hobby” thesis).

21. See Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992).

even discussions of the political and religious views of Justices.²² There has also been a strong liberal response to the New Religionists restating the basic principles of neutrality, equality, and religious liberty.²³

Amid all this activity by the legal community, there continues to be an unease about the current Court's decision-making in the area of the religion clause.²⁴ The legal academy perceives a deep incoherence in both the structure and the language of the Court's written decisions,²⁵ as well as little adherence to precedent²⁶ and deep contradictions in doctrinal analysis.²⁷ Scholars moan that the

22. See Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990).

23. A central statement of this position is by Kathleen Sullivan:

The correct baseline, then, is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order. On this view, the exclusion of religion from public programs is not, as McConnell would have it, an invidious 'preference for the secular in public affairs.' Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all.

Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198-99 (1992). See also Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 609 (1996) (criticizing one New Religionist's "inability to recognize the equality of persons as the secular value at the core of religious liberty..."); Eisgruber, *supra* note 15, at 347.

24. See Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); Phillip E. Johnson, *Concepts and Compromise in the First Amendment Religious Doctrine*, 72 CAL. L. REV. 817 (1984); Philip B. Kurland, *The Irrelevance of the Constitution; The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978-1979); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847 (1984).

25. In the area of religion and law, the Court's use of multiple opinions has become legion. See *Capital Square Review & Advisory Bd. v. Pinette*, 510 U.S. 1307 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992). For examples of opinions not speaking to each other, see Kent Greenawalt, *Religious Liberty and Democratic Politics*, 23 N. KY. L. REV. 629, 631-32 (1996); Rainey, *supra* note 19.

26. There is much evidence of the Court not following prior standards. For example, the standard put forth in *Lemon v. Kurtzman*, 403 U.S. 736 (1976), has been roundly criticized both by Court members and by the legal academy. New tests have commonly been proposed in each opinion. O'Connor proposed the "no endorsement" test in *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989), while Kennedy proposed a "no coercion" test in *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

Perhaps the most famous recent example of citing opinions that have been overruled in the area of religion is the case of *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990), in which Justice Scalia cites *Minersville Sch. Dist. v. Gobbitts*, 310 U.S. 586, 594-95 (1940):

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

Court has lost all predictability, will not address its own precedents, and is swerving from one untenable position to another.²⁸ Quotes to substantiate these points abound. Douglas Laycock has pronounced the religion clause doctrine as "so elastic...it means everything and nothing."²⁹ Justice Scalia has described the *Lemon* test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried...."³⁰

B. A New Approach through Models

The present incoherence in the opinions and articles on religion invites new considerations and approaches to the question of the Court's characterization of religion. Instead of starting with the Court's doctrinal analysis, the research for this Article began with the language used by the Court to typify different religions. Taking the entire body of cases available in the area of First Amendment jurisprudence, the author abstracted and analyzed hundreds of contextualized quotes characterizing religion.

A basic premise in this approach is that bodies of knowledge are structured into categories, many of which constitute idealized *models*. This means that individuals think and make further categorizations based on idealized examples of what they "know" to exist in the world, in this case, what they know about "religions." Hilary Putnam has used the term "stereotype" to describe an idealized mental representation of a normal case.³¹ A stereotype need not be an

discharge of political responsibilities.

Gobitis was overruled by a majority of the Court in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). McConnell suggests that relying on *Gobitis* without mentioning *Barnette* is like relying on *Plessy v. Ferguson* without mentioning *Brown v. Board of Educ.* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990).

27. Commentators find too many doctrinal tests and too many definitions used in combination or in opposition to one another in the opinions of the same case. They complain about rapid switches in reasoning from one case to the next, often not matched to the proposed tests and a post-facto, back-up rationale quality to much of the reasoning. In short, it is difficult for many commentators to discern the direction and reasoning of the Court. Phillip E. Johnson puts it this way: "Many areas of constitutional law are unsettled, of course, but in most areas the uncertainty concerns how far the Constitution requires us to go in a particular direction. In the religion clause area, even the general direction is often difficult to ascertain." Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 819 (1984).

28. The problem of addressing precedents may be changing. In a 1997 term case, *Agostini v. Felton*, 117 S. Ct. 1997 (1997), the Court directly overturned *Aguilar v. Felton*, 473 U.S. 402 (1985), in its first paragraph.

29. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986).

30. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993).

31. See HILARY PUTNAM, *MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS*. VOL. 2 (1975). See also HILARY PUTNAM, *MEANING AND THE MORAL SCIENCES* (1978); HILARY PUTNAM, *REASON, TRUTH, AND HISTORY* (1981).

actual occurrence in the world nor an accurate representation. For example, the stereotype of the metal "gold" is yellow, although white and red gold also occur in nature.

George Lakoff, a scholar in cognitive and linguistic research, has worked for many years at uncovering the basic categories that organize our thoughts, perceptions, and speech. Lakoff has expanded the propositional stereotype of Putnam to allow for more complex representations in each category.³² Working directly from language extracts, he includes in his prototype the range of possible images, metaphors, and meanings connected to a concept. An example is the term "mother" usually defined as "the person who gives birth." There are many other meanings to the term such as the *genetic mother*, the *nurturance mother*, the *marital mother* and the *genealogical mother*. To determine the real "mother" intended, we may have to use additional compound expressions such as *stepmother*, *surrogate mother*, *adoptive mother*, *foster mother*, *biological mother*, *donor mother*. Thus, this general concept of "mother" can not be defined in terms of a few necessary and sufficient conditions but instead forms a cluster of several types of "mothers" each of which is not entirely sufficient. Metaphoric references, images, representations, and value judgments also attach to these complex models.³³

After applying the work of Putnam and Lakoff to the Court's statements on religion, the language was grouped into categories and then grouped into clusters of types of religion. From these categories, three basic images of religion emerged—a traditional cosmological religion ("Traditional religion"), a modern citizenship religion ("Modern religion"), and a postmodern New Age religion ("Postmodern religion"). The author then wrote descriptions of each of these types based on the abstracts from the cases.³⁴ These descriptions were then checked against the cases to see if they represented useful models of religion. Their characteristics were also checked against popular and scholarly models of religion available during the periods in which the cases were written by the Court.³⁵

32. See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980); GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* (1998); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987).

33. See LAKOFF, *supra* note 32, at 68–76. See also LAKOFF & JOHNSON, *supra* note 32; LAKOFF & TURNER, *supra* note 32.

34. For example, the typical "traditional" religion in the Court's decisions was community-based, devoted to God or a supernatural force, not integrated into the larger democratic community, and anti-scientific.

35. The scholarly conceptions of religion that inform our legal understandings are multiple and come from wide array of disciplines; only a few that are pertinent to our current inquiry will be mentioned here. There are three general types of social models: evolutionary, bipolar, and ideal type.

The classical evolutionary models of society were superceded by the mid-eighteenth century work of Giambattista Vico who described four stages for society—the Bestial condition, the Age of Gods, the Age of Heroes, and the Age of Man. For Vico, religion was the most important component in determining the stage of a society. See M.H. FISCH & T.G. BERGIN, *THE AUTOBIOGRAPHY OF GIAMBATTISTA VICO* (1944); BENEDETTO

The basic thesis of this Article, then, is that these prototypes or models of religion used by the Court in its opinions are central to an understanding of the Court's interpretation of the religion clause. Unlike current doctrinal analysis, the models demonstrate a coherent pattern in the Court's opinions. In a case involving a religion that the Court has depicted as negatively New Age in the past, the plaintiff carries a much heavier burden.³⁶ Statements in the Court's opinions also indicate just how important the depiction of types of religion are in their decisions. The Court will often change or adjust the commonly understood image of a religion or a religious practice so that the opinion will reinforce the Justices' images of religion.³⁷

CROCE, *THE PHILOSOPHY OF GIAMBATTISTA VICO* (1964). Karl Marx and Friedrich Engel's well-known evolutionary model rejected religion as central to society and instead rooted evolutionary stages in technology, mode of subsistence, and general political structure. See FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (1902).

More recently, Robert Bellah, a sociologist of religion, has outlined five different types of religion occurring along an evolutionary scale: primitive, archaic, historic, early modern, and modern. His stages are historical, based on the differentiation of religious symbols, and are not mutually exclusive. See ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* (1970).

Auguste Comte, considered the founder of modern sociology, focused on the role of religion in creating personal feelings and social solidarity, as well as on the difference between rational and religious thought, all common themes in current legal discussions. See AUGUSTE COMTE, *SYSTEM OF POSITIVE POLITY* (1875); AUGUSTE COMTE, *RELIGION OF HUMANITY; SUBJECTIVE SYNTHESIS* (1891); *THE POSITIVE PHILOSOPHY OF AUGUST COMTE* (Harriet Martineau, trans. 1896). Emile Durkheim drew from Comte the idea of a bipolar structural model of society, a "mechanical society" with shared religious beliefs juxtaposed to "organic society" with a shared collective conscience. This bipolar opposition has retained its importance in current times. See EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (1893). Max Weber developed the ideal-types of religion. See MAX WEBER, *MAX WEBER ON LAW AND ECONOMY IN SOCIETY* (Max Rheinstein, ed. 1954).

36. Each of the three models—the traditional, modern, and postmodern—appears in the Court's opinions in both positive and negative formulations. For example, the traditional model has a positive normative weight when it represents an American Quaker in the founding period—see Justice O'Connor's dissent in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2182–83—but it has a negative weight when it is used to typify the former Hindu practice of *suttee* in which a wife is expected to place herself on her husband's funeral pyre and expire in grief. See *Reynolds v. United States*, 98 U.S. 145, 166 (1878). Both images are derived from the central prototype of a devout population with a strong religious cosmology. See *infra* Part II.

37. This is exactly what happened in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Here, the Court was faced with a difficult free exercise claim concerning a minority religious group. The Santeria religion originated in the nineteenth century in Cuba as a blend of traditional Yoruba religion and some aspects of Christianity. A Santeria church, proclaiming, through its priest Ernesto Pichardo, its desire to go public with the practice of animal sacrifice, leased land within the city of Hialeah and the city council swiftly enacted specific ordinances against ritual animal sacrifice.

Given the Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), a reasonable guess on the Court's position would have been to uphold the ordinance of the City finding it to be formally neutral under *Smith's* lowered threshold test—"a law that is neutral and of general applicability need not be justified by a compelling governmental

The three prototypes of religion used in Supreme Court discourse are presented in Parts II, III, and IV. In Part II, a description of the Traditional prototype is given first in a succinct italicized paragraph that presents its basic features. The current understanding of this transcendent worldview by the Supreme Court and in the legal academy is followed by a presentation of the Traditional model in academic non-legal literature and finally in popular culture. Traditional religion is often the sacred or religious half of the religious/secular dichotomy presented in much of the current legal and popular literature.

Part III presents a Modern image of religious thought and practice as modeled by the Supreme Court. In legal literature, this is the model that is referred to as a secular and neutral form of religious expression, practice, or institutionalization. This is the site for most of the current argument within the legal academy on the nature of the secular moral public order and the role of religion in the lives of public officials.

In Part IV, the Postmodern model coincides with religious expression and practice in a period of more fluid change and malleable identity. The Supreme Court has been using this model for deciding cases at least since *United States v. Seeger*.³⁸

Part V takes a brief look at the Framers' conceptualization of religion. The Framers' religion is not included as a prototypical model in this Article because it does not involve a current religious practice brought before the Court. Part V suggests that because it is difficult to know the actual intent of the Framers, their image of religion will remain an area of controversy. This section focuses on the Court's decision in *City of Boerne v. Flores*,³⁹ a suit challenging the 1993 Religious Freedom Restoration Act, and particularly Justice O'Connor's long dissent.

The Conclusion suggests that an inquiry into these models is the first step to a coherent understanding of the Court's decisions. It urges a new approach to the interpretation of the Religion Clause based on the Court's use of models.

II. TRADITIONAL COSMOLOGICAL RELIGION

One of the common views of religion evinced in the case law of the Supreme Court is religion as a closed traditional cosmological system that

interest." *Hialeah*, 508 U.S. at 531. But the *Hialeah* decision is interesting because the Court felt compelled to move beyond doctrinal reasoning to depict the Santeria religion, qua religion, in a favorable light. Here the Court was under enormous pressure due to two factors: (1) the passage of RFRA compelled the Justices to demonstrate that they supported the Free Exercise clause, and (2) *Hialeah* involved a statute specifically targeting a religious practice. Justice Kennedy begins this work of changing the popular image of the Santeria religion at the very beginning of his opinion. We are told four times in the first paragraph of section I(A) not that the Santeria participants are part of a strange New Age syncretic cult but that the Santeria are Roman Catholics, use Catholic saint iconography, Catholic symbols, and attend "the Catholic sacraments." Their extensive animal sacrifice rituals, we are told, are actually quite normal and have "ancient roots." *Hialeah*, 508 U.S. at 524.

38. 380 U.S. 163 (1965).

39. 521 U.S. 507 (1997).

represents a complete worldview for a community. The Traditional model can be presented in the following hypothetical form.

A. The Traditional Model of Religion

Religion is an all-encompassing, all-embracing worldview that is generally pre-modern, ancient, and divine. Devotion to a supramundane power or God(s) and to a centrally accepted canon are essential and a mark of goodness. With no substantial secular sphere, religious doctrine saturates and integrates every individual's life, with the cosmos providing a scheme for understanding both the ordinary world and the universe. Thus, the meaning of symbols and actions within the ordinary world is prefigured and directly linked to the religious.⁴⁰ This is a mystical, non-scientific, non-commercial worldview. Religious reasoning is always a higher duty than secular reasoning. Personal identity is completely framed within and by religion with a concomitant lack of individualism and an emphasis on hierarchy, position, and community in a population that is relatively homogeneous.⁴¹

B. The Case Law Defining the Traditional Model

One of the strongest delineations by the Supreme Court of the Traditional model occurred in *Wisconsin v. Yoder*,⁴² a 1972 case stemming from the convictions under a Wisconsin compulsory school-attendance law of Jonas Yoder, Wallace Miller, and Adin Yutzy, all members of Amish Churches. After their children graduated from the eighth grade at the local public school, they stated that sending their children to high school would expose them "to the danger of the censure of the church community...[and] also endanger their own salvation and that of their children."⁴³ In his opinion, Chief Justice Burger wrote that the Amish exemplify our traditional "early national life" and have "sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world."⁴⁴ The Amish emphasize that "salvation requires life in a church community separate

40. In the Traditional model of religion, the meaning of religious symbols is set. All religious symbols and art are prefigured and predetermined as to their religious significance, much like the fixed iconography of a stained-glass window as it was understood in the Middle Ages. Contrast this with the current tentative and fluid understanding of art typified by the postmodern ironic canvases of Russell Conner, the layout of WIRED magazine, or channel surfing television.

41. In this model, an individual's identity is firmly rooted, traditional, tied to, and embedded in a place—not self-consciously chosen, fluid, socially constructed, or manipulable. Personal agency, therefore, is limited to the options available in the religious worldview. Narrative is structured as God's narrative, a personal religious narrative or hagiographical narrative. And finally, both community and society are not chosen, they are dictated by the larger Providential Plan of God in which everything has a natural place and purpose.

42. 406 U.S. 205 (1972).

43. *Id.* at 208.

44. *Id.* at 210.

and apart from the world and worldly influence."⁴⁵ They want "a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."⁴⁶ The Court that they are "productive and very law-abiding members of society" who "reject public welfare,"⁴⁷ are reliable, self-reliant, and dedicated to work:

Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.⁴⁸

The rest of the opinion praises the Amish and their "fundamental mode of life"⁴⁹ and characterizes them as a time-tested human experiment and endangered species whose atechnic lifestyle emphasizes the need for tolerance and pluralism. Burger upheld the Wisconsin Supreme Court ruling that the convictions of the respondents under Wisconsin's compulsory school attendance law were invalid under the Free Exercise Clause.

Yoder can be understood as the traditional religion case that worked. However, this exception is well-marked territory in legal discourse. Robert Cover's classic article, *Nomos and Narrative*, describes the Amish as the originators of moral values for pluralistic communities, the site for jurisgenesis.⁵⁰ Cover posited that our common moral universe, which he termed "nomos," is not derived from nationalistic sentiments but is an essentially cultural activity that takes place in "communities with a total life-vision."⁵¹ The nomos of a community like the Amish he termed "paideic"—"a common and personal way of being educated into this corpus and...a sense of direction or growth that is constituted as the individual and his community work out the implications of their law."⁵² The visionary sacred and its narratives evolve and are maintained in such communities; from these traditional communities, moral laws become common law through the process of jurisgenesis.

45. *Id.* at 210.

46. *Id.* at 211.

47. *Id.* at 222.

48. *Id.* at 217.

49. *Id.* at 210-25.

50. See Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). See also NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1992). Bruce Ackerman uses a "jurisgenerative eras" approach to explain the three narratives of the Founding, Reconstruction, and New Deal welfarism periods. This is a different use of the ideas of jurisgenesis. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

51. Cover, *supra* note 50, at 32.

52. *Id.* at 12-13.

Chief Justice Waite in *Reynolds v. United States*⁵³ introduced the problems with a closed, traditional system.⁵⁴ George Reynolds, a Mormon, had been indicted in the Territory of Utah under a bigamy statute for marrying a second time, a duty he felt was required by God in a revelation to Joseph Smith, the founder of the Church of Jesus Christ of the Latter-Day Saints. Distinguishing between religious beliefs (“mere opinion”)⁵⁵ that should not be touched by the government and religious actions (“actions which were in violation of social duties or subversive of good order”),⁵⁶ Chief Justice Waite condemned a closed, traditional religion that allows abominable practices considered offensive to society⁵⁷ by comparing Mormon polygamy to human sacrifice and wife-burning:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?⁵⁸

The Court found that Mormons engaged in a religious practice that has “always been odious among the northern and western nations of Europe”⁵⁹ and “fetter[ed]” in a state of “stationary despotism.”⁶⁰ Here a Traditional closed religion is considered extreme and in violation of normal codes of decency.

The Satmar Hasidic Jewish community in *Board of Education of Kiryas Joel Village School District v. Grumet*⁶¹ had requested a statute creating a school district specifically for their religious community. Justice Souter found their branch of Judaism to be a Traditional model, but one that, like Mormonism a century before, was distasteful in its exclusion of the modern world. He found the statute to fail the test of neutrality after describing their community with the following language.

53. 98 U.S. 145 (1878).

54. *Id.* at 162. It should be noted that Justice Waite begins his explanation with originalist arguments and recounts the *Virginia Bill for the Teachers of the Christian Religion*, Madison’s response, Jefferson’s *Bill for Establishing Religious Freedom* passed by the Virginia Assembly in 1786 and the resulting First Congress passage of the First Amendment.

55. *Id.* at 164.

56. *Id.* Chief Justice Waite cited Thomas Jefferson’s address to the Danbury Baptist Association for the powerful metaphorical reference to the wall of separation between church and state and the distinctive dualism for which *Reynolds* is famous—that the legislative powers of the Government reach actions only and not opinion.

57. *Id.* at 167.

58. *Id.* at 166.

59. *Id.* at 164.

60. The quote is: “Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.” *Id.* at 166.

61. 512 U.S. 687 (1994).

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly;...speak Yiddish as their primary language; eschew television, radio and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools...where [boys] receive a thorough grounding in the Torah and limited exposure to secular subjects and, most girls...[receive] a curriculum designed to prepare [them] for their roles as wives and mothers.⁶²

While most of the opinion could have applied directly to the Amish as easily as to the Satmar Hasidic community, Souter's tone was different. This was a Traditional closed worldview religion that, in the view of the Court, had gone too far.

In other recent cases, the "stationary despotism" of the *Reynolds* case shows up as "fundamentalism." In 1968, Susan Epperson, a high school biology teacher in Little Rock, Arkansas, was worried about teaching science in her classroom under a 1928 state statute prohibiting instruction on evolution. In *Epperson v. Arkansas*,⁶³ the Court depicted the anti-evolution statute as a "monkey law" based on "fundamentalist sectarian conviction" which discomforts the "modern mind."⁶⁴

In *Edwards v. Aguillard*,⁶⁵ the Court considered the negative impact on children of a traditional religious viewpoint. At issue was the constitutionality under the First Amendment of Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act of 1982. The majority cited *McCullum* for the need to keep religious factionalism out of the schools: "In no activity of the State is it more vital to keep out divisive forces than in its schools."⁶⁶ Citing *Epperson*, the Court noted that the Creation-Science law was "a product of the upsurge of 'fundamentalist' religious fervor that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible."⁶⁷ For the majority, Justice Brennan stated that the requirements of

62. *Id.* at 691.

63. 393 U.S. 97 (1968).

64. *Id.* at 101-07 (1968). Citing pamphlets and letters used to promote the passage of the bill in 1928, Justice Fortas gives an excerpt from the following letter as an example of closed-minded fundamentalism:

The cosmogeny taught by [evolution] runs contrary to that of Moses and Jesus, and as such is nothing, if anything at all, but atheism.... Now let the mothers and fathers of our state that are trying to raise their children in the Christian faith arise in their might and vote for this anti-evolution bill that will take it out of our tax supported schools. When they have saved the children, they have saved the state.

Id. at 109 n.16.

65. 482 U.S. 578 (1987).

66. *Id.* at 584 (quoting *Illinois ex rel. McCullum v. Board of Educ.*, 333 U.S. 203, 231 (1948)).

67. *Id.* at 590 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968)).

secularity and neutrality are fulfilled by a "comprehensive science curriculum," not by a creation-science class.⁶⁸

In the dissent, Justice Scalia stated "the Balanced Treatment Act did not fly through the Louisiana Legislature on wings of fundamentalist religious fervor,"⁶⁹ or result from "Christian fundamentalist repression."⁷⁰ He pointed out the contradiction of ruling that secular humanism is protected as a "religion" in some Court cases⁷¹ and then depicting it as a neutral non-religion in this case. Justice Scalia castigated the majority of the Court for inappropriately presuming that the legislators are mired in a fundamentalist Traditional model of religion.

C. *The Legal Literature on the Traditional Model*

Except for Cover's visionary article, there appears to be little understanding of the comprehensive worldview of the Traditional model within the legal academy. The transcendent life, the life permeated with the sacred in every object, word, and action, is not easily comprehensible in legal discourse. The current debate regarding whether or not religious beliefs can be used in political decisionmaking is illustrative. Rather than beginning with a discussion of the nature of the Traditional and other models as religious worldviews for different citizens, the debate centers around an understanding of Traditional worldviews as somehow fundamentally problematic for legal argument.

An article by John Garvey, entitled *The Pope's Submarine*,⁷² is an example of this current discussion. It outlines the problems confronting then-Governor of New York State, Mario Cuomo, when asked to speak on abortion in 1984 at Notre Dame University.⁷³ Garvey, himself a Catholic, compares the

68. Justice Brennan's full comments are:

Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

Id. at 586.

"In a similar way, teaching a variety of scientific theories about the *origins* of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." *Id.* at 594.

69. *Id.* at 619 (Scalia, J., dissenting).

70. *Id.* at 634 (Scalia, J., dissenting).

71. The U.S. Supreme Court has held that secular humanism is a religion. "In *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), we did indeed refer to 'Secular Humanism' as a 'religio[n].'" *Id.* at 635 n.6.

72. John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849 (1993).

73. Mario M. Cuomo, *Religious Belief and Public Morality; A Catholic Governor's Perspective, Address to the University of Notre Dame (Sept. 13, 1984)*, in 1 NOTRE DAME J. L. ETHICS & PUBLIC POL'Y 13 (1984). Cuomo became a subject in legal discourse when, as a religiously motivated public official, the Governor of New York and a liberal Democrat, he delivered an address at the University of Notre Dame. As Garvey described Cuomo's speech:

He began by explaining that he accepted the Church's teaching about

authority of the Catholic church to the authority of a political system in his paper but is hampered by the necessary framing of the argument in political terms. He begins the first section with a statement that the traditional religious life is no longer a serious option in America:

There was a time when people relied upon their religious sense to help them understand the idea of political authority. This is why German kings for centuries claimed the title of Holy Roman Emperor. I think the tables are turned today. For most of us political authority is a familiar—even congenial—notation, but it is hard to see why we should take seriously a claim of religious authority.⁷⁴

Garvey tries to argue that “liberal principles...should not prevent Cuomo from acting on his religious belief about the morality of abortion” and that indeed “the Free Exercise Clause positively encourages it.”⁷⁵ Garvey then states that while the dilemma between religious and political beliefs rarely arises, when it does, “it confirms the stereotype of Catholics as citizens with divided loyalties.”⁷⁶ He concludes with the claim that “there is no reason to disqualify religious authorities” as sources of authority.⁷⁷ Legal discourse in the United States obviously does present problems for the citizen and public official committed to a Traditional or even quasi-Traditional model of religion.

There is also a stronger position against the Traditional model within the legal academy. Several law review articles evince a desire to eliminate the Traditional worldview from the discussion as inappropriate because its presumed intolerance is inconsistent with “the establishment of the secular public order.” These religions are excluded because they will bring on the “war of all sects against all.”⁷⁸ This is seen as a possible danger when a New Religionist presents religion as a different kind of entity or good,⁷⁹ or speaks of a “Providential Plan” or a “classical view of Nature” as necessary for the construction of religion.⁸⁰

abortion as the rule for his own life. But as a public official he could not approve a legal prohibition of abortion. Most of New York's citizens were not Catholics and many of them (indeed many Catholics) disagreed with what the Church said. An anti-abortion law would be unfair to them, and ineffective in the way Prohibition was. Cuomo added that he also favored Medicaid funding of abortions for the poor.

Garvey, *supra* note 72, at 850.

74. Garvey, *supra* note 72, at 851.

75. *Id.* at 872.

76. *Id.* at 875.

77. *Id.* at 876.

78. See, e.g., Sullivan, *supra* note 23; Eisgruber & Sager, *supra* note 23; Eisgruber, *supra* note 15.

79. See generally WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES (1994).

80. STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON (1998).

D. General Literature and Popular Culture Images

Outside legal discourse, the Traditional model often works in either a nostalgic or historical mode as the first half of a dichotomy—traditional versus modern.⁸¹ There are many examples of such theoretical dualisms: Jacques Le Goff on how the Medieval imagination differs from the modern,⁸² Stanley Tambiah on the dichotomy between traditional religious and modern scientific worldviews,⁸³ Brian Tierney on the correct moral conscience of the Medieval period,⁸⁴ and Talal Asad on the lack of inner moral order and personal discipline of Medieval religion in modern religion.⁸⁵ Charles Taylor has referred to a Traditional sensibility as “the doctrine of correspondences” in which a person lives in a world of “publicly understood subjects of divine and secular history, events and personages that had heightened meaning, as it were, built in to them.”⁸⁶

In the evolutionary scheme Robert Bellah, “historic religion” is the closest to the Traditional model. Historic religions are characterized by transcendentalism,

81. Many of the current formulations of traditional society versus modern society are derived from Emile Durkheim, who was heavily influenced by Auguste Comte, the originator of sociology. See COMTE, *supra* note 35. Starting with the premise that law is at the heart of society because it reproduces the principle forms of social solidarity, Durkheim worked with a bipolar structural model. At one pole is “Mechanical Society” with little specialization, repressive and harsh physical punishments, and a shared totality of religious beliefs. It is contrasted with “Organic Society,” a heterogeneous, specialized society with penal and restitutive sanctions and a common collective conscience created to bind the group together, similar to Comte’s notion of consensus. This bipolar model is replicated in many of the discussions of closed fundamentalist religious viewpoints or negative versions of *Traditional*, as opposed to secular consensual viewpoints, in modern legal and political theory. See EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (W.D. Halls trans., New York Free Press, 1984); EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (Stephen Lukes ed. & W.D. Halls trans., 1895); EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph Ward Swain trans., 1915). See also ANTHONY GIDDENS, EMILE DURKHEIM (1979).

It should also be pointed out here that several authors have referred to postmodernism as a return to the traditional, the sacred, the particular, the irrational, the emotional, the mystical, and the magical. See PAULINE MARIE ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS* 148–49 (1992). See also MADAN SARUP, *IDENTITY, CULTURE AND THE POSTMODERN WORLD* (1996). Postmodern religion is not a return to the Traditional model of cosmologically integrated religious experience although it may be a return to Traditional sensibilities. It is more likely that this is a form of Postmodern. See *infra* Part V.

82. JACQUES LE GOFF, *MEDIAEVAL IMAGINATION* (1988).

83. STANLEY JEYARAJA TAMBIAH, *MAGIC, SCIENCE, RELIGION, AND THE SCOPE OF RATIONALITY* (1990).

84. *AUTHORITY AND POWER: STUDIES ON MEDIAEVAL LAW AND GOVERNMENT PRESENTED TO WALTER ULLMANN ON HIS BIRTHDAY* (Brian Tierney & Peter Linehan eds., 1980); BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE 1050–1300* (1964); BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150–1650* (1982).

85. See TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (1993).

86. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991).

universalism, religious action as necessary for salvation, the idea of the flawed nature of humankind, and a new conceptualization of the self. Examples of this form of religion include early Buddhism, Medieval Christianity, early Judaism, and early Islam. Echoing the tension described by Garvey as "divided loyalties," historic religions legitimate and reinforce the social and political order at the same time that they create tension due to the new religious elite.⁸⁷

The Fundamentalism Project of Martin Marty and Scott Appleby at the University of Chicago is another example of a non-legal academic approach to the phenomenon of Traditional religion. In several large volumes, they have collected essays that meticulously describe individual cases of religious fundamentalism around the world.⁸⁸ In the conclusion to their first book, the editors recognize that modern religious fundamentalism, as discussed in *Epperson and Edwards*, is a very complex phenomenon. Marty and Appleby see fundamentalist movements as arising in "times of crisis, actual or perceived"⁸⁹ and employing both modern and traditional forms selectively, but, strikingly, as having a greater "affinity to modernism than to traditionalism."⁹⁰

In books and media for a more general audience, the virtuous side of the Traditional model at times has been transformed into "real religion" and has been

87. "Whether the confrontation was between Israelite prophet and king, Islamic ulama and sultan, Christian pope and emperor, or even between Confucian scholar-official and his rule, it implied that political acts could be judged in terms of standards that the political authorities could not finally control." ROBERT BELLAH, *supra* note 35, at 35. Bellah's two preceding models of religion are primitive and archaic. Primitive religion, typified by the Australian Aborigines, is "oriented to a single cosmos; they know nothing of a wholly different world relative to which the actual world is utterly devoid of value." *Id.* at 23. Archaic religion

includes the religious systems of much of Africa and Polynesia and some of the New World, as well as the earliest religious systems of the ancient Middle East, India and China. The characteristic feature of archaic religion is the emergence of true cult with the complex of gods, priests, worship, sacrifice, and in some cases divine or priestly kingship. The myth and ritual complex characteristic of primitive religion continues within the structure of archaic religion, but it is systematized and elaborated in new ways.

Id. at 29.

88. See THE FUNDAMENTALISM PROJECT, FUNDAMENTALISMS OBSERVED (Martin E. Marty & R. Scott Appleby eds., 1991); FUNDAMENTALISMS AND SOCIETY: RECLAIMING THE SCIENCES, THE FAMILY, AND EDUCATION (Martin E. Marty & R. Scott Appleby eds., 1993); FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMIES AND MILITANCE (Martin E. Marty & R. Scott Appleby eds., 1993).

89. THE FUNDAMENTALISM PROJECT, *supra* note 88, at 822.

90. They define modern religious fundamentalism as having the following characteristics: a comprehensive religious worldview as "an irreducible basis for communal and personal identity," "revealed truth as whole, unified and undifferentiated," literalism and "extremism," the repudiation of "secular-scientific notions of progress and gradual historical evolution," "dramatiz[ation] and even mythologiz[ing] their enemies," protection of "the group from contamination" to maintain purity, "missionary zeal," and "charismatic and authoritarian male leaders." THE FUNDAMENTALISM PROJECT, *supra* note 88, at 817-27.

contrasted with our current degenerate times. For example, David Klinghoffer defines real religion—in contrast to kitsch religion—as a transcendent experience of God created through orthodoxy, faith in the truth of God, moral obligations, strict education, discipline, standards of conduct, and dedication to a religious life.⁹¹ On the other hand, religious cults created around figures such as Jim Jones,⁹² Bhagwan Shree Rajneesh,⁹³ David Koresh,⁹⁴ and Sheik Omar Abdel Rahman⁹⁵ have come to typify the vices of the Traditional closed model.

When considering the Traditional model as a national system, Americans tend to view it sympathetically in certain cases (such as the Government-in-Exile of the Dalai Lama of Tibet) and negatively in others (such as the government of Iran under the Ayatollah Khomeini). This reiterates the ambivalent images of the Traditional model reflected in Supreme Court thinking, both the nostalgic picture of the self-reliant, ethical community operating under a Providential Plan and the closed, dogmatic, intolerant religious quasi-state.

91. David Klinghoffer, *Kitsch Religion*, in *DUMBING DOWN: ESSAYS ON THE STRIP MINING OF AMERICAN CULTURE 258–60* (Katharine Washburn & John F. Thornton eds., 1996). Klinghoffer addresses the question of the modern mode of religiosity and points out that “eviscerating discipline...isn’t necessarily hazardous to the health of a religious body,” given that the fastest growing sects in the USA are Southern Baptists, Mormons, Orthodox Jews, and other traditionalistic groups. *Id.* at 257.

92. Jim Jones was the leader of the People’s Temple cult, consisting primarily of U.S. citizens, which built a community known as Jones Town in Port Kaituma, Guyana. In 1978, a group of defectors was ambushed by People’s Temple members. Four of the defectors, as well as a California congressman who was assisting them, were killed. Later that day, Jones and 912 of his “disciples” committed mass-suicide. See Howell Raines, *Lane Sees “Master Plan” by Cult for Political Murders*, N.Y. TIMES, Nov. 23, 1978, at A17. Like other leaders of cults, Jones controlled his followers by isolating them from the outside world. See JAMES RESTON, JR., *OUR FATHER WHO ART IN HELL: THE LIFE AND DEATH OF JIM JONES* (1981).

93. Shree Bhagwan Rajneesh (posthumously known as Osho), who was deported from the U.S. in 1989 and died in 1990, was an Indian guru who founded a community first in Poona, India and later in Antelope, Oregon. Revered by many as a profound spiritual teacher, in the U.S. media he “became notorious for his teachings of free love and ‘cosmic orgasms.’” Alastair Percival, *Trial Shame of Women Who Followed Rolls-Royce Guru*, Press Association News File, Home News Section, July 29, 1995. Rajneesh owned 85 Rolls-Royces, “preferring to ride in a different car every day.” Peter Applebome, *Guru’s Rolls-Royces Fetch Top Prices*, N.Y. TIMES, Mar. 26, 1986, at C10.

94. David Koresh was the leader of a Branch Davidian religious commune in Waco, Texas. Koresh allegedly incited his followers to commit mass suicide during a stand-off with the Federal Bureau of Investigation in April, 1993. He had a very negative image in the media and was described as a “sexually predatory messiah.” Geoffrey Parker, *True Believers*, N.Y. TIMES, June 29, 1997, at 26, quoting FELIPE FERNANDEZ-ARMESTO & DEREK WILSON, *REFORMATIONS: A RADICAL INTERPRETATION OF CHRISTIANITY AND THE WORLD 1500–2000* (1997).

95. Sheik Omar Abdel Rahman is the Islamic fundamentalist who incited the World Trade Center bombing in New York. See Mary B.W. Tabor, *Sheik, in Court Denies Terror Charges*, N.Y. TIMES, Aug. 27, 1993, at A1. The “Islamic fundamentalist cleric...whose preaching attracted some of the World Trade Center suspects....” N.Y. TIMES Apr. 24, 1993, at 25.

III. MODERN CITIZENSHIP RELIGION

The most common view of religion evidenced in the Supreme Court case law is the Modern model. Most closely associated with our understanding of the role of religion in modern democratic nations during the twentieth century, it is summarized in the following hypothetical form.

A. *The Modern Model of Religion*

Religion is a private affair and privately celebrated and it takes place in and through generally recognized institutions.⁹⁶ Religion is social; it provides for the socialization of children into moral values; it connects one to the community and provides counseling in time of stress and family need. Morality, meaning, and value through religion are reflected in one's daily life and through one's family and religious community. Scientific methodology, technology, and materialist concerns are compatible with religious views and are the primary conceptualization in the public sphere instead of religious cosmology. There are many different religions within the nation-state, and for this reason, respect and tolerance for other religions is basic to the perpetuation of each individual religion.⁹⁷ The State is inclusive and tolerant, anti-dogmatic and protective of public discussion and religion against coercion. All public spheres are secular such that religion should rarely enter into the political or commercial order or the academic and intellectual order.

B. *The Case Law Defining the Modern Model*

Wisconsin v. Yoder,⁹⁸ discussed in the last section, provides an entry into some of the core concepts of the Modern model. As one of the few successful free exercise challenges decided by the Court,⁹⁹ it contrasted the hardworking, simple,

96. This Modern model of religion in a democratic nation-state emphasizes the private, institutional, and majoritarian nature of religion rather than the all-embracing religious worldview of the Traditional model. There is no revelation of the divine Providential Plan here unless it is privately expressed. No longer tied to the cosmology of God or a transcendent reality, science and the scientific method define reason as it is commonly understood.

97. An individual's identity within this model is rooted in the secular nation, defined by narratives of individual merit and occupational achievement. Art and media symbols without significant religious iconography constitute the visual field. Community has become modern networks that aid individuals in times of stress and family need, with religion as one among competing network systems.

98. 406 U.S. 205 (1972).

99. See also *Sherbert v. Verner*, 374 U.S. 398 (1963) (upholding the right of a Jehovah's Witness not to work on her Sabbath); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987) (upholding right of Seventh Day Adventist not to work on her Sabbath); *United States v. Seeger*, 380 U.S. 163 (1965) (upholding right of draft-eligible citizen to qualify for conscientious objector status due to belief parallel to that filled by orthodox belief in God); *Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding right of Church of Latter Day Saints to require employees of non-religious business to be members of Church).

intensely communitarian Amish, throwbacks to our historical origins and religious heritage, with modern-day people.¹⁰⁰ In highlighting this contrast, Chief Justice Burger outlines for us the components of the Modern social world: individuals and institutions that are complex, diverse, have technical scientific knowledge, material success, a competitive spirit and are integrated into national political life.¹⁰¹ Modern society is "populous, urban, industrialized, and complex...government regulation of human affairs has correspondingly become more detailed and pervasive."¹⁰² As their non-participation allows them to fit into modern "democratic society," Burger states that the Amish are the very image of "Jefferson's ideal of the 'sturdy yeoman.'"¹⁰³

The Amish were also praised in *Yoder* because they did not ask any benefit from the state and because their religious principles remain outside of the commercial sphere.¹⁰⁴ This point is further highlighted in the unsuccessful Amish cases, such as *United States v. Lee*.¹⁰⁵ Written in 1982 by the same Chief Justice, *Lee* contains none of the praiseworthy language of *Yoder* and no references to the "early, simple, Christian life" of the Amish. In *Lee*, Burger described an Amish man, who requested to be exempted from the responsibility of paying social security taxes, as a "follower of a particular sect [that] enter[s] into commercial activity as a matter of choice."¹⁰⁶ Not surprisingly, *Lee*'s employees were not found exempt from the tax.

In the Modern model, religion is not envisioned as to content or form as much as it is conceptualized as one of many private activities¹⁰⁷ in the open secular plaza of a democracy that encourages diversity and pluralism. This conceptualization of religion finds fruition in a classic 1969 case, *Walz v. Tax Commission*.¹⁰⁸ In *Walz*, a property owner in Richmond County, New York, sued to enjoin the New York City Tax Commission from granting a tax exemption to religious organizations for properties used solely for religious worship. Chief Justice Burger began by pointing out that exemption for religious properties is a concept "deeply embedded in the fabric of our national life beginning with pre-Revolutionary colonial times"¹⁰⁹ and can best be understood as a sort of "benevolent neutrality"¹¹⁰ that avoids "excessive entanglement"¹¹¹ by the government. However, instead of talking of the importance of the Creator's plan or

100. See *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

101. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

102. *Id.* at 217.

103. *Id.* at 225-26.

104. *Id.* at 216.

105. *United States v. Lee*, 455 U.S. 252 (1982).

106. *Id.* at 261.

107. That religion is a private matter can hardly be contested in the Modern model. For example, in *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971), Chief Justice Burger stated: "The Constitution decrees that religion must be a private matter for the individual, family and the institutions of private choice...."

108. 397 U.S. 664 (1970).

109. *Id.* at 676.

110. *Id.* at 669.

111. *Id.* at 670.

the essential and necessary nature of religion for the fabric of the society, the Court described religious institutions as one of several groups that are "beneficial and stabilizing influences in community life" because they are "useful, desirable and in the public interest."¹¹²

Justice Brennan's concurrence took the argument one step further, by presenting secular arguments for religion. First, Brennan established that two good secular purposes weigh in favor of exempting religious organizations: they "contribute to the well-being of the community in a variety of non-religious ways"¹¹³ and they "uniquely contribute to the pluralism of American society." Next, he declared:

It is true that each church contributes to the pluralism of our society through its purely religious activities, but the state encourages these activities not because it champions religion per se but because it values religion among a variety of private, non-profit enterprises that contribute to the diversity of the Nation. Viewed in this light, there is no nonreligious substitute for religion as an element in our societal mosaic, just as there is no nonliterary substitute for literary groups.¹¹⁴

With *Walz*, the Court shifted dramatically into a new model of religion. Members of a Traditional religious community with a traditional worldview would be shocked at the Supreme Court's equation of religious rituals with the activities of a reading group.

If *Lee* and *Walz* demonstrate the virtues of the Modern model, *United States v. Ballard*¹¹⁵ in 1944 depicts some of its problems as perceived by the Court. Guy W. Ballard, who believed himself to be a medium for an "ascended master" named St. Germain, created the "I Am" movement with his relatives to solicit funds for healing and curing diseases. Indicted and convicted for using and conspiring to use the mails to defraud, the Ballards appealed on the basis of the First Amendment.¹¹⁶ The case was first remanded and then reversed, with the Court dismissing the indictment.¹¹⁷ In *Ballard*, the Court no longer saw itself as capable of determining for society at large what constitutes an abominable practice, as it did in *Reynolds* and *Late Corporation*.¹¹⁸ In his dissent, Justice Jackson enjoined the Court to stay out of the business of "examining other people's faiths," and then proceeded to comment on the hunger for meaning in the modern world:

112. *Id.* at 673.

113. *Id.* at 687 (Brennan, J., concurring).

114. *Id.* at 693 (Brennan, J., concurring).

115. 322 U.S. 78 (1944) (*Ballard I*) (holding that the truth of the respondent's religious doctrines or beliefs should not be submitted to the jury).

116. *Id.* at 83, 84.

117. *Ballard v. United States*, 152 F.2d 941 (9th Cir. 1945) (*Ballard II*). See *Ballard v. United States*, 329 U.S. 187 (1946) (*Ballard III*).

118. *Reynolds v. United States*, 98 U.S. 145 (1878); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). In *Late Corporation*, the Court referred to polygamy as "abhorrent to the sentiments and feelings of the civilized world.... [T]his barbarous practice...[is] a blot on our civilization." *Id.* at 48-49.

But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get.¹¹⁹

Justice Jackson warned us not to forget that religion is a very different sort of entity than "the representations of secular fact in commerce."¹²⁰

In a 1952 school release-time case, *Zorach v. Clauson*,¹²¹ Justice Douglas warns that a complete separation of church and state in a modern democracy can lead to relations between state and religion that are "hostile, suspicious and even unfriendly."¹²² In his dissent, Justice Frankfurter raised another theme, questioning the "surprising want of confidence in the inherent power of various faiths to draw children to outside sectarian classes."¹²³ These themes of state hostility to religion, loss of the special understanding of religion, and the possible decline of religion and spirituality due to the over-secularization of the public sphere have been picked up by the New Religionists in their criticisms of current legal discourse.

Justices Rehnquist and Scalia have been the two most vocal critics of the neutrality and separation aspects of the Modern model of religion. In a dissent in *Wallace v. Jaffree*,¹²⁴ a case concerning an Alabama statute that authorized a period of silence for "meditation or voluntary prayer," Justice Rehnquist looked specifically at the metaphors used in First Amendment jurisprudence. He condemned the wall of separation between church and state as a "metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned,"¹²⁵ for, "[a]s its history abundantly shows...nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."¹²⁶

In *Edwards v. Aguillard*,¹²⁷ the 1987 case that tested the constitutionality of Louisiana's Creation-Science Statute, the majority represented the Louisiana legislature as mired in a Traditional worldview. Justice Scalia, joined by Chief Justice Rehnquist, made two other arguments pertinent to the Modern model of religion. First, if the legislators were voting for the act on the basis of their religious beliefs, this is not an adequate reason for invalidating the act as long as a

119. See *Ballard*, 322 U.S. at 94-95 (Jackson, J., dissenting).

120. *Id.* at 94.

121. 343 U.S. 306 (1952).

122. *Id.* at 312.

123. *Id.* at 323 (Frankfurter, J., dissenting).

124. 472 U.S. 38 (1984).

125. *Id.* at 107 (Rehnquist, J., dissenting).

126. *Id.* at 113 (Rehnquist, J., dissenting).

127. 482 U.S. 578 (1987).

secular purpose also figured into their vote. Second, he paraphrased the statutory drafters who believed that teachers are largely influenced by "an entrenched scientific establishment composed almost exclusively of scientists to whom evolution is like a 'religion.'"¹²⁸ Here, he is noting the centrality of science and the scientific method within modern society.

The Court's use of a Modern model of religion—a religion that fits well in the secular public sphere as one of many permissible secular activities—creates problems in the interpretation of the First Amendment. The first problem stems from the model's inversion of the relationship between the sacred and the secular spheres. In most Traditional models of religion as well as in the late eighteenth century, when the Constitution was framed, the sacred realm incorporated and defined much of the secular realm. In the Modern model, the secular realm defines the sacred. It is not surprising therefore that the Court has been faced with the problem of the "pickled past"—that is, defining what is sacred and what is merely nostalgic. The Court has been asked to make determinations about whether or not large Christian crosses, menorahs, and crèches standing next to Christmas trees on public property are simply nostalgic renditions of our national heritage or actual religious symbols.¹²⁹ This set of secular-sacred decisions has proven particularly thorny for the Court.

Understanding the First Amendment as applying to a secular public sphere based in pluralism and secular neutrality presents a second interpretive challenge: other constitutional arguments from the free speech section of the First Amendment—such as the "marketplace of ideas" metaphor—will move into religion clause interpretation.¹³⁰ As this occurs, the emphasis on the Modern model will be on the secular sensibilities of individuals, rather than on finding, emphasizing, or protecting the role of the sacred or the religious individual. For example, an Orthodox Jewish rabbi denied the right to wear a yarmulke in the Air Force brought suit against the Secretary of Defense for infringing his free exercise of religion in *Goldman v. Weinberger*¹³¹ and lost. Justice Brennan's dissent demonstrates this second interpretive issue:

The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi nor dreadlocks to a Rastafarian.... As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority.¹³²

128. *Id.* at 624.

129. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

130. *See* Stephen Carter, *Does the First Amendment Protect More than Free Speech?* 33 WM. AND MARY L. REV. 871 (1992). *See also* Douglas Laycock, *Freedom of Speech that is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793 (1996).

131. 475 U.S. 503 (1986).

132. *Id.* at 519, 523–34 (Brennan, J., dissenting).

C. The Legal Literature on the Modern Model

The legal academic literature supporting the Modern model is enormous. Indeed, the Modern model of religion is the standard legal academic model of religion. The Supreme Court has not presented a strong description of a type of religion so much as an image of the space that a religion may occupy in the secular public sphere as one of many permissible secular activities. This model regards religion as private and rarely allowed to enter into the political, commercial or intellectual order because it has a dampening effect on the freedom of others. Legal scholars writing in this area describe a legal system that embraces religion fully but does not advocate religion, investigate religious beliefs, or allow religious beliefs to impinge on important individual rights. And, these scholars insist that a fundamentalist religious point-of-view, to the extent that it stops the conversation necessary for an engaged democratic population, should not be promoted.¹³³

In general, the New Religionists legal scholars attack the Modern model. They complain about the current secularized, scientific, material state for diminishing the understanding and place of religion in our public sphere.¹³⁴ They decry increasing secularity because it has caused a general moral decline.¹³⁵ They reject the large role of the secular state in the daily lives of the general population and push to bring religious or moral speech back into legal discourse.¹³⁶ Many New Religionists are characterized as adhering to a Traditional model. But the majority of legal academics support the Modern model, and the oppositional New Religionists are no different. Even as they adopt these stances, they remain modern—none of the New Religionists want to join the Amish or live in a truly traditional integrated worldview.

However, the New Religionists' discussions have addressed a central question about the modern model; that is, is the Supreme Court's Modern model a model of religion? This is the line of attack in journals such as *First Things*,¹³⁷ and in books such as Stephen Carter's *Culture of Disbelief*¹³⁸ and Steven Smith's *Foreordained Failure*.¹³⁹ When New Religionists state that they reject the diminished place of religion in the modern public sphere and the secularized,

133. For some typical examples of the extensive literature in this area, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989), BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); RONALD DWORKIN, *LIFE'S DOMINION* (1993); Eisgruber *supra* note 15; Eisgruber & Sager, *supra* note 23; Greenawalt, *supra* note 17; Laycock, *supra* note 29; JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Sullivan, *supra* note 23, at 198–99; James Boyd White, *Talking about Religion in The Language of the Law*, 81 MARQ. L. REV. 177 (1998).

134. See *supra* notes 19, 20.

135. See *supra* note 16.

136. See *supra* notes 17–19, 21

137. *FIRST THINGS* is published by the Institute on Religion and Public Life in New York City.

138. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

139. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995).

scientific and consumerist orientation that has promoted it, they are in large part bemoaning the lack of content to the Supreme Court's most important model of religion.

Other legal academics with a philosophical and interpretivist bent have attacked the Modern model as well. They have suggested that the core ideas of the secular public sphere have not been sufficiently delineated,¹⁴⁰ that the current liberal stance is itself a sort of "secular fundamentalism,"¹⁴¹ and that "here in the final decade of the twentieth century, the postindustrial processes of bureaucratization, consumerization, commercialization and mass media saturation threaten substantially to transform our experience" of religion just as they have threatened the "marketplace of ideas."¹⁴² Another implicit criticism is the lack of appropriate reproduction of social and cultural forms—including the socialization of children—that takes place through the current secularized system.¹⁴³

D. General Literature on the Modern Model

In the academic and popular literature, the Modern model of religion is the standard, and therefore the references to it are vast. It would be neither possible nor useful to review all of this material. Instead, this section will describe briefly two insightful theoretical approaches to the Modern model, one from a sociologist and one from a philosopher.

In 1965, Robert Bellah's essay, *Civil Religion in America*,¹⁴⁴ generated a huge response and resulted in the creation of a new academic field.¹⁴⁵ In his book,

140. See Pierre Schlag, *Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1 (1997).

141. See generally Paul Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814 (1994).

142. Steven Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965, 973 (1993).

143. See, e.g., Nomi Maya Stoltzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993) (discussing in some depth the problems with secular education for minority religious groups such as the Hassidic Jewish population in the United States). The best theoretical work on moral and cultural reproduction is by Pierre Bourdieu. See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., 1977); PIERRE BOURDIEU, *LA DISTINCTION: CRITIQUE SOCIALE DU JUGEMENT* 272-92 (1979).

144. Robert Bellah, *Civil Religion in America*, DAEDULUS, Winter 1967, at 1-21.

145. Robert Bellah's evolutionary model of religion is also pertinent to the Court's Modern model. Modern religion according to Bellah is typified by a loss of the traditional historic symbolization system: "It is indeed an open question whether there can be a religious symbol system analogous to any of the preceding ones in the modern situation which is characterized by a deepening analysis of the very nature of symbolization itself." BELLAH, *supra* note 35, at 40. The simple social structure of the traditional historic model is replaced by a social system that is "infinitely multiplex." *Id.* He credits philosophy, and particularly the work of Immanuel Kant, with the modern disenchantment with the traditional metaphysical basis of all religions and a regrounding of religion in "the structure of ethical life rather than in a metaphysics claiming cognitive adequacy...." *Id.* Bellah states that while many continue in an historic religious symbolization in modern times, "just as

The Broken Covenant, he defined "civic religion" as the "religious dimension found I think in the life of every people, through which it interprets its historical experience in the light of transcendent reality."¹⁴⁶ He has also written the following description:

A republic must attempt to be ethical in a positive sense and to elicit the ethical commitment of its citizens. For this reason, it inevitably pushes toward the symbolization of an ultimate order of existence in which republican values and virtues make sense. Such symbolization may be nothing more than the worship of the republic itself as the highest good, or it may be, as in the American case, the worship of a higher reality that upholds the standards the republic attempts to embody.¹⁴⁷

These ideas of civil religion are now generally understood as a religious-like attachment to the American state—its myth of origins, concept of chosen people, salvation through success. In law, it is conceptualized as the deification of the Constitution and the search for constitutional principles; in academics, it has resulted in a flourishing of studies on nationalism. Bellah's notion of civic religion is particularly interesting because it may be the core of the Court's and legal academic's version of the Modern model. Indeed, the religion at the center of the Modern model would then be a civic religion, that is, a religion of the state.¹⁴⁸

surely many others have developed elaborate and often pseudoscientific rationalizations to bring their faith in its experienced validity into some kind of cognitive harmony with the twentieth-century world." *Id.* at 42. No church, no group, not even Western Christianity has a monopoly any longer over man's definitions of his own existence. "Not only has any obligation of doctrinal orthodoxy been abandoned by the leading edge of modern culture, but every fixed position has become open to question in the-process of making sense out of man and his situation." *Id.*

146. ROBERT BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL*, 53 (1975).

147. *Id.* at 176.

148. While Bellah initiated the concept in a 1967 essay, by 1975, in the concluding chapters of *THE BROKEN COVENANT*, he finds current American civic religion to be an empty shell with little internal strength. The end of Bellah's book turns into a jeremiah (his own term, *Id.* at xi). He states that civic religion has resulted in "utter devastation—of the natural world in which we live, of the ties that bind us to others, of the innerness of spiritually sensitive personality.... If our economic and technological advance has placed power in the hands of those who are not answerable to any democratic process; weakened our families and neighborhoods as it turned individuals into mobile, competitive achievers; undermined our morality and stripped us of tradition...then we must consider where else to turn." *Id.* at 143. He laments America's "long love affair with economic development without adequate attention to anything else." *Id.* at 149. For Bellah, religion has become commodified as part of the advance of technical reason and the commodification of all of American life. From a legal perspective, these do not seem to be issues particularly well addressed by the courts. But, according to Bellah, the New Religionists are moving in the right direction to the extent that they are addressing the "failure of our central vision" *Id.* at 157 and are engaged in much needed ecumenical reflections on the creation of "a larger religious and moral context." *Id.* at 152.

The philosopher Charles Taylor is another trenchant observer of the Modern model with both its virtues and vices.¹⁴⁹ Taylor outlines three problems in modern life that lead to a diminishing of religion: individualism that can become self-absorbed and lead to fading moral horizons; instrumental reason that can lead to tremendous scientific and material advance but also loose society from its sacred structure; and finally, a highly centralized and bureaucratized politics that can lead to enormous efficiency and yet limits freedom.¹⁵⁰ However, Taylor refuses to be either a booster or a detractor of contemporary culture and instead sees the current debate as inarticulate. He states that works like Alan Bloom's *The Closing of the American Mind*,¹⁵¹ which criticizes current social trends, miss the powerful modern ideal to be "called" to authentic self-fulfillment, including religious self-fulfillment.¹⁵² Tracing back to the work of Johann Herder and the Romantics, Taylor finds that good forms of individual authenticity and self-fulfillment need to be sensibly articulated. From Taylor's point of view, liberal theorists like Ronald Dworkin, who espouse neutrality toward religion in a secular public sphere, eliminate important discussions on the "constitutive ideal of modern culture" and our religious and moral horizons.¹⁵³ Thus, like the New Religionists, both Bellah and Taylor address the problems with civic religion at the center of the Modern model of religion and a loss of focus on moral horizons.

IV. NEW AGE POSTMODERN RELIGION

The third model of religion evinced in Supreme Court case law is the Postmodern model. It is most closely associated with our understanding of the role of religion in what is termed "postmodern society" in the United States. The postmodern model of the Court can be summarized in the following hypothetical form.

149. See CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991).

150. In his first chapter, entitled "Three Malaises," Taylor outlines these three problems of modernity in detail. *Id.* at 2-12.

151. ALAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

152. TAYLOR, *supra* note 149, at 13-23.

153. *Id.* at 18. Charles Taylor has used the term "moral horizons" to describe the background, the horizons that matter from religion, history, nature, society or citizenship within a group. He argues that to move away from our current "inarticulate debate," we need a "work of retrieval." Moving from soft relativism and incoherence into real dialogue, in Taylor's view, requires a non-trivializing engagement with modern ideas of authenticity and identity coupled with an assessment of "moral horizons." Moral horizons present higher demands than just "the self," make some options more significant than others, and require an engagement with the past, the demands of citizenship, and the duties of solidarity. In Taylor's view, we need to engage in arguments that make a difference, to use coherent ideals and models in those arguments and to believe that the arguments are more than just subjective or momentary. For a similar call to a deeper consideration of important social and religious underpinnings, see Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992) and Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

A. *The Postmodern Model of Religion*

Religion is a self-created entity or a self-created identity centered in spiritualism, power and wisdom. It can be a newly formed institution or religious movement with a central canon based on a wide variety of ideas ranging from more traditional religious concepts, such as devotion and faith in God, to new concepts with central figures and distinct ritual practices not commonly considered religious. It can also be a deliberately constructed individual religious identity. Here an individual, in a voluntaristic way, chooses either a particular religion or parts of religious and other practices, and forges them into a personalized package of concepts and daily or yearly rituals. These religious concepts and practices are often uncoupled from their original cultural context. An individual may experience or create a religious identity more than once during her or his lifetime.

This third model has two aspects that require a more detailed explanation. The first is the newly created religion or religious practice—examples are some of the new Christian cults,¹⁵⁴ Scientology,¹⁵⁵ and New Age Channeling.¹⁵⁶ These are generally syncretic religious movements, some utopian, some canonical, some based primarily on new ideas in personal psychology, others formed around the ideas of a particular person such as L. Ron Hubbard or Sri Aurobindo.¹⁵⁷

154. Examples include Christ Family, the Process Church of the Final Judgement, the Children of God, the Fellowship for Christian Understanding, and the Foundation Church of Divine Truth.

155. In 1950, L. Ron Hubbard wrote a book on psychotherapy which became an international best-seller. Based on this book, he founded the Church of Scientology, a religio-scientific movement headquartered in Los Angeles. According to Scientology, a religio-scientific movement, individuals have life energy called "thetan" that is made up of "MEST"—matter, energy, space, and time. As all experiences are recorded in the mind, thetans must purge "engrams" or painful experiences from their "reactive" or subconscious mind to eliminate irrational behavior and achieve good mental health. This therapy takes place in a highly structured environment with a therapist "auditor" and is expensive. The Church of Scientology has been prosecuted by the Internal Revenue Service for fraud and tax evasion. See L. RON HUBBARD, *DIANETICS, THE MODERN SCIENCE OF MENTAL HEALTH* (1950).

156. Channeling is "the use of altered states of consciousness to contact spirits...from other times and dimensions." MICHAEL BROWN, *THE CHANNELING ZONE: AMERICAN SPIRITUALITY IN AN ANXIOUS AGE* viii (1997). This practice has spread rapidly in the United States and Europe since the early 1970s. A person who seeks insight into his or her actions and knowledge about how to make the best decisions in the future turns to a channel who acts as a vessel for messages from these spirits. The messages are typically in the form of "affirmations"—"declaration[s] believed to bring about a desired outcome through repeated performance." *Id.* at 134. Brown believes that these affirmations are "rooted in the New Thought movement of the nineteenth century, which asserted the power of positive thinking to heal illness and create prosperity." *Id.*

Robert Bellah and his co-authors describe channeling as "therapeutic contractualism," that is, looking to spirituality to meet personal needs rather than to determine right from wrong. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART; INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1995).

157. See L. Ron Hubbard, see *supra* note 155. See SRI AUROBINDO, *THE LIFE*

The second aspect of this model is the deliberately constructed religious identity. An example is a person who grew up Southern Baptist, proclaimed herself an atheist at twenty and has now joined Scientology. Another example is someone who meditates every morning at a Japanese zendo before work, takes holidays at a Tai Chi retreat twice a year, is a member of a science fiction club devoted to Yoda from the *Star Wars* movies,¹⁵⁸ and celebrates Christmas with his family. This is a grocery store approach to religion in which each individual fills a customized cart full of preferred religious options. The uncoupling of certain aspects of religions from their older, steady state inside a specific cultural and cosmological context is the first step. Then various parts of a religion—concepts, practices, rituals, emotive responses, cosmology—are recombined with aspects of other religions to create an individuated religious life and identity.¹⁵⁹

B. The Case Law Defining the Postmodern Model

United States v. Seeger,¹⁶⁰ the first step by the Court into a postmodernist depiction of religion, concerned the exemption of two young men for conscientious objection under the 1948 Military Selective Service Act.¹⁶¹ In this Act, Congress defined religious belief as "...an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological or philosophical views or a merely personal moral code."¹⁶² In his opinion for the Court, Justice Clark used analogical reasoning to equate a belief in God or a Supreme Being to any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God."¹⁶³ He spoke of "the ever-broadening understanding of the modern religious community" and then cited Dr. Paul Tillich:

And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, of what you take seriously without any

DIVINE (1940); SRI AUROBINDO, *THE HUMAN CYCLE* (1949); SRI AUROBINDO, *THE SYNTHESIS OF YOGA* (1948).

158. *STAR WARS* (20th Century Fox, 1977). Yoda is the Star Wars character who trained the Jedi Knights in the quasi-religious philosophy of "the Force." The key phrase in the Star Wars trilogy of movies is "May the Force be with you." Arguably, these movies were successful precisely because of the rise of tolerance for newly created personal psychology and quasi-religious movements in American life.

159. For the Postmodern religious individual, narrative, agency, and community are more fluid and less prescribed than in either the Traditional or the Modern models. An individual creates his or her own combination of religious concepts, practices and rituals not necessarily related to their original form or cultural context. Personal identity here is contested, deliberately constructed and changing; one can switch from one tradition to another several times in the course of one lifetime.

160. 380 U.S. 163 (1965).

161. Universal Military Training and Service Act, § 6J, as amended 50 U.S.C. Ap. § 456(j) (1948).

162. *Seeger*, 380 U.S. at 172.

163. *Id.* at 176. *See also id.* at 166.

reservation. Perhaps, in order to do so, you must forget everything traditional that you have learned about God....¹⁶⁴

The religious groups cited by the Court in *Seeger* remained well-known institutionalized religions such as the Mennonites, the Society of Friends, the Amish, Hutterites, Buddhists, and Hindus.

Seeger was followed by *Welsh v. United States*, in 1970.¹⁶⁵ In *Welsh*, Elliott Ashton Welsh II appealed a conviction for refusal to submit for induction into the Army despite a request for conscientious objector status. During a period of extreme draft pressure for an unpopular war, Welsh chose to describe on his exemption application his current religious ideas as neither religious nor attached to any particular religious institution. Justice Black began his opinion in this case by noting the similarities to *Seeger* and then proceeded to find Welsh's personal beliefs "religious" under the statute.¹⁶⁶ Taking the *Seeger* decision one step further, Justice Black decided not to be bound by "traditional or parochial concepts of religion," stating that an essentially political, sociological, philosophical, or personal moral code *is* equivalent to theistic belief:

In resolving the question whether *Seeger* and the other registrants in that case qualified for the exemption, the Court stated that "[the] task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are *in his own scheme of things*, religious." The reference to the registrant's "own scheme of things" was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life.¹⁶⁷

Welsh shows the further uncoupling of the term "religion" from an historically legitimated set of definitional ideas and institutional attachments that centered around theistic, extra-worldly beliefs and practices. "Religion" has now been placed on equal footing with all "beliefs [that] play the role of a religion." This case raises the question of whether activities that "function like a religion" should be treated as a religion for purposes of the First Amendment.¹⁶⁸

A second indication of the Court's use of the Postmodern model of religion is the move to individual psychological reasoning as exemplified in *Lee v. Weisman*, in 1992.¹⁶⁹ Robert Lee, the principal of Nathan Bishop Middle School in

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

165. 398 U.S. 333 (1970).

166. *Id.* at 335-44.

167. *Id.* at 339 (citation omitted) (emphasis in original).

168. Postmodern functionalism makes its entry at just this point: it now becomes possible to imagine bicycling, for example, as a healthy obsession that will "function as a religion" in American life.

169. *Lee v. Weisman*, 505 U.S. 577 (1992). This case is also an example of the multiple opinions now rendered by the Court in religion cases. Justice Kennedy delivered the majority opinion in which Justices Blackmun, Stevens, O'Connor and Souter joined. Justice Blackmun filed a concurrence in which Justices Stevens and O'Connor joined.

Rhode Island decided to invite a member of the clergy to say a prayer at the 1989 graduation. He presented Rabbi Leslie Gutterman with a pamphlet entitled *Guidelines for Civic Occasions* which outlined the non-sectarian nature of the benediction. Daniel and Deborah Weisman sued to enjoin officials of the Providence public school system from inviting clergy to give benedictions at any future graduations.

In *Lee v. Weisman*, Justice Kennedy stated that the recitation of a non-sectarian graduation invocation was an officially sanctioned religious activity that "bore the imprint of the State."¹⁷⁰ He then turned to psychological reasoning. The students were subjected to "public pressure, as well as peer pressure" to stand and "maintain respectful silence during the invocation and benediction."¹⁷¹ Rejecting the argument that these prayers were of a *de minimis* character, the Court stated: "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."¹⁷² Being subtly coerced to pray is a message of exclusion from the open secular plaza of the state. In their dissent, Justices Scalia, White, Rehnquist, and Thomas made several points. First, invocations at graduations are part of a "longstanding American tradition of nonsectarian prayer to God at public celebrations generally."¹⁷³ Second, students who objected could just sit down leaving "absolutely no basis for the Court's decision."¹⁷⁴ Third, the "deeper flaw in the Court's opinion,"¹⁷⁵ lies in its equating of postmodern psychobabble with the important historical meaning of the establishment clause as a bulwark against sectarian religious orthodoxy: "Unfortunately...the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself."¹⁷⁶ Fourth, the dissent laments the Court's use of victimology reasoning saying that "it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to [join in prayer] voluntarily."¹⁷⁷

While the Court uses the Postmodern model to protect the individual and an individually constructed religious identity in *Seeger*, *Welsh*, and *Lee*, it more

Justice Souter filed a concurrence in which Justices Stevens and O'Connor joined. Justice Scalia, joined by Justices Rehnquist, White and Thomas, filed a dissent.

170. *Id.* at 590.

171. *Id.* at 593. Daniel O. Conkle singles out Justice Kennedy's psychological approach in *Lee* and states that it was pragmatic and "honored the spirit of *Lemon*." See Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 882 (1993).

172. *Lee*, 505 U.S. at 593.

173. *Id.* at 632.

174. *Id.* at 637-38.

175. *Id.* at 640.

176. *Id.* at 644.

177. *Id.* at 646. For further critiques of this case, see Keith A. Fournier, *In the Wake of Weisman: The Lemon Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still*, 2 REGENT U. L. REV. 1 (1992); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123 (1992).

often than not finds fault with newly-formed Postmodern religious institutions or religious movements. In these cases, the Court perceives something it considers false and non-majoritarian in the constructed nature of the religion and therefore declares that it should not be afforded protection under the First Amendment. For example, in his concurrence in *Welsh*, Justice Harlan plainly marks this ground by defining "bad" religions as "cults that represent schools of thought...[and] are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral or intellectual views."¹⁷⁸ They are distinct from "conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic."¹⁷⁹

The Court often views the Church of Scientology as just such a non-majoritarian postmodern cult. In *Hernandez v. Commissioner of Internal Revenue*,¹⁸⁰ a 1989 appeal from a U.S. Tax Board decision by a member of the Church of Scientology, Justice Marshall's description of the church emphasized its postmodern and commercial aspects: Scientology was founded in the 1950s, has branch churches called "franchises," uses electronic devices to monitor "spiritual difficulty by measuring skin responses during a question and answer session," charges "fixed donations" also known as "prices" for a schedule of graduated "training sessions" and offers discounts for advanced payments.¹⁸¹ This is not the language of the Traditional Amish model, reflecting an anti-science, anti-technology life of goodness and inner morality, nor is this the Modern religion that stays out of commercial affairs and does not mix science and religion. This is paying to maintain "inflow" and "outflow" to achieve spiritual balance—pure Postmodern religion. Justice Marshall also presented other factors that indicate a Postmodern religion: the lack of a congregational aspect, mediated promotion of the religion, the reciprocal nature of spiritual exchanges, commercial purpose, commercial promotion, and required payments as a *quid pro quo*.¹⁸² In her dissent, Justice O'Connor acknowledged that the members of the Court may be using different models of religion: "This is not a situation in which a governmental regulation 'happens to coincide or harmonize with the tenets of some or all religions,'.... Rather, it involves the differential application of a standard based on constitutionally impermissible differences drawn by the Government among religions."¹⁸³

From the Court's perspective, the Native American religion cases¹⁸⁴ are also examples of Postmodern religions. In each of these cases—concerning,

178. *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring).

179. *Id.* Justice Harlan is, perhaps, also making a distinction here between a Traditional religious cult that is a closed traditional religion as typified in *Reynolds* and a Postmodern religious cult, a postmodern amorphous "loose and informal associations of individuals who share common ethical, moral or intellectual views." *Id.*

180. 490 U.S. 680 (1989).

181. *Id.* at 684–86.

182. *Id.* at 684–86, 691–92.

183. *Id.* at 712.

184. *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Bowen v. Roy*, 476 U.S. 693 (1986).

respectively, social security payments, sacred burial grounds and the use of peyote in a Native American church—the majority of the Court treated Native American religions as postmodern. The Court's comments all relate to perceived Postmodern qualities: the religion's newness,¹⁸⁵ the possibility for fraudulent representations to the government,¹⁸⁶ the Court's difficulty in discerning a coherent basis for the religion or religious practice,¹⁸⁷ and the possibility for the individual to become "a law unto himself."¹⁸⁸ For the majority in *Smith*, Justice Scalia even outlined what an acceptable modern majoritarian religion, as opposed to this postmodern Native American religion, entails: "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts, assembling with others for worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."¹⁸⁹ For the Court, Postmodern religions lack a coherent comprehensible religious tradition or a consistent canon, and feature provisional moral values and multiple interpretations. While Native American religions are hardly new, inauthentic, provisional, or New Age in nature, when a Postmodern model of religion is applied, the Native American party loses.

In summary, when the Court characterizes an individual's behavior as falling within the Postmodern model, it is usually to reinforce the religious activities and choices of that individual as in *Welsh*. On the other hand, when the Court characterizes an institution as Postmodern, such as the Church of Scientology in *Hernandez*, or the Native American church in *Smith*, the complainants lose. Postmodern churches seem to have at least one of several characteristics that the Court does not like: commercial promotion, the lack of a congregational aspect, provisional moral values that appear to allow for multiple interpretations, required payments, or non-majoritarian rituals such as the use of peyote.

C. The Legal and General Literature on the Postmodern Model

Although legal postmodernism has been the topic of several law review articles and at least one book,¹⁹⁰ the Postmodern version of religion remains largely

185. *Bowen*, 476 U.S. at 696 (noting the plaintiff's "recently developed...religious objection").

186. *Id.* at 711–12.

187. In his dissent in *Lyng*, Justice Brennan makes just this point: "In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths—the mainstay of Western religions—play no part in Indian faith." *Lyng*, 485 U.S. at 460.

188. See *Employment Division v. Smith*, 494 U.S. 872 (1990): "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense." *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

189. *Id.* at 877.

190. GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* (1995). See also Dennis

unrecognized in legal journals. Law review articles on postmodernism such as Jerry Frug's *Decentering Decentralization*,¹⁹¹ which talks at length of the existential condition of the postmodern subject, do not discuss postmodern religion. Law review articles on religion, on the other hand, discuss the nature of religion and its role in the U.S. legal system but do not include postmodern forms of religion in their discussion.¹⁹²

The general movement, postmodernism, has been a hot topic in the academic literature for well over a decade¹⁹³ and postmodern religion has been described ethnographically in the social science literature.¹⁹⁴ Descriptions of the characteristics of postmodernity in art, architecture, literature, and the professions—often primarily attempts to present what is currently happening—vary enormously, as do scholarly theoretical analyses.¹⁹⁵ Tony Giddens, an astute social critic, dates the start of postmodernism to the mid-1960s and connects up psychological trends such as therapy and victimology to economic and technological changes such as increasing capital commodification and the growth of globalized information technology in the last thirty years.¹⁹⁶ Mark Taylor, a

Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Winter, *supra* note 142.

191. Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

192. While no law reviews have discussed postmodern religion, a few law reviews have used Tom Wolf's famous quote as an introductory epigram to signal that they recognize the changing nature of religion in the last twenty years: "Now is a great time for new religions to pop up. There are people who get religious about jogging, they get religious about sex...health foods...ESP, of course, flying saucers, anything is fertile ground now. There's a new messiah born every day." TWENTY YEARS OF ROLLING STONE: WHAT A LONG, STRANGE TRIP IT'S BEEN 340 (Jann S. Wenner ed., 1987). See also M. Elisabeth Bergeron, "New Age" or New Testament?: Toward a More Faithful Interpretation of "Religion," 65 ST. JOHN'S L. REV. 365 (1991); Ben Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989).

193. Discussions of the nature of postmodernity and comparisons with modern and traditional societies abound. See, e.g., ZYGMUNT BAUMAN, *INTIMATIONS OF POSTMODERNITY* (1992); TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNITY* (1996); ERNEST GELLNER, *POSTMODERNISM, REASON AND RELIGION* (1992); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989); FREDERICK JAMIESON, *POSTMODERNISM* (1991); DAVID SIMPSON, *THE ACADEMIC POSTMODERN AND THE RULE OF LITERATURE* (1995).

194. See, e.g., DAVID VAN ZANT, *LIVING IN THE CHILDREN OF GOD* (1991).

195. The key concepts of postmodern analysis in literature are decanonization, the use of metaphor, and deconstruction of the text. In art and architecture, they are the collage of former images and styles combined with irony, humor, and an absence of current form. In social sciences, the key postmodern concepts are a fluid and constructed identity, the use of narratives, spatial and temporal compression and globalization issues such as diaspora and violence. See ARTHUR C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY* (1997).

196. See TONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991). Giddens introduces what he calls not postmodernity but late modernity as the period following modernity. He uses modernity "in a very general sense to refer to the institutions and modes of behavior established first of all in post-feudal Europe

theorist of postmodern religion, has written several books to try to describe what theology might be after deconstruction.¹⁹⁷

Many general books take one of two positions—they espouse the new freedom of social forms in the postmodern era¹⁹⁸ or decry its problems through a lens of cultural pessimism.¹⁹⁹ Christopher Lasch's *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* was an initial clarion call to the importance of psychology in the postmodern search for identity.²⁰⁰ A recent

but which in the twentieth century increasingly have become world-historical in their impact." *Id.* at 14–15. The nation state is the most prominent form of modernity which is typified by separation of time and space, disembedding mechanisms which delocalize particulars, and institutional reflexivity. *Id.* at 20. The big problem, as Giddens sees it, in late modernity thinking, is derived from

the centrality of the reflexive project of the self in late modernity coupled to the contradictory nature of the extension of modernity's internally referential systems. The capability of adopting freely chosen lifestyles, a fundamental benefit generated by a post-traditional order, stands in tension not only with barriers to emancipation, but with a variety of moral dilemmas.

Id. at 231.

197. See MARK TAYLOR, *ERRING: A POSTMODERN A/THEOLOGY* (1984); MARK TAYLOR, *ALTARITY* (1987); MARK TAYLOR, *DISFIGURING ART, ARCHITECTURE, RELIGION* (1992); MARK TAYLOR, *HIDING* (1998) (discussing the "religious" architecture of Las Vegas, tattooing, and fashion).

198. In an early work, Robert Bellah had a sanguine and interesting view of the Postmodern model (calling it a different aspect of the "modern"): "The analysis of modern man as secular, materialistic, dehumanized and in the deepest sense areligious seems to me fundamentally misguided, for such a judgment is based on standards that cannot adequately gauge the modern temper." BELLAH, *supra* note 35, at 40 (1970). Here, Bellah embraces the modern human as self-transformative, capable of remaking the world, multidimensional and newly responsible. As standards of doctrinal orthodoxy and attempts to enforce moral purity disappear, an individual's search for meaning is not confined to the church in the modern age. Instead each individual will search for her or his own standard of action, personal maturity and social relevance. Bellah does not see these changes as indifference and secularization. Instead, except for holdover religions from the modern period, he finds "an increasing acceptance of the notion that each individual must work out his own ultimate solutions and that the most the church can do is provide him a favorable environment for doing so without imposing on him a prefabricated set of answers." *Id.* at 43–44.

199. For an early discussion of the problems that arise if religion cannot be distinguished from non-religion see SIDNEY HOOK, *RELIGION IN A FREE SOCIETY* (1967). See also BLOOM, *THE CLOSING OF THE AMERICAN MIND*, *supra* note 151; DUMBING DOWN, *supra* note 91.

In his recent books, Bellah has turned to excoriating postmodern religion for its extreme individualism, selfishness, constant economic calculus, and stunted conversation. See ROBERT BELLAH ET AL., *THE GOOD SOCIETY* 129–30 (1991) (abortion); *id.* at 82–110 (commodification); *id.* at 111–44 (law and individual rights). *THE GOOD SOCIETY* is a follow-up to their first collaborative book, ROBERT BELLAH ET AL., *HABITS OF THE HEART* (1985).

200. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979).

popular book in this genre is *The Sibling Society*, by Robert Bly, which bemoans the lack of “codes of responsibility, restraint and renunciation.”²⁰¹

D. Popular Culture Images of the Postmodern Model

In popular culture, the Postmodern model is represented by syncretic religious movements such as Scientology, New Age channeling, the community of Auroville,²⁰² the Urantia fellowship,²⁰³ and the Gaia environmental movement.²⁰⁴ Science and reason may or may not play a large role in postmodern religion; for Heaven’s Gate followers waiting in San Diego for the UFO following the comet Hale-Bopp, precise astronomical calculations were combined with science fiction beliefs about alien beings.²⁰⁵ Canonical and non-canonical texts may be combined

201. ROBERT BLY, *THE SIBLING SOCIETY* 232 (1996).

202. Auroville is a world-famous ashram retreat near Pondicherry, a former French colony on the east coast of India. Founded by Sri Aurobindo (1872–1950), it is a utopian community with individuals from many nationalities. It was headed until recently by his wife, “The Mother” and based on teachings and revelations by both figures. Sri Aurobindo taught that the movement of two forces toward each other—the yogic mind from below and enlightenment mind from above—resulted in the creation of a synthetic gnostic individual capable of transcending her or his own individuality. See AUROBINDO, *THE LIFE DIVINE*, *supra* note 157; AUROBINDO, *THE HUMAN CYCLE*, *supra* note 157; AUROBINDO, *THE SYNTHESIS OF YOGA*, *supra* note 157.

203. The origins of the “Book of Urantia,” which is the basis of the Urantia Fellowship (also called the Jesusonian Foundation) are unclear. A key figure is Dr. William Sadler, a surgeon and psychiatrist who practiced in Chicago. For thirty years he was also a lecturer in Pastoral Counseling at McCormick Theological Seminary. In the mid-1920s, Dr. Sadler gathered together twenty or thirty friends who called themselves “the Forum,” for discussions on psychological and medical subjects. At their fourth meeting, Sadler told the members that an unnamed member of the Forum was giving revelations from higher intelligent beings in his sleep. The name of the person who channeled in his sleep has never been verified by the Chicago Urantia Fellowship, but Martin Gardner claims that it was Sadler’s brother-in-law, Wilfred Kellogg. The results of these revelations was *The Urantia Book*. See MARTIN GARDNER, *URANTIA* 35–38, 115–24 (1995). *The Urantia Book* has a foreword that was “indited by an Orvonton Divine Counselor, Chief of the Corps of Superuniverse Personalities assigned to portray on Urantia the truth concerning the Paradise Deities and the universe of universes.” *THE URANTIA BOOK* 17 (1998). Over 300,000 copies of the Book have been printed and distributed in several languages. Interestingly, an offshoot of the original group, the Jesusonian Foundation, is now being sued in Federal Court by the Chicago Urantia Foundation for violating the Chicago Foundation’s valid copyrights and trademarks. The new group claims that Urantia is their religion, and therefore the Urantia Book cannot be copyrighted. See *Religious Dispute: Urantia Readers Fight Copyright Suit*, *THE DAILY CAMERA*, OCT. 16, 1997, at 1B.

204. This environmental movement is named after the Goddess of the Earth in Greek mythology, Gaea or Gaia. It is based on the work of atmospheric scientist James Lovelock, who has theorized that the entire earth is a single living entity in which each animal, from protozoa to human being, represents a small part of the same, integrated larger being called Gaia. See *Britain Whole Earth Guru*, N.Y. *TIMES (MAGAZINE)*, Nov. 23, 1986, at 67; MICHAEL ALLABY, *A GUIDE TO GAIA* (1990).

205. The Heaven’s Gate group was founded by Marshall Applewhite, a former music professor, and his companion, Bonnie Lu Nettles, whose background was in nursing.

as in *The Urantia Book*, which incorporates and expands on the Bible by adding chapters back to the Big Bang origin of the universe, adding details to the Bible itself and then projecting forward in time with chapters on the future.

Even the Supreme Being at the core of postmodern religion can be multivalent and multivocal. For example, in a pop culture book entitled *God Made Easy*, Patrice Karst renders this postmodern, multivalent view of God:

Wait! Before you get all charged up and your buttons pushed out of shape.... The great news about God is that He has absolutely no ego and will be perfectly content if you wish to call Him instead[:] Goddess, Supreme Being, Heavenly Father (or even Big Dad), Divine Mother, The Creator, Lord, Holy Spirit, Higher Power, The Man Upstairs, A Loving Presence...(there's more!), Almighty, Infinite Intelligence, Universal Energy, Cosmic Consciousness, The Light Within, The Source, Something bigger than me. You get the idea; just fill in the blank with any name you want...[large blank space].²⁰⁶

When the Court uses the Postmodern model, functional replacements for religion are given as explanations. Justice Black, for example, stated that other beliefs might “function as a religion in the registrant’s life.”²⁰⁷ Therefore, religion or aspects of religion come to be understood as functionally replaced by other activities in society.²⁰⁸ There are several ways that the idea of functional replacement can be understood in popular culture. First, if religion fulfills certain particular functions for an individual—explaining the afterlife, coping with change and stress, giving meaning to life, connecting to the supernatural, creating a peak emotional experience—then these functions can be separated out and replaced by other activities.²⁰⁹ Second, a non-religious activity can function as religion in a person’s life because it is a source of almost religious devotion. If one is devoted to

In March of 1997, Applewhite and 38 of his followers committed mass suicide in an attempt to hitch a ride, via what they believed to be an extraterrestrial spacecraft, to a “Level Above Human.” Todd S. Purdum, *Death in a Cult: The Scene*, N.Y. TIMES, Mar. 30 1997, at A1.

206. PATRICE KARST, *GOD MADE EASY* (1997) (pages not enumerated).

207. *Welsh v. United States*, 398 U.S. 333, 339 (1970).

208. Functionalism has been traditionally understood to describe the ways in which the parts of an organic whole complement each other and operate to preserve the larger entity. A basic premise of functionalism theory is that every society has several functional requisites that must be fulfilled and each part fulfills at least one of these basic needs. In this sense, the functionalism of religion, then, would be an investigation into why and how religion helps to preserve and maintain this society. Functionalist explanations of this sort have been criticized as giving only utilitarian explanations and as heavily biased toward integration of culture.

Functionalism as used in this article has a limited meaning related to the Supreme Court’s use of the term. Justice Black, in *Welsh*, describes the beliefs of the registrant as functioning “like a religion” in his life. *Id.* at 339. Here the Court is stating that general moral beliefs are the equivalent of, or fulfill the same role as, religious beliefs for this individual. The Court assumes that religious beliefs or their equivalent are an important part of the makeup of this individual.

209. Self-help/therapy books are perhaps the best example of this.

playing basketball, riding a bicycle, losing weight, going to a therapist, then these activities can “function as a religion” in an individual’s life. Third, a non-religious activity can function like a religion in that it occupies the time that was spent attending to religion. It is in these three senses, then, that one reads of media advertisements *as* religion, law *as* religion, environmentalism *as* religion, a hobby *as* religion, or consumerism *as* religion.²¹⁰ The media often employs these ideas of functional replacement to promote consumer products. For example, *Bike* magazine ran an issue on bicycling obsession as a “religion,” with a cover depicting the Madonna encircled by a bicycle gear.²¹¹

V. THE RELIGION OF THE FRAMERS AND *CITY OF BOERNE V. FLORES*

Perhaps the most contested arena in religion clause jurisprudence is the originalist argument over the Framers’s conceptualization of religion. This model of religion—the Framers’s model—has been cited as authority in almost every Supreme Court case since *Reynolds* as well as in most law review articles.²¹² However, originalism is difficult to delineate as a model of religion, because it is a site for contestation and each authority that cites it is using it to bolster a particular current argument.

There is little doubt that most Americans in the eighteenth century were very religious by current standards and experienced lives saturated with a strong religious cosmology. However, they were also anti-clerical, anti-church, anti-traditionalist, egalitarian, innovative, individualistic and scientific. Steven Smith describes this tension, arguing that “reason,” during the early period of the founding generation, can be understood as the confluence of two distinct traditions—a strong notion of the Providential Plan of God connected to “the classical conception of Nature and the Great Chain of Being philosophy” and a

210. More than a metaphoric or referential use is meant here; rather, these uses are understood as actual functional replacements for parts or all of religion. For fitness, see RAY KYBARTAS & KENNETH ROSS, *FITNESS IS RELIGION—KEEP THE FAITH* (1997), endorsed by the singer Madonna. For media advertisements as religion, see JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* (1996). For law, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) and JOHN BRIGHAM, *CULT OF THE COURT* (1987). Thomas Grey reviews the appropriateness of some of these ideas in law in *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984). For environmentalism, see TOM HAYDEN, *THE LAST GOSPEL OF THE EARTH* (1996).

These three types of functional replacement are often combined: one is shopping Sunday morning during the time one might have spent at church, one is “devoted” to shopping (“shop ‘til you drop”), and both shopping and purchasing items give meaning to life by providing a peak emotional experience.

211. Mike Ferrentino, *Acts of Faith*, *BIKE MAGAZINE*, Sept. 1996, cover, 40–44.

212. See Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia and its Intellectual Incoherence*, *NEW REPUBLIC*, May 5, 1997, at 26: “We are all originalists now. That is to say, most judges and legal scholars who want to remain within the boundaries of respectable constitutional discourse agree that the original meaning of the Constitution and its amendments has some degree of pertinence to the question of what the Constitution means today.”

more modern "anti-traditional spirit of Cartesian rationalism" based in early Greek philosophical positions.²¹³

The tension in this Framers' model appears to exist then between a strong conceptualization of God and the religious life—in many ways similar to the Traditional model—and a strong conceptualization of individuality and scientific reason from the Modern and Postmodern models. And yet, for the Framers' generation, this was less a tension than a revelation. The founding generation of Thomas Jefferson and James Madison was assisted in its endeavors by divine inspiration from a God that acted intelligently in every moment of their lives.²¹⁴ The larger Providential Plan meant that everything natural and manmade in the universe had a position, a spot in the greater scheme of things, and creating the Constitution was an act of deference to this divine plan. Here "the anti-traditional spirit of Cartesian rationalism" and a divinely revealed religious cosmology were part of the same blended worldview.²¹⁵

213. SMITH, *supra* note 80, at 15.

214. The Framers' model comes closest perhaps to Robert Bellah's depiction of "early modern religion," placed between "historic" religion and "modern" religion, based on the Protestant Reformation. In this model, "the cosmological baggage of Medieval Christianity is dropped as superstition," and there is a direct relation between the individual and transcendent reality. Religious action now becomes

the whole of life. Special ascetic and devotional practices were dropped as well as the monastic roles that specialized in them; instead the service of God became a total demand in every walk of life. The stress was on faith, an internal quality of the person, rather than on particular acts clearly marked religious."

BELLAH, *supra* note 35, at 37. According to Bellah, early modern religion gave up the notion of hierarchy in both its religious organizations and its symbolizing system. Bellah joins Weber, Merton and others in attributing "a whole series of developments from economics to science, from education to law" as service to God within the framework of the Protestant Reformation. *Id.* at 38.

215. See SMITH, *supra* note 139, at 48. As Smith notes about Jefferson's approach to the Constitution, "The proper ends of society are not for human beings to choose; they are given in the divine plan and the duty of government is simply to ascertain and conform to that plan. Thus the Jeffersonian theory of government amounted to little more than deference to the Creator's plan." *Id.* at 24. Smith describes the religious precepts of the Framers' generation as consisting of three recurring ideas:

First, the world was created by an originating mind—the demiurge or, more commonly, God—who by virtue of being perfectly good and self-sufficient could not know envy and hence chose to confer existence on everything that it could conceive of. Second, because everything that exists is the product of the mind, not of chance, there is a reason why everything exists in just the way that it does.... Third, because the originating mind could not but choose to give existence to everything that it could conceive of, the universe is in fact rich with the greatest possible variety of entities...which together form a continuum from the lowest and the most inanimate to the highest and most intelligent. This hierarchy is the Great Chain of Being.

Id. at 17.

Milner Ball appears to take a somewhat similar position, stating that religious

The complexities of these contrasts are rarely reflected in current legal discourse, because the Court and the legal academy primarily employ the Framers' model to bolster normative legal arguments to current questions. A recent example is *City of Boerne v. Flores*,²¹⁶ an opinion from the 1997 term, in which the Court was presented with a suit challenging the 1993 Religious Freedom Restoration Act ("RFRA").²¹⁷ Justice Kennedy, speaking for the Court, concluded that in enacting RFRA, Congress had exceeded the scope of its enforcement power under section five of the Fourteenth Amendment.²¹⁸

In a long dissent, Justice O'Connor takes up an originalist argument—the appropriate model of religion both before and at the time of the framing of the Constitution. She quotes several sources, including Madison's objections to George Mason's proposed clause on religious liberty in the Virginia Constitution.²¹⁹ She states:

To Madison then, duties to God were superior to duties to civil authorities—the ultimate loyalty was owed to God above all. Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.²²⁰

Justice O'Connor gives concrete early examples of religious exemptions from statutes in which the state had a compelling interest: Baptists and Quakers being exempted from government-compelled tithes; Quakers being excused from having to remove their hats in court; Jews being exempted from the requirements of state marriage laws; and sectarian European immigrants being allowed to organize whole towns in Georgia.²²¹ Each of these examples can be linked to a particular recent case in free exercise—Amish being forced to pay social security taxes,²²² a rabbi not being allowed to wear a yarmulke in the military,²²³ Satmar Hasidim Jews

duties and liberty are necessarily prior to duties to the state. See Milner Ball, *The Unfree Exercise of Religion*, 20 CAP. U. L. REV. 41, 55 (1991).

216. 117 S. Ct. 2157 (1997). Boerne, a city located near San Antonio, Texas, has several historic mission-style structures built in the early part of this century, including St. Peter's Catholic Church. An application to enlarge the church to accommodate an increase in the number of parishioners was denied by the city authorities under an historic landmark ordinance. P.F. Flores, the Archbishop of San Antonio, requested relief from the local zoning restriction citing RFRA as a basis.

217. See *supra* note 3.

218. *Boerne*, 117 S. Ct. at 2162–63.

219. See *id.* at 2183–84 (O'Connor, J., dissenting).

220. *Id.* at 2184 (O'Connor, J., dissenting).

221. *Id.* at 2182–83 (O'Connor, J., dissenting). These examples are taken from an article by Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1469–71 (1990).

222. *United States v. Lee*, 455 U.S. 252 (1982).

223. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

organizing themselves into a school district to receive government benefits²²⁴—and together they imply a much wider zone of deference for religious action.

Although she presented the Framers's model of religion, Justice O'Connor was not arguing that we should define the secular by the sacred once again. Nor was she returning to Madison's understanding of civil obligations as subordinate to religious duty. She did not even imply that the next time a case like *Goldman* or *Kiryas Joel* comes before the Court, the Court should allow yarmulkes to be worn in the military or the Hasidim to organize themselves as a school district. Instead, she provided three principles for current interpretation of the Religion Clause of the First Amendment: first, "these early leaders accorded religious exercise a special constitutional status"²²⁵; second, "government interference in religious practice was not to be lightly countenanced"²²⁶; and third, "the republic rested largely on moral principles derived from religion."²²⁷ O'Connor concluded with the following statement: "The Religion Clauses of the Constitution represent a profound commitment to religious liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law."²²⁸ What Justice O'Connor presented is a stronger accomodationist stance. Justice O'Connor argued that the role of religion in creating moral values be recognized in current legal discourse. As her dissent indicates, the Framers' model, as the most important source of authority in current religion clause jurisprudence, will remain a contested image even as it continues to be used to bolster important current arguments.

VI. CONCLUSION

Religion clause jurisprudence has reached a state of incoherence that leaves many uncomfortable, both on and off the Court. Attempts to resolve this problem have resulted in numerous law review articles and searching, at times fractious, opinions by the Court. Congress advocated a particular legal test with RFRA that was struck down by the Court in *City of Boerne* with a separation of powers argument.²²⁹ Frederick Gedickss has put it most succinctly: "few areas of constitutional doctrine have succeeded like religion clause jurisprudence in simultaneously maintaining internal inconsistency, ridicule by commentators, and lack of popular support over such a long period of time."²³⁰ Explanations of the current incoherence in terms of the need to observe neutrality between religions and non-religions, the collision course between the free exercise and the establishment clause, or the accomodationist versus separationist positions, have

224. See Board of Education of Kiryas Joel School Dist. v. Grumet, 512 U.S. 687 (1994).

225. *Boerne*, 117 S. Ct. at 2157.

226. *Id.* at 2185.

227. *Id.*

228. *Id.* at 2185.

229. *Id.*

230. FREDERICK MARK GEDDICKS, *THE RHETORIC OF CHURCH AND STATE* 3 (1995).

not been successful. This Article argues that it is time to turn instead to a consideration of the models of religion being projected by the Court and the legal academy.

This article also takes a different methodological approach. The basic premise is that we make categorizations based on idealized models of what we "know" to exist in the world. Evidence for these idealized models can be abstracted from linguistic and textual references such as Supreme Court opinions. Three basic images of religion emerged: a Traditional integrated worldview religion, a Modern secular religion and a New Age Postmodern religion.

The Framers' model is the area of greatest interest in the legal academy, with numerous books published each year reinterpreting and representing the models of religion of the Framers of the Constitution. While there is little doubt that Americans in the eighteenth century were devoutly religious by current standards, they were also egalitarian, individualistic and scientific. These two different modes of thought, what Steve Smith has called the anti-traditional spirit of Cartesian rationalism and a divinely revealed religion, were part of the same blended worldview of the Framers.²³¹ The Framers' model of religion is the most contested because of its legitimating power, the difficulty of uncovering its historical nature and its use to bolster current legal formulas.

Modeling the Court's characterizations of religion demonstrates a coherency in the Court's opinions that is not available through doctrinal analysis. The opinions of the Court are determined, to a large degree, by the stereotypical images that the Justices have of the particular religion involved in a case.

These models also may have predictive value. First, if the Court has generally viewed a particular religious institution as Postmodern in the past and the opinions have been negative, a similar religion will have a heavier burden to carry in proving its case regardless of the doctrinal arguments. The Native American religion cases demonstrate this. Second, if the Court rules for a religion that it would generally have characterized in a negative light, the opinion will often correct that view by reinterpreting and describing the religion in a favorable light as in the *Santeria* religion case from Florida. Third, if the religion is an acceptable Modern religion, the Court is much more likely to look upon it seriously and to look carefully at other doctrinal issues involved. The use of the separation of powers argument in last term's RFRA case shows this process. Finally, the Framers' model of religion is used to highlight many different aspects of current religious jurisprudence. It is employed most often as a rhetorical legitimation device because it incorporates aspects of all three models.

It is important to begin a conversation in the legal academy about the models of religion currently being used by the Supreme Court. These models are shaped by historical doctrinal precedents, they are the subject of discussions in the political and scholarly communities and they are rooted in intellectual ideas—philosophical, political and sociological—as well as the representations of religion in literature and popular culture. This Article argues that various religions pose

231. See SMITH, *supra* note 80.

very different kinds of jurisprudential problems for the Court. The Court decisions fall into patterns in terms of *idealized* types of religion—Traditional, Modern and Postmodern—rather than the particular religions themselves. Further inquiry into the models of religion employed by the Court perhaps will provide idealized coherency and predictive clarity to the discussion and aid in articulating, in Charles Taylor's words, our common moral horizons.