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RELIGIOUS PLURALISM AND THE THEORY OF DEEP DIVERSITY

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Abstract

American Supreme Court jurisprudence in the area of religious freedom is, for the most part, predicated upon a form of liberal democratic theory commonly known as "procedural liberalism." A close analysis of this jurisprudence reveals that because of this theoretical basis, the Supreme Court has been unable to craft a consistent jurisprudence that adequately addresses the reality of religion as a pluralistic social institution. Based upon the detailed critiques of procedural liberalism by such thinkers as Charles Taylor and Iris Marion Young, and drawing upon a concept known as "deep diversity" suggested by Taylor, a new general political theory, identified as the theory of deep diversity, is developed to answer these critiques. This theory is then used to reconceptualize Supreme Court jurisprudence and to demonstrate how the theory can be applied in a practical way to resolve the many problems inherent in existing religious freedom jurisprudence so as to support and advance religious pluralism.

Résumé

La jurisprudence de la Cour suprême des États-Unis dans le domaine de la liberté de religion est, pour l'essentiel, fondée sur une forme de théorie démocratique libérale généralement connue sous le nom de "libéralisme procédural". L'analyse approfondie de cette jurisprudence révèle que ces fondements théoriques ont empêché la Cour suprême d'élaborer une jurisprudence cohérente qui traite adéquatement de la réalité de la religion comme institution sociale pluraliste. Sur la base des critiques approfondies du libéralisme procédural formulées par des penseurs comme Charles Taylor et Iris Marion Young, et en s'inspirant du concept de "profonde diversité" proposé par Taylor, une nouvelle théorie politique générale ou théorie de la diversité profonde est proposée en réponse à ces critiques. Cette théorie est ensuite appliquée à la reconceptualisation de la jurisprudence de la Cour suprême et utilisée pour démontrer comment la théorie peut être appliquée à la résolution des nombreux problèmes inhérents à la jurisprudence existante en matière de liberté de religion, de manière à défendre et à faire progresser le pluralisme religieux.

To Ada, Luisa and Sarah -

I couldn't have done this without you.

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CITATION STYLE AND THE USE OF NON-SUPREME COURT CASES

In General

The primary citation method used within this dissertation is that of the Author-Date or social sciences format. However, based upon the extensive use of Supreme Court cases, certain modifications have been made to the citation method for legal cases recommended by The Chicago Manual of Style and other sources in order to make those citations useful to non-lawyers while limiting their intrusiveness within the text itself. The citation style used can be summarized as follows:

First, the initial citation of a case will be give as Name of the Case (Date). Here the name of the case will be given in full.

Second, subsequent references to that case in relatively close proximity to the first or where the case is cited so extensively that it should be familiar to the reader will be given in an abbreviated form, such as citing the name of the first party in the case (e.g. Heffron v. International Society for Krishna Consciousness, would be cited as Heffron) or, where the first party is a government or governmental organization, by citing the name of the individual involved (e.g. Employment Div., Dept. of Human Resources of Oregon v. Smith would be cited as Smith). Where the case has not been cited in the text for some time, the full case name will again be used.

Third, a separate table of cases is included in the table of Cited Works at the end of the dissertation using the standard legal citation form.

Finally, within the text citations certain indicators may be used. Among the most important of these are the following:

(a) concur - this refers to a opinion (known as a concurring opinion) written by a particular Justice which supports the holding of the Court (expressed in the majority opinion) without necessarily agreeing with the reasons given by the Court in its majority opinion;

(b) dissent - this refers to an opinion written by a justice who disagrees with the holding of the majority opinion;

(c) in part - this refers to the fact that a justice can concur in part with an opinion (i.e. agreeing with part of the holding of a case), joining in that decision in part (meaning that the Justice agrees with both the holding and reasons given in relation to a particular aspect of the decision) or dissent in part (meaning that justice rejects part of the holding and rational) or any combination of these.

Use of these indicators will also identify the name of the Justice who wrote this part of the Court's overall opinion.

Use of Non-Supreme Court Cases

In most instances, Supreme Court jurisprudence will be interpreted based upon decisions written by the Supreme Court itself. However, there are times that lower court cases will be cited. These can be recognized within the citation in the text through the inclusion of a notation appearing within the italics before the date identifying the court, in the case of an Federal appellate court (e.g. Americans United for Separation of Church and State v. Grand Rapids (CA 6, 1992)) or the State, where the decision is that of a state court. Admittedly, such cases cannot be directly attributed to the Supreme Court itself except insofar as the Court has not elected to overturn those rulings and may

speculatively be assumed to have passively adopted them. These cases must therefore more properly be understood as either suggesting how the Supreme Court might answer a particular question or as reflecting how lower Courts have understood other Supreme Court decisions.

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CHAPTER ONE

INTRODUCTION

The dominant political ideology present in the United States and in those countries which are increasingly adopting liberal democratic ideas modeled upon the United States is "atomistic" (Taylor 1985). It is an ideology whose primary focus is upon the individual and an individual's rights as against the interests of the society as a whole. As reflected in a variety of theories put forth by such prominent thinkers as Ronald Dworkin, Robert Nozick and John Rawls, which may be collectively described as theories of "procedural justice" (Taylor 1993), this ideology holds that in a society made up of individuals with many possible conceptions of the "good," liberal society is obligated to refrain from legislating with respect to any controversial notion of the good and instead must respect the right of each individual to determine and pursue their own "good" (Larmore 1987).

As against this ideology, one finds in many postmodernist discourses generated by such groups as feminists, various liberationist groups, and multiculturalism advocates arguments focusing upon the communal nature of all humans (Addelson 1994; Taylor 1992). Instead of focusing upon the individual and individual rights, these discourses highlight the human need for communities and how those communities can be protected and preserved. Often known as "communitarian" theories, they are in essential conflict with liberal theories in that they demand respect and attention to difference and diversity among individuals as opposed to the liberal focus upon equality and, implicitly,

"sameness" (Taylor 1985; Young 1990). Moreover, these communitarian theorists generally reject the distinction made by liberal theorists between areas of public and private concern. This distinction seeks to avoid conflict by segregating issues relating to community and community membership within the private domain as issues of "private" concern; the public domain is reserved for that which is common among all and, as such, individual rights and equality are considered appropriately preeminent (Greenawalt 1995; MacKinnon 1989).

Paradigmatic of this conflict, and the way in which I wish to approach this problem, is the way in which issues of religious freedom are handled in American Supreme Court jurisprudence. In reviewing existing American jurisprudence one largely finds religion being treated as simply a characteristic of an individual, similar to race, ethnicity, sex, and age. These decisions seem to suggest that liberal religious pluralism is simply the acceptance and toleration of individuals with diverse religious beliefs. This analogy is, however, faulty. Religion is not simply a particular belief in God or some other transcendental belief held by an individual. Religion is in most instances a way of life; it commonly associates an individual both with a social community of believers and a social institution (Berger 1967; Durkheim 1915). The practice of religion entails significant potential for conflict with others outside of that religion, both in terms of conflicts involving individuals and the social institutions of religion. To conceive of religious pluralism on an individual level fails adequately to address these larger social dimensions.

This dissertation will demonstrate: (a) that the Supreme Court operates on an

understanding of religion that is not consonant with the reality of religion as comprehended by a range of modern scholarship; and (b) that a theory of 'deep diversity' can be developed out of roots suggested by Charles Taylor that would allow better nuancing of the reality of religion within Supreme Court jurisprudence.

In Chapter Two I will present a brief historical overview of the history of religious freedom in America and Supreme Court Jurisprudence in this area. In particular, I will seek to demonstrate first, that there is a significant discontinuity between the understanding of the Religion Clauses of the First Amendment of the United States Constitution and subsequent Supreme Court jurisprudence. Ancillary to this I will provide a brief overview of several prominent theories of Constitutional interpretation which can be used in attempting to discern the meaning of the Religion Clauses. Second, I will argue that the "incorporation" of the Religion Clauses under the Fourteenth Amendment which holds State governments to the same standard which the First Amendment had originally intended to be binding only on the Federal government, requires an interpretive shift that would allow a slightly more expansive reading of the Religion Clauses than might otherwise be the case if the incorporation doctrine had not been applied. Finally, I will attempt to demonstrate that the dominant discourse within Supreme Court jurisprudence on religious freedom is largely predicated upon a particular philosophical, theological understanding of religion as a private, individualistic affair strictly between a "man and his God" (Jefferson 1904-5, vol. 16, 281-282).

In Chapter Three I will turn to the question of the nature of religion so as to determine whether religion, as understood by theologians, philosophers, sociologists, and

anthropologists actually conforms to the understanding held by the Court. In fact, I will argue that it does not and that, as a result, the Supreme Court jurisprudence does not adequately address the reality of religion as a social phenomenon. I will also attempt to highlight some of the social values of religion which justify its special status in society and under the Constitution and which must be considered in the application of the principles of religious freedom.

I will then begin to outline and develop a theory of deep diversity which I believe can be used to rectify many of the problems in existing Supreme Court jurisprudence. While this theory is suggested by the work of Charles Taylor, Taylor has not fully developed this theory in his writings. As a result of this, it will be necessary first to extract and outline those ideas and themes present in Taylor's work which can be related to the concept of deep diversity and then to develop those ideas into a comprehensive theory. To do this, I will start in Chapter Four by outlining the general anthropological and political premises which underlie the theory of deep diversity. This task will include developing an understanding of the self as a "dialogical" creation, as opposed to the atomistic understanding prevalent in the dominant form of liberalism and an understanding of the value of community and culture in the formation of the self. It will also be necessary to define what is meant by the term culture (a term which includes religion as a culture) and to understand how culture must be incorporated into the "politics of difference" and "recognition" (Taylor 1992).

In Chapter Five I will outline the actual parameters of the theory of deep diversity. As a part of this effort, it will also be necessary to reconceptualize liberalism

in a way which is both supportive of the values of traditional liberalism and conducive to the needs of culture and community. One of the key concepts to be developed in the theory of deep diversity is the idea of culture acting as a mediating institution in the relationship between the individual and society as a whole. This idea will require a rethinking of political theory such that culture will have a role in society distinct from that of the individuals that are a part of that culture.

I will then attempt to develop the theory of deep diversity further by applying it to the issue of religious freedom in Supreme Court jurisprudence. In doing so, I will highlight certain themes and ideas present in existing jurisprudence that are in accord with the theory of deep diversity as well as the many problematic aspects of that jurisprudence which the theory of deep diversity is intended to redress. I will begin, in Chapter Six, by outlining the general features of how deep diversity can be applied to the issue of religious freedom and how religion can be understood to function as a mediating institution. In particular, I will be looking at four key areas: the nature of equality; the need for religious autonomy and the ways in which that autonomy may come into conflict with other social needs and values; the nature of an individual's membership within a religious group and how that impacts their relationship to the larger society; and the need for a common identity among all individuals with society as a whole.

In Chapter Seven I will attempt to rearticulate the requirements of deep diversity in relation to the Establishment Clause in a more general way. In particular I will argue that existing jurisprudence has violated the Establishment Clause in some ways by advancing particular religious creeds at the expense of others based upon a faulty

historical analysis without the application of an appropriate standard of critical review. At the same time, I will argue that the First Amendment allows for a greater level of public support for religion in a more non-discriminatory way than is recognized within the dominant approach taken by the Court. Indeed, based upon the changing social circumstances of the modern welfare state and the problem of the changes wrought by the incorporation doctrine, such support is needed now more than ever before.

In Chapter Eight I will consider the issue of the free exercise of religion. In particular, I will attempt to develop a judicial standard of review that not only supports the free exercise right in accord with its special status within the Constitution, but is also capable of evaluating free exercise claims as a social value. I will also consider the question of religious strife in relation to the free exercise right and how such strife can be avoided.

Finally, in Chapter Nine I will argue for the need to adopt a deep diversity approach to the issue of religious freedom in the context of a post-modernist America and I will consider how that approach can be adopted as a jurisprudential standard. I will also argue that religious people and religious organizations cannot seek to stand on privileged ground in relation to the concept of deep diversity simply by virtue of the Constitution and the constitutional protections accorded to religion. It must actively embrace the full concept of deep diversity with respect to all cultures so as to help create an atmosphere of tolerance, acceptance, and respect.

The significance of this work lies in three contributions. First, it represents a critique of current Supreme Court jurisprudence. Second, it develops a comprehensive

theory out of Taylor's concept of 'deep diversity' that is capable of wide application to the many conflicts between culture and the state. Third, it demonstrates how this theory can be applied to a concrete social problem, that of the proper dimensions of Constitutional religious freedom.

CHAPTER TWO

RELIGIOUS FREEDOM IN AMERICA

It has been said that the concept of freedom of religion is a uniquely American contribution to the advancement of civilized society (Cobb 1902, 2). The colonies of Delaware, New Jersey, Pennsylvania and Rhode Island and later the United States federal government were the first governments in the world to abstain voluntarily from asserting a governmental right to control or regulate religious activity within their territories and jurisdictions (Schaff 1888, 22-23). The value placed upon religious freedom by Americans cannot be denied. Thomas Jefferson asserted that religious freedom was "the most inalienable and sacred of all human rights" (Jefferson 1943, 958). Religious freedom is undoubtedly a part of the ideology of America, part of Americans' self concept.

Yet the reality of religious freedom is far more complex and ambiguous than many might think. In constitutional jurisprudence, this "most inalienable and sacred" right has been rendered devoid of independent content, "forbidding by its own force no more than do the [Constitution's] other clauses that protect individual rights." (Carter 1993, 129). Moreover, a mythos, poorly supported by the historical record, has arisen that the founders of the nation, with the adoption of the First Amendment provisions on freedom of religion "erected a wall between church and state...high and impregnable." (Everson v. Board of Education, 303 U.S. 1, 15-16, 18) The consequences of this metaphor have been profound, including, it can be argued, contributing significantly towards an open

hostility towards religion in the "public square" (Neuhaus 1984).

The detail and the full implications of this evolution are beyond the scope of this dissertation. Nonetheless, a general overview of the history of religious freedom in American and its constitutional developments is necessary.

The Colonial Period

It might be thought that the impetus for the development of religious freedom in the colonies arose out of the experiences of the many colonists who fled to America to escape persecution by the established churches of their homes in Europe. Undoubtedly, this did contribute to it. However, this impulse was tainted. Instead of welcoming absolute freedom, many sought merely to substitute their faith for that of their oppressor (Muller 1963, 68). They maintained the belief that it was proper for the state to support the existence of religion through the imposition of an establishment that supported the religious practices of that religion by law and supported its ecclesiastical operations through taxes. Moreover, even where official religious tolerance was shown, it was almost universally limited to tolerance towards other trinitarian religions (i.e. generic Protestantism or, more rarely, Christianity, including both Protestantism and Catholicism) and never extended to Judaism, Buddhism, Islam or any other religion (Levy 1986).

The move towards religious freedom can, in many ways, be more accurately described as one of economics, practical politics and necessary accommodation. For example, while it was the policy of England to promote "Anglicanism in New York and in the southern colonies, [it] wisely prevented its establishment in America from

obstructing religious peace, because immigrants were an economic asset, regardless of religion" (Levy 1988, 141). For similar reasons England also granted colonial charters "on a nondiscriminatory basis--to Cecil Calvert, a Catholic, for Maryland; to Roger Williams, a Baptist, for Rhode Island; and to William Penn, a Quaker, for Pennsylvania and Delaware" (Levy 1988, 141). Similarly, although the Church of England was the established church of Virginia until 1785, Virginia refrained from asserting that establishment in the sparsely populated western areas of the colony where settlement of dissenters was actively promoted by the government (McBrien 1987, 57).

The promise of life in America drew people from all of Western Christendom, resulting in a "multiplicity of sects" -- the existence of which James Madison identified as the true source of the concept of religious freedom (Madison, quoted in Levy 1988, 141). While the initial acceptance of religious pluralism may have arisen out of economic need, over time that acceptance was necessitated by the reality that America was "in fact a pluralistic society" (Muller 1963, 69). It can be argued that religious conflict in this increasingly pluralistic society had initially been mediated by the fact that, in the eyes of Europe and its colonists, America was an unsettled land. 'Dissenters' from the dominant, established church could simply move -- or be encouraged to move either to other colonies where those dissenters could become the dominant Church, such as in the founding of Connecticut, or to the more scarcely populated sections of a particular colony, such as the settlement of the western portions of Virginia. This demographic reality undoubtedly contributed to the regionalism and the emphasis upon state rights which troubled the young nation at the time of the Revolution and the ratification of the

Constitution.

In time, however, this geographic reallocation was not enough. The numbers of dissenters and the number of sects to which they were adherents steadily increased. To accommodate these changes, colony after colony was forced to alter its approach to the establishment of religion. In some cases, such as New York, Connecticut and Massachusetts, the shift was towards the acceptance of multiple or "non-preferential" establishments of religion. In others, such as Maryland and Rhode Island, this movement lead to the rejection of any establishment of religion. In the absence of any one sect having a clear majority status, religious tolerance became a practical necessity (Miller 1973).

While the movement during the late 17th and through the course of the 18th centuries was toward the disestablishment of religion throughout the colonies, complete disestablishment did not in fact occur until 1833. At the time of the ratification of the Bill of Rights in 1791, seven of the fourteen states that comprised the Union still authorized the establishment of religion by law, though on a nonpreferential basis (Levy 1986, xvi). The First Amendment guarantees of freedom of religion arose in this transitional context.

The Constitution and the First Amendment

The Constitution of 1787 had no Bill of Rights and made no provision for freedom of religion save for the proviso contained in Article VI, clause 3 that "...no religious tests shall ever be required as a qualification to any office or public trust under the United

States." This omission is readily explained by the fact that the framers believed that they were creating a government of limited, expressly enumerated powers. As argued by Alexander Hamilton in The Federalist Papers: "[W]hy declare that things shall not be done which there is no power to do?" (No. 84) However, whether out of legitimate concern over the possibility that the new Federal Government proposed by the Constitution would intrude upon civil liberties or as mere political opportunism, opponents of the proposed Constitution seized upon the omission of a Bill of Rights as a basis for arguing against its ratification (Levy 1988, 147-148). To overcome this challenge, supporters of the Constitution promised to add a Bill of Rights to the Constitution. This promise was subsequently fulfilled through the drafting and adoption of the first ten amendments to the Constitution during the period 1789-1791.

Constitutional protection for freedom of religion constitutes the very first topic of the First Amendment to the Constitution. There it states that: "Congress shall make no law respecting the establishment of religion [the "Establishment" clause], or prohibiting the free exercise thereof...[the "Free Exercise" clause]." The vagueness and ambiguity of this language can in part be blamed upon the fact that the authors of this amendment are, for the most part, the same men who had initially thought a Bill of Rights unnecessary when applied to a government of limited powers. Indeed, during the initial Congressional debates over the amendments to the Constitution, James Madison, one of the principal authors and advocates for the Bill of Rights appears to be in agreement with the comment of Roger Sherman that "the amendment [was] altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution

to make religious establishments" (cited in Levy 1986, 77). His motives were strictly to comply with the demands for a Bill of Rights made by various ratifying state conventions.

A second reason for the vagueness of this language may be that it reflects a compromise between advocates for the state support for religion through non-preferential establishments and those opposed to any establishment of religion. Such an interpretation can be applied to the conflicting recommendations made by the state of New Hampshire on the one hand, and the states of Virginia, New York and North Carolina, on the other (Levy 1986, 80). In effect this language ultimately reflects the drafters' efforts to incorporate "the jurisdictional concern of federalism...[that] civil authority in religious affairs resided with the states, not the national government" (Adams & Emmerich 1990, 46) and to avoid the possibility that the new Federal Government might attempt to impose the disestablishment of existing state established religions (Carter 1993, 118) or, alternately, impose an establishment upon states where no establishment existed.

Before attempting to determine the meaning of the two freedom of religion clauses, note must be made of certain historical contexts and certain theories of judicial interpretation. First, it should be noted that the First Amendment was intended to apply solely to the Federal Government. Its starting point of reference is that "Congress shall make no law..." There is no reference to actions by the states. Indeed, the rejection during Congressional deliberations of a proposal directed against the states "showed...that so far as the United States Constitution was concerned, the states were free to recreate the Inquisition or to erect and maintain exclusive establishments of religion...." (Levy 1986, 122). That the provisions of the Bill of Rights were not intended to apply to the

states is further buttressed by the Supreme Court decision to that effect in Barron v. Baltimore (1833).

This limitation on the First Amendment changed with the adoption of the Fourteenth Amendment and the emergence of the judicially created rule of constitutional interpretation known as the "incorporation doctrine." The Fourteenth Amendment, added to the Constitution after the Civil War and intended to assure the rights of the newly freed slaves, provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens;...nor...deprive any person of life, liberty, or property without due process of law; nor deny to any person...the equal protection of the laws." There is clear and convincing evidence that the framers of this amendment did not intend its provisions to incorporate any part of the Bill of Rights nor to impose the same limitations on the states that the Constitution imposed upon the Federal Government (Levy 1970). Nonetheless, the Supreme Court in a series of controversial cases has held that many, though not all, of the rights embodied in the Bill of Rights are applicable against the states as a limitation upon their authority (Abernathy 1989, 73). These incorporated rights include the incorporation of the Establishment Clause in Everson v. Board of Educ. (1947) and the Free Exercise Clause in Cantwell v. Connecticut (1940).

While the incorporation doctrine has been severely criticized as a usurpation of governmental authority by the Courts, it is well established Court practice (Berger 1977). While it is possible that the Supreme Court might reverse itself regarding the use of the incorporation doctrine, as previously occurred with its expansive use of the "due process" clause (Bork 1990; Cox 1987), such a reversal appears unlikely. Thus, we are left with

the anomalous situation that a right that can be fairly read as intended to protect the rights of the state, the Establishment Clause, has been applied to abridge that very right (Amar 1991).

A second historical context which deserves to be noted is that at the time when the Constitution and the First Amendment were being drafted and adopted, the drafters were operating under a theory of government which, for the most part, viewed the Federal Government as possessing limited powers and authority while state governments, though limited in some senses, nonetheless possessed much more substantial powers (Adams & Emmerich 1990). This reality has radically changed through the ever increasing authority of the Federal Government brought about by the American Civil War, expansive economic regulation initiated by the New Deal, and the nature of the emerging "welfare state" (Carter 1993). In assessing this historical context, it must be noted that the framers of the Constitution and the First Amendment may have had radically different understandings of what religious freedom meant in terms of the Federal Government and what it meant in relation to the state government - an intent to limit the one does not necessarily reflect an intent to limit the other. Moreover, in drawing those limits, the framers cannot have been expected to foresee how extensive governmental authority would become and the consequences of that expansion for religious freedom.

"The Wall" and "The Line"

In seeking to discern the intent of the framers of the First Amendment, or at least as a way of justifying a particular interpretation being offered, it is popular among both

commentators and the Courts alike to refer to two metaphors attributed to two of the Founding Fathers. The first is the metaphor of a "Wall of separation between Church and State", identified with Thomas Jefferson. The second is the metaphor of a "Line drawn to mark the boundary between Church and State" attributed to John Madison.

The Wall of Separation

Undoubtedly, the most popular metaphor for the American concept of religious freedom is that of a "wall of separation between church and State," coined by Thomas Jefferson in 1802. "This phrase, which appears nowhere else in Jefferson's writings, became one of his permanent contributions to our political lexicon, a rallying cry for many Americans who perceive threats to their religious freedom" (Healey 1990, 124). It has also worked its way into Supreme Court jurisprudence, first appearing in the landmark decision of Reynolds v. U.S. (1879) where Chief Justice Waite asserted that the metaphor itself "may be accepted almost as an authoritative declaration of the scope and effect of the amendment'" (p. 164).

This metaphor arose in the body of an address delivered by Jefferson to the Danbury Baptist Association. In this address he states the following:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions,-- I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation on behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social

duties. (Jefferson 1904-1905, vol. 16, 281-2) [emphasis added].

Elsewhere, Jefferson noted that the purpose of this address was to "sow[] useful truths and principles among the people, which might germinate and become rooted among their political tenets....It also furnished an occasion....of saying why I do not proclaim fast and thanksgiving days as my predecessors did." (Levy 1986, 183).

At the outset, Chief Justice Waite's assertion that this metaphor, made over ten years after the adoption of the First Amendment, should be considered authoritative or definitive must be challenged. While it can be acknowledged that Jefferson was a strong advocate of religious freedom and its expression in the Constitution, he was neither the sole or principal author of the amendment nor the sole person responsible for its passage and ratification. The metaphor clearly does not reflect the conceptual ambiguity and vagueness apparent, for example, in the Congressional debates over the drafting of the amendment nor does it necessarily reflect the understandings present in the various constitutional conventions which ratified the Amendment. That it did not reflect a consensus opinion is also reflected in his own comments that he was presenting this idea as a way to 'cultivate it' in the public at large, who were obviously either unaware of it or did not necessarily agree with it, and to explain the fact that his understanding of the amendment differed from that of his predecessors (who were also important political leaders at the time of the adoption of the Constitution and the Bill of Rights) who had interpreted it as allowing for the declaration of days of "fast and thanksgiving."

His own attitudes towards the relationship between religion and the state also appears far less decisive than this passage would initially suggest. For example, within

a year of this address he authorized the use of Federal monies pursuant to an Indian treaty to build a Catholic Church for the Kaskaskia Indians (McBrien 1987, 64) and subsequently approved legislation "that underwrote missionary expenses to 'propagate the Gospel among the Heathen'" (Levy 1986, 183). In this sense his attitudes were in accord with other members of the Congress, which included many of the framers, advocates and ratifiers of the First Amendment who, despite the presence of the First Amendment, appointed chaplains at government expense to the two houses of Congress to lead prayers at the beginning of each session and established government paid chaplaincies in the military to serve the troops as well. These actions would be incomprehensible if, in the common understanding of the nation, the First Amendment had in fact erected an impregnable wall between religion and the state.

These problems can be alleviated to some extent, however, if one interprets the metaphor of the wall as an effort to protect religion from the state, a position taken, for example, by Stephen Carter (Carter 1993, 105). There is a strong tradition which would support this. Though we cannot be sure that Jefferson was aware of this fact, the metaphor of a "wall of separation" was used by Roger Williams in 1644, more then 150 years before Jefferson's use of the term, where he argued that the wall was necessary to protect religion from the corrupting, destructive effects of the world (Levy 1986, 184). Indeed, the history of the emergence of the concept of freedom of religion in the colonies was primarily driven by the complaints of dissenters against existing established churches. The Virginia Statute of Religious Freedom, penned by Jefferson, clearly asserts this understanding in its provision that no "man shall be compelled to frequent or support any

religious worship, place, or ministry whatsoever" (Levy 1986, 182).

There are two obvious implications to be drawn from an understanding of the "wall of separation" being one intended to protect religion rather than to segregate it. First, this idea of the wall cannot used as a grounds for arguing against the participation of religious people in public life or the use of religious ideas or discourses in the public square, as all too frequently occurs (Greenwalt 1995). "The metaphorical separation of church and state originated in an effort to protect religion from the state, not the state from religion" (Carter 105). Second, while this conception of the wall can be used to limit government actions which are clearly oppressive towards religious freedom, as would be the case if it sought to impose certain religious practices upon the public or explicitly prohibit practices solely on religious, theological grounds (a point to be elaborated on later), it does not provide clear guidance in questions regarding the role of government in supporting the free exercise of religion by citizens -- the far more important and divisive question.

It must also be noted that Jefferson's use of the metaphor links the protection of religion with his own conception of the nature of religion. He clearly thinks of religion as being a private matter "between man and his God," implicitly rejecting the idea of religion in any larger social or communal context. It is this linkage of religion and the private which is the most important and influential aspect of his coinage of this metaphor. It is this point which is picked up in Reynolds v. U.S. (1879) and the Court's effort to distinguish between opinion (religion) and practices (public acts) -- a determination with extremely damaging results for religious freedom, as will be discussed hereinafter.

The Line of Separation

The second popular metaphor for nature of religious freedom is that of a line drawn between the church and state offered by James Madison in a letter to the Reverend Jasper Adams in 1832.

> [I]t may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points....The tendency to usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinence of the Government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others. (Mead 1968, 349)

As noted by Richard McBrien (1987), this metaphor is a far more accurate description of the actual situation of religious freedom in the United States than that suggested by Jefferson's wall. It focuses attention upon religion rather than "the church" (which is strictly a Christian institution) and "Civil authority" as opposed to the state, which, under the expanded reach of the First Amendment, reflects the scope of possible conflicts involving not only the Federal Congress, but state governments and regulatory agencies as well.

The issue being picked up in this metaphor is the problem of an inherent conflict within the twin clauses of the First Amendment between restrictions upon governmental support for religion and government actions which may impair a citizen's free exercise of their religion. At what point does the government's efforts to support a citizen's right of free exercise by, for example, granting religious institutions tax exemptions (Walz v. Tax Commissioner of New York City (1970)), cross the line to be a form of supporting religion in a manner prohibited by the establishment Clause? (This issue will be

discussed in greater detail below.)

The existence and adoption of either of these two metaphors must not be thought of as representing a common theoretical understanding regarding Establishment Clause jurisprudence. A careful review of Supreme Court decisions in the area of religious freedom reveals that its decisions have been made without the benefit of an identified, overriding theoretical perspective (Westin 1965, 43, 52). "The Court seems to prefer to muddle through on its own, and any occasional congruence with one academic theory or another seems to be more an accidental artifact cast up by the interplay of diverse views within the Court itself than a conscious tracking of any outside intellectual system" (Kelley 1990, 18). Nonetheless, notwithstanding a number of appeals made to the "wall of separation" in various decisions, "the Court has adopted, in practice, the Madisonian rather than the Jeffersonian metaphor" (McBrien 1987, 66).

It should also be noted that both Jefferson and Madison and virtually all of the framers of the Constitution were profoundly influenced by the concept of individualism, individual rights and the social contract theory of government (Locke 1947). Indeed, the concept of rights and the social contract theory was prevalent in the American colonies prior the appearance of Locke's work (Levy 1988, 139), and has been profoundly important up to the present date (Glendon 1991; Clor 1996). Thus, while both metaphors can be used in defense of the communal interests of religion, they can both equally be applied to an individualistic, privatistic understanding of religion. In fact, as we shall see, that has been the case in the bulk of the jurisprudence on religious freedom that has used either metaphor.

History and Constitutional Interpretation

Before attempting a more detailed and substantive discussion of the constitutional protections for freedom of religion, it is necessary to consider what method of constitutional interpretation will be favored. Specifically, it is necessary to consider how and to what extent the historical information contained in the proceeding sections is relevant to our understanding of the constitutional concept of religious freedom. While this is not the place to attempt to develop a comprehensive hermeneutic of constitutional interpretation, it is necessary to sketch out the general parameters of the method being used so as to avoid possible confusion how certain conclusions may have been reached.

It should also be noted that a theory of constitutional interpretation must necessarily encompass a theory of judicial review. That is to say, the theory will be constrained by the functions or role to be played by the courts within our overall legal and political system. Once again, the specifics of this theoretical understanding can only be sketched out here in only the barest detail.

Three contemporary theories of interpretation need to be considered: the theory of original intent; the theory of evolutionary change; and legal pragmatism. I will begin by presenting a brief summary of each and then I will attempt to outline the parameters for interpretation which I have drawn from them.

Original Intent

The interpretive theory of original intent argues that judicial decision making with regards to the Constitution should be guided by the intentions of those who wrote and

adopted the Constitution (Bork 1990). "Effectuation of the draftsman's intention is a long-standing rule of interpretation in the construction of all [legal] documents" (Berger 1977, 365). The application of a similar rule to the Constitution would appear axiomatic and undoubtedly conforms with the common understanding of most Americans who have not been exposed to arguments generated by the theory of original intent.

There are many arguments for this theory of interpretation beyond this common sensical appeal. First, requiring judicial conformity to the original intent of the framers provides stability in the law. If "the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it," James Madison wrote, "there can be no security for a consistent and stable government, more than for a faithful exercise of its powers" (Berger 1977, 364). Or as Jefferson put it: "Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction." (Berger 1977, 364). Second, in the American system of government, the courts are limited to the role of exercising judicial review over the acts of the "political" branches of government (i.e. legislative and executive) according to the standards set forth in the Constitution. The moment the court begins to render its decisions based upon grounds other than those clearly set forth in the Constitution then, at that point, the court has begun to usurp the legislative/political function of the other branches of government (Berns 1987). This is particularly problematic given the fact that Federal judges are appointed for life, rather than being elected and therefore, at least indirectly, subject to the will of the people as a whole.

There are, however, problems with the theory of original intent. Beyond the

criticisms which might be made based upon modern theories of hermeneutics and the argument that we can never know the intent of an "author" based upon written sources, one has the much more prosaic problem of determining who is the author of a constitutional provision. If the text itself is unclear as to what is intended, are we to seek out the intentions identified in other sources by the drafters of the Constitution? The people who debated it in Congress? Those who participated in the various constitution conventions which ratified the Constitution and/or amendments to it? Even if this were our intent, the written records relating to the original Constitution and the Bill of Rights are fragmentary and incomplete at best.

Evolutionary Theories

There are a wide variety of theorists whose work can be characterized as rejecting original intent or 'intentionalism' in favor of an understanding of the Constitution as being a "living" document (Miller 1973, 595). Theorists, such as Alexander Bickel, Benjamin Cardozo, John Hart Ely, and Irving R Kaufman all see the law as evolving. Starting from a position which argues that the obvious vagueness and relative terseness of the Constitution was in fact intentional, so as to allow its adaptation to meet future needs through the process of judicial interpretation, these theorists assert that it is the proper role of the judiciary to incorporate contemporary understandings into the Constitution through the Court's interpretation of the Constitution. In some senses, one can argue that this interpretive theory is in accord with Gadamer's hermeneutic theory that our understanding of a text necessarily involves a merger of "horizons." (Gadamer

1975), though its focus is much more pragmatic in terms of these legal theorists.

The best of these theories are, however, forced to seek some kind of grounding within the text of the Constitution, usually in the form of asserting that the Constitution applies certain general "principles" which are to be sought out by the Court and then applied to reach a particular decision. Lest one accept that those principles may also be arbitrarily read into the text of the Constitution, a charge actually leveled at the court in terms of its controversial decisions with respect to the so-called right of privacy (Bork 1990), one is then forced back into a position of seeking the original intention which sets forth those principles. Moreover, if this is the case, then the evolutionary freedom of the Court must be concomitantly limited.

Legal Pragmatism

"Being a legal pragmatist," Yale law professor Jack Balkin once noted,"means never having to say you have a theory" (Sherry 1996, 17). It is a theory which focuses attention on particulars and denies the importance of grand theories in judicial decision making. Cass Sunstein, in his book Legal Reasoning and Political Conflict (1996), offers two useful concepts for the interpretation of the Constitution and constitutional jurisprudence. First is the idea of "incompletely theorized agreements." This concept highlights the fact that in many legal or political situations, decisions are made by groups of individuals without those individuals agreeing upon or even specifying the theories which might justify them. Second is the concept of analogical reasoning which facilitates the enforcement of incompletely theorized agreements by binding the courts to decide

cases which bear similar characteristics in similar ways based upon the facts or details of the cases rather than upon principles or rules.

One of the key ways in which judicial activism or discretion is controlled under the theory of legal pragmatism outlined by Sunstein is through a court's obligation to adhere to precedent. There are two difficulties with this. First, it does not allow a court to reverse an obviously incorrectly decided precedent. Second, it assumes the precedents are self-evident and do not require as much interpretation as the statute or constitutional provision which may have generated them. This too is problematic.

The Approach To Be Taken

It appears to me beyond question that a written constitution, by its very existence, demands that its interpreters follow the intentions set forth within that written document lest, as Jefferson argued, we "make it a blank paper by construction." In seeking to understand that document we are not and should not be confined to the document itself. Writings require references to external understandings in order to give them meaning (Schliermacher 1977). If we attempt to cut off reference to the past, we are in effect substituting the present as the source for that external reference and undercutting the law's need for long term stability (Aquinas, S.Th. I-II Q.97 a.2).

In seeking the intention of the document, care must be taken not to give too great a weight or authority to identified individual authors of the text in question. While these authors may offer some valuable insight, the true "author" of the text is governmental system itself embodying the discourse present at the time of the Constitution's enactment.

In one sense, the effort to determine the "intent" of this corporate "author" is somewhat more legitimate than attempting to identify the intent of an individual author as we are in a far better position to consider the intentions expressed within the dominant discourses of particular historical periods than the idiosyncracies of individual authors (Foucault 1979). At the same time, in seeking the meaning or intent of a passage, it is necessary to bear in mind the concept of "incomplete agreements" as a political reality. It is likely that significantly different understandings of the law may be captured within a single passage.

In seeking to be bound by the originally intended meaning, it does seem appropriate to accept that there are appropriate limits to the intention. Specifically, a court should be bound by the general principle involved in the constitutional provision, limited as tightly as possible to adhere to the intent of the text, without being bound to the detailed assumptions that may underlie that text. For example, despite the fact that it was obviously intended that the word "person" as used in the Constitution did not include Negroes, women or American Indians (a situation not completely addressed by subsequent constitutional amendments), the Courts should not be bound by this intended meaning, but rather by our contemporary, more inclusive understanding of the term which, it can be argued, more accurately reflects the intended principle of recognition of the rights of the "person" freed from the bias of that historical period.

Finally, with respect to constitutional jurisprudence, while I believe that the legal pragmatism concepts of incomplete agreements and analogical reasoning are useful in understanding the process of judicial decision making in the area of the First Amendment

freedom of religion cases, I do believe that a foundational legal theory is appropriate and would be useful in helping to guide future decisions in this area and that such an interpretation can properly be applied to this area of jurisprudence.

Religious Freedom at the Adoption of the First Amendment

While much remains unclear about contemporary understandings of the nature of religious freedom at the time the First Amendment was drafted and adopted, some conclusions can reasonably be drawn from the available information. The most obvious observations relate to those points specifically noted in the clauses of the First Amendment itself. First, the Federal Government is precluded from making any law which would establish any religion as the official religion of the state. Second, every individual is guaranteed the right to practice her/his religion. Reading the two clauses together, along with the understanding that the intention of the doctrine of separating religion and the Federal government was to protect religion, one can further specify that the Establishment Clause was intended to preclude the use of coercive Federal governmental power to support a particular religious tradition.

There has been an extended scholarly debate as to whether or not the language of the Establishment Clause was directed solely at "exclusive" establishments of religion where the state supported the existence of a single, state church, as was the case in Europe at the time, or whether it also covered the non-preferential types of establishment that existed in many of the States (Berns 1970; Cord 1982; Levy 1986). More specifically, they argue that the First Amendment does not preclude non-discriminatory

aid towards religions (Rehnquist's dissent in Wallace v. Jaffee (1985)).

On a first level analysis, non-discriminatory aid may be argued to be allowable on the basis that the intention of the Establishment Clause was to protect religion from interference by the Federal government. Non-discriminatory aid, by its definition, does not distinguish among religions by favoring one over the other, nor is it coercive toward non-believers except insofar as tax dollars may be used to the benefit of religion in the same way such tax dollars are used to benefit a multitude of other socially desirable activities that may or may not be enjoyed or supported by each member of society. On the other hand, the use of tax dollars is to some degree a coercive action (Nozick 1974, 169-172) and as such it can be said to be violative of the Establishment Clause for that reason. At this level, the arguments either way appear inconclusive.

There is a second level of analysis, however, that makes this question even more problematic. In essence, in seeking the intent of the framers of the Constitution, we are asking a question which is fundamentally different from the one which they sought to answer. The framers and ratifiers of the First Amendment were being asked about the propriety of the Federal government involving itself in support of religion in a situation in which religion was already the subject of support by many of the States. Given the existence of this State support and the rejection of Madison's proposed amendment addressed at securing religious freedom in the states through a constitutional amendment restricting State actions (McBrien 1987, 62), it is quite reasonable to assert that the intent of the authors of the First Amendment was limited to one of jurisdiction. However, with the expansion of the First Amendment to cover actions by the States, the question now

being asked is fundamentally different. In reality, the new question is whether it was the intent of the First Amendment to preclude any support for religion. Here, the answer is clearly no.

Finally, it should be noted that while among the authors of the Constitution there were some, such as Jefferson and Madison, who were very strong supporters of the idea of religion being a matter of individual conscience and therefore a private concern as opposed to a public event, such a position is not inherent within the expressed intent of the First Amendment. There were also many supporters of religion and its public role, including Washington, who argued for the need of religion in supporting public morality in his farewell address (McBrien 1987, 27) and who introduced many aspects of so-called "civil religion" into his administration (Carter 1993, 99).

The issue of non-discriminatory support may also be said to turn on the fact that a failure to offer support may not in reality be 'neutral' towards religion and a citizen's right of free exercise. It may be detrimental to that right. This issue will be explored in greater detail in Chapter Seven.

Religious Freedom in Supreme Court Jurisprudence

David Souter, in his testimony before the Judiciary Committee during his confirmation hearings, noted that one could usually tell the outcome of a case argued on freedom of religion grounds simply by finding out on which clause the judgement was being based. If the decision was written on free exercise grounds, it was more than likely that the judgement would go in favor of the person claiming a right of free

exercise. If it was decided on establishment grounds, the government action in question would more than likely be found unconstitutional. It is uncertain whether this is factually accurate or not, though it did appear to reflect the general tendencies of the court at one time. The point that Souter was making is that the distinction between the two is not as clear as it might appear at first glance and that the same facts are subject to different results according to the conceptual lens taken to look at those facts.

There is nothing about the history, the language, or rules of constitutional construction that necessitates that the protection of religious freedom be read as two independent clauses. Indeed, reading them together, as was done above, may help to illuminate what was intended by their drafting. Nonetheless, the Court has consistently broken the provision into two parts, the Establishment Clause and the Free Exercise Clause, and has developed a body of case law related to each.

Another revealing feature of the jurisprudence in this area is that free exercise decisions are almost always decided in connection with an individual plaintiff on the basis of an individual rights analysis in common with decisions rendered in relation to allegations of infringement of other constitutionally guaranteed rights (see, for example, Reynolds v. United States (1879); West Virginia Board of Education v. Barnette (1943)). For example, in one case which appears to recognize a group right of free exercise, the case in fact joined an individual plaintiff with the institutional plaintiff in asserting this right (Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo v. City of Hialeah (1993)). By contrast, cases involving religious groups and organizations have largely been argued and decided on the basis of the Establishment Clause, though here too, the

ultimate decisions of the Court are profoundly influenced by the Court's understanding of relgion as being an individualistic, privatistic right and concerns about the equality of all citizen on an individual level.

The Establishment Clause

Despite the fact that one can trace the American debate over the appropriate relationship between religion and the state back to the debates between John Cotton and Roger Williams in Massachusetts Bay Colony in the first half of the seventeenth century, there was no significant constitutional litigation based on this clause until the mid-1940s (Abernathy 1989). We therefore find ourselves in the relatively anomalous situation that our whole body of constitutional jurisprudence on an important, clearly identified provision of the Bill of Rights is of totally modern origin.

The basic problem with the clause is that it is both brief and ambiguous. "Congress shall make no law respecting the establishment of religion...." What does the term "respecting the establishment of religion" mean? As we have seen, this phrase could reasonably be interpreted strictly as a limitation upon the power of the Federal Government to interfere with the States' authority to regulate and/or establish religions (Amar 1991). Such an interpretation is, of course, inadequate, unless one adds the necessary corollary that the Federal Government is also precluded from "establishing" a particular religion, a point supported by both the legislative and historical records relating to this amendment and the logical reality that a federal establishment would necessarily interfere with any state establishment laws (whether for or against an establishment of

religion.) Moreover, whether one accepts this interpretation or argues that the clause was simply intended to preclude the Federal Government from "establishing religion," the definitional problem remains. What does "the establishment of religion" mean?

The first effort specifically to define this term occurred in Everson v Board of Education (1947), where Justice Black, speaking for the Court asserted that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state [based upon the incorporation doctrine under the Fourteenth Amendment decision in Murdock v Pennsylvania] nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." [Cite omitted] (Everson at 15-16.)

Justice Black further strengthened the metaphor by asserting that the "wall must be kept high and impregnable. We could not approve the slightest breach." (Everson at 18.)

Interestingly, despite the seeming rigidity and distance between religion and the state suggested by the above cited language, the decision then recognizes the central dilemma of the Establishment Clause cases: religion cannot be isolated out of the complex web of society and governmental actions in society. For example, it could be argued that the rendition of essential government services such as fire and police protection, connections for sewage disposal, and the use of public highways and sidewalks represents "support" for religion. Yet to deny those services would not be a simple act of neutrality

towards religion -- it would introduce an impediment to the ability for religion to exist and the rights of free exercise held by the citizens under the second clause of the First Amendment. Even if religion were taxed (it is generally a "tax-exempt" institution), taxation does not necessarily represent a true, fair exchange for value, assuming such a value could be determined. Equally, to single religion out for special taxation treatment for benefits normally available to all citizens and organizations is problematic as potentially, if not likely, discriminatory towards religion. The Court therefore affirmed that the establishment Clause "does not require the state to be the[] adversary [of religion]. State power is no more to be used so as to handicap religions than it is to favor them." (Everson at 18).

The reality of this social interrelationality and interconnection has generally lead the Court to reject the metaphor of the wall and to accept in its place the metaphor of "the line." This is further qualified to assert that the line is "elusive" (Abington School District v. Schempp (1963) J. Brennan, concur.), "not easy to locate" (Board of Education v. Allen (1968)), and "cannot be [drawn as] an absolutely straight line" (Walz v. Tax Commissioner of New York City (1970)). In order to determine where the line is to be drawn, the Court in Lemon v. Kurtzman (1971) developed a three-part test for constitutionality: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion,'" (Lemon at 612-613).

The Lemon test has been severely criticized. Despite the fact that it appears fairly

clear and straightforward in its pronouncements, the results in the courts' attempting to follow this standard have "been all over the map" (Carter 1993, 110). Moreover, the Court has taken the first part of the test, that of "legislative purpose" and has read into it a test looking at the "motivation" of the legislators in enacting the legislation (Edwards v. Aguillard (1987)) as opposed to simply determining whether there is a legitimate "political purpose" (Carter 1993, 111).

There are a number of significant problems with this latter development. First, it goes against the reality of how much legislation is passed. It has been noted that "over 90 percent of the members [of Congress] say that they consult their religious beliefs before voting on important matters. Indeed, by some estimates, an absolute majority of the laws now on the books were motivated, at least in part, by religiously based moral judgments" (Carter 1993, 111). Second, it represents a restriction upon the rights of religiously devout people to participate in the political system. Not only does this violate the idea that the separation of religion and the state was intended to protect religion from the state rather than the state from religion, as will be developed in more detail later, it arguably infringes upon the right of "free exercise" if an individual's religion calls upon him or her to take an active role in the political process. Third, making this judgement, as a form of state action, would also appear to violate the third part of the Lemon test. That is to say, requiring a court to assess religious motivation also entails significant regulation of religion in terms of determining when a religious person is acting strictly according to religious motivations and how a religion must regulate itself so as to allow its adherents to participate as citizens in the public arena. By contrast, limiting the first

part of the test to an assessment of whether there is a legitimate "political purpose," supplemented by the further question of whether the action advances or hinders religion, would avoid these problems.

One could reasonably interpret the attitude behind this motivation test and the way it has been applied in such cases as those relating to the teaching of "scientific creationism" for example, (Edwards v. Aguillard (1987)), as expressing contempt for (Carter 1993) or hostility towards (Neuhaus 1984) religious belief. Religious faith is simply not accepted as a legitimate foundation for public actions. While these characterizations may in fact be accurate to some extent, a more generous interpretation of this approach is that it reflects a particular philosophical or theological understanding of religion as a private, individual act. If, as expressed by Jefferson, religion is exclusively a matter between a "man and his God," then it is arguably true that it has no place in public relations between humans on a political level. One can further specify that the understanding of religion identified here is concerned solely with spiritual matters as opposed to matters of the flesh, though the Court itself has never addressed this matter in this way.

It should be added that while the Court has been fairly consistent in holding that the Establishment Clause precludes direct aid to religion, this position is not without its critics -- even on the Court. For example, Chief Justice Rehnquist has argued that "[t]he Establishment Clause [does] not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion" (Wallace v. Jaffee (1985) at 106.)

This position is supported in many ways by the historical reality of how religion has been treated by the government, such as the support provided for military chaplaincies and even in the Supreme Court's acceptance of practices such as legislative chaplaincies (Marsh v. Chambers (1983)), governmentally sponsored displays of nativity scenes (Lynch v Donnelly (1984)) and the validity of Sunday closing laws (McGowan v Maryland (1961). Efforts to justify these actions other than as historical anomalies are tortured at best (Lynch v Donnelly (1984) and have resulted in continuing litigation with sometimes conflicting results (compare, for example, Lynch with ACLU v. City of Birmingham (CA6 1986).) Moreover, these cases are troubling in that they represent the tacit adoption of Christianity or, more rarely, Christianity, Judaism, and Islam as acceptable expressions of a kind of "civil" religion without making equal accommodation to other "minority" religions. They do not in fact reflect a non-discriminatory approach to religion, but rather an acceptance of majoritarian attitudes. While a non-discriminatory approach to religion may be an appropriate approach to Establishment Clause cases, those cases which could be said to support this approach must be said to fail this same test.

The Free Exercise Clause

There has been a substantial and growing body of rights litigation in the United States over the last quarter century. Indeed, the Supreme Court has been severely criticized not only for its willingness to support individual rights at the expense of other legitimate political values (Berger 1977; Bickel 1970), but also for its willingness to recognize rights that are not themselves explicitly written into the constitution (Berns

1987; Bork 1990). Ironically, at the same time that the protection for personal rights was expanding in many areas, the right of the free exercise of religion has contracted. Commentators like Stephen Carter can, with some legitimacy, claim that this clause has been rendered devoid of independent content (Carter 1993, 129), while others argue that this was in fact the intent of the First Amendment (Weber 1990).

In examining free exercise cases, two factors need to be considered. First, care must be taken to delineate carefully the nature of the actual right being protected. For example, one can ask whether the right being protected under a particular holding is one of the free exercise of religion or, whether it would be more accurate to characterize it as touching upon the right of assembly also protected under the First Amendment. Second, in regards to rights litigation in general, the existence of a 'right' does not preclude government action which may impinge upon that right, it merely raises the question as to what level of justification is required of the government for such an infringement (Dworkin).

The first Supreme Court case to consider the right of free exercise held that under the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order" (Reynolds v. United States (1879) at 150), a standard commonly rephrased as allowing for the legal protection of public morals, health and safety. What is striking about this statement is how clearly it expresses the Jeffersonian theology that religion is strictly a matter between "man and his God." According to this statement, the substantive content of the Free Exercise Clause is its restriction against interference with

"mere opinion" -- or religion. Expressions of those opinions in the form of action are not protected on the basis that they are religious. Instead, one finds such actions receiving protection only when they resemble other protected rights such as the right of free speech (Cantwell v Connecticut (1940); Kunz v. New York (1951)) or free assembly (Widmer v. Vincent (1981)). One of the only ways in which a religious action is protected on the basis that it is religious appears to be where overt discriminatory intent against that religious group is shown on the part of legislators enacting an infringing law (Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo v. City of Hialeah (1993)) and even here, the Equal Protection Clause which prohibits discrimination by the government among its citizens would achieve the same result. Indeed, the Court itself has suggested that religious freedom must be combined with some other protected freedom in order to be protectable (Employment Division v. Smith (1991).)

Of course, the Court in its decisions has not openly expressed the opinion that the Free Exercise Clause is meaningless (except insofar as such an attitude can be read into the dicta contained in the majority opinion in Employment Division v. Smith noted above.) Generally, the Court will, at some level, acknowledge that each citizen has the right to the active practice of his or her religion. However, the value of that right is increasingly being held de minimus. (In terms of minority religions, there is even question as to whether it has ever been held to have value (Gedicks 1995).)

In decisions involving "fundamental" rights, such as the right of free speech, free press, and free assembly, it is common to require that the state demonstrate a "compelling state interest" in any law or regulation which would unduly infringe upon those rights.

While this standard had been held to apply to free exercise cases in Wisconsin v. Yoder (1972), a more recent case virtually obliterated any special treatment for religious practices by adopting a "facially neutral" test which holds that a law which is neutral on its face by not specifically singling out a religious group or practice can be used against a religious group's practices (Employment Division v. Smith (1991)). Indeed, while the Smith decision has been severely criticized, it appears simply to reflect a pattern of decisions which denigrate religious exercise rights such as Goldman v. Weinberger (1986) (which upheld an air force prohibition against the wearing of a yarmulke as a justified exercise of "professional judgement"), Lyng v. Northwest Indian Cemetery Protective Association (1988) (which ruled that it was unnecessary for the Forest Service to consider claims by native American groups that certain lands were "sacred" in making its decisions on the grounds that "the government simply could not operate" if it were required "to satisfy every citizen's religious needs and desires"), and many prisoners' religious freedom cases (where the infringement of such rights were allowed if it could be shown that the infringing rule was merely "reasonably related" to legitimate penological interests (Cooper 1995, 329).)

As many commentators have noted, the most obvious victims of this line of decisions are members of minority religions (Richardson 1997). While the Court can rule that the Forest Service is free to build roads through areas which the Court itself admitted were held sacred by certain groups of Native Americans for hundreds of years, one cannot even concieve of any governmental agency proceeding with such little regard against the interests of a majority religious group by, for example, attempting to build

a road through the site of St. Patrick's Cathedral. One cannot imagine the results of a court case on such an attempt because the attempt itself would be so politically untenable. The political process itself protects majority interests. The Bill of Rights is, in most cases, thought to protect the interests of minorities against abuse by the majority (West Virginia Board of Education v. Barnette (1943) at 638; Employment Div. v. Smith (1990) O'Connor J., concur at 901). That clearly is not the case here.

There are a number of possible explanations for the limited scope of the Free Exercise Clause. First, as suggested above, it appears that the Court conceptualizes religion along the lines of the Jeffersonian theology of the private sphere. Under this theory, to move religion out of the private sphere requires that it be combined with a "public" right, such as free speech or free assembly. Second, there are also often pragmatic concerns involved in these cases. For example, in cases involving the religious use of controlled substances, such as Employment Division v. Smith (1991), one senses a concern that if the Court allows a religious exemption to use a controlled substance to one individual or group, enterprising drug users and purveyors would suddenly emerge en mass as the gurus of new religions demanding similar treatment. Moreover, this concern leads into the third major explanation: the Court is loath to give "special" treatment to any group or individual based upon its commitment to treat all citizens equally.

It is a tenet of faith in the United States, in spite of its many breaches in practice, that all people are to be treated equally before the law. From the assertion made in the introduction of the Declaration of Independence that "all men are created equal" up

through the most recent decisions on civil rights, this has been held as a central defining characteristic of self understanding in mainstream United States thought. The individualist focus of this conception of equality can be seen at the outset in the provisions of the Fourteenth Amendment (Sec. 1 "All persons....are citizens....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens....nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law" [Emphasis added.]) It is equally present in enactments under its authority, such as the Civil Rights Act of 1964 and those court decisions supporting it which outlaw discrimination against individuals on the basis or race, religion, nationality, and sex.

The nature of this equality of treatment is heightened and to some degree problematized by the interaction between twin rubrics of the First Amendment supporting the free exercise of religion and prohibiting the establishment of a state sponsored religion. State actions, such as taxation (see, e.g., Murdock (1943) (free exercise); Walz (1970) (establishment)), labor laws (see, e.g., Thornton (1985) (free exercise); McGowan (1961) (establishment)), and military regulations (see, e.g., Goldman (1986) (free exercise); Abington (1963) (establishment) impact issues regarding both the free exercise of religion and the establishment prohibition.

By requiring, explicitly or implicitly, that the free exercise right be combined with another civil right, the Court has in effect eliminated the problem of special treatment by making the religious element irrelevant. All citizens, not just those professing a particular religion, possess rights of free speech and free assembly. On such grounds,

there is no question of discriminating in favor of or against any individuals based upon their religious belief. However, the concomitant result is that the Free Exercise Clause becomes meaningless in terms of the public sphere.

It should be noted that the perception that religious freedom has been lost or severely impaired by recent Court decisions is well recognized and lead to the passage in 1993 of the Religious Freedom Restoration Act. In this act, Congress has attempted to mandate that the Court utilize what has been referred to as a "compelling state interest" test in its review of state actions where a free exercise claim is asserted in a form similar to that accorded under such decisions as Sherbert v. Verner (1963) and Thomas v. Review Board of Indiana Employment Security Division (1981). (The issue of judicial standards of review and the compelling state interest test will be discussed in detail in Chapter Eight.) There is some question as to whether or not this law is constitutional, in that it appears to be an attempt to "over-rule" the Supreme Court (Richardson 1997). Moreover, it is uncertain whether or not the Court will accept its constitutionality or, if it does, whether it will accept the intent behind the law or subvert it through its interpretation of the details. Nonetheless, the point to be made is that there is a large, political understanding that Supreme Court jurisprudence in this area does not reflect common understandings and values regarding religious freedom.

The Status of Religious Freedom in Contemporary America

At the time the First Amendment was drafted and ratified, religion was highly valued. As will be emphasized again in Chapter Seven, there was at that time substantial

support for religion at both the state and federal level. The freedom of religion clauses of the First Amendment embodied this valuation. They were included in the Constitution in an effort to protect religion, which was supported and valued as a public good, from interference by the Federal Government. On the other hand, subsequent Supreme Court jurisprudence in this area has lost this recognition of value. Instead, it has been replaced by a somewhat mechanistic effort to segregate religion from the state and an understanding of religion as a personal, private matter. Instead of religion being considered a social good, the Supreme Court has relegated religion to the status of a personal freedom, referred to by one commentator as a jurisprudence of "freedom of choice" (Nolan 1996) and has adopted a theology, taken from Jefferson, that religion is "between man and his God." Indeed, in at least one case its decision has effectively rendered the Free Exercise Clause impotent, requiring that it be combined with other rights such as free speech, free assembly, or equal protection in order for it to be effectively asserted (Employment Division v. Smith (1991)).

This shift or discontinuity between the intention of the framers of the Constitution and subsequent Supreme Court jurisprudence might not be objectionable if the Supreme Court's interpretation of the Religion Clauses accurately and coherently reflected the political reality of religion in contemporary America. However, as this review also demonstrates, the status of religious freedom in the United States today is, at best, ambiguous. The nature and existence of such extensive, ongoing litigation and legislation in this area suggests that no political consensus has yet been reached. Judicial decisions in this area have been marked by their ambiguity and inconsistency. Moreover, litigation

in this area reveals only part of the problem. On a more fundamental level, one finds an on-going controversy about the place of religion in the public sphere that at times exhibits a troubling hostility towards religion and religious belief. At the heart of this situation lie two fundamental problems: that of defining what religion is and its relationship to the public sphere; and the problem of how to balance the demands of equal treatment of all citizens before the law against the special needs of religious groups. It is the first of these that we turn to in the next chapter.

CHAPTER THREE

THE NATURE OF RELIGION AND ITS IMPLICATIONS FOR SUPREME COURT JURISPRUDENCE

In the preceding chapter, it was suggested that implicit within much of the constitutional jurisprudence related to the issue of religious freedom was the Jeffersonian theological notion that religion is an individualistic, private affair "between man and his God." If this idea were an accurate understanding of religion, one could readily assent to the validity and merit of much of that body of jurisprudence. However, the ongoing nature and extent of the litigation in this area amply attests to the fact that this not an understanding which is universally shared. As much as the Court tries, it cannot restrain religion to operate only in the sphere of the private.

In order to address the issue of religious freedom and the adequacy or inadequacy of jurisprudence on this subject, it is, therefore, necessary to explore what is encompassed within the phenomena of religion. This involves a number of related issues and questions.

First, what is religion and how is it different from other social values and institutions? Primarily due to the demand for equal treatment of all citizens, the Court has taken a very expansive view of religion (see, e.g. United States v. Seeger (1965)). Does this conform with the true nature of religion? If it does not, what problems does this raise?

Second, is religion a "private" concern or does it have a public dimension? Existing jurisprudence has primarily been predicated upon the former assumption, that it is a matter between a "man and his God." In order to explore this issue it is necessary to consider the value of religion both in terms of the individual and society in general. It is also necessary to consider whether the public/private distinction is itself tenable.

Third, it is necessary to consider the forces external to religion which have shaped Supreme Court jurisprudence in this area in relation to what religion may require in order to serve the needs of believers and any public values it may possess. Sources external to religion would include the demand for the equal treatment of all citizens, the needs of the common community, and the need for a common identity shared by all citizens. A need arising within religion is that of religious autonomy.

While no definitive answers can be offered to these questions, the effort to answer them in even a preliminary way must be made.

Defining Religion

The Supreme Court has never attempted to define exactly what it means when it uses the term religion. While one commonly finds references to belief in God or a Supreme Being associated with religion in the dicta of many decisions, the Court has allowed that "a given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" qualifies that person as having religious conviction for purposes of granting conscientious objector status (United States v. Seeger (1965)). In many ways, as in the comparison suggested

by Richard McBrien, the Court has looked at religion much as it looks at pornography: "It's very difficult to define, but you're supposed to know it when you see it" (McBrien 1987, 8.).

William James has argued that the attempt to define religion is futile. "[T]he word "religion" cannot stand for any single principle or essence, but is rather a collective name" (James 1958, 39). Indeed, the attempt to define religion has been criticized as a probable or potential infringement on religious freedom -- a limitation upon those "religions" which do not conform to that definition (Weiss 1964; Hall 1992). Moreover, when courts have alluded to the meaning of religion or, at least in one case at the appellate level, attempted to define religion (Africa v. Commonwealth of Pennsylvania (3d Cir. 1981)), one finds that the descriptions used largely conform to a description of Judeo-Christian traditions. Nonetheless, insofar as the Jeffersonian theological understanding of religion underlies the concept of religious freedom in the United States, a definition of religion must be sought so as to determine whether this understanding conforms to the reality of religion.

It would appear that fundamental to the definition of religions offered by most philosophers, theologians, and sociologists is an understanding that religion is (1) a social system (2) centered upon the relationship between the human and the "sacred" (Berger 1967; Eliade 1959; Otto 1923), the supernatural (Spiro 1966; Stark 1965), or Ultimate Reality (Tillich 1957). As suggested by David Tracy, religion is an orientation towards "the one Reality that, as Ultimate, must be radically other and different, however that Reality is named -- Emptiness, the One, God, Suchness" -- which grants us "hope"

(Tracy 1987, 85.)

Important features of this definition are, first that it is a "social system." "Religious experience is almost impossible without some form of group support" (Bellah 1970, 200). Second, it is within the construct of this social system that rituals, symbols and dogma are to be understand (Durkheim 1915). These rituals, symbols and dogma are formative, supportive and expressive functions within the community rather than being definitional of religion. That is not intended to diminish their significance. Indeed, one must emphasize their importance to that community, rather than simply considering them as merely the accoutrements surrounding some vague, central issue of religion.

A minority of sociologists and thinkers, such as Emile Durkheim and Clifford Geertz, adopt a much more expansive definition that would not make this orientation towards the sacred determinative. Instead, as defined by Clifford Geertz, religion is: "(1) a system of symbols which acts to (2) establish powerful, pervasive and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the motivations seem uniquely realistic." (Geertz 1973, 90). It should be noted that this definition is descriptive of the systematizing, motivational, normative-making and pervasive nature of religion which would be accepted by most thinkers in the supernaturalist position on defining religion. What distinguishes it is that it would also embrace any systematic belief such as Marxism and secular humanism as well as traditionally identified religions.

While this latter expansive definition has in some ways been accepted and operationalized by the Supreme Court in its decisions on conscientious objector status (Seeger (1965); Welsh v. United States (1970)) and in the dicta of a footnote by Justice Hugo Black (Torcaso v. Watkins, at 495 n. 11 (1961)), such a definition fails on an intellectual level because it leaves open the question of how one would distinguish between what we know as science and what is commonly known as religion (Berger 1967, 178). "[T]he differences between supernatural and nonsupernatural (or naturalistic) systems are so profound that it makes no more sense to equate them than to equate totem poles and telephone poles" (Stark and Bainbridge 1985, 3).

It might be suggested that despite these intellectual problems, this definition might be appropriate on a legal level in that terms such as supernatural, sacred, and Ultimate Reality are so loaded down with meanings that align themselves with traditional understandings of religion that freedom of religion requires a rejection of those terms so as to allow for the development or emergence of new religions not conforming to these prior forms. It may, for example, be argued that the Court's adoption of the term conscience, as used in Seeger, represents such an openness to new religions as demanded by the First Amendment (Hammond and Mazur 1995). However, this rationale fails on a practical level in that it masks the fundamental problem of religion in a secular world which the law is being called upon to address. Systems of thought such as Marxism and secular humanism operate under naturalistic, rationalistic epistemologies that are and have been accepted as appropriate to the public sphere throughout the Modern period. While one may find examples of ideological discrimination against particular thought systems

such as occurred against Marxism in the 1950s throughout much of America, they remain systems which can be explained and justified according to the normal standards of rational discourse. As such, they can participate in the Millsian "marketplace of ideas" so long as they receive appropriate protection under the right of free speech and assembly.

In contrast, religion which is oriented towards Ultimate Reality operates under a different epistemology. It accepts as "real" something which cannot be conclusively demonstrated by naturalistic, rationalistic and/or scientific means. It is because of this incommensurate epistemology that even erstwhile supporters of religious freedom have argued that religious reasons and reasoning should be excluded from debates in the public sphere (Greenawalt 1995). It can be said that the concept of religious freedom is intended to protect each epistemology from the other.

The potential for conflict between these differing epistemologies is not simply a theoretical possibility. For example, one can see it arising in the controversy over the teaching of "scientific creationism" (Edwards v. Aguillard (1987)). The conflict here is not over the validity of two theories which can in any way be evaluated against each other according to some common criteria. The problem is that the differing epistemologies upon which they each rest requires differing tests for validity. The theory of scientific creationism ultimately rests upon biblical authority while evolutionary theory rests upon empirical, scientific authority (Carter 1993, 167).

The Court's failure to develop an accurate definition of religion or, where it has attempted to do so, its over-expansive definition has precluded an adequate assessment of religious needs and values. Instead of making any effort to understand the true lived

reality of religion, it has sought refuge in its more common understanding of individual rights by treating religion as an individual, privatistic freedom.

Religion in America

The foregoing discussion has sketched out some general ideas about religion. However, it may be asked whether these general concepts accurately reflect the reality of religion in modern America. For example, might there be such a thing as an American form of religion which conforms more to the criteria implicit in the modern discourse on religious freedom expressed in Constitutional jurisprudence (i.e. that it is a private affair between "man and his God" and that it is primarily related to a concern for personal freedom or choice) than it does to traditional philosophic, theological and/or sociological understandings of religion?

The Habits of the Heart research of Robert Bellah and his associates (1985) suggests just such a possibility, particularly in their discussion of the "privatization" of religion (220-225) and "religious individualism' (232-237). Bellah et. al. cite with approval a 1978 Gallup poll that found that "80 percent of Americans agreed that 'an individual should arrive at his or her own religious beliefs independent of any churches or synagogues,'" and they detail a number of examples of how some Americans separate their individual religious faith from any form of organized religion. Even where attachment to religious communities can be shown, it is suggested that much of that attachment may be shown to exist independent of the individual's religious sentiment.

There are a number of problems with this study, however. First, it was not a

scientific study. It "was not psychological or even primarily sociological, but rather cultural" (Bellah x). Thus, one must question the weight one gives its findings. Moreover, while it is based upon interviews with a number of individuals, the critical apparatus applied to those interviews is unclear. For example, the work of Michael Foucault and many feminists alerts us to the difficulty that a "dominant discourse" may serve to mask or repress issues of real concern to individuals. The popular idea of religious freedom may be just such a dominant discourse. This can be seen in the articulated belief that religious faith can arise independent of any church or synagogue. Sociologists inform us that this is not in fact the nature of religious belief (Berger 1967; Durkheim 1915). This isolated conception of the individual self is an ideology that is out of touch with the reality of our true identities (Taylor 1989b).

History also bears witness that this private, individualist discourse on religion, while present as early as de Tocqueville's study, Democracy in America (1964), has never truly reflected the reality of American religious life and religious activism in the public domain. From the time of the colonial establishment up through the emergence of the "religious right," one finds ample evidence of strong involvement in religious communities and of religious involvement in the public sphere.

Finally, even if Bellah's study does reflect the reality of those religions practiced within the dominant middle class (the group studied by Bellah et. al.), this does not address the reality of the many minorities who were not formed by or do not accept the standards called for by this American discourse. The ideals of religious freedom call for the needs of this pluralistic group to be met as well.

The Value of Religion

By identifying religion as a private freedom and relegating its practice to the private domain, the Supreme Court has been able to avoid considering the nature of religion. Indeed, it has been suggested by the Court that it is incompetent to judge religious matters (Hernandez v. Commissioner (1989); United States v. Ballard (1944)). As such, it has not had to consider the special nature of religion and its differing epistemology as noted above. Yet it must be asked if this avoidance is justified by the nature of lived religion. Here two fundamental questions arise. First, can one exclude religion from the public sphere, as attempted by the Court? Second, should one exclude it? As a subsidiary point, the very concept of the public/private distinction must be considered. Both questions demand an assessment of what the value of religion may be for the individual believer and for society as a whole. Again, the Court's privatistic understanding has to date largely precluded such an assessment of value.

Religion in Relation to the Individual

The question as to whether or not one can delimit religion to the private sphere depends upon the role that it plays in human life. One must ask to what extent is it constitutive of being human as opposed to simply being an aspect of human life?

Peter Berger asserts that one of the basic tasks of humanity is "world-building" which he posits as a biologically constituted need to find or impose meaning on the world into which the human is born (Berger 1967). Historically, religion has played a vital role in this world-building and world-maintenance. Our very identities as human beings are

grounded in this world-making activity, an activity that is not limited to the "spiritual" or merely the objective of personal salvation but to our total relation to the world. Thus, one finds ninety percent of the members of Congress having said that they consult their religious beliefs in making important judgements (Carter 1993, 111). To attempt to deny this role of religion in our lives would be an attempt to deny a part of ourselves (Perry 1991).

One can, of course, find individuals who have rejected any reliance upon the "supernatural" religions as a source for their world-building, substituting for it a Geertzian type of systematic belief. One can also find systems of supernaturalist religious thought which, in their "world-building" have consciously separated themselves out from the secular domain. Within the Christian tradition, for example, St. Augustine's doctrine of the two cities (Augustine 1972), Luther's doctrine of the two Kingdoms (Luther) and Troeltsch's conception of "mystical" religion (Troeltsch 1960) all reflect world-making views which fit comfortably in the idea of religion being within the private domain. However, among Christian theologies, for example, these are minority views. Others see a much more complex, interactive relationship (Niebuhr 1951; Troeltsch 1960).

Moreover, even at this fundamental level of understanding of religion one cannot simply relegate religion to the private sphere as a kind of act of private conscience. That is to say, religion is not an irrational motivation for action such as empathy or intuition that one might argue should appropriately be controlled unless it is supported by rational reasons (a questionable idea as well.) To assert that one may "consult" religion but may only "act" upon publicly accessible grounds either masks the reality of the individual's

real basis for action or precludes action altogether.

It is also difficult to constrain religion to the private domain because it is not simply an individual phenomenon. World-making, according to Berger, is a collective activity. While it is true that Robert Bellah and his associates in Habits of the Heart found a woman, Sheila, who practice a religion of one called "Sheilaism," it is undoubtedly the case that she drew upon existing culture for her definitions and understanding of the concept of "God" and religion in the first place. What is more often the case is that religion is forged and sustained within a community of believers. While that community is made and constituted by its adherents (both past and present), the community itself takes on a life of its own in shaping the identities of and demanding the allegiance of its adherents (Durkheim 1915; Berger 1967). Insofar as it is communal and insofar as it may demand actions by its adherents in support of its existence, it cannot be simply relegated to the private sphere. For example, the wearing of a yarmulke in public is an expression of communal identity and of that community's relation to the world and to Ultimate Reality. To prohibit that act intrudes upon a fundamental aspect of that community's world-building activity. Here again, insofar as world-making is a global activity, restricting that activity to the private sphere represents a repression of religion.

The Public Role of Religion

In asking whether religion should be restricted to the private sphere, one is in fact asking two separate though related questions. First, what values does religion offer society? Second, on what grounds should those values be set aside to meet other social

needs or values? In identifying these values, we are again forced to draw conclusions about religions in general. How these values are manifest or even whether they are present may well vary from religion to religion or even within particular religions according to the specific, historical tradition under view. However, insofar as these values exist in any one identified religion, they must be attributed as possible to any religion.

The first value associated with religion one can identify is that of individual rights and liberty in a liberal democratic state. In the dominant form of liberal democratic theory practiced in the United States, it is generally agreed that it is inappropriate for the government to impose a particular, controversial understanding of the "good" life upon its citizens (Ackerman 1980; Larmore 1987). Instead, the general approach is to be one which maximizes the opportunities of each individual to determine and seek their own "goods" insofar as such activities do not prejudice the interests of others, an idea known as "procedural justice" (Taylor 1995, 186). Clearly, insofar as adherence to a religion is a voluntary act of the individual, it represents a particular view of the good, the impairment of which is not justified under liberal democratic theory unless it can be shown that its exercise is prejudicial to others.

In this latter regard, it should be noted that it is not enough to show that there is a conflict of interests between religious individuals and the non-religious or other religionists. Rather, it must be shown that some fundamental interest is at stake. Thus, in the enactment of legislation, it should not be enough under liberal democratic theory to show that the legislation was motivated by religious concerns but rather that the

activity against which the legislation is directed is either protected as a fundamental right of others or is one which the government is not competent to regulate.

Second, while the substantive content of morality is a hotly and endlessly debated topic, it cannot be denied that most people in America believe that a positive morality is an important social good (Clor 1996). It is equally well accepted that morality does not arise in isolation. It is created by communities for their communal life (Aristotle 1962; Frankena 1973), and we acquire our understanding of morality and the good from our education and training, our experiences of the good in community and those who exemplify it (Aristotle 1962; Kant 1964). It has long been recognized that religion is an important source of morality in American life. George Washington, in his Farewell Address of 1796 stated: "[L]et us with caution indulge the supposition that morality can be maintained without religion. What ever [sic] may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." (cited by McBrien 1987, 235).

Third, not only is positive morality a social good, the type of morality offered by religion may be specifically an important counterbalance to the values (and weaknesses) inherent in a modern democratic state. George Will, echoing many of the ideas of Aristotle on this point, has argued that the purpose of religion and politics is "the steady emancipation of the individual through the education of his [sic] passions" (Will 1983, 27). While equality, a central value of the liberal democratic state, brings with it the temptation to pursue one's own interests at the expense of others', religion directs its

followers away from materialistic and selfish desires and imposes upon them obligations towards the rest of humanity. "Thus, religious peoples are naturally strong just at the point where democratic peoples are weak." (Will 1983, 444-445).

Moreover, in this regard religion is not merely serving as a moral supplement to society and culture, but as a source of moral resistance to culture. It serves as a moral base from which to challenge or counterbalance society (de Tocqueville 1964). "[R]eligions, at their best, always bear extraordinary powers of resistance....Whether seen as Utopian visions or believed in as revelations of Ultimate Reality, the religions reveal various possibilities for human freedom...[and] can help us all discover new modes of action that are ethically, politically, and religiously, acts of resistance to the status quo" (Tracy 1987, 83-85). Resistance is important, because the ideals of equality and rights discourses are not passive nor are they limited to the realms of politics and law to which they were initially addressed. They are pervasive and intrusive (Glendon 1991; Hutchinson 1995). It was, for example, in religious circles that the ideas of the abolitionist movement were nourished in the face of a society which considered Blacks as inferior and less than human and discussions of rights were directed towards white slave owners.

Fourth, religion creates communities of resistance. Individuals operating in isolation are disempowered in modern America (Adams 1971). One of the key efforts of the modern women's movement has been to try to bring women together in order to find their common voice and to bring about change. They have sought to create community so as to overcome their weakness in isolation (Greer 1971; Flexner 1973;

Rowbotham 1972).

Religions and the communities created by them provide a similar source of empowerment. While the recent political activism of the "religious right" in America has become the source of heated debate and much criticism (Carter 1993), it must be remembered that it was the activism of the Christian realist movement at the turn of the century that supported many economic reforms of that period that are now valued, and the support of the Black churches and Black religious leaders that advanced the cause of civil rights in the 1950's, 60's and 70's.

Finally, pluralism is often presented as a recent phenomenon in America, as a contemporary rejection of the "melting pot" which is thought to have defined the historical American experience. In point of fact, pluralism has been the norm in America from the time of its colonial founding (Mueller 1963) up through the present (Glazer and Moynihan 1963, 1970). Indeed, such pluralism was seen as a value.

James Madison expressed the concern that democracy faced the risk that a simple electoral majority linked by a particular world-view or special interest could have the power to oppress unallied individuals or minority groups, a problem he identified as "factionalism." (Federalist Papers, No. 10). Religious pluralism was therefore desirable as a method of assuring diversity among the electorate and those charged with representing them. The more groups that existed which could claim the loyalties of members of the populous, the less likely it was that any single group with a single view point would be able to arise and assert dominance. This value could, of course, be lost if religion or a particular expression of it became a faction. Hence, religious freedom

was thought of as a way of both accommodating the existing religious diversity and encouraging its continuance.

The Public Sphere versus the Private Sphere

In the foregoing discussion, the terms "the public sphere" and "the private sphere" have been used in conformity with the commonly accepted understanding that the private sphere embraces the realms of personal relationships, marriage, family and the home, while the public sphere encompasses the realm of politics and larger social relations. Under this schema, religion in a secular society is deemed appropriate only to the former sphere and not the latter (Wilson 1966). However, as many have argued, this distinction is false.

The slogan, "the personal is political," widely attributed to Robin Morgan, has been adopted by the feminist movement to express its rejection of this dichotimization. It is a dichotimization which has been adopted, feminists argue, as an element in the oppression of women (Elshtain 1981). On even the most pragmatic level, it is a distinction which is hard to discern in the activities of the modern welfare state.

For example, while marriage and choices regarding marriage are commonly identified as falling within the private domain, those choices are subject to extensive governmental (i.e. public) regulation. Not only are the economics of marriage regulated in terms of issues of property and contract, but also many of the personal choices are regulated as well. One is precluded from marrying individuals under a certain age, individuals possessing certain familial relationships to oneself, members of the same sex,

and from entering into group marriages (either polygamous, polyandrous, or other forms). Moreover, where governmental assistance programs are involved, it has been argued that such programs can operate and have operated in a way which discourages marriage among those subject to those programs (Moynihan 1986). Thus it would appear untenable to argue that religion can be concerned with marriage but is precluded from involvement in the public regulation of marriage that impacts that institution in such profound ways.

While the use of the schema of the public sphere versus the private sphere as outlined above is of questionable utility or validity, there is a second sense which must be considered in which the distinction between the "public" and the "private" may be applied to religion. Here, two approaches can be taken.

First, one can limit the domain of religion to the Jeffersonian relationship between "man and his God." Underlying this approach is a form of salvation theology that can be identified as derived from Luther (though this in fact represents a shallow and distorted reading of his work). It views religion as humanity's effort to be in a right relationship with God as central. While acting in accordance with one's faith may be encouraged, such actions are peripheral to the central concern of faith and relationship. Here, it is thought, governmental intrusions upon actions in no way impinges upon this central feature of religion, which is faith or salvation.

While one can in fact find examples of religious faith that would adhere to this model, it is not the exclusive model of religion. To impose this mode upon all types of religion must be acknowledged as the imposition of a particular theological belief upon

those religions. All that would be left of religious diversity under this approach would be the vestiges of differing language and ritual. Clearly, this would be a violation of religious freedom.

Second, it might be suggested that while religion may provide individuals with sources of inspiration or guidance in their private lives and their reflections upon public issues, religion should not be used in public debate nor should religious organizations become active participants in public debates or political actions. There are a number of problems with this approach as well. First, it equates religion with ethics as a moral code as opposed to a way of life, which is the way many people view their religions. Second, it serves to delegitimate religion by asserting that religion is not a valid method of discerning truth (Carter 1993). Third, it marginalizes religion by seeking to silence its "voice." As suggested by the arguments of the feminist movement, such marginalization is a form of oppression (Young 1990) which could disempower religion and vitiate many of the values of religion identified above. Finally, this ignores the historic understanding of religion held by the framers of the Constitution who not only understood religion to be an important influence upon public debate and behavior but also, it would appear from the analysis in chapter Two, drafted the Religion Clauses of the Constitution as a way of protecting that influence by shielding State established religions from interference by the Federal government.

For all of the foregoing reasons, the distinction between the public and private must be rejected as applied to religion. While religion and religious activities may require some circumscription in a pluralistic society, such limitations cannot be made to

rest upon such an inadequate base.

Tensions in Religious Freedom

In considering the nature of religion and the values associated with it, as outlined above, and the general terms and parameters of religious freedom present in First Amendment jurisprudence outlined in the previous chapter, one can identify four areas in which conflicts or tensions commonly arise. These are: (1) the concept of strict equality; (2) the problem of autonomy; (3) issues relating to community membership; and (4) the need for a common national identity. In identifying these issues, it must be noted that they are not always explicitly addressed within the decisions, but instead must be abstracted from those decisions as forces which implicitly shape their result.

Equality

The issue of equality is pervasive throughout the Court's jurisprudence on religious freedom, arising under both the Establishment Clause (see, e.g. Mueller v. Allen (1983)) and the Free Exercise Clause (see, e.g. United States v. Seeger (1965)). As noted before, the concept of treating all citizens as absolute equals, what I would refer to as 'strict equality,' is a fundamental principle of American jurisprudence and, indeed, of the whole American political ideology. "Equality is a pervasive theme of American history" (Cox 1987, 305.) Any characteristics or criteria which are raised as a justification for treating one individual differently than another (with the possible exception of sex and sexual orientation) are viewed with extreme suspicion and

antagonism. Where discriminatory criteria have been recognized, such as in the case of affirmative action, such recognition has required strong justification and has provoked heated and on-going debate (Cahn 1995; Mills 1994; Nordquist 1995).

Religious freedom, insofar as it would allow one person to act in ways that are prohibited to all others (for example, to use controlled substances such as peyote as a part of religious activities) is commonly seen as discriminatory. While it can be argued that religious freedom treats all citizens equally in that all have the freedom to practice whatever religion they choose, including those that follow proscribed activities, religious faith is not universal. Hence, application of particular laws will ultimately vary according to this non-universal variable.

Because of this enormous pressure towards strict equality, it becomes readily understandable why the Supreme Court would seek out justifications for the support of religious freedom that do not rest upon religious criteria (e.g. requiring that the free exercise clause must be combined with other rights such as free speech or assembly, Wooley v. Maynard (1977)), by seeking a broader, more inclusive definition of religion (e.g. equating it with conscience, Seeger (1965)), or by the adoption of a simple test of "facial neutrality" with respect to religion (Employment Division v. Smith (1990)). Each of these efforts is ultimately directed towards delimiting religion as a discriminatory criterion.

The difficulty is, of course, that this effort ignores the reality of lived religion. It seeks to treat everyone as isolated individuals whereas individuals are in fact partly constituted by the communities of which they are a part (Taylor 1989b; Young 1990).

Those communities, particularly religious communities, place differing requirements on their members. To prohibit an orthodox Jewish man from wearing a yarmulke as the Court did in Goldstein v. Weinberger (1986) is not simply to treat that person as equal to all others but is rather to discriminate against a part of that person's identity. Such a view of equality can most charitably be said to be simply procedural, seeking to impose a strict form of equal actions undertaken by the government. At the same time, it must be noted that such a procedural emphasis has been attacked in relation to claims of racial or other prohibited forms of discrimination on the grounds that such procedural justice is inadequate where discriminatory effect can be shown (Rosenfeld 1991). More ominously, these approaches can be seen as an effort to create a false universal citizen that ignores the reality of individual diversity. Added to this is the problem that this false universal citizen will not be a truly neutral standard but will in fact generally reflect and embody the values and standards of the majority (Goldman at 521, Brennan, J. dissent)).

This individualistic focus on equality has also impacted the Court's understanding of religion as a collective, social enterprise. In terms of the issue of equality, decisions involving religious group rights largely focus upon treating religious groups in the same manner as similarly situated secular groups in relation to such issues as access to public property (Widmer v. Vincent (1981)), taxation (Walz v. Tax Commissioner (1970)), and access to public funds to be used for public, secular benefits (Roemer v. Board of Public Works (1976); Hunt v. McNair (1973)). The rights of the collective here are, it should be noted, significantly more limited than are the rights of individuals. For example, while "churches as much as secular bodies and individuals have [the] right [to engage in]

vigorous advocacy of legal or constitutional positions" (Walz (1970) at 670) a religious organization can lose its tax exempt status if it becomes too involved in political advocacy. Moreover, the courts have resisted acknowledging free exercise rights being held by a religious organization (see, e.g. Bob Jones University v. United States (1983); Harden v. State of Tennessee (TN 1949)).

Thus, the application of the concept of strict equality in terms of how it has been applied to individuals and to religious groups fails to address the reality of religion as a social phenomenon. It is not truly equal treatment in that it fails to respect the unique nature of the religious believer and the religious community. Instead of honoring the values put forth by religion, it often imposes a standard of values drawn from the perspective of the majority. This standard, in turn, may not allow the believer and/or the religious community to practice and adhere to their religious values.

Autonomy

For religion to provide the values that have been identified with religion, including such things as its providing a base of "resistance," requires that a religious organization be granted those tools necessary to form and maintain its sense of community as well as its ability to hold and put forth its own views. In other words, it requires that the community have a certain autonomy in how it manages its affairs and the controls it exercises over the affairs of its adherents (Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos (1987) at 342, Brennan, J. concur). Dress codes and rituals, while in some ways public events and expressions of religious

faith, are also sources of community identity and adhesion. Restricting such acts, simply because they are public, must be understood as a threat to the autonomy and very existence of religion as an independent reality.

A significant portion of a religious organization's exercise of autonomy will escape judicial review on the basis that it involves private actions via a private association. Conflicts arise, however, where the interests of the religious group conflict with duties imposed by society based upon the needs of life in a common community. Four areas of common community concern can be identified here. First, and most basic, are issues of public health and safety. Laws regulating vaccination requirements (Jacobson v. Massachusetts (1905)), water treatment (Baer v. City Bend (OR 1956)), animal slaughter and food preparation (Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993)), and public safety law relating to public assemblies (Cox v. State of New Hampshire (1941)) are, from a U.S. perspective, relatively non-controversial. While these laws may impact certain religious beliefs or tenants, there is a strong and obvious public interest in their enforcement and they are generally not considered major threats to religious autonomy, though some improvement in this area may nonetheless be possible.

A second area of concern relates to socio-economic regulations. Here there are at least two categories of concerns. First, there are simple administrative regulations which govern economic relations among people, such as those concerning contracts, mail fraud (United States v. Ballard (1944)), regulating zones for commercial activities (Heffron v. International Society for Krishna Consciousness (1981)), and marriage,

insofar as it is considered an economic partnership. Second are those laws relating to public fiscal responsibilities, most notably the payment of taxes, participation in the social security system (United States v. Lee (1982), and the obligations of religious organizations as charities (Bob Jones University (1983)). Again, these concerns are relatively non-controversial though they too may be subject to some improvements.

The third area of concern relates to the concept of the public welfare and the principles of the modern welfare state. To the extent that the state is expected to insure the economic survival of individual members, religion is expected to give way to support that effort. Some of the education cases are illustrative of the difficulty and ambiguity in this area.

The courts have long recognized that parents have a significant interest in raising and educating their children according to their own values and, as such, have a right to seek out and provide their children with a private education in lieu of a public education (Pierce v. Society of Sisters (1923)). Nonetheless, in large part, the state retains "the power to demand minimum standards in such schools, such as curriculum approval and teacher accreditation, if the private schools are to be allowed as alternatives to the public schools" (Abernathy 1989, 326). Hence, religious education can be and is restricted.

Finally, the fourth area of concern involves issues of public morals. It is here that the greatest potential for controversy lies, in that many of these values reflect basic understandings of what it means to be a citizen and of the proper relationship between the state and its citizens on the one hand and the duties and responsibilities of the individual to her religion on the other. Under this heading one would class the

prohibition of polygamy (Reynolds v. United States (1879)), child labor laws (Prince v. Massachusetts (1944)), laws governing the medical treatment of minors (State of Washington v. King County Hospital (1968)), and Sunday closing laws (McGowan v. Maryland (1961)). It is also where one would expect to see issues of female genital mutilation addressed in the event that it is ever argued as a religious issue. Moreover, it is here that religion might be classified not only as subject to public morals regulation, as in the cases identified above, but also as a proponent for public morals legislation in such areas as abortion, public sex education, and contraception.

In attempting to resolve these conflicts, there are two problems in existing jurisprudence. First, in evaluating conflicts between individual rights and community interests, the Court normally applies a certain standard of review which assigns the relative weight to be given to each side of the conflict. That is to say, it will identify the relative strength of the state interest required to overcome the assertion of a particular right. In the area of religious freedom, the Court has been inconsistent in identifying the appropriate standard of review, varying from requiring a "compelling state interest" test (see, e.g. Sherbert v. Verner (1963); Thomas v. Review Board (1981)) which offers significant protection for the right of religious freedom, to a "facially neutral" test (Employment Div. v. Smith (1990)) which offers practically no protection. Moreover, in applying those standards the Court has been frequently criticized for failing to adhere to its own asserted standard (Braunfeld v. Brown (1961) Brennan, J. concur and dissent; McGowan v. Maryland (1961) Douglas, J. dissent).

Second, because it has refused to define and assess the value of religion, the Court

has been unable to weigh the positive values of religion in balance with the values represented by the asserted community interest in these conflicts. In this sense, religion is disadvantaged because any comparison pits religion, an unknown and unvalued interest, against a well articulated, well understood public interest. Religious freedom is considered as only an arbitrary (fixed only by the terms of the Constitution), "negative" right against intrusions by the state. While the Court may be called upon and may in fact enforce this "negative" right, structuring the conflict this way must be acknowledged as favoring the public interest as against a relatively unknown interest or value.

Community Membership

One of the most difficult and problematic issues for the United States to deal with in terms of religious freedom can be said to reside in the question of community membership - who properly belongs to that community? There are two levels of concern here. First, where community membership is thought to confer some special benefit, there is concern about the legitimacy of an individual's claim to that benefit. For example, in cases regarding the religious use of controlled substances, a subtext of many decisions is concern that a claim of "religion" may be set forth merely as a pretext for the use of such a drug. Because religion is viewed as a social good, expressed commitment to it must be legitimate. Otherwise, one risks trivializing it as merely a license for otherwise proscribed activities.

Second, there are questions about the competency of membership choice. Where the individuals involved are adults, as seen in connection with the

conscientious objector cases, the question is relatively straight forward and an individual rights approach has little difficulty in supporting the choice of the individual. The problem arises in connection with those whom the state has traditionally labeled as incompetent to make individual choices, most notably children. For example, while it is now relatively settled law that an adult has the right to refuse life saving treatment, such as a blood transfusion, based upon religious convictions (Paris), the right of a parent to refuse treatment for his or her child is questionable (see, e.g., State of Washington v. King County Hospital (1968)). Significant here is the fact that neither the child nor the child's parents can assert her right to religious freedom.

Here again, the Court's adherence to standards of strict equality and its failure to develop adequate standards of judicial review can and frequently does result in the impairment of the rights of religious freedom. By adhering to its individualistic, privatistic understanding of religion, it denies religion its communal dimension and it is incapable of assessing the role of community in the state's relationship with the religious individual.

Common Identity

Patriotism has, in recent years, acquired a rather negative reputation. Nonetheless, patriotism in its more generic sense is necessary for the existence of the state (Taylor 1995.) Citizens may be, and often are, called upon to make many sacrifices for the common good, not only in times of war but also in times of peace because the state acts as a form of community. The very existence of welfare programs reflects the

reality of this community, and support for those programs represents the recognition of common membership among its citizens. Patriotism requires not just a commonality of interest, but an identification with some type of unifying ideal specific to that state/community (Taylor 1995, 196).

In the United States, the concepts of equality and of civil rights have served as ideals around which many have made allegiance. Similarly, the ideal of the melting pot, now largely rejected (Glazer and Moynihan 1963/1970), reflects this drive towards seeking to create and sustain the common identity around which the community can be formed.

In terms of religious freedom, two approaches have arisen based upon this perceived need for a common national identity. First, in furtherance of the identity forming function of equality and civil rights, religion has been relegated to being simply one among many individual rights, identified as simply an issue of freedom of choice (Nolan 1996). Moreover, because religion is sometimes perceived as divisive in public affairs, it has been repeatedly identified as a private interest and relegated to the private sphere with virtually no standing within the public sphere (see, e.g. Employment Div. v. Smith (1990)).

Alternatively, it has been argued that the state must either be made to support a particular religion or a single, inclusive "civil religion" should be created around which all citizens could be drawn (Davis 1994). While the former approach is obviously precluded by the Establishment Clause, the Court has, in some instances, adopted some aspects of the latter approach by co-opting certain religious symbols as secular (Lynch

v. Donnelly (1984)) and by affirming the constitutionality of legislative chaplaincies (Marsh v. Chambers (1983)).

It should be noted that this issue of a common national identity is not a topic which has been specifically addressed in jurisprudence on this issue. It is, however, a concern which arguably undergirds it and to which it has not given an answer.

Summary

According to the foregoing analysis, existing freedom of religion jurisprudence fails to meet the realities of religion and religious diversity. The Court has failed here in a number of important ways:

First, it has not developed an adequate definition of religious which could serve to identify the special characteristics of religion (such as are presented by its differing epistemological basis) or identifying the nature of its community. Moreover, its current understanding of religion as individualistic and privatistic has been demonstrated to be inaccurate. Hence, decisions based upon that understanding are necessarily incongruent with the reality of religion as a social phenomenon.

Second, by relegating religion to the so-called private sphere and categorizing it as an individual right, the Court has failed to develop a positive understanding of the individual and public values of religion. As a result of this, when conflicts arise, it has left religious freedom in a relatively weak position in those conflicts.

Third, again based upon its understanding of religion as an individualistic and privatistic affair as well as the overall liberal focus upon the individual and individual

rights which is pervasive throughout American law and polity, the Court has been unable to address properly the public, social dimension of religion in the form of religious communities. It has left itself with no grounding upon which to recognize or support those values. At best, this jurisprudence can be described as an impediment around which religion must work or which religion must be adapted to overcome. At worst, it represents an insidious, long term threat to the viability of religion in a secular society.

The question becomes whether a viable jurisprudential alternative can be proposed. The answer to be proposed here lies in the theory of deep diversity first suggested by Charles Taylor and developed as a theory below. Important features of this theory are that it recognizes the value of community and that it provides a coherent and comprehensive framework within which the lived reality of religion can be accomodated within a liberal society such as the United States.

CHAPTER FOUR

DEEP DIVERSITY: RECOGNITION, UNIVERSALISM, DIVERSITY AND MODERN CONCEPTS OF THE SELF

At the end of the last chapter, I suggested that the theory of deep diversity could be used to address the many problems I have identified in current Supreme Court jurisprudence in the area of religious freedom. In this and the following chapter I will develop and outline the general parameters of the theory of deep diversity and then in Chapters Six, Seven, and Eight I will attempt to illustrate how the theory can be applied to Supreme Court jurisprudence in relation to the issue of religious freedom.

As I have previously noted, the concept of deep diversity was suggested by Charles Taylor (1993). However, Taylor's use and development of this concept is extremely limited. It is set out in a relatively short essay upon a specific topic, Canadian-Quebec relations, and his articulation of the concept is limited by many of the contexts of the topic he was intending to address. It is my intent to develop this concept into a more comprehensive political theory which can then be used to reconceive religious freedom jurisprudence. To do this I will be drawing upon the works of a number of thinkers, with particular attention given to Taylor and Iris Marion Young, as a way of fleshing out this theory.

In this chapter, I will begin by laying out the groundwork for the theory. Primarily, I will be focusing upon the anthropological and social-political ideas that

undergird both the dominant liberal discourse, which underlies current Supreme Court jurisprudence, as well as the critique of those ideas and the alternate understandings that are embraced within the theory of deep diversity.

In the following chapter I will outline and develop the operative concepts and principles of deep diversity and how the theory can be applied within a modern, liberal democratic context.

Concepts of the Self

Social and political systems organize themselves around certain anthropological assumptions (Jaggar 1983). These assumptions include ideas about the nature or qualities of its human members and the social and psychological needs of those members. As these understandings evolve, so too do the social and political systems which are based upon those understandings. Individuals are both influenced by these understandings (Foucault 1980; Berger 1963, 121) and have the power to change them insofar as their needs come into conflict with the needs assumed to be present by the existing social system (Berger 1963, 128-129).

Prior to the Enlightenment, Western society was organized according to a system of social hierarchies, in which individuals were grouped according to certain characteristics such as sex, race, religion, class, or occupation, with the assumption that each group represented a different quality of humanity. As argued by Plato in The Republic, some were born to rule and others to serve. "Social inequality was justified by church and state on the grounds that people have different natures, and some natures

are better than others" (Young 1990, 156).

Within this system "what we would now call identity was largely fixed by one's social position. The background that explained what people recognized as important to themselves was to a great extent determined by their place in society" (Taylor 1992, 229). The concept of honor, underlying these social hierarchies "is intrinsically a system of preferences" (Taylor 1992, 226). Under such a system of preferences, individuals were not free and independent beings, they were other-dependent and hierarchically related. This other-dependent person, Taylor argues citing Rousseau, "is a slave to 'opinion'" (1992, 237). Moreover, the "esteem" sought in such a system "is intrinsically differential. It is a positional good" (p. 238; Walzer 1983, 249-251).

The Enlightenment marks a revolutionary break with this historic approach. At that time a new understanding of humanity emerged in which all people are deemed equal "inasmuch as all have a capacity for reason and moral sense" (Young 1990, 156). The "dignity" of each person is to be respected not by virtue of their social position (Taylor 1992, 227) or membership in a particular group (Young 1990, 156) but rather because all individuals are posited as being free moral beings (Kant 1964) and hierarchies are denied.

Understandings of the self also necessarily shifted to conform to this understanding. The idea of a free and independent or "autonomous" self emerged (Meyers 1989, 19). However, despite its ideological conception as such, the self cannot be understood as a free-standing reality. It requires social support (Berger 1963, 66-67). What this newly identified self required was "recognition" of the human dignity of the

individual as a way of replacing the social supports inherent in the prior regime. For example, it is on the basis of this need for recognition that the use of common honorifics such as Mr., Miss, Mrs. or Ms. in place of hierarchical titles has been thought essential in some democratic societies, such as the United States (Taylor 1992, 227; Walzer 1983, 252).

Related to this social shift, there has been a "massive subjective turn of modern culture, a new form of inwardness, in which we come to think of ourselves as beings with inner depths" (Taylor 1992, 228). This subjective turn can be identified as arising out of the eighteenth century notion that human beings are endowed with an "intuitive" moral sense. The modern concept of individualized identity, what Taylor refers to as the "ideal of 'authenticity'", a term he adopts from Lionel Trilling, emerges "out of a displacement of the moral accent in this idea" (1992, 227). This displacement occurred when "being in touch with our feelings t[ook] on independent and crucial moral significance" in terms of our attaining the status of "true and full human beings" (227), a displacement he identifies as occurring within the work of Rousseau and Herder.

The problem with this "subjective turn inward" is not in terms of its validity as a standard of reference but rather in the nature of the self that underlies modern social practice and the social, ethical, and political discourses that support that practice. Specifically, in the dominant forms of modern discourse the self is posited as a "monological" development. That is to say, individuals are thought to define themselves independently of the social forces around them by picking and choosing which influences they will accept or reject according to the nature of their true selves (Meyers 1989, 19-

20; Taylor 1992, 230). They are viewed as more or less integrated wholes "set contrastively both against other such wholes and against [their] social and natural background[s]" (Geertz 1984, 126).

Taylor, in company with many other theorists and social scientists, argues that the self is a dialogical creation. While he allows that an individual possesses some autonomy, based upon some type of idiosyncratic nature of the individual, that autonomy necessarily operates in dialogue with social forces that surround the individual in establishing the character of the self (Taylor 1992, 231). Inherent in the idea of dialogue is that there is an "I" and an "other." The key point is that the self is a result of the interactions between the two and not the product of the I alone.

Modern philosophers such as Derrida (1976), Foucault (1972), and Rorty (1979) argue that language is an essential component of being human. Language and discourse not only shape how we express ourselves, they are the fundamental source of our very knowledge of the world. Taylor emphasizes that we learn language, used in the broadest sense to include not only verbal languages, but the languages of love, gesture, art, and the like, through exchanges with others. In attempting to understand and define ourselves, we do so in dialogue with "significant others" in our environment (Taylor 1992, 230).

One can discern this dialogical reality very clearly in our socialization as children. While we may start with certain innate characteristics, drives, and desires, we lean how to express those drives in dialogue with our parents. Moreover, "[w]e don't just learn the languages in dialogue and then go on to use them for our own purposes" (Taylor

1992, 230). We remain always in dialogue with, sometimes in struggle against, our significant others whether those significant others are in our present or remain only in our past. For example, Habermas argues that our linguistic and practical interactions with our parents are "internalized" as a part of our wills and are subject to challenge only when our social context allows such a challenge (Habermas 1987, 36-40).

Even such an essential feature of the self as our gender does not reside in us but instead simply exists in our social interactions and how they are socially defined (Bohan 1993). Moreover, the social construction of identity is not limited to interactions with loved ones. It may be imposed on us through the dynamics of power and violence (Kaufman 1987; Larkin and Popaleni 1994) or it may be facilitated or hindered by our socio-political context (D'Emilio 1992).

This dialogical character of the self clearly underlies our need for recognition on both the personal and public levels. Recognition of our worth, value, and identity have come to replace the supports to the self which had previously been given by the system of social hierarchies that had served to establish an individual's identity in the past. This is not to say that personal relationships were not important in the past, but rather that issues of identity "were then too unproblematic to be thematized as such" (Taylor 1992, 231).

Problems arise, however, in our modern context, in the effort made to separate the personal and the public and in the nature of recognition operationalized in the public sphere.

The Politics of Universalism

In the shift from a social system based upon social hierarchies and preferences to one of individual dignity, the concept of recognition has been operationalized through a "politics of universalism" the focus of which "has been the equalization of rights and entitlements. What is to be avoided at all costs is the existence of first-class and second-class citizens." (Taylor 1992, 233). As a means of over coming the group-based oppression of the ancient regime and its vestiges in the current, the politics of universalism argues for the elimination of any recognition of group based difference itself (Wasserstrom 1980). The anthropological understanding underlying the politics of universalism is that all humans are essentially the same and social justice requires that they be treated that way (Bellah et. al 1985).

The politics of universalism receives its primary expression within the dominant liberal democratic theory known as "procedural" (Larmore 1987, 44; Rawls 1980, 83-86) or "deontological" (Sandel 1982, 1) justice (sometimes referred to as procedural liberalism). Ronald Dworkin (1978) in articulating this theory, begins by distinguishing between two moral commitments. One is that we all hold particular, "substantive" views of the nature of human life, what constitutes the 'good' and the goals for which we should all strive. The second commitment is that we have a duty to deal fairly and equally with everyone irrespective of their view of the good and the values that view entails. Dworkin argues that a liberal society is one that is strongly united around this latter, "procedural" commitment. Such a society is precluded from adopting any substantive views of the good on the grounds that in any pluralistic society such a

substantive view would not be accepted by all of the citizens of that society and its adoption would be denying equal recognition to those who deny the validity of that substantive view. It would be an assertion by that society that their views were not as valuable as the views of those whose views were in accord with the favored substantive view.

Underlying this theory are certain philosophical assumptions, which Taylor identifies as being rooted in the thought of Kant (though since these ideas reflect an inaccurate interpretation of Kant's work as a whole, it might be better to state that they are derived from Kant). These assumptions include, among other things the notion that human dignity resides in the autonomy of the individual -- in the individual's ability to determine and adhere to their own particular view of the good (Taylor 1992, 245). Dignity, in this sense, is associated less with the substantive view taken than with the individual's ability to adopt that view.

There are two important points to note here. First, this form of liberal theory and the assumptions that underlie it clearly conform to the understanding of an atomistic self within the subjective inward turn that is dominant within contemporary society as described by Taylor (1989b) and Diana Meyers (1989). The focus of attention is upon the individual and the autonomy of each individual. Second, within it, the relationship between the individual and the state is direct. Each individual is entitled to the benefits of procedural justice; each, by virtue of citizenship, possesses certain rights and privileges which the state is obligated to protect and against which the state is precluded from intruding on without strong justification (Dworkin 1977).

The Politics of Difference

Since the 1960's, a number of oppressed groups have begun to challenge the goals and methods of the politics of universalism. It is argued that giving everyone the same rights and privileges not only fails to recognize their unique identity as an individual or group, it actually oppresses them by demanding their assimilation into the dominant identity implicit in the nature of the rights and privileges being granted them (Taylor 1992, 237; Young 1990, 164-165). In place of a politics of universalism, these groups adopted what may be referred to as a "politics of difference" (Young 1990). While this politics of difference may be said to rest in part upon practical political considerations about how best to achieve their political goals, it also reflects a differing understanding of the self, its dialogical nature, and its relationship to society (Taylor 1992; Young 1990).

This politics of difference grew out of a shift in social understanding about the human social condition which focuses upon those relationships to communities which are essential to each individual's unique development and identity, what may be referred to as their "cultures." It may be said to have its basis in the same concept of "dignity" which gave rise to the politics of universalism in that it reflects an effort to reject oppression and second-class citizenship (Taylor 1992, 234). The problem, from the perspective of the politics of universalism, is that it is asking "that we give acknowledgement and status [i.e. recognition] to something that is not universally shared" (p. 234).

Proponents of the politics of universalism have attempted to address some of the

arguments of this politics of difference. For example, where difference can be shown to have been socially discriminatory towards individuals resulting in an impairment of their ability to function successfully within society, affirmative action or reverse discrimination policies can be and are adopted under the politics of universalism. These policies are, however, intended as remedial and time limited, with the ideal being that once the disadvantages have been overcome, society will return to a "difference-blind" politics of universalism (Dworkin 1977; Wasserstrom 1980). This approach cannot, however, answer claims made on the basis that difference or distinctness, such as the preservation of one's culture or religion, is a value to be preserved and supported (Taylor 1992; Young 1990), nor does it answer the challenge that the politics of universalism itself embodies a cultural norm deserving of critique and challenge (Young 1990, 165).

Taylor argues that this conflict comes down to one of value. The politics of universalism "is based on the idea that all humans are equally worthy of respect....What is picked out as of worth here is a universal human potential, a capacity that all humans share...rather than anything a person may have made of it" (Taylor 1992, 235). While it may be argued that the politics of difference is also based upon a universal idea, that of "the potential for forming and defining one's own identity, as an individual and also as a culture," this politics has also advocated "that we accord equal respect to actually evolved cultures" (p. 236). Though not stated by Taylor, it seems fair to add that culture as it is used in this context should be read in its broadest sense to include other significant social communities such as religion and the "oppressed" or "social groups" identified by Iris Marion Young (1990) as the subject of the politics of difference. (The term "culture"

as it is used and applied within the theory of deep diversity will be described in more detail below.) It is clearly this latter demand for equal respect for existing culture that is in direct conflict with the politics of universalism. Instead of grounding recognition upon a universal characteristic held by all human agents, it calls for recognition to be accorded to something that is not shared, that is definitionally distinct and different.

Finally, the politics of universalism may be criticized because of its oppressive tendencies. This occurs in two ways. First, on an individual level, acceptance of the politics of universalism's ideal of assimilation also entails acceptance of the understanding that the oppressed culture is somehow inferior to that of the dominant culture (or else one would not have to 'give it up' in favor of the dominant culture.) In that culture is constitutive of the self, this leads the individual to a devalued sense of self worth and disempowerment (Young 1990, 165-166). Second, the politics of universalism weakens the collective power of particular groups both by its disempowerment of individual members and by weakening the cohesion of the group itself. To the extent that individuals succeed in achieving assimilation into the dominant society (a task with obvious benefits), their allegiance to and identification with members of their cultural groups have been shown to be substantially weakened (Young 1990, 159). In essence, those members of the culture that are the most adept and skilled in confronting the challenges imposed by the dominant culture, and thus could be expected to serve as leaders of the culture in its struggle against oppression, are in effect siphoned off and co-opted into the dominant culture.

The reality of multicultural life is not going to go away. Indeed, in response to

increasing urbanization and group interactions, cultural solidarity and differentiation appears to be increasing (Young 1990, 163). Thus, cultural difference cannot be simply ignored in the fashion attempted by the politics of universalism. It must be incorporated into the social and political matrix of society through some form of the politics of difference. The theory of deep diversity is one such form.

Culture

In identifying the groups whose interests are being asserted under the politics of difference, Young (1990) uses the terms "oppressed groups" or "social groups" while Taylor (1992) uses the term "culture," the term to be preferred herein, though he does not attempt to define the term culture in any comprehensive way. (While the term culture does create some definitional problems, as will be seen, based upon varying existing understandings of this term, I prefer to use it here not only because of its long standing and positive association with such concepts as multiculturalism, but also because social groups tend to self identify the social norms and values of their groups as being their "culture" (Young 1993, 159-162).) Given the importance of culture for the theory of deep diversity, it is necessary to define this term with some precision.

First, in accord with the understanding of the self as being a dialogical -- as opposed to a monological creation, culture must be understood as being constitutive of the self. Culture provides a "frame within which [individuals] can determine where they stand on questions of what is good or worthwhile or admirable or of value" and in the absence of which "they would be at sea, as it were; they wouldn't know anymore, for

an important range of questions, what the significance of things was for them" (Taylor 1989b, 27). While individuals find additional "frames" in other ways, such as through the personal and familial relationships, it must be understood that such frames are "essential to being a human interlocutor" (Taylor 1989b, 29) and therefore, culture as one such frame, is of great importance. As a "frame" it may be understood as a crucial element in the "world-building" process described by Peter Berger (1967) as being a fundamental human need.

Second, inherent in the concept of culture as a frame, culture embodies and reflects the values of its members, both past and present (Young 1990). Social norms are historically grounded and culture is the means by which those mores are translated from one generation to the next (MacIntyre, 1981; Frankena 1973). While contemporary members have the power collectively to alter their cultures in dialogue with their past and in contemporary interactions, this historical dimension is one of the key factors which distinguishes culture from being simply a form of voluntary association.

Third, culture is a necessary, everpresent element in human social life. Insofar as the basic human need for "world-building" (Berger 1967) and the dialogical nature of the self (Taylor 1989b) is acknowledged, culture as a primary source for these processes must be recognized. This does not mean that an individual is restricted to only one culture, it merely notes that one or more cultures will be present in these omnipresent human processes.

Fourth, culture is socially constructed in relation to and in interaction with other cultures (Young 1990, 43). While some cultural norms can be self generated, that is to

say, they may arise independently within a single culture, they become definitional of that culture only insofar as they differ from the norms of another cultural group with which it comes in contact. At the same time, cultural norms may result from interactions with other cultures. One of the defining characteristics of Black American culture is its history of oppression, a history which has shaped its social norms and institutions and with which Black Americans identify (Young 1990, 44; West 1982).

Fifth, culture is affiliational (Young 1990, 47). In one sense, it may be said that culture may be imposed upon an individual based upon ones' birth into a particular culture or based upon the possession of certain characteristics which society has used to define a particular group, such as sex, race, sexual orientation, socio-economic status, or other criteria. Indeed, this would appear to be the dominant understanding of culture, and this social imposition of culture may in fact result in the formation of a culture (Young 1990, 47). However, this provides a problematic definition of culture, for it combines into one grouping those who are unwilling members of a culture and those who positively identify with that culture. That this is an incompatible grouping is evident by the fact that the former undoubtedly would be happy to escape the culture while the later seek to preserve and affirm its worth. As such, it is necessary to define the former as a "social group" suffering under the burden of group prejudice, while the later are constitutive of a culture. Thus, while certain characteristics may be a predicate for cultural membership, culture also entails an active affiliational, identification with that group by its members.

Finally, culture creates a collective or group identity (Young 1990, 167). While

some sociologists have attempted to distinguish culture from social institutions (see, Sills 1968), as an aspect of political theory some form of institutionalization is necessary for culture to be recognized. This does not mean that a culture must have a single or uniform organizational structure. It does mean that the group must be collectively cognizable and that representatives of that culture can acquire standing to assert the collective interests of that culture. Thus, all blacks need not be members of the NAACP nor all women members of NOW in order for those organizations to assert the interests of members of those cultures and for all members of those cultures to benefit from the efforts of those organizations on their behalf. Moreover, insofar as the culture is recognized as a collective unity, individual members of those cultures may be able to assert their interests as members of that culture.

This definition of culture is, admittedly, quite broad. Obviously, a strong, well established ethnicity can be defined as fitting within it. However, in looking at popular movements operating under the politics of difference, one can also find examples of religion, racial groupings, the feminist movement, and the gay/lesbian liberation movement providing a cohesive social identity to which individuals may orient themselves and which may provide those individuals with the necessary orientation frame identified by Taylor and Young. Examples of how gender and sexual orientation can serve as normative "frames" can be seen in the work of Carol Gilligan (1982) and the numerous theories of feminist ethics based on that work and, with respect to sexual orientation, in the work of such thinkers as Sarah Hoagland (1988) and Carter Heyward (1989). One may even suggest that socio-economic status, such as poverty, may also be considered

as a culture in that such status must be recognized as formative of the individuals suffering under the burdens of poverty and the social milieu which surrounds that poverty.

While it would appear that in most cases culture is something one is born into in, it may also include voluntary associations (assuming that the culture in question satisfies the other criteria identified above). Ethnicity is an example of the former while religion, possibly, represents the latter, though here too, religion is often something one is born into. Moreover, membership in one culture does not preclude membership in others. Socio-economic status, ethnicity, gender, and religious affiliation, while all providing distinguishable frames may nonetheless be constitutive of a single individual identifiable as fitting within each (Young 1990, 48). Indeed, it must be noted that individuals are almost universally identifiable as being members of multiple cultures, to a greater or lesser degree. While they may be primarily affiliated with a particular sub-culture, they are also unavoidably members of the dominant culture insofar as the dominant culture necessarily functions as a frame against which their differences are identified and with which they may at the same time identify themselves.

This last point emphasizes an aspect of the self which sometimes appears to be overlooked in the controversy between the "individualists" of the politics of universalism and the "communitarians" of the politics of difference. The controversy appears to present a dichotomized understanding of the self as being either atomistic/individualistic (Meyers 1989) or communitarian/collectivist (Addelson 1994). In fact, the self must be considered as an amalgam of the two. As noted above, the very nature of dialogue which

is used as the model for the collectivist, politics of difference understanding of the self presupposes the existence of an 'I' which is in dialogue with the 'other.' Moreover, insofar as individuals are members of and identify with the existing dominant culture represented by the politics of universalism which operates upon an individualist understanding of the self, they will have incorporated that understanding within themselves. Thus, the modern self must be understood as having some autonomy and independence as well as being in part constituted by culture and cultural relationships (see, Young 1990, 46-48).

Culture and the Liberal State

In attempting to examine the nature of the relationship between the state and culture, it is necessary to further refine our understanding of nature of culture. While one important aspect of that relationship relates to the nature of the association between an individual and her/his culture (a point to be addressed below under the heading of community membership), what I am concerned with here is to consider the function or impact of culture on its members and in relationship to society as a whole. There are three possibilities that need to be considered: (a) culture as an impediment; (b) culture as a private association; and (c) culture as a good.

Culture as an Impediment

As argued above, poverty and prejudices based upon race, gender, ethnicity, and sexual orientation can be recognized as creating social groups that can then form a culture

(Young 1990, 46). Individuals living in poverty or suffering the oppression of prejudice are invariably shaped and informed by these social forces. Their world view, their "frames" will be shaped by these forces and their capacity to function as free and effective agents according to the norms of the dominant society may be impaired by this culture (West 1993).

This fact has been recognized by universalist thinkers and accommodation has been made within the universalist framework for remedial treatment (such as affirmative action) directed at removing such impediments to the full and free participation of those affected. While the methods of such remedies as affirmative action have been the subject of heated debate, the ideal that such impediments need to be removed appears to have received general acceptance as a legitimate form of state action (Wasserstrom 1980). What is recognized as being at stake is the autonomy of the individual, a good long recognized and accepted by liberal democracy. Here autonomy means the ability of individuals to make their own life choices free from the impediments created by their oppressive culture.

In terms of the politics of difference, there are two factors to be considered here. First, the definition of culture given above requires not only the existence of an identifiable social group but also an identification/affiliation with that group on the part of its members. Without such identification/affiliation, the group does not acquire the status of culture and, as such, there is no cultural interest as stake. The members of the group must be considered as simply oppressed members of the dominant culture who should be treated accordingly.

Second, assuming that the members of that group do possess an identification/affiliation with the group, thus constituting a culture, insofar as they agree with the determination that their culture is an impediment to them, the politics of difference is amenable to the remedial approach offered by the politics of universalism. In this case the affiliational interests of the members of that culture may be understood as being motivated by the desire to overcome these impediments. The culture will have served its purpose when such impediments are overcome and the culture can be anticipated to expire with the impediments.

Culture as a Private Association

The idea that culture is and properly should be a private concern appears to be a general theme within the dominant liberal democratic theories. One can see clear evidence of this in relation to the issue of religious freedom and how religion is to be treated as was discussed in Chapters Two and Three above. The only real controversy in this regard arises, surprisingly enough, when the state erects an impediment to this private association by asserting that it is of public interest as opposed to the normal approach of asserting that culture is a private concern. One can find an example of this in those laws which make homosexual activity among consenting adults in private a criminal offense.

Under liberal theory, the value that is being expressed in these associations is that of individual autonomy, the right of the individual to partake in any private associations they may deem fitting. Thus, under the politics of universalism, one could oppose

sodomy laws as an impairment of individual rights while affirming the value of private association.

The politics of difference, while arguably being receptive to the benefits of private association rights, would view those rights quite differently. First, advocates of the politics of difference have questioned the legitimacy of the public/private distinction (Young 1990, 107-111) and, as such, they would view all associations as public acts. Second, because of their understanding of the self as being dialogical, they would undoubtedly reject grounding this right strictly in terms of individual autonomy (though some respect for individual autonomy must be retained (see, Young 1990, 46-48)).

Culture as a Good

The politics of difference comes into conflict with politics of universalism when culture is claimed as a good which must be recognized and supported by the state. The problem here arises on two levels. First, the politics of difference demands not only that cultural differences be tolerated, but that those cultures be recognized as being of equal value with other cultures and, in particular, with the dominant culture (Taylor 1992, 236; Young 1990, 166). Second, it is demanded that culture not be treated as a option which should be allowed to be available for private individuals, but that culture be assured of survival for its own sake (Taylor 1992, 246; Young 1990 181-183).

At least two major problems arise in connection with the first demand that culture be recognized as a value or a good. First, this demand obviously conflicts with the dominant form of liberal theory that argues that the state is precluded from adopting any

particular view of the good save for the "good" of individuals to determine their own understanding of the "good" which they will seek. The good that is being proposed to be recognized is not one shared by all but only by those who are members of that culture. The counter argument to this position from the perspective of the politics of difference is that the state is not in fact neutral, but rather, that it recognizes a certain set of goods which are reflective of the dominant culture and are embodied in liberal theory itself (i.e. the good of the autonomy of an atomistic individual). In this sense, the state by its very functioning is discriminatory to minority cultures that may not share these values (Taylor 1992, 237; Young 1990, 164-165). The second problem arises in determining the value of a particular culture. The question is, on what grounds is value to be assessed?

The problem with determining the value of different cultures is that culture itself is determinative of value. Thus, one culture's assessment of the value of another is always tainted by the values of the assessing culture (Taylor 1990, 236; Young 1990, 59). Within a liberal society, it is relatively easy to argue that the requirement that one respect another culture arises out of the need to respect an individual's autonomy in building their culture and respecting the universal human potential for building a culture of great value. Here, there is a certain conformity with liberal theory itself (Taylor 1992, 236). However, a stronger version of this demand is that one not only respect this potential but also the culture that is actually formed. An example of this problem cited by Taylor is the comment attributed to Saul Bellow that "When the Zulus produce a Tolstoy we will read him" (1992, 236). Here the complaint is that the evaluation of the Zulus is being based upon those Western standards which judge Tolstoy to be a great

writer. It is a complaint that has similarly been lodged by feminist critics against a male biased literary cannon (Kolodny 1986).

The only way liberal theory has been able to accommodate this claim of value, at least in its weaker form, is by treating it as an impediment. In educational debates over the content of the cannon of works taught within the humanities, it has been argued that the works of women and minority cultures must be included in significant ways within the cannon. Liberal theory can recognize this argument when it is presented in a form which argues that the exclusion of the works of women and cultural minorities give the members of those groups a demeaning and damaging picture of their worth through the absence of works representative of their cultures. The cannon as formulated teaches them that only the works of men of European provenance have value (Kolodny 1986).

Liberal theory is, however, unable to address affirmatively the stronger demand that each culture be recognized as having equal worth or value. The critical apparatus that exists in liberal culture, because of inherent cultural bias, is unable to evaluate other cultures fairly. Yet, from the perspective of the dominant culture, to elevate such cultures to a status of equal cultural worth without the application of any universally applicable critical standard of value would appear to be discriminatory (Taylor 1992, 253-254). It would be imposing the value judgements of each culture on the other without the benefit of a shared or common standard of value -- particularly where those values require a common expression, as is the case in a shared educational curriculum.

The central conflict in this area can be said to be one in which a shift in focus is

being sought from that of the autonomy of the individual to that of the autonomy of the culture. It is the values that are determined by the culture that are to be recognized and it is the culture that is to be freed from impediments and supported in its efforts towards self preservation. While individuals may be said to constitute culture, the community must be acknowledged as possessing a reality greater than the simple sum of its parts (Young 1990, 44). The difficulty for liberal theory and the politics of universalism is that culture is not a recognized entity under these theories. Instead, the sole valid relationship that is recognized is that between the individual and the state.

Cultural Community Membership

It would appear that culture is generally something into which one is born. Yet, under the broader understanding of culture being put forward here, it is also possible for culture to be voluntarily chosen. Because of the identification of a direct relationship between the state and its citizens and the liberal focus on individual autonomy, there are problems with each understanding or mode of membership.

When an individual is born into a particular culture, liberal theory will be concerned about the voluntariness of the individual's continuing membership within that cultural community. This concern can be seen most clearly when the particular culture is considered as an impediment to the individual's participation in the greater society. State actions against the impact of poverty and prejudicial discrimination are efforts that are justified as an effort to assist individual in developing and exercising their potential for autonomy in the face of the oppression created by these cultures. As such, such

actions rest with relative comfort within politics of universalism and, as was discussed above, can be accommodated by the politics of difference when these impediments are also recognized by the members of that culture or social group.

A state's interest in overcoming impediments to an individual's participation in greater society becomes problematic when culture is considered as a good. For example, one of the ways culture perpetuates itself is through the education of its children. The state is concerned that education should adequately prepare all its citizens for life in society as a whole. An inadequate education would impair that individual's opportunities and, hence, their autonomy. Moreover, such an inadequate education entails an economic concern for society as well. In a modern welfare state, an inadequately prepared individual represents a potential liability to the state whose welfare system may be called upon to support those who are incapable of supporting themselves. Education is directed against this.

A cultural group may, however, view a state's general educational requirements as a threat to that cultural community (Wisconsin v. Yoder (1983).) In the Supreme Court case of Wisconsin v. Yoder, for example, it was argued that such an education entails not only substantive content but also incorporates, explicitly or implicitly, values that may conflict with the values of that culture. A culture may therefore seek to reject or alter that education as a means of self preservation. Yet, from the perspective of the liberal state, to allow a culture to modify its educational requirement results in the potential impairment of those individuals' autonomy and economic viability. (It should be noted that while Yoder resolved this controversy in favor or the religious-cultural

group, it did so on the basis of the Free Exercise Clause of the Constitution and it may be an anomalous case, as will be discussed hereinafter. This therefore remains an open question with respect to other religious groups and cultures.)

This problem is exacerbated by the fact that children are involved. Liberal society cannot simply justify allowing this impairment as arising out of the autonomous decision of an individual because children are deemed incompetent to make such profound life choices. Moreover, for both philosophical and economic reasons, the United States, for one, has not accepted the possible option that parents should have the exclusive absolute right to make such life decisions for their children. Instead the state is asserted to have a direct interest in these matters (Pierce v. Society of Sisters (1924)). To allow culture to be determinative as to who makes these decisions for children, therefore, again raises the issue of equal treatment and the issue of distinguishing among citizens based upon non-universalist grounds (i.e. cultural membership.)

Cultural impairment may also cause problems for adults even where society agrees that a particular culture is a good. For example, how is a liberal state to respond to the claims of an individual that they are being discriminated against by the culture of which they are a member but whose ability to remove themselves from that culture is impaired due to factors such as poverty, inadequate educational preparation, or other socio-economic constraints? Here the voluntariness of the individual's acceptance of the demands of a particular culture is placed in question. For the state to refuse to intervene represents a denial of the dignity of that individual, yet to act represents an intrusion upon the autonomy of that culture and a denial of due recognition to it. An example of this

problem is the situation of allophones (non-English/non-French speaking Canadians or immigrants) in Quebec. In deference to Quebec's efforts to protect the francophone culture, due to their residency in Quebec these individuals are denied certain rights, such as educational choice which they would have in the rest of Canada. Yet changing that residency may be precluded for economic reasons. The politics of difference needs to develop ways to address this problem.

The issue of cultural membership arises in a different way where culture is accepted as a good and membership in that culture confers certain benefits not available to other citizens by virtue of that membership. As we have seen, this problem arises, for example, in connection with the use of controlled substances as a part of religious practices. Exemptions from these otherwise applicable laws are based upon the value of religion for society as a whole. The dilemma for liberal society is that the principle of equality would argue that all individuals should be free to associate with that culture as they see fit. However, if individuals affiliate with a culture simply to benefit from this exemption, such an affiliation would not legitimately reflect the values of the exempted culture and would not advance that identified social interest. Moreover, such associations may harm those cultures, for example, by creating the perception that such cultures exist solely for the purpose of avoiding the restrictions of particular laws. Again, the politics of difference needs to develop ways to address this problem as well.

Identity

The foregoing discussion has highlighted the differing understandings of the self

and the proper relationships between the self, culture, and the state held by the politics of universalism and the politics of difference. In large part, this analysis can be characterized as identifying how the politics of universalism is unable to meet the needs identified by the politics of difference. It does not explain the hostility that commonly exists towards the politics of difference (Taylor 1992). Here there are two factors to be considered.

First, it must be acknowledged that the politics of difference represents a threat to the status quo and existing relationships of power and oppression. The current political system obviously benefits members of the dominant culture and society is structured in ways to preserve those benefits and privileges of power (Foucault 1965; 1980; MacKinnon 1989). While this threat to the status quo understandably evokes resistance, oppression cannot be ethically justified. As such, the politics of universalism has rejected the maintenance of such oppression as reflected in its adoption of such programs as affirmative action. The disagreement between the politics of universalism and the politics of difference can thus be characterized as one of method as opposed to substance.

There is, however, a second, somewhat more legitimate concern raised against the politics of difference. That is that the politics of difference represents a threat to the common identity of a liberal society. Civilized society requires some type of unitive principle through which individuals feel themselves bound to that community. This unitive commitment is not simply grounded in a general commitment to shared values but must reach a deeper level of "identification with" a particular way of life (Taylor 1989a, 196) though that way of life may nonetheless be grounded in identifiable social values.

As argued by Rousseau and Hegel, democratic society requires "a common purpose, one in which there is a '"we" that is an "I," and an "I" that is a "we"'" (Taylor 1992, 241).

Ronald Dworkin (1978) argues that liberal society's commitment to procedural justice has provided just such a unitive principle. When this principle is seen in terms of its close relationship with the dominant understanding of the individualized self, its unitive power becomes clear. Indeed, as noted by Taylor, "[t]he popularity of [the] view of the human agent as primarily a subject of self-determining or self-expressive choice helps explain why this model of liberalism is so strong" (1992, 246.) It can be argued that the two are intertwined.

In order to understand how the politics of difference can answer this complaint, it is necessary to explore how the politics of difference is to be operationalized as a political theory. That is the subject of the next chapter.

Conclusions

As the foregoing analysis demonstrates, the dominant form of liberal democratic theory as practiced in the United State operates out of a historically situated understanding of the self as being monologically developed and atomistic. This form of liberal theory has found expression in the politics of universalism within which: individuals are understood as being self determinative and deserving of recognition; each individual is posited as having a direct relationship with the state; and each is deserving of strictly equal treatment as an individual with all other individuals under the law.

This individualistic understanding of the self has been under increasing challenge

since the 1960's by movements that may be identified under the politics of difference. Lead by thinkers associated with various oppressed groups and increasingly supported by social scientific research, the politics of difference is based upon a dialogical, socially constructed understanding of the self. Instead of focusing upon the individual, the politics of difference focuses attention upon groups and cultures and asserts that oppressed groups and cultures should have significant standing within the public sphere. It demands that these cultures be valued and respected as important constituents of human life. For the most part, the politics of universalism is ill-suited and unable to meet these demands.

The theory of deep diversity is one method of operationalizing the politics of difference. How this can be accomplished will be addressed in the next chapter.

CHAPTER FIVE

THE THEORY OF DEEP DIVERSITY

In this chapter I will be outlining the theory of deep diversity. While this theory was suggested by a concept first set forth by Charles Taylor and will be heavily grounded on his work, it is in fact proposed as a new theory that is intended to address the demands of the politics of difference discussed in the previous chapter and, ultimately, to be used in reconceiving Supreme Court jurisprudence in the area of religious freedom. In developing this theory, I will begin by reviewing an essay by Charles Taylor in which the concept of deep diversity is first suggested. I will then critically examine some of the related ideas contained in this essay and extend and elaborate upon those ideas in relation to the politics of difference in a more general, comprehensive way.

Charles Taylor and the Concept of Deep Diversity

Background

Charles Taylor developed the concept of deep diversity out of a study of and a proposed resolution to problems created by the relationship between the province of Quebec and the rest of Canada (Taylor 1993.) (Unless otherwise noted, all subsequent isolated page citations in this chapter will be to this essay by Taylor.) For those not familiar with this situation, it can be inadequately summarized as follows. Quebec is a province of Canada in which a majority of citizens are of French descent. Most

Québécois are native French speakers (Francophones), there is a vibrant French-Canadian/Québécois culture, and Quebec operates under a civil law tradition. By contrast, the "rest of Canada" is commonly identified as "English" Canada, in which English is the common language spoken in public. English Canadian culture is strongly influenced by its history as a British Colony and its continuing membership in the British Commonwealth including the fact that it operates under a common law tradition.

In the 1960s and continuing up to the present, a "Quiet Revolution" occurred, which sought and acquired increasing autonomy and authority for Quebec over its own policies, most notably, its efforts to protect French-Canadian/Québécois culture and the French language (Russell 1992). While the specific details of the debate since that time have changed, one of the central underlying arguments has been to focus upon the extent to which such special treatment should be given to Quebec and the appropriateness of giving special treatment to one province as opposed to treating all of the provinces the same (165).

As noted by Taylor, the divergence between Quebec and the other provinces goes deeper than simple discrepancies in the allocation of provincial powers. There is also a fundamental difference in political philosophy between Quebec and the rest of Canada. The rest of Canada operates under a traditional liberal democratic approach, in which the primacy of the individual is favored and government is posited as a neutral arbitrator of interests and conflicts as evidenced by its adoption of the Charter of Rights and Freedoms, a Constitutional document similar in principle to the American Bill of Rights (172). From this perspective, there is no common conception of what is "the good" and

the government is denied the right to legislate controversial conceptions of what is considered the good (175).

By contrast, Quebec operates under a more communitarian, collectivist orientation. Quebec explicitly affirms and asserts that it is entitled to legislate in terms of the common good, which it identifies as the preservation and protection of the French language and French culture in Quebec. In advancing this interest, Quebec acknowledges that the rights of individuals can and must give way in favor of this common good. For example, laws in Quebec deny Francophones and Allophones (those whose mother tongue is neither French nor English) the right to attend what are designated as Anglophone schools (i.e. schools where the instruction is given in English) in spite of the fact that Canadian Anglophones whose parents attended Anglophone schools have a right to attend such schools based upon certain guarantees under the Charter (173).

These differences touch a deeper level as well. Given the conflicts over the differing levels of provincial autonomy granted Quebec as opposed to the other provinces and the radical divergence in political philosophies between Quebec and the rest of Canada, the question has arisen, on what basis can one develop and claim a common national identity? With so much difference, how can Canada define itself as a unified nation? (157)

Exacerbating this national "identity crisis" is the fact that there is a strong sovereignty movement in Quebec that has argued for its separation from Canada (157). In the face of this threat, Canada outside of Quebec has had to ask the question, what is a nation? What is it that distinguishes Canada from the culturally domineering United

States? (157) (This latter question is one which Quebec, because of its strong French-Canadian culture, need not address (162).)

Taylor's Response

In answering the unity questions posed by Quebec, Taylor acknowledges the need to develop a common identity. At the same time, he recognized that this common identity must be conceived in ways which accommodate the various differences between Quebec and the rest of Canada. To do this, Taylor offers a four-fold response.

First, he asserts that it is necessary to recognize the many similarities in attitude and understanding held by both Quebeckers and other Canadians. These include shared understandings against violence and supportive of law and order (162/158-159); a commitment to collective provision such as health care (162/159); a commitment to the equalization of life chances between regions (162/159); and some aspects of the Charter of Rights and Freedoms (163/161). These common attitudes are, Taylor asserts, one basis for the recognition of a common identity.

Second, Taylor argues that Canada must alter its understanding of the concept of equality and equal treatment at the individual and provincial levels. At the individual level, the type of liberalism embodied in the Charter requires that all individuals be treated according to the standards of strict equality (as defined in the previous chapter) (174). By contrast, Quebec has adopted an understanding of liberalism in which individual rights must at times give way in favor of the strong collective goals of preserving the French language and culture (175-177). While the rest of Canada in its

own self administration can continue to practice strict equality, in order to accommodate the needs of Quebec, Canada must shift its understanding away from a demand for strict equality in all aspects of life for all of the citizens of Canada (in and out of Quebec) to a more limited focus on the protection of certain fundamental rights, such as "the right to life, liberty, due process, free speech, free practice of religion, and the like" which are all equally protected in Quebec as in the rest of Canada (176).

At the provincial level, Taylor asserts that it is necessary to shift from a standard of equality which focuses upon the allocation of powers and privileges among the provinces to one which focuses upon the unique needs of each province (180). That is to say, each province should be accorded those powers and privileges that are necessary to advance the collective goals of that province insofar as the granting of those powers and privileges does not directly impair the rights and privileges of the other provinces. Thus, the special status that has been conferred upon Quebec is justifiable on the basis that those powers and privileges are necessary for Quebec to advance its collective goal of advancing and sustaining the French language and culture in Quebec (180). Insofar as the other provinces do not have similar "tasks" or collective goals, they do not require the same powers and privileges (180). Moreover, it cannot be asserted that those powers and privileges substantially impair the powers or privileges of the other provinces. While this allocation of powers might impair the interests of those who are seeking greater centralized authority for the national government at the expense of the provincial governments, this result is not inevitable, depending upon what type of authority is being sought to be centralized (180). (Though not noted by Taylor, such a concern with

centralization more properly may be considered as an effort to reform Canadian federalism as opposed to raising questions of equality.)

Third, Taylor argues that it is necessary to reconceptualize the nature of one's membership in Canadian society. Under the traditional form of procedural liberalism, as embodied in the Canadian Charter of Rights and Freedoms, membership is viewed on an individual basis, each citizen being understood as having a direct and personal relationship with the state and each other and in which all are bound together by the acceptance of certain procedural norms applicable to all in the same way (178). While Canadians are proud of their tolerance of diversity, as reflected in their policies on multiculturalism, and even identify this acceptance as an element of their national self identity (161), Taylor argues that this acceptance exists as only an acceptance of "first-level diversity" (182). There remains an expectation that despite the existence of "great differences in culture and outlook and background...[the] patriotism or manner of belonging is uniform [for all]" (182).

In place of this understanding, Taylor offers the concept of "second-level or 'deep diversity'" (183). This concept allows for alternate ways of belonging to Canada. For some, this would entail their "feel[ing] Canadian as a bearer of individual rights in a multicultural mosaic" (183) in line with the understanding already present. For others, such as Quebeckers, most French Canadians, and many of the aboriginal communities, "their way of being a Canadian...is by their belonging to a constitutive element of Canada" (182). Their membership in Canada would "pass through" the community with which they have primary identification (183). The concept of deep diversity would

require that both ways of belonging be recognized and respected.

Finally, in order for Quebeckers to embrace Canada "dans l'honneur et l'enthousiasme" (169) [with honor and enthusiasm], it is necessary for Canada outside of Quebec to accord Quebec appropriate "recognition" (168). During the course of the Quiet Revolution, Quebec has effectively acquired a special status in Canada so as to allow it to advance its collective goal of protecting and advancing the French language and culture. Nonetheless, two Constitutional reform efforts that sought to recognized this special status within the body of the Canadian Charter were defeated on the grounds that such recognition would violate norms of equality and ideas relating to the need for uniform membership within Canada (165). The rejection of these largely symbolic efforts to recognize the special status of Quebec represents for many Quebeckers a denial of their appropriate role in Canada. Thus, in order to achieve unity Canada must find a way not only to tolerate the differences of Quebec but to honor and value those differences.

The Theory of Deep Diversity

As may be evident from the foregoing summary, Taylor was not attempting to develop a full fledged political theory in this essay, he was attempting to formulate an approach to resolving the problems of Canadian unity. Nonetheless, one can discern a significant level of integrated, coherent theory which underlies this effort (as is the case with much of Taylor's other work) that is compatible with, if not drawn from the politics of difference discussed in the previous chapter. Moreover, the concept of deep diversity suggested by Taylor offers a valuable focal point around which a more comprehensive

theory can be developed to meet the needs identified by the politics of difference.

In order to develop this theory it will be necessary to explore some of the details of Taylor's arguments in somewhat greater depth and generally to move significantly beyond them so as to escape the limits imposed by the context in which Taylor was writing and address the more general demands of the politics of difference. The effort here is not to discover Taylor's own theoretical understanding but rather to develop a new theory that is capable of meeting the demands of the politics of difference, though the resulting theory may in many respects conform to Taylor's general theoretical approach to politics.

In developing this theory, the order of the arguments just presented will be altered slightly.

Liberalism Redefined

The form of liberalism dominant in Canada outside of Quebec is virtually identical to that critiqued by the politics of difference and operationalized by the politics of universalism as discussed in Chapter Four. However, unlike some thinkers who assert that liberalism is incapable of meeting the needs of the politics of difference and hence should be rejected (Young 1990), Taylor appears unwilling to surrender the label of liberalism to the politics of universalism. In part, this reluctance appears to be based upon his recognition that liberalism embodies some legitimate understanding of the nature of being human. For example, while he accepts the importance of community and culture in the formation of the self as argued by the politics of difference, he also appears

to recognize the existence of a self separate from that cultural influence (Taylor 1992, 230). He also acknowledges the need to protect the autonomy of the individual to some degree, through such actions as the recognition of fundamental rights (176).

Though he does not say so, a second reason for Taylor's reluctance to abandon the label of liberalism is the popularity of the label itself. The idea of liberalism is so popular and strong that it is accepted by many which might not subscribe to the philosophic arguments underlying its current dominant expression (175). It is, therefore, politically expedient to lay claim to the label by redefining it.

Taylor's Communitarian Liberalism

The dominant form of liberalism asserts that a liberal society is precluded from adopting any substantive understanding of the "good." It is instead bound together around just procedures which allow each individual member of that society to determine and pursue her or his own understanding of the good (Dworkin 1978; Larmore 1987).

Taylor's proposal is to identify the form of liberalism as practiced in Quebec as an alternate form that liberalism can take. In Quebec it is thought that a liberal society can be organized around a definition of the good, and where that good requires that it be sought in common, it is appropriately an object of public policy.

> According to this conception, a liberal society singles itself out as such by the way in which it treats minorities, including those who do not share public definitions of the good; and above all, by the rights it accords to all its members. In this case, the rights in question are conceived to be the fundamental and crucial ones that have been recognized as such from the very beginning of the liberal tradition: the right to life, liberty, due process, free speech, free practice of religion, and the like (176).

Laws relating to language, for example, cannot legitimately be said to touch upon such fundamental rights.

Taylor acknowledges that there will be tensions within a liberal society with strong collective goals, but argues that "the problems are not in principle greater than those encountered by any liberal society that has to combine liberty and equality, for example, or prosperity and justice" (177). It is simply required that the state achieve some type of balance which respects diversity and protects fundamental rights.

Diverse Liberalism

This model of liberalism, which we may designate as communitarian liberalism, does not, however, fully answer the demands of the politics of difference. As exemplified by Quebec, the common good which has been adopted is that of preserving French-Canadian culture and the French language. While Quebec has been forced to accommodate the demands of English Canadians in certain regards (e.g. in their desire to maintain their English Canadian culture and language) due to the requirements of the Charter of Rights and Freedoms, Quebec does not offer similar accommodations to Allophones. Indeed, it has developed policies that are explicitly intended to encourage Allophones to assimilate into the French-Canadian culture of Quebec (173).

While viewing Quebec in the context of the whole of Canada may be understood as the efforts of one cultural community seeking survival in accord with the politics of difference, Taylor's approving recital of the type of liberalism practiced by Quebec would appear to be offered more as a defense of Quebec against charges that it is not a liberal

society (156) rather than a developed model of the type of liberalism that would meet the demands of the politics of difference. It cannot, for example, shield Quebec from charges of oppressing various subcultures within Quebec. Insofar as Quebec makes language a definitional aspect of culture, its efforts to impose French upon Allophone Quebeckers by its own standards must be defined as oppressive towards that culture. However, this model does provide the groundwork for such a theory of liberalism, one which may be identified as diverse liberalism.

The politics of difference asserts that there are a multitude of goods in a pluralistic society, each associated with a particular culture which must be recognized. The capacity of liberal society to adopt a particular good, subject to the constraints of fundamental rights and a need to respect all minorities, is a key shift towards accommodating this demand. How such a society does so can be viewed in two ways.

First, insofar as society can adopt a common good, it can also adopt a multitude of goods. In this case, it could adopt all of the goods proffered by each of the cultures present within it. Beyond the possibility of conflicts among or between those goods, which will be present in any adaptation to diversity, this approach could result in a feeling that such a society is too amorphous to claim the loyalties of its citizens. As noted above, such "feelings" are important. Society requires an identification with it that includes both ideals and feelings.

In a sense, this first approach is the approach taken in Canada, where accommodations have been given to Quebec which substantively represent a passive adoption of the common good of preserving French-Canadian culture (170), while at the

same time adopting procedural justice as the standard good for the rest of Canada (173). In some senses it appears that loyalties in Canada are linked more closely to those two goods (i.e. cultural survival for Quebec; procedural liberalism for the rest of Canada) -- which are not shared -- than to the society in which both are present. As such, identification with a common Canada has been put into question in each of the "two solitudes" (i.e. Quebec and the rest of Canada.)

The second, and preferable approach, is where society adopts the good of preserving and respecting culture as one of its guiding principles or goods. While such a society would support the goods of each of its constituent cultures, it would not be thought of as adopting each good as its own. At the same time, because there is a central, over-arching understanding of the good which this society is seeking, that of supporting cultural diversity, this good can serve as a unifying force in that society.

Thus, diverse liberalism can answer three important demands made by the politics of difference. First, it is capable of recognizing and supporting on a public level a variety of understandings of the good held by both individuals and subcultures within it. Second, by recognizing that traditional liberalism reflects the values of the dominant culture and by recognizing the importance of protecting fundamental rights, this form of liberalism can protect individuals in a manner similar to the politics of universalism as well as protecting other cultures and their interests. Finally, it can take the place which procedural liberalism now holds within the national self understanding in Canada and the United States.

Diverse Liberalism and Cultural Goods

In that the adoption of certain common goods is one of the most controversial aspects of the theory of deep diversity, it is necessary to explore this idea in somewhat greater depth. This will include considering the nature of goods identified within traditional procedural liberalism as well as the goods to be protected under diverse liberalism.

As has been noted, procedural liberalism asserts that a liberal society is precluded from adopting any substantive understanding of the "good" in that in a pluralistic society there will not be an absolute consensus on the good. To adopt any one good will be to fail to respect the dignity of any citizen who does not agree with that understanding of the good. Therefore, procedural liberalism focuses its attention upon developing procedures that will support each individual in her or his understanding and pursuit of the good (Dworkin 1978; Larmore 1987). What is generally not acknowledged in these theories is that they are in fact predicated upon a particular understanding of the good. That is that human dignity should be respected and that individual autonomy in making life choices is something which liberal society must support. Both of these ideas are in fact "goods." They reflect particular value determinations about human life.

Moreover, even proponents of procedural liberalism have been forced to acknowledge that liberal societies such as the United States have in practice adopted certain understandings of the good as a necessary public reality (Larmore 1987). These include legislating in areas such as obscenity, prostitution and drugs (Clor 1996). This has led some theorists to formulate liberalism as precluding the state from adopting

"controversial" understandings of the good (Larmore 1987, x). This will involve, as a practical matter, the state adopting some understandings of the good that are not universally shared but rather reflect the will of a substantial majority (Larmore 1968, 68).

Thus, the adoption of certain common understandings of the good as proposed within the concept of diverse liberalism is not as radical a change as it might first appear. The real question is what goods are to be adopted under diverse liberalism that are different from those accepted under procedural liberalism.

First, diverse liberalism as an element of the theory of deep diversity embraces some of the goods embodied within traditional liberalism. The theory of deep diversity posits the human individual as being a combination of a somewhat autonomous self in dialogue with the cultural 'other.' Thus, through its adoption of standards of fundamental rights and the recognition of the existing dominant culture as a culture, diverse liberalism will be supportive of the principle of individual autonomy in accord with this understanding. It will also be supportive of individuals identifying and pursuing their own understandings of the good to a degree somewhat similar to that existing under the current, dominant liberalism.

What distinguishes diverse liberalism is that it also adopts the preservation and advancement of diverse cultures as a common good. This has two effects. First, the state must recognize and support those activities of culture which those cultures deem to be the good and which are necessary to sustain and preserve culture. Second, insofar as conflicts may arise between cultures in relation to their understandings of the good, it is necessary for the state to develop fair and equitable ways of arbitrating those disputes in

ways which do not unfairly discriminate among those cultures. In that many current understandings of the good may and probably do reflect the identification of goods held by the dominant culture, this may require reassessing those goods as "controversial" understandings of the good (to use Larmore's distinction), thus requiring the state to abstain from making those determinations where possible.

While the principle of being open to and supportive of a variety of common understandings of the good is a central premise of the theory of deep diversity and diverse liberalism, it is not an absolute. There are undoubtedly understandings of the good which are unacceptable in a liberal society. The crucial question is how such judgements are made. It is hoped that at least a partial and preliminary answer to this question will be developed in the course of the discussion which follows in this chapter.

Social Membership and Mediating Institutions

Another significant stumbling block in procedural and communitarian liberalism that diverse liberalism must overcome concerns the nature of the relationship between the individual and the state. As previously noted, liberalism posits a direct relationship between the state and its citizens. The problems that this direct relationship poses for diversity can be seen in Canada's approach to multiculturalism.

Canadians are, Taylor argues, rightly proud of their adoption of multiculturalism as a national vision and their resulting acceptance of cultural difference. However, this acceptance is what he identifies as "first level diversity" (182). While this position accepts great differences in the cultures of its many members, it demands that each

individual share "the same idea of what it is to belong....Their patriotism or manner of belonging is uniform, whatever their other differences...." (182). In this case, membership is linked to the idea of each individual standing in direct relation to the state as reflected in the Charter of Rights and Freedoms. The necessity of this "manner of belonging" became one of the central concerns in the constitutional debates over the Meech Lake Accord in Canada outside of Quebec where the effort to grant "distinct society" status to Quebec was viewed as a threat to the Charter of Rights and Freedoms (173.)

As exemplified by the case of Quebec, culture intrudes upon this direct relationship. In order to effectuate its goals of survival, Quebec exercises authority over its citizens that contravenes the rights and privileges that would be accorded citizens outside of Quebec by virtue of their direct relationship with Canada. The autonomy of Quebec comes at the expense of the individuals who are made subject to that autonomy. At the same time, it must be acknowledged that a majority of Quebeckers are in accord with this reality. As constituents of this culture, their primary loyalty is to it and to the common good expressed by it. Their identification with Canada is tangential at best. While there are many attachments between Canada and Quebeckers, a "genuine patriotism for a bilingual, two-nation Canada has never developed among Quebeckers" (168).

Taylor's proposal on this point is to suggest the need to accept the possibility of "a plurality of ways of belonging." He identifies this as second level or "deep" diversity (183). In this formulation, one may belong to society as an individual bearer of rights, under the liberal democratic perspective of the rest of Canada, or as a member of a

mediating community where, for example, being Canadian would "pass through" some other community to which that individual is a member (183).

It must be acknowledged that Taylor's idea of deep diversity is drawn from and is intended to describe the relationship between Quebeckers and Quebec in relation to the rest of Canada. In that Quebec has cognizable geographic boundaries and acknowledged governmental authority over that territory and its citizens, it is relatively easy to conceptualize Quebec as a mediating institution. However, in my opinion, the definition of culture developed in the previous chapter allows the theory of deep diversity to adopt this concept within the limits identified by the theory. By analogy, the characteristics describing culture define its territory, the description of membership defines its citizens and its institutional aspects defines its governance. While geographic isolation of a culture might make it easier to treat that culture as a mediating institution, such isolation is not required by the theory in order for the concept to be applied.

While the concept of a mediating institution is crucial to the theory of deep diversity and how it may be operationalized, in reality as discussed in the previous chapter, we all belong to our common society via a particular cultural membership. This fact is not always perceived because liberalism and liberal governance in North America has not been recognized as an extension of culture. Its unique cultural components are masked behind the language of "neutrality" and the idea that government should stand apart from culture, which is perceived as a personal concern (Young 1990). Moreover, in that individuals can and frequently do belong to multiple cultures, many members of cultural groups identify with North American liberalism but do not see it as a separate

culture because it is the norm into which they were born. Instead, they are trained by the dominant culture to see culture as that which makes them different, rather than what they may share with members of other cultural groups (Young 1990). Yet the very ideas of "atomistic" individualism and rights is clearly a product of Western and North American culture (Geertz 1984) that has been operationalized in North American governance.

This misperception, in turn, leads to the mistaken idea that the politics of difference represents a demand that particular cultures be granted special treatment and be exempted from neutral, otherwise universally applicable standards and norms (Taylor 1992, 237; Young 1990, 164-165). The correct view is that the politics of difference requires that all cultures be recognized and supported equally. Rather than receiving special treatment, the demand is that they receive treatment equal to that accorded the dominant culture.

To accomplish this, the following steps are needed. First, it must be recognized that all individuals are members of society via their membership in particular cultures, either through one or more particular sub-cultures, through membership in the dominant culture, or, as is most often the case, through a combination of cultures including the dominant culture. Second, all cultures must be given institutional standing within society by which to assert the interests of that culture. Third, membership in a particular sub-culture must be recognized as membership in society as a whole. Finally, interactions between the state and the individual must conform to the standards imposed by the particular culture with which that individual is associated within the context in which the

interaction applies. That is to say, if an individual is asserting a claim as a member of the dominant culture on the grounds of individual rights, that claim must be respected in the manner which all other similar claims are made within the dominant culture. However, to the extent that the individual asserts a claim based upon membership in a particular sub-culture, it is on the basis of the needs and claims of the sub-culture that such a claim must be judged.

This latter point does not mean that individuals are free to pick and choose which culture they are a member of according to the circumstances they find themselves in and the results they want to achieve. The state may properly require that an individual be a legitimate member of a particular sub-culture before the treatment of that individual is adjusted accordingly. To do otherwise would make a mockery of a culture and threaten its survival. This merely provides that where such membership exists, it must be duly recognized by the state. (Problems of membership in a particular culture will be discussed in greater detail below.)

Equality and Diversity

The concept of the equality of all citizens is fundamental to all forms of liberal democracy. Under the politics of universalism, the concept of equality has been interpreted to require identical treatment of all individuals based upon certain universal characteristics which are thought to be shared by all of the members of that society as a universal potential. This has been referred to as strict equality. The politics of difference is thought to violate that norm. However, as noted by Taylor, the politics of difference

may also be said to have "a universal potential [as] its basis, namely, the potential for forming and defining one's own identity, as an individual and also as a culture" (1992, 236.)

The difficulty is that this potential may be expressed and come to fruition in a multitude of potentially incompatible ways. Even if it were thought desirable, law and civil society is not well suited to allowing each individual absolute freedom of self expression and development. We do not trust individuals not to operate out of selfish, self serving motives for selfish ends. We legislate so as to exact a demand that the individual conform to behavior supportive of the community. Moreover, as a rule making system (Hart 1961), law is incapable of operating in such a radically atomistic environment. It cannot evaluate all actions according the idiosyncratic needs of each individual. Civil society, in turn, requires some element of commonality and cohesion. There must be some method of grouping individuals together.

The problem for procedural liberalism with its focus upon the individual is that it either must group all people within the single cultural standard of procedural liberalism or it can address them only as isolated, atomistic individuals. While the former is objectionable in that it fails to respect difference, the latter, as suggested by Hart, is functionally impossible.

The politics of difference raises a third alternative: that of culture as a mediating institution. Here, while reserving the authority to address issues of fundamental rights, society can delegate to each culture certain normative, rule making functions to which that culture's members will be obligated to adhere. Society can be assured, to some

extent, that this rule-making will then lead to community supporting action by virtue of the fact that it is a form of rule making by a community for a community. At this point, it can be said that culture is serving a public good.

This does not mean that there cannot and will not be inter-cultural conflicts. Nor does it imply that cultural deference will inevitably lead to acquiescence to any decision by that culture. "Liberalism [in even its most hospitable form] is not a possible meeting ground for all cultures; it is the political expression of one range of cultures, and quite incompatible with other ranges" (Taylor 1992, 249.) A liberal society, for example, could not be expected to tolerate the Islamic call for the assassination of Salman Rushdie because of his book, Satanic Verses.

In order to effectuate the good of culture and cultural diversity, I believe it is necessary to reformulate our understanding of the principle of equal treatment away from the rigid standards of universalism. This requires that we look at the demands of equal treatment on three levels, those of: (1) the individual in relation to the state; (2) the individual within culture; and (3) culture in relation to the state.

The Individual in Relation to the State

At the level of the individual in relation to the state, the universalist standards of equal treatment can be thought to be still binding and effective. Insofar as the state may have a direct relationship with the individual on the basis of its affirmation and protection of fundamental rights or, more simply, in relation to non-controversial common undertakings, such as its welfare system, taxation system, or criminal laws, such

interactions should conform to standards that treat all citizens equally. (This is the standard currently accepted in North American culture, and there is nothing in diverse liberalism which would argue for changing it unless the activities of the state can be argued to impinge upon the interests of culture, at which point the analysis should be made at the level of culture.)

The Individual Within Culture

In considering the concept of equal treatment of individuals within their culture, it would appear that a similarly strict application of the rule of strict equality could be applicable. Clearly, where the liberal state also embodies and acts on behalf of the dominant liberal culture, that culture by its very nature demands that the state treat each of its cultural citizen-members according to standards of strict equality. It would appear that a cultural institution, separate from the state, should act with the same respect for the dignity of its members as does the state, particularly where it is understood that the state has delegated some rule-making authority to that cultural group that the state would otherwise exercise. The problem here is that the discrimination of which citizens may complain may involve a cultural value. For example, based upon certain cultural values, a particular culture may discriminate against its female members with respect to educational opportunity or employment. The question then becomes whether or not equal treatment, in the universalist sense, is a fundamental right or at least, a fundamental right in relation to such areas as educational opportunity or employment. While there is much to argue in favor of an affirmation of equal treatment, it would appear that it is necessary

to leave this question open, subject to a culture by culture analysis.

Culture and the State

The nature of the relationship between the state and culture with respect to the ideal of equality is a new question which cannot be answered by attempting to substitute culture for the individual in traditional understandings of the equal treatment of individuals. There are different needs and values which must be addressed in this relationship. Those needs and values must be applied so as to define the appropriate contours of this relationship.

One may start by considering what standards are appropriate at the point at which culture is recognized by the state. Even the most hospitable form of liberalism cannot be expected to accept all cultures. There will be fundamental conflicts with either individual aspects or, perhaps, the totality of particular cultures. One can suggest that in the state's evaluation of culture as to whether or not it is acceptable, such an evaluation should be made with procedural neutrality (as far as humanly possible) and in conformity with equal standards of review. That is to say, insofar as something relating to a particular culture is unacceptable, it should be unacceptable with regards to any culture.

Once a particular culture has been accepted as a good by the state, it would appear that a second, somewhat more controversial standard of equal treatment should apply. Here, the standard is that the state should provide all cultures with an equal opportunity and accommodation for survival and should be precluded from discriminating against any culture in terms of its survival unless it violates a fundamental norm of that society. This

does not require that all cultures receive identical treatment or identical rights. Instead, that culture should be accommodated so as to allow it to achieve the good identified by it and the good it fulfills as identified by the state.

For example, Taylor justifies the differing treatment and the special powers accorded to Quebec by the fact that Quebec needs those special powers and privileges to carry out its objective of preserving the French-Canadian culture in North America. By contrast, the other provinces do not pursue similar social/cultural goals and therefore, they do not require comparable powers or privileges. To treat all provinces equally in this regard ignores the reality that they all have different needs (180). Moreover, giving to one province advantages such as those given Quebec (except in terms of the reallocation of wealth) is not necessarily prejudicial to the others. That is to say, the treatment of one culture does not threaten the survival of the other(s). Here, identical treatment is not the same as equal treatment.

The issue of equal treatment may be more controversial where a given culture requires not only accommodation but economic support. Should the state be required to give such support? If it does, should it be obligated to provide equivalent support to all cultures? Conceptually, there is no correct answer to either question. Liberal states frequently make economic allocations according to need without questioning whether or not those allocations affect the ideal of equal treatment. It would appear that these questions fall into this same category, as a form of political, social conscience.

An analogy to the type of equality advocated here may drawn from the idea of "complex equality" suggested by Michael Walzer (1983, 3-30). Without adopting all of

the specifics of Walzer's proposal, the idea of complex equality suggested here may be described as follows. Every culture occupies certain spheres of social activity the parameters of which are defined by the particular goods identified by and with that culture. Within each sphere that culture should receive comparable though not necessarily identical treatment with all other cultures, including the dominant culture, operative within that sphere in accordance with the goods identified by that sphere. Insofar as a culture is active in multiple spheres, its treatment may vary according to the specific sphere in question.

What makes this analogy difficult is the fact that it may not always be possible to separate a culture's activities into separate spheres. It may be that a culture's goods are so interrelated and interconnected that one cannot distinguish among them and hence, its sphere may be unique. Nonetheless, insofar as a conflict arises, that conflict itself may be said to identify a sphere which is shared by at least two cultures between whom the conflict exists. The judgement of equality must then be made in relation to those two cultures within that sphere.

The Autonomy of Culture

As demonstrated in the case of Quebec, the goal of cultural survival will frequently entail collective action by that culture in furtherance of that survival and the good identified by that culture. Moreover, the determination of a good is culturally conditioned. One culture cannot necessarily evaluate fairly the good identified by another. To effectuate the twin goods of survival and the good, cultures require a certain level of

autonomy. They must have the freedom to determine what actions are necessary to effectuate these twin goals.

The problem for the state is that cultures do not exist in isolation. We all share a common space, both physical and psycho-social. We constantly interact, as individuals and as groups. It is, therefore, a central concern of the state to manage this common space in ways that: first, provide a base level of health and safety for all its citizens; second, allow for the existence of the state by providing it with the necessary financial resources and other prerequisites of governance; third, avoid conflicts among citizens which, ultimately, would represent a threat to the cohesiveness of the state; and fourth, facilitate all of its citizens' pursuit of the good, however that is defined.

Examples of the specific areas in which conflicts can be expected to arise were highlighted in Chapter Three. They include: the regulation of health and safety issues; socio-economic regulations; regulations regarding the welfare state; and public morals laws. Unfortunately, the theory of deep diversity can not give an easy answer to these problems. Conflicts will inevitably arise and the resolution will, at times, be extremely difficult. The theory of deep diversity does, however, give some general guidance as to how those problems should be approached. Its approach differs from current approaches.

First, public laws and regulations are promulgated on the basis that they are in the public interest. Under current approaches to conflicts in this area, exempting cultures from the requirements of general laws is considered to be a privileging of those cultures, and is therefore resisted on grounds of the need for equal treatment. Under the theory of deep diversity, culture is recognized as a public good. As such, instead of focusing

upon privileging one group over another, the correct analysis would be one which seeks to balance two conflicting public goods. The resolution of the conflict should, therefore, seek to promote both goods.

Second, differing treatment according to non-universal characteristics is generally thought of as a harm. It is thought of as a form of discrimination against those who are not accorded the benefit of the accommodation offered to a particular culture. By rejecting rigid, universalist understandings of the demand for equal treatment, deep diversity requires that we reconceive harm to be something more specific. For example, as argued by Taylor (1993), granting Quebec greater autonomy in its own governance so as to allow it to advance its cultural interests does not harm the other provinces in Canada. It does not affect their relationships to their own citizens nor their relationship with the Federal government. The focus must be to what extent an accommodation offered to one culture actually impairs the ability of other individuals or cultures to pursue and achieve their own specific goods.

Finally, the theory of deep diversity necessarily requires a certain level of moral relativism. The regulation of public morals is undoubtedly one of the most controversial aspects of law in liberal society. It has been the subject of countless debates and has generated an enormous body of literature, the most famous of which is the published debate between Patrick Devlin (1965) and H.L.A. Hart (1963). Liberal theory has not reached a consensus upon the issue of regulating morality or how such regulation can be justified, though in practice, liberal states frequently regulate public morals in such areas as pornography, sexual behavior, and the use of controlled substances (Clor 1996).

Unfortunately, the theory of deep diversity does not provide an easy answer to this problem. Arguments for the recognition of a public morality are based upon the idea that a certain base level of moral behavior is necessary for civilized society. Breaches of that morality are said to corrupt or pollute the public atmosphere and impair the development and dignity of society's citizens (Clor 1996; George 1993). There are certain strands of liberal theory, generally drawing heavily upon John Stuart Mill's essay On Liberty (1974), that argue that morality is strictly an issue to be decided on by each individual. While this approach has obvious appeal for liberal theorists, liberal societies have not adopted it in practice, though such laws are regularly subjected to criticism on these grounds. What this practice suggests is that the people who make up liberal society, from their own cultural experience, do not believe individuals capable of making such choices on an appropriate ground. They suspect them of having selfish, self- centered reasons for their behavior and therefore believe that society must provide an atmosphere supportive of true moral behavior and development (George 1993).

What deep diversity offers to this debate is the idea that an alternative moral perspective may be based upon differences of culture rather than upon individualistic motives. That is to say, rather than relying upon the character and potentially suspect motives of individuals regarding their moral behavior, an individual's culture may attest to and support a differing moral standard that should be recognized. In such a situation, the culture is attesting to the fact that such a morality is socially valuable and that it conforms to non-individual socially affirming demands and norms.

There will still inevitably be conflicts between the moral standards of various

cultures that the state will be called upon to resolve and there will be times where certain culturally normative behaviors will be deemed unacceptable. The practice of female genital mutilation in the North American context, as opposed to its practice in its culture of origin, would be one example. While female genital mutilation may, to some extent, be justifiable within its culture of origin (a point which I will not argue for, but a position taken by some third world feminists (Asha 1996), I believe it would be found unacceptable in North America. However, where there is a close question about the moral acceptability of a particular behavior, the theory of deep diversity supports the argument that it is appropriate to defer to the culture in which it is practiced.

Moreover, in making moral judgements in an intercultural context, we are confronted by the problem of cultural bias. Culture provides the frame within which judgements are based. As such, the judgement by one culture of another is always suspect. The theory of deep diversity provides an alternate perspective. As argued by Taylor:

> [I]t's reasonable to suppose that cultures that have provided the horizon of meaning for large numbers of human beings, of diverse characters and temperaments, over a long period of time -- that have, in other words, articulated their sense of the good, the holy, and the admirable -- are almost certain to have something that deserves our admiration and respect, even if it goes along with much that we have to abhor and reject" (1992, 256.)

We can, therefore, in close cases accord reasonable deference to the judgements of those cultures.

This assertion also embodies a standard which may be useful in distinguishing between a culture and a special interest group and affect how we treat each. Insofar as we may elect to base our respect for culture upon this historical dimension, we may elect

to confer greater respect for the positions taken by a historical culture than we do a group of contemporary individuals drawn together around a special interest, a situation more resembling a political movement than a culture. While a special interest group may reflect certain shared norms and, in a contemporaneous fashion, is formative of the "selves" of its members, that formative character is arguably limited to the area of special interest, whereas culture is seen as formative and normative to the individual's whole world view. This is part of the value of culture being recognized by deep diversity.

This standard must not be mechanistically adopted, however. An example of a situation where this standard of analysis may weaken deep diversity is where it is applied to feminism and gay/lesbian liberation movements as cultures. While it was argued above that these communities should be accepted within the definition of culture, tracing their historical roots is difficult. Nonetheless, while it cannot be adequately explored here, I believe that the strength of the frame provided by these grouping due to the shared oppression experienced by the members of those groups is so profound and character shaping that they should be accorded strong cultural status regardless of how their historical continuity is determined. Again, it is the character shaping and normative making characteristics present here that are valued in historical cultures.

Cultural Membership

The acceptance and valuing of culture under the theory of deep diversity and acceptance of culture as a mediating institution does not totally abrogate the direct relationship between the state and its citizens. Liberal society's direct relationship with

each of its citizens continues based upon its continuing obligation to protect each citizen's fundamental rights and a general social relationship as required for the existence of a common society and common community. Given this fact, there are three ways in which the nature of an individual's membership in a culture can be considered as a subject of particular state concern. These can be categorized under the headings of: voluntariness; opportunism; and conflicting membership.

Voluntariness

Liberal society is predicated in large part upon an ideal of individual autonomy. This ideal is not totally abrogated by the adoption of a philosophy of deep diversity. It remains inherent in the concept of fundamental rights and the idea of the self as being dialogical. The positing of an "I" element within the dialogue also embodies the idea that an individual may transcend or leave their culture of origin as a result of that dialogue. Hence, the state will be concerned with the voluntariness of an individual's membership within a culture. Any impairment of that voluntariness allowed by the state may, therefore, be viewed as an abandonment of the individual by the state in relationship to its direct relationship with that individual.

Against this state interest stands the interest of culture in terms of survival. Survival requires not only a certain degree of autonomy, but also the power to propagate itself. This can be seen most clearly in relation to the question of children's education. As previously noted, education is one of the primary methods by which a culture preserves and propagates itself. Both the state and culture are interested in the content

of that education in conflicting ways. The former seeks an education that supports the individual as an autonomous being in common society, while culture is concerned that education prepare people for life in that community.

One can find similar problems in relation to the situation in Quebec. It is one thing to say that a community such as Quebec should have substantial autonomy over its own governance and another to determine who makes up that community. Is it anyone who resides within Quebec? If so, then any citizen from outside of Quebec could be said to lose their "Rest of Canada" citizenship rights whenever they cross the border into Quebec. If not, then the exclusion of some weakens the autonomy of the whole of Quebec by the degree of that exclusion.

There are no easy answers to these problems. While the theory of deep diversity supports the idea of granting strong deference to cultural survival, it appears that such survival will inevitably require some individual sacrifice. While such sacrifice may be allowable on the basis that the sacrifice being required does not impinge upon a fundamental right, the point is that sacrifice is nonetheless being exacted. For example, insofar as language is defined as an essential element of culture, as argued for in Quebec, the preservation of French as the primary method of public discourse requires that all other cultures surrender their language to that cause. While language may not be a fundamental right, it is nonetheless an interest of each cultural group that simply cannot be universally accommodated.

This problem ultimately rests within the political process and must be decided on a case by case basis. What the theory of deep diversity offers here is the idea that culture

is a value which must be given positive weight in making these judgements as opposed to a simple focus on individual rights.

Opportunism

Where cultural membership confers a particular benefit or exempts a cultural member from the requirements of a generally applicable law, the question arises as to whether that claim of membership is legitimate or represents an individual's effort to claim a particular benefit or circumvent a law. Insofar as culture is a social good, such opportunism is detrimental in two ways. First, it does not embody the good of culture as a legitimate norm or frame. Second, insofar as it may lead to the perception that culture is merely a tool for circumventing the law, it is actually detrimental to the interests and support of cultural diversity.

There are two ways in which this type of opportunism can manifest itself. First, a group of individuals may join together and assert a claim for cultural status on the basis of certain proffered ideals. An example of this would be a group claiming status as a religion with certain identified religious dogma. Under universalist principles, there is a strong tendency to accept any such voluntaristic association and consequently, granting deference to any culture is viewed as problematic in that it would require according similar deference to any other group claiming cultural status. Under the theory of deep diversity, however, the principle of adopting culture as a good also entails the right of society to determine whether or not the culture is in fact one which will be accepted. This does not mean that all cultures can or must be accepted. The state must make

critical assessments as to the particular value offered by any such association.

The state could refuse to grant a new association cultural status on the basis that it does not conform to the historical standard incorporated in the definition of culture presented by the theory of deep diversity. There are, as noted above, problems with this approach, in that it may eliminate cultural status to groups which should receive cultural status. Therefore, the preferable method would be one based upon a direct assessment of the good offered by the proposed culture. While liberal culture is resistant to making decisions of substantive goods openly, such evaluations have been going on throughout history. Deep diversity simply requires that these judgements be made openly and explicitly in regards to culture.

The second way in which the problem of opportunism may present itself is where an individual joins an existing culture as a means of circumventing the law. For example, Quakers have frequently been granted "conscientious objector" status during times of war. How is the state to handle a claim for conscientious objector status asserted by someone newly admitted to the Quaker faith? This situation is much harder to address. To a certain extent, the state may be forced to rely upon each culture to police itself and if the culture is satisfied that the new member is a legitimate member, the state should abide by that decision.

Conflicting Memberships

The final problem in relation to cultural membership arises where individuals find themselves in conflict as a result of membership in more than one culture. This may be

a minor problem in that in most instances the individual will possess the power voluntarily to leave one of the conflicting cultures. That it may exist as a problem is again demonstrated by the situation in Quebec. Quebeckers are members of both the Quebec society and the Canadian society. There have been and are conflicts between the two. The resolution of those conflicts may require certain unavoidable sacrifices by individuals. Similarly, membership in a particular culture may provide certain benefits, the loss of which might preclude leaving that culture. An example of this would be membership in certain Native American tribes where government benefits or the benefits derived from land claim settlements are linked to tribal membership.

This also appears to be a problem which must be addressed on a case by case basis according to the principles of the theory of deep diversity.

Deep Diversity and the Need for a Common Identity

Multiculturalism in the United States and in Canada has been severely criticized as being divisive and as standing in the way of the development of a common, national identity. This identity, whether labeled as patriotism or nationalism, is important. As Taylor has argued, the survival of a nation requires some level of common understanding and undertaking (patriotism) (1989b, 193-200). Moreover, that allegiance must be compelling. National identity requires more than a simple agreement to 'share expenses' or co-operate in regards to economic matters. National identity frequently requires sacrifices for the common good, not only in times of war but also in times of economic disparity. For example, in times of famine, environmental crisis, or simply changing

economic circumstances such as demographic changes or changes in the economic base (e.g. the aging of industry in the "rust belt") one region may require economic assistance from other parts of the country. The sacrifice of transferring public monies from more prosperous regions to those in need requires some kind of common identity between the two. The growing pains of the European Community can, it is suggested, be attributed in part to the fact that it is still largely thought of as an economic association while the individual allegiance of its "citizens" remains bound to the individual member states.

Historically, as argued by Ronald Dworkin, for example, liberal society has grounded its identity upon its adoption of the standard of procedural justice and, implicit in that, a shared understanding of the self. Taylor argues that, as an alternative to this, such an identity can be constructed out of certain shared substantive values. In the case of Canada, Taylor's entire essay can be characterized as seeking to develop the grounding for such a shared self-understanding.

In addition to seeking out substantive commonalities as a basis for shared identity, the theory of deep diversity itself may provide a common basis. Adopting deep diversity as an ideal and the understanding of the self embodied in it may provide a common source of national self understanding in the same way that procedural liberalism has served as a unifying fact to date in North American culture. Acceptance of deep diversity necessarily requires that a person make individual rights subservient to some higher allegiance, such as an allegiance to "deep diversity." It is this allegiance that can be shared by all.

Summary

As demonstrated throughout the course of the last two chapters, the dominant form of liberalism accepted in North America, that of procedural liberalism, is based upon a flawed understanding of the self as a monological development. As operationalized in its governance, it is unable satisfactorily to meet the demands of the emerging politics of difference. To meet those demands, it is necessary to radically reconceptualize liberal theory and liberal governance so as to integrate cultural diversity as a common good. The theory of deep diversity does this both by reconceiving the nature of the liberal state and by integrating culture within the matrix of relationships between the state and the individual in the form of a mediating institution.

The key principles of the theory of deep diversity can be summarized as follows:

(1) The theory of deep diversity is premised upon the ideas that: (a) while each person is a unique individual deserving of respect as an individual, each individual is also a member of one or more cultures that are in part constitutive of that individual; and (b) insofar as cultures are constitutive of their members they must be valued and respected.

(2) In order to operationalize this understanding, the theory of deep diversity offers a new definition of liberalism, referred to as diverse liberalism, which asserts that liberal society must respect the dignity of each individual through the recognition of fundamental rights while adopting the preservation of cultures as a substantive common good.

(3) In recognizing culture as a social good, the theory of deep diversity requires that culture be considered as a constitutive part of society as a whole. Here culture

must have standing in the public sphere and culture may serve as a mediating institution in a state's relationship with the individual members of that culture.

(4) The state must serve the dual functions of: (a) exercising authority over the necessary functions of common life; and (b) mediating disputes among different cultures on a fair and equitable basis.

(5) In carrying out its role as mediator of intercultural disputes, the theory also asserts that the state must recognize that existing laws of the state in large part are expressions of the values of the dominant culture. This in turn requires the recognition that the existence of a conflicting value held by a particular cognizable culture must be understood to place the state law in question as an intercultural conflict. Where the two values can co-exist without identifiable harm to others, the theory of deep diversity would provide that they be allowed to do so. Where the two values cannot co-exist and/or where identifiable harm to others exists, the state must justify its selection of one over the other according to the highest possible standard relating to its function as authority over the common life of the community.

The theory as formulated is of general applicability and is intended to operationalize the politics of difference.

In the following chapters, I will attempt to demonstrate how this theory can be used to reconceptualize Supreme Court jurisprudence in the area of religious freedom where religion is viewed as a particular culture.

CHAPTER SIX

DEEP DIVERSITY AND RELIGIOUS FREEDOM

The status of religious freedom in America today is troubling. Public attitudes and judicial interpretation of the freedom of religion clauses of the Constitution not only fail to support religious freedom in accord with the true nature of religion, they have served to create an atmosphere that may be characterized as either contemptuous of (Carter 1993) or hostile to (Neuhaus 1984) religion and religious faith. Supreme Court jurisprudence in this area is particularly troubling in that it entails an almost total denigration of the fundamental right of religious freedom except in the narrowest, most isolated sense of understanding religion as a purely personal matter.

As should be apparent at this point, the approach to religious freedom taken by the Court largely conforms to the politics of universalism outlined in Chapter Four. The focus of most of those decisions is primarily upon individuals and upon individual rights and the application of principles of strict equality. This jurisprudence gives only very limited acknowledgement to religion as a social institution (i.e. as a culture under the definition of the theory of deep diversity) and the Court has deemed itself incompetent to judge the goods of religion, though it regularly renders judgements that profoundly impact those goods. These are all issues which the politics of difference has identified as problems inherent in the politics of universalism. In that the theory of deep diversity has been developed to answer these criticisms, I believe it offers a very useful way to reinterpret the concept of religious freedom in a manner which would be conducive to that freedom.

It must be acknowledged that the theory of deep diversity cannot be fully achieved simply by legislation or judicial action. It requires a fundamental shift in social thinking about the philosophic principles that underlie liberal government. In the area of religious freedom, for example, the assertion that religion should be accepted in public debates cannot be addressed by the law. Public attitudes are not amenable to governmental regulation. Nonetheless, law has a didactic function as well as a regulatory one. "[T]o make a law is to articulate and promulgate a principle, thereby both manifesting and affecting attitudes about what is right and wrong" (Clor 1996, 77). A shift in the attitudes taken in law making and judicial review will not only address the problems present within the current legal regulation of religion and culture, such a shift can be anticipated to lead to changes in public attitudes towards religion as well.

In this chapter, I will be considering how the theory of deep diversity may be applied to the concept of religious freedom in relation to the four areas of tension between religion and contemporary secular culture previously identified under the headings of equality, autonomy, community membership, and identity. The primary focus here will be in looking at how certain Supreme Court decisions can be interpreted as being in accord with the principles of deep diversity as well as suggesting how deep diversity might provide new approaches to the problems in these areas of tension. Indeed, it will be argued that many of the seeds of deep diversity are already sown within this jurisprudence and they merely require cultivation and supplementation in order for deep diversity to be brought to fruition.

In succeeding chapters I will be looking more broadly at how the theory of deep

diversity can be used to reconceptualize our understanding of the Establishment Clause and the Free Exercise Clause.

Equality

As has been repeatedly stressed throughout the foregoing discussion, the concept of strict equality is the greatest stumbling block to the recognition of deep diversity and to the full expression of religious freedom. To accommodate religion is thought to be both an affront to the demand for equal treatment of all citizens and a threat to community standards where the accommodation of the needs of a particular religious group would require similar accommodation to anyone seeking such accommodation. Strict equality is predicated upon an atomistic understanding of the individual that leaves no room for religious or cultural considerations.

The principle of equality put forth by the theory of deep diversity, however, would support the accommodation of religion as a public good. It represents a holistic understanding of the individual that recognizes that equal treatment must include an accommodation to the cultures that are constitutive of the individual's self.

While current Supreme Court jurisprudence is generally based upon an individualistic understanding of religion which relegates religion to the private sphere, the public nature of religion and the need and capacity of the state to accommodate religion is nonetheless present in some of the decisions of the Court. In an extraordinary opinion, Justice William Douglas, one of the strongest advocates for individualist civil rights in the history of the court, noted that:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous influence to religious groups. That would be preferring those who believe in no religion over whose who do believe. (Zorach (1952) 313).

While it must be admitted that Douglas is here primarily focusing upon the rights of individuals to the free exercise of their religion, what is equally clear is that he is recognizing religion as a legitimate public reality which should be and can be accommodated by the state.

Despite the strong emphasis on individualized rights and equal treatment, two areas in current law can be used to illustrate how identification with a religious collective may be said to mediate one's treatment as an equal citizen in a form comparable to deep diversity tolerance. They are: the status of conscientious objectors, and the anomalous case of Wisconsin v. Yoder (1972). Though decided on other theoretical grounds, these cases are conceptually compatible with deep diversity tolerance.

Since 1917, conscription laws have incorporated an exemption from conscription to serve in combat for all persons who can claim the status of conscientious objector based upon their religious training and belief (Abernathy 1989). While decisions in this area have been influenced by individualist tendencies, such that the individual's moral, ethical, or religious belief is the primary locus of decision (Welsh (1970); Clay (Ali)

(1971)), it has been asserted that the status of conscientious objector is appropriately grounded in a communitarian identification and not simply a political, sociological and/or philosophical view of an individual, and that this grounding reaches a level of commitment that corresponds with the role served by religion in the lives of those professing religious belief (United States v. Seeger (1965)). One's religious affiliation can thus serve as a mediator of one's obligation to serve in the military.

In Wisconsin v. Yoder (1972), members of the Old Order Amish religion and the Conservative Amish Mennonite Church for religious reasons declined to send their children to school after they completed the eighth grade in contravention to a Wisconsin statute requiring school attendance up to the age of sixteen. While the Court's decision rested on individual, free exercise grounds, in supporting the rights of the parents the Court placed great emphasis upon the communal nature of the Amish: the fact that public education was damaging toward the separationist Amish way of life; that the Amish way of life is self sufficient and largely separated from normal social obligations such as the obligation to pay social security taxes with respect to self-employment income; and the fact that the Amish provided an "ideal" vocational education for their children subsequent to public school. Here again, religious affiliation could be said to be acting as a mediating institution regarding the parent's educational obligations.

As has been previously noted, in reaching these decisions the Court has struggled with the demands of strict equality, in spite of the existence of the First Amendment Religion Clauses which could easily be used to justify these decisions. Indeed, as I argued above, the pressure towards strict equality has lead the Court to render decisions

in the conscientious objector cases which distort our understanding of religion. By rejecting the standard of strict equality, the theory of deep diversity would free the Court from this pressure and allow it to be more amenable to recognizing individual claims to religious freedom where membership in a recognized religion can be shown and there is no evidence of actual harm to others.

Autonomy

The idea of religious autonomy is relatively invisible in current jurisprudence. Because there is no place for the religious community in current analysis, most problems are currently identified with individual interests. This identification of the problem then largely relegates it to analysis under the equal treatment doctrine with limited latitude being granted to the individual on the basis of the Free Exercise Clause.

Deep diversity and the recognition of religion as a mediating institution would not, of course, eliminate conflicts in this area. It would, however, shift the frame of analysis away from the individual to that individual's religion as the true claimant in most of these cases. In doing so, we shift the locus of discussion away from that of individual conscience to one of inter-cultural conflict. That, in turn, requires that we examine the state's position, as an expression of the dominant culture, with some suspicion so as to avoid unfairly favoring one culture (the dominant culture) over another (the religion in question). In the event the dispute involves a close question (i.e. one that does not involve a vital or fundamental interest of the state including the fact that it does not involve an identifiable harm to others) then the theory of deep diversity argues that

deference should be given to the religion's self-determination of that issue.

Conflicts, as previously noted, can be expected to arise in four areas of public concern related to the nature of our common community. They include: health and safety laws; socio-economic regulation; welfare state regulations; and public morals.

Health and Safety

Health and safety are issues of vital concern to the state and the common community it is called upon to uphold. In most cases, laws regarding health and safety must be universally enforced in order to be effective. The chlorination and/or fluoridation of the public water system cannot be accomplished on an individualized basis. Laws regarding vaccinations arise because the failure of an individual to receive such vaccinations not only places that individual at risk for a particular disease, but also represents a threat to all of the other citizens who may come in contact with that individual.

Deep diversity would not lead to a rejection of the general applicability of these types of laws. It may, however, require a rethinking as to the application in certain instances. For example in Church of the Lukumi Babalu Aye, Inc. (1990), the city of Hialeah adopted certain zoning and health and safety regulations regarding animal slaughter and food preparation in response to the public announcement that a group practicing the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion, was planning to open a place of worship in Hialeah. These regulations were overturned by the Supreme Court on the grounds that it was very clear

that they were passed in an effort to stop the opening of this place of worship or, at least, to preclude their practice of animal sacrifice. However, under the test put forth in Employment Div. v. Smith (1990), it is fairly clear that had these same ordinances been drafted in a facially "neutral, generally applicable" way, they would have been found constitutional regardless of the fact that they would have had the same detrimental effects upon the practice of Santeria.

Deep diversity principles would require a higher standard of review than that required under the Smith test. Known as the test of "compelling state interest," any law which infringes upon a fundamental right, such as freedom of religion, must be shown not only to advance a legitimate state interest but the state interest must be shown to be compelling and the law must be drawn in a way that is the least intrusive upon any fundamental right as can be achieved while still furthering that interest. (Standards of judicial review, including the compelling state interest test will be discussed in greater detail in Chapter Eight.) Under the test put forth in Smith, and presently governing Free Exercise Clause cases, this higher standard of review is required only when it is shown that a law is not neutral and generally applicable on its face (878). What is proposed here is that this standard should arise whenever free exercise rights are implicated. Thus, while there are clearly very powerful state health interests involved in how animals are slaughtered and food is prepared, those interests can be met without imposing zoning regulations that would preclude the practices of the Santeria religion within a local community.

Socio-Economic Regulation

A second area of concern relates to socio-economic regulations. Here there are at least two categories of concerns. First, there are simple administrative regulations which govern economic relations among people, such as those concerning contracts, mail fraud (United States v. Ballard (1944)), regulating zones for commercial activities (Heffron v. International Society for Krishna Consciousness (1981)), and marriage, insofar as it is considered an economic partnership. There would appear to be no conflicts in this area of regulation with the principles of deep diversity (except where zoning might to considered as discriminatory as in the manner applied in Church of the Lukumi Babalu Aye or where marriage laws touch on religious concerns (Reynolds v. U.S. (1879)).

The second category involves those laws relating to public fiscal responsibilities, most notably the payment of taxes, participation in the social security system (United States v. Lee (1982)), and the obligations of religious organizations as charities (Bob Jones University (1983)). There is, perhaps, at least a conceptual problem here.

In United States v. Lee (1982), a member of the Old Order Amish community claimed an exemption from application of the social security system based upon the argument that he had a religious duty to provide to his fellow members the same types of assistance contemplated by the social security system. Moreover, on religious grounds, it was believed that the Amish were precluded from receiving benefits under the social security system.

While the law governing the social security system accords the Amish an

exemption from payment of social security taxes on all self-employed income (26 U.S.C. §1402(g)), undoubtedly on the basis of their autonomy and religious beliefs, what was found determinative here was the fact that the appellee was engaged in a commercial enterprise employing other Amish members in his carpentry shop. "When followers of a particular sect enter into a commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity" (261). While Congress could have made an exception to the law which would have covered this situation (Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos (1987)), the Court clearly found that it did not have to. The Court therefore ruled against the Amish appellant.

This argument is not totally persuasive. Implicit in the group of cases commonly identified as the unemployment compensation cases (e.g. Hobbie v. Unemployment Appeals Commission of Florida (1987); Sherbert v. Verner (1963); Thomas v. Review Board of Indiana Employment Security Division (1981)) is the idea that religious belief should not be burdened by financial constraints imposed by the state. That is to say, an individual's free exercise right should not be constrained by concern over their livelihood, where that constraint lies within the power of the government. In this case, it may be that Lee's ability to work as a carpenter may require that he work in a commercial form which is capable of meeting the demands of the existing market. If so, then the state is effectively constraining his free exercise rights by forcing him to choose between his livelihood and his religious beliefs in violation of the holdings in the unemployment

compensation cases noted above.

The argument in Lee which may be given greater weight is that the social security payment is part of the national tax system. While it can be argued that the social security system is simply a general tax for the support of the common community, an approach consistent with the Court's opinion though not expressed as such, that is not always how it is viewed, where it is often referred to as an insurance system. Insofar as this system is designed and understood to reflect a correspondence between the contributions made by and on behalf of an individual and the benefits to be received by that individual, the theory of deep diversity would require that the Amish be accorded some level of exemption from coverage of the law. In that it can probably be shown that the Amish do not draw upon the resources of the social security system, respecting their religious culture under the theory of deep diversity would in principle require that they be exempted from payments except where it can be shown that such payments represent a general tax. What would be required is that the law be justified according to the compelling state interest test, a standard which Justice Stevens in his concurring opinion asserts the Court did not meet (261-262).

Public Welfare

The third area of concern relates to the concept of the public welfare and the principles of the modern welfare state. To the extent that the state is expected to insure the economic survival of individual members, religion is expected to give way to support that effort. As previously noted, some of the education cases are illustrative of the

difficulty and ambiguity in this area.

Again, Wisconsin v. Yoder (1972) provides an exception that would support deep diversity. The conflict in Yoder is between the State, which argues that its educational standards are necessary to prepare a child to be a self-reliant, self-sufficient participant in society, and a community which has separated itself from that society based upon its religious convictions. In surrendering authority over post eighth grade education to the Amish community, the Court is in essence granting that community a degree of educational autonomy based upon the religious convictions of that community. The statutory exemption from participation in the social security system further supports the autonomy of the Amish community.

As suggested by Yoder, the state's interest in education relates to its concern that its citizens be prepared to lead useful, productive lives in society. The exception in Yoder, while supportive of deep diversity, does not totally ignore this state interest. For example, the court noted that the Amish are an economically successful, self-sufficient community and that they reject any reliance upon public welfare. The court also notes that the combination of formal, public education up through the eighth grade and the vocational education provided by the Amish after that were well suited to prepare Amish children to lead useful and productive lives within Amish society. Finally, while it might be argued that this practice might preclude Amish children from pursuing many careers in the society outside the Amish community, the court asserted that these children would, if they wished, be able to find ready markets in today's society for their services. On the other hand, it is doubtful that a court following Yoder would, for example, allow a

religious community to preclude all female children from receiving any formal, public education on the rationale that their role is restricted to the home and that they can best learn those tasks at home. Such a position would leave those female children totally helpless in the larger world in contrast to the asserted economic viability of the male Amish children in Yoder. (It must be admitted that a decision in this latter situation may also be influenced by the belief that such treatment is unfair and violative of a fundamental social value regarding the equality of women.)

This careful balancing of state and religious interests is in accord with the theory of deep diversity and the dual relationship recognized between the state and the individual and that individual's distinct culture. Insofar as a culture is seeking exemption from a public welfare system or law, it is fair and reasonable for the state to demand evidence from the religion that it is capable of providing a viable religious alternative welfare system capable of meeting the needs of its members. If so, the religion's autonomy should be respected. If it cannot, then the direct relationship between the state and the individual must take precedence.

The question of denying a public education to female children, speculated upon above, is a much more difficult question for the theory of deep diversity. Ultimately, I believe this to be a question of public morals to be discussed below.

Public Morals

Finally, the fourth area of concern involves issues of public morals. It is here that the greatest potential for controversy lies, in that many of these values reflect basic

understandings of what it means to be a citizen and of the proper relationship between the state and its citizens on the one hand and the duties and responsibilities of individuals to their religious traditions on the other. Moreover, it is here that religion might be classified not only as subject to public morals regulation, but also as a proponent for public morals legislation in such areas as abortion, public sex education, and contraception.

One can discern some tolerance for deep diversity in this area related to an adult individual's right to refuse medical treatment on religious grounds (Paris 1975). The promotion and protection of life is clearly a strong public moral value which is being waived in deference to a particular religious value. It is, however, a waiver based upon the individual's right of autonomy rather than in furtherance of the community as is reflected in the discussion of the rights of parents to refuse treatment for their children, as discussed in Chapter Three.

In Corp. of the Presiding Bishop (1987), the Court took an approach much more compatible with the theory of deep diversity. Discrimination on grounds other than the merit of the individual is generally acknowledged as a moral wrong, not only when practiced by the government, which is prohibited by the Equal Protection Clause, but also when practiced by individuals or private groups. As such, discrimination is a topic which has been made the subject of important legislation (e.g. Civil Rights Act of 1964). The question arose as to whether a religious organization could practice discrimination on the basis of its religious mission and beliefs. Specifically, the question presented in Presiding Bishop was whether a religious organization could discriminate on the basis of religious

affiliation (a suspect category under Sherbert v. Verner (1963)) in its hiring practices.

Recognizing both the communal nature of religion and the need for autonomy, Justice Brennan asserted in his concurring opinion that:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission could conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well. Presiding Bishop (1987) 342.

He then argued that this type of discrimination should be allowed where it is limited to religious and not secular activities (a distinction he admitted is hard to make). (He used the non-profit nature of the employment in question as a reasonable guide for making this decision.)

Respecting the autonomy of a religion does not, however, give religious organizations or individuals an unlimited right to discriminate. Beyond the distinction between the religious and secular activities noted in Presiding Bishop, racial discrimination can, for example, serve as grounds for preventing a religiously affiliated institution from participating in a governmental aid program to which it would otherwise be entitled (Bob Jones (1983)). Similarly, religious individuals are not allowed to discriminate against unmarried couples on religious grounds in their activities as "commercial" landlords (Donahue v. Fair Employment and Housing Commission (CA 1992). What is being reflected here is the kind of "moral" line drawing that is seeking to find a moral balance between the value of religion and other social values. This is in

accord with the theory of deep diversity.

One can also find some support for a deep diversity approach in the administrative and legislative approaches taken to the issue of the use of controlled substances (peyote) as a part of some Native American religions. Here, some legislatures have enacted laws specifically exempting such religious uses of peyote, while in other cases, administrative officials have refrained from enforcing laws against the use of peyote when it is used in the course of religious practices (Lupa 1995).

At the same time, deep diversity would support the argument that the courts should adopt a strict scrutiny or compelling state interest standard in reviewing public morals legislation where possible through application of the standards of deference set forth in the theory of deep diversity identified in the previous chapter. Such standards would require that a significant level of respect be accorded to religious practices and religious determinations of moral values. Again, the fact that a particular religion has adopted a particular moral norm different from that of the dominant society necessarily places the norm of the dominant society into question as an inter-cultural conflict. In resolving this conflict, the state must arbitrate the conflict fairly between the two cultures where only one of the two values can stand or allowing both where they can co-exist.

Community Membership

The application of deep diversity may increase the problems associated with the question of community membership. Given the generally voluntary nature of religious association, as increasing deference is shown towards religion, the problem may increase

of individuals claiming religious membership as a means of circumventing certain laws. As previously noted, fear of this phenomenon has undergirded much of the jurisprudence in relation to the use of controlled substances in religious practices.

As suggested within the theory, some of this risk may be ameliorated by withholding recognition from groups that do not have a historical grounding or where an assessment can be made that the group does not meet the substantive standards and values identified with religion. Moreover, where established religions are involved, society may to some extent rely upon those religious groups policing their own membership if they are given proper recognition. Nonetheless, this is a concern which cannot be completely resolved and may entail an ongoing level of conflict which must be determined on a case by case basis.

The second major concern in the area of community membership arises in connection with those whom the state has traditionally labeled as incompetent to make individualist choices, most notably children. The education cases and Yoder (1972) again illustrate both the traditional approach and a possible deep diversity approach. Traditionally, while parents were allowed to provide private educational opportunities for their children, the content and extent of education required was subject to state regulation for the benefit of the child. Yoder, it can be argued, shifted the locus of discussion by placing the child within the community and making judgements on behalf of that child as a member of that particular community. While the judgement was still rendered independent of the parent's or child's wishes by a Court looking out for the "best interests" of the child, the decision was not predicated upon the interests of an abstract

child in society at large, but rather in terms of Amish children being raised to live in a specific community.

Identity

As noted in Chapter Three, the issue of religion in relation to the need for a common, national identity has not been a subject explicitly addressed by the Supreme Court. Instead, it can be said to be a subject which is implicit within the theoretical understandings which underlie its general approach to religious freedom. In this regard, religion has been viewed as an obstacle to the formation of a common identity which must be relegated to the private sphere or reconstructed along the lines of a homogenized civil religion.

The theory of deep diversity is based on the idea that culture, in this case, religion, is a good which is not destructive of a common identity, but may in fact serve as a constitutive part of it. In looking at the issue of identity and religious freedom in the United States, the question is, upon what do Americans base their self understanding? What is the nature of their patriotism? Moreover, in regards to the possible adoption of deep diversity, what grounds exist to support a shift towards an identity compatible with deep diversity?

First, identity issues arise in connection with the issue of what may be referred to as the common community. Explicit or implicit within many decisions is the judgement that we all reside in a common community and that the interests of this common community outweigh an individual's right to religious freedom. Educational

standards are established and deemed necessary to prepare a child to be a self-reliant, self-sufficient participant in society (Yoder (1972)). In most cases, individuals are required to participate in the social security system regardless of their religious objections (Bowen v. Roy (1986)). Social institutions which may have a religious grounding, such as marriage, are subject to civil regulation (Reynolds v. U.S. (1879)). Finally, public health concerns relating to such matters as vaccinations (Jacobson V. Mass. (1905)) and the fluoridation of water (Baer v. City of Bend (OR 1956)) supersede religious convictions. This common community exacts duties and responsibilities from all its members.

Second, one finds an ideology of individual freedom expressed throughout the discussion of religious freedom. The very approach taken to the problem of religious freedom is almost uniformly one of individual rights and freedoms. Even Justice Douglas' famous comment that "We are a religious people..." (Zorach 313) ultimately turns on the rights of individuals to pick and choose and participate in religion as they individually think best. Again, as previously noted, this ideology of freedom is thought of as a part of the American identity -- "the land of the free" (the "Star Spangled Banner").

Third, related to and growing out of the ideology of individual freedom and hence a part of identity, one already sees in place a certain tolerance for deep diversity. In such areas as the conscious objector cases and in Yoder, there is an implicit and/or explicit recognition that individuals can have loyalties to a particular community which in some ways take precedence over their rights and duties as citizens in the common republic.

Nonetheless, on a legal basis there is no question that they are considered fully integrated citizens.

Finally, it must be acknowledged that the United States has traditionally been identified with the metaphor of the "melting pot." For many people whose ethnic origins have been muddied by multiple and diverse intermarriages, this metaphor is undoubtedly still accurate in describing their ethnic identities. However, the metaphor of the "melting pot" has fallen into disfavor since the 1960s (Glazer & Moynihan 1963/1970) and the phenomenon of "Roots." (Haley 1976). There is now a much stronger identification by individuals with their race and their ethnicity as defined by their family's country of origin rather than their place of birth in the United States. Instead of the melting pot, one now commonly finds metaphors such as the "rainbow coalition," as used in the political campaigns for the Mayor of New York City in the late 1980s and early 1990s, to describe the American identity.

Of the four identity issues identified above, three can be said to be supportive of a deep diversity identification. Admittedly, the issue of a common community appears to be an unavoidable, ongoing problem in terms of deep diversity and the autonomy of the religious community. While one can foresee the possibility of some loosening in the need for regulatory conformity in such areas as education, where in a case like Yoder there is an identifiable, autonomous community involved, there will remain substantial areas in which a common community interest will be held to be at stake. The most obvious example of this is in terms of public health issues. At the same time, while common community will be a locus of inter-group conflict, it will nonetheless remain a

supportive basis for a shared identity within a deeply diverse society by emphasizing that despite these conflicts, there in fact remains a common community. Moreover, both the practical experience of increasing tolerance of diversity and the changing metaphor of self identification away from the "melting pot" image to that of a "rainbow" or other similar concepts are additional potential supports for a new shared identity.

In terms of deep diversity, it is only the ideology of individual liberty which can be said to be a significant stumbling block to the development of a common identity in a deeply diverse society. While one cannot underestimate the depth of the problem, as noted above, this same ideology can be seen as supporting diversity in its emphasis upon the standard of freedom and its tentative acceptance of individual identification with collective interests. As the current politics of difference continues to develop and its ideas become a more accepted part of the common understanding of the self, it can be anticipated that the resistance of this individualistic ideology may be overcome.

Summary

While it remains fair to conclude that Supreme Court jurisprudence in the area of religious freedom fails in large part to address and meet the needs of religion, the foregoing analysis demonstrates that this jurisprudence does not speak with a single voice. There are within it ideas and strands of thought that support religion in accord with the type of support proposed by the theory of deep diversity. This is an important finding. Under the principles of common law, judicial decisions are expected not to initiate new understandings of the law arbitrarily. The law is expected to evolve over time through

an ever more refined analysis of the principles at stake in relation to preceding decisions which are deemed to provide precedent for all subsequent decisions. The presence of decisions and even concurring and dissenting opinions within those decisions which can be interpreted in accord with the principles of deep diversity offer just such precedents for an evolving jurisprudence of deep diversity in relation to religious freedom.

The foregoing analysis also demonstrates that the theory of deep diversity provides us with a useful framework within which to analyze problems arising in the area of religious freedom. Instead of attempting to analyze problems according to vague, general standards of freedom, the theory of deep diversity seeks to define the multiple domains within which those problems arise and the values that are at stake in each. It rejects the requirements of strict equality as a faulty understanding of equality and requires religion, as constitutive of the individual, be involved in the matrix of social decision making. It places the norms of the dominant society into question as one set of cultural norms among many and requires the state to justify any action which impairs religion according to the standard of the compelling state interest test in order to give preference to those norms as opposed to the claims of religion. Finally, it argues that the theory of deep diversity allows us to view religious pluralism as a common value which can serve to support our sense of common identity.

CHAPTER SEVEN

DEEP DIVERSITY AND THE NO ESTABLISHMENT CLAUSE

While the foregoing four part analysis of religious freedom issues provides a useful entry point for discussing the application of the principles of deep diversity to religion and addressing the some of the problems present in current Supreme Court jurisprudence, there are other problems which require a broader, philosophical reinterpretation of the concept of religious freedom. These problems must be addressed at the level of each of the twin clauses of the constitutional enactment of religious freedom: the Establishment Clause and the Free Exercise Clause. While it has been argued that the two clauses need to be read together in order to discern their true intent, each clause does hold independent content and they have been consistently interpreted that way.

In this chapter I will be considering how the Establishment Clause will need to be reconceptualized in light of the theory of deep diversity. In this regard I will be looking at two general areas of concern. The first relates to governmental actions which advance or promote a particular creed or religion. The second arises around the issue of providing support for religions. It must be admitted that although they are distinguishable, the two will frequently coincide. In general, I will be arguing that deep diversity requires a greater flexibility in the understanding of the Establishment Clause than is present in the vast majority of decisions in this area.

In the next chapter, I will be considering the Free Exercise Clause.

Promotion of a Particular Creed

The state can be said to be promoting a particular creed or religion when: (1) through an agency of the state, it requires citizens to participate in activities of a religious nature; (2) it regulates activities solely on the grounds of or in conformity with or in opposition to a particular creed or religious perspective; (3) it promotes a specific religion through public acts identified with a particular religion or the provision of an exclusive public forum; or (4) it engages religious professionals to provide religious services within a restricted format. Surprisingly, while existing jurisprudence (in theory) and the theory of deep diversity are both opposed to these forms of establishment, existing jurisprudence has in fact made limited accommodation with respect to some of these forms of establishment.

Required Participation

The most obvious example of the state requiring an individual to participate in a religious activity arose in connection with school prayer, a practice overturned by the Supreme Court in a series of cases in the 1960s (most notably Engle v. Vitale (1962) and Abington School District v. Schempp (1963)). In its original form, these prayers were of almost exclusively Christian origin and, as such, objectionable on that ground. However, every subsequent reformulation of the school prayer requirement, such as requiring a moment of silent reflection/meditation (Wallace v. Jaffee (1985)) must equally fail in that the behavior being demanded of the students carries an irrefutable religious message in that it is out of character with the type of behavior normally expected of

students. It is clearly a state action in that the schools, a state agency, are involved in such actions, and it is coercively being mandated of the students. This character of failing to respect diversity is not salvaged by provisions that a student can opt out of such requirement through parental consent because this would force resistant students into a position of confrontation and resistance against a norm of behavior being put forth by the state. Such a requirement would, as argued by the Court, place them in a position in which they may face discrimination based upon their differing beliefs (Wallace (1962) 70, O'Connor, J. concur.).

The theory of deep diversity would support this line of cases in that mandatory school prayer would intrude upon the respect due to those cultures not holding the particular religious perspective embodied in the form of school prayer employed and those holding no religious beliefs. Such a requirement would unfairly marginalize them in the class room. Moreover, the offense in this situation does not run solely against those who do not adhere to religions within the Judeo-Christian traditions. As noted by Richard McBrien:

> [Mandatory school prayer violates a] principle rooted even more deeply in theology than in constitutional law, that the state has no competence in the area of religion in general and over such particular religious activities as calling people to prayer, silent or not....[I]n a situation where the state places its legal authority at the service of religion and religious interests, it is more likely that religion would be corrupted by the state than the state by religion. (McBrien 1987, 173).

Therefore, under the theory of deep diversity, the state would be failing to accord appropriate respect for the values of even its favored religion(s) by activities such as mandatory school prayer.

The prohibition against school prayer which is mandated by the state/school must,

of course, be distinguished from religious activities including prayer that may be linked to school activities but that are the result of the voluntary acts of the students. This latter situation is clearly supported by the right to the free exercise of religion (Widmer v Vincent (1981)), a position also supported by the theory of deep diversity which argues for the support of individual autonomy as well as for the support of religion.

Religiously Based Laws

The problem of laws being based upon religious creeds or convictions, while theoretically prohibited by both existing jurisprudence (Epperson v. Arkansas (1968) (prohibiting the teaching of evolution); McGowan v. Maryland (1961) (Sunday closing laws)) and the theory of deep diversity, is much more problematic. As has been previously noted, it is estimated that over 90% of the existing laws are based upon religious tenets and a majority of the members of Congress admit that they consult their religious conscience before making important legislative decisions. As a result of this fact, though without admitting religion as a source of law, the Supreme Court has asserted that "the Establishment Clause does not always bar a state from regulating conduct simply because it harmonizes with religious concerns" (McGowan v. Maryland (1961) 462, Frankfurter, J. concur.) Instead, the Court has focused upon whether or not the law has a legitimate secular intent (Harris v. McRae (1980) 319-320.) "[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion and if it does not foster an excessive entanglement with religion (Committee for Public

Education v. Regan (1980) 653).

In that the theory of deep diversity is supportive of religion being an active force in public debate, laws which result from that debate will obviously reflect that religious contribution. Nonetheless, the courts must act as a forum which seeks to balance that religious input with the demands of deep diversity. In doing so, as discussed in the critique of Lemon, the Court should not attempt to discern or evaluate the motives of legislators or what was in their minds in enacting a particular law unless it can convincingly be shown that the intent was discriminatory in a sense which would violate the Equal Protection Clause of the Constitution. Instead, the analysis must turn on the concept of harm to an identified religion, individual or other culture as balanced against the state interest asserted to be at stake. The ordinances directed against the Santeria religion in Church of the Lukumi Babalu Aye (1993) clearly exemplify this problem of identifiable harm and limited state justification, further corroborated by the fact that there was clearly demonstrated evidence of discriminatory intent. The same problem was present in the laws against polygamy that were upheld in Reynolds v. U.S. (1879). While the Court in Reynolds upheld those laws, arguing that they were in accordance with the standards of civilized society, those standards were clearly drawn from a Christian viewpoint and were harmful to a religious tenet of a religious minority (i.e. the Mormons). The theory of deep diversity could -- though not necessarily would -- support a contrary holding. Whether or not monogamy is a fundamental moral standard of society would require a much stronger justification then that offered by Reynolds.

Promoting Religion Through Public Acts

The state can be said to be promoting a particular religious perspective where it (1) puts forward a particular religious action as a state act or (2) where it provides religion an exclusive public forum. Both actions are objectionable under the Establishment Clause.

The erection of a creche at Christmas time by the state is an example of the first type of prohibited activity. The Supreme Court in Lynch v. Donnelly (1984) actually sustained the right of the City of Pawtucket to provide and erect a creche on privately owned land at public expense as a part of a larger Christmas display sponsored by the downtown retail merchants association. The Court argued that such a display was a simple, passive reminder of a historical, religious event and compared it to the display of religious art work in museums and public buildings. However, as pointed out by the dissent of Justice Brennan, a creche is a "re-creation of an event that lies at the heart of Christian faith" (711). To erect a creche without qualification clearly advances one particular faith, that of Christianity, and is therefore offensive to the views of non-Christians. However, to erect it and justify its erection as a "neutral harbinger of the holiday season" in fact reflects a failure to respect and honor the beliefs of Christians by denigrating a central symbol of their faith (727, J. Blackmun, dissent.) As one of the witnesses testified at the trial, the display invited people "to participate in the Christmas spirit, brotherhood, peace, and let loose with their money" (727). In order to support the erection of the creche, Christians are forced to deny its religious significance and are therefore precluded from affirmatively responding to this attitude.

That the secularization of these symbols is a necessary consequence of this approach is made even clearer in County of Allegheny v. American Civil Liberties Union (1989) where the display of a Menorah, donated by a Jewish group but maintained and erected by a governmental agency, which was displayed in a public park accompanied by a Christmas tree and a sign saluting liberty was allowed (subject to further factual findings to be made by the trial court on remand) while the display of a creche donated by a Roman Catholic organization on the grand staircase of the Allegheny County Court House without other symbols being present was held to be violative of the Establishment Clause. The distinguishing factor between the offending creche in Allegheny and the menorah and the creche in Lynch was that the menorah and the creche in Lynch were displayed in association with secular symbols of the season, while the objectionable creche in Allegheny was displayed alone. Indeed, the court stressed that the menorah was the only symbol available to the state by which to acknowledge that the Jewish holiday of Hanukkah was taking place at the same time as Christmas and it therefore served the state purpose of identifying the nature of the season.

Lynch, County of Allegheny, and the various lower appellate court decisions that have attempted to address this issue (e.g. ACLU v. City of Birmingham (CA 6, 1986); American Jewish Congress v. Chicago, (CA 7, 1987); Americans United for Separation of Church and State v. Grand Rapids (CA 6, 1992)) all turn on the question of whether or not the display of a religious symbol (i.e. a creche or a menorah) represents some form of endorsement, preference, or promotion of religion. The theory of deep diversity would militate against the importance of this question. Because religion would be

recognized as a cultural good, the state could endorse it as such. What would be objectionable would be the idea of preference. Interestingly, Justice Scalia in a stinging dissent in Lamles Chapel v. Center Moriches Union Free School District (1993) attacks the very idea that the Constitution "which itself gives religion in general preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general" (400). He too asserts that the problem is not endorsement but preference.

It might be argued that the requirement that a religious symbol be displayed in association with secular symbols would in fact meet the objection of preference. This approach, however, would violate a second concern of deep diversity, that of respecting the religion associated with that symbol. While the problem of preference reflects disrespect towards or a failure to recognize those cultures not so favored, the treatment of a religious symbol as a secular symbol corrupts that symbol and must ultimately be understood as a failure to respect the values of that religion. This point was made also by Blackmun in his dissent in Lynch.

Related to this, the problem of preference will also arise whenever the state pays for and provides a particular religious symbol. Preference will always occur whenever the government decides which symbols to adopt and display. The state cannot and should not be expected to acquire and display all of the symbols which various religions and cultures may deem important. As such, it cannot fail to exhibit certain preferences.

Based upon the foregoing principles, the theory of deep diversity would support the argument that Lynch is wrong both because of the "preference" being shown by Pawtucket in providing and displaying a creche and the justification of its display as a

secular symbol resulting in a denigration of its religious value. County of Allegheny is equally wrong in its justification for allowing the Menorah by making it a secular symbol.

An issue which is not well presented in County of Allegheny, though present, is the permissibility of allowing religious groups to erect religious symbols on public property. The requirement that such a display must be in association with secular symbols is again wrong under the theory of deep diversity, as argued above, as a devaluation of that symbol. The question which is not asked or answered in Allegheny is whether or not that public space is made available on a non-discriminatory basis to all other religions and cultures. If not, the problem of preference again arises and unless such discrimination can be justified on other grounds in conformity with the Free Exercise Clause, the theory of deep diversity would argue that no display be allowed. On the other hand, if it is made available on a non-discriminatory basis, such an allowance should be accorded to the religious community(ies) as well.

Employment of Religious Professionals

Finally, the state can be said to be promoting a particular religion when it engages religious professionals to render religious services at public expense. This issue does require some qualification based upon the context in which it arises. In particular, this would depend upon whether or not the provision of religious services by the government is intended to overcome an obstacle to religious practices imposed by the government.

The engagement of legislative chaplains to lead theistic oriented prayers at the commencement of the legislative session, though allowed under existing jurisprudence

(Marsh v. Chambers (1983)), should be precluded under the theory of deep diversity. These chaplaincies represent particular religious perspectives and advance those perspectives through the act of public prayer -- an activity not necessarily practiced by all religions much less by cultures holding no religious convictions.

The one Supreme Court decisions which addresses this issue, Marsh v. Chambers (1983) must be considered as an interpretive anomaly. Largely abandoning any pretense of applying the Lemon test, which is normally applied to Establishment Clause cases, the Court here attempts to ground its decision in historical practice by arguing that since the First Congress which drafted the First Amendment engaged a Congressional chaplain at the same time that it was debating the Establishment Clause, it clearly evinced an opinion that such an activity did not represent an establishment of religion in contravention to the Establishment Clause. Interestingly, the chaplaincy practice being upheld in Marsh was not only one involving leading prayers, an activity the dissent correctly characterizes as an "act of religious worship" (811), but it involved, at the time the case was brought, (1) a chaplain from a single denomination that had been engaged for 16 consecutive years, (2) being paid at public expense (3) who lead prayers drawn exclusively from the Judeo-Christian tradition. Yet despite such strong evidence of the state favoring a particular religion, the law was sustained.

The theory of deep diversity would not support this decision. To favor so overtly one particular religion must be considered an affront to those not holding that perspective -- as evidenced by the existence of the case itself. This is not to say that legislatures cannot start with prayer or other similar rituals. What would be prohibited is starting

those sessions with prayers drawn from only one or a limited number of religions or cultural traditions. (How this could or should be accomplished will be discussed below in relation to the issue of allowable support for religion.)

The situation with military and prison chaplaincies is somewhat different. Given the fact that military service frequently removes military personnel from their home communities and prison always does so, the provision of chaplains in these cases can be thought of as compensating for the harm caused by this removal. As such it is arguably supported by existing jurisprudence. As suggested by Justice Brennan, "hostility not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut by the state from all civilian opportunities for public communion" (Abington School District v. Schempp (1963) 299, Brennan, J. concur.). The theory of deep diversity would similarly support these chaplaincies as necessary to the respect due those holding a particular religious belief. Again, this approach is buttressed by the interpretation of justifiable support for religion which will be presented below.

State Support for Religion

Despite the popularity of the metaphor that the Constitution mandates a "wall of separation" between religion and the state, as discussed in Chapter Two, the Supreme Court has long recognized that the state cannot be strictly neutral with respect to religion (Zorach v. Clauson (1952).) "[T]his Court has long recognized that the government may (and sometimes must) accommodate religious practices...without violating the

Establishment Clause" (Hobbie v. Unemployment Appeals Commission of Florida (1987) 144-145). Indeed, the Constitution "affirmatively mandates accommodation not merely tolerance of all religions....[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from government action" (Lynch v. Donnelly (1984) 673).

However, against this line of thought is the equally strong (if not stronger) tradition that holds that the state is strictly prohibited from aiding any or all religions (Everson v. Board of Education (1947); Lemon v. Kurtzman (1971)). Because this issue is most frequently litigated in relation to state efforts to support private education, a primary beneficiary of which are the many religiously affiliated schools, fine and often tenuous lines are drawn between support given to such schools for secular activities, which are allowable, and religious activities, which are not. Complicating this is the belief that religion permeates even the secular instruction taking place in religiously affiliated schools (Lemon v. Kurtzman (1971)).

In order to separate secular aid from religious aid, the Court has upheld the loan of secular textbooks by the state to students (Wolman v. Walter (1977)) but rejected a law paying for secular textbooks purchased by religious schools (Lemon (1971)). Aid directed towards the parents of students attending non-public schools (again, generally religiously affiliated) has been held unconstitutional (Committee for Public Education v. Nyquist (1973)) while a similar aid program open to all parents (though effectively benefiting primarily those whose children were in private, religious schools) was held constitutional (Mueller v. Allen (1983)).

Ultimately, both the cases that argue for the need to accommodate religion and the cases that prohibit aid to religion are struggling with the conflict between the Establishment Clause and the Free Exercise Clause. The former line of cases recognizes the public nature of religion while the latter are grounded in an understanding of religion as a private act and the need to protect religion from state interference. While the former provide a ground for a reinterpretation of Supreme Court jurisprudence along the lines of the theory of deep diversity, the latter direct us to the problem of what exactly is prohibited by the Establishment Clause.

The Establishment Clause

The Establishment Clause asserts that "Congress shall make no laws respecting the Establishment of religion...." As discussed at length in Chapter Two, this is a very difficult clause to interpret and the problems with it have been exacerbated by the incorporation doctrine under the Fourteenth Amendment.

One can reasonably take the position that the Establishment Clause was intended by the drafters to preclude any aid or involvement with religion on the part of the Federal government. This is in accord with the idea of the Federal government as a government of limited powers. This did not mean that they did not value religion or believe that it should not be supported by the States. The same Congress that drafted the First Amendment, in that same summer passed the Northwest Territory Ordinance which asserted in Article II that: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall

forever be encouraged" (cited in Lamles Chapel v. Center Moriches (1993) 400, Scalia, J. dissent.). That religion could be and was being supported by the States is evidenced by the fact that over half of the States of the union had established religions at the time the First Amendment was adopted.

Of course, this alternative understanding of the appropriate source for the support of religion has been taken away by the Fourteenth Amendment and the incorporation doctrine. For this reason, if religion is to be supported, this must occur in terms of what we understand the Establishment Clause to mean. The problem of whether or not the state can support religion has taken on greater significance in recent times due to the nature of the welfare state and the ever increasing regulatory reach of the state. It is an issue which cannot be ignored, as has been recognized by the Court (Zorach v. Clauson (1952)).

State support, though not always characterized as such, can arise in three ways: (1) acts of accommodation of religion; (2) support for the secular activities of religious groups; and (3) direct support for religion.

Accommodation

Accommodation is the lowest level of support for religion which the state can exercise and the one with the strongest support in existing Supreme Court jurisprudence. Questions about accommodation most frequently arise in relation to claims arising under the Free Exercise Clause. Nonetheless, accommodation is a form of support. It assists religion by allowing certain variances in law to accommodate the needs of religion. As

such, it must be addressed as a form of support and tested under the standards of the Establishment Clause.

The focus in these cases is generally upon the fact that an individual's right to the free exercise of their religion will be impaired if the government fails to accommodate that individual (Zorach v. Clauson (1952)). One can see the conflictual nature of government regulation and the Free Exercise Clause in the unemployment compensation cases (e.g. Hobbie v. Unemployment Appeals Commission of Florida (1987); Thomas v. Review Board of Indiana Employment Security Division (1981); Sherbert v. Verner (1963)). The question posed in these cases is whether the state can withhold unemployment compensation to those individuals who cannot obtain a job, lose their job or leave their job due to conflicts between the demands of the job and their religious convictions. As framed by the Court, "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists" (Thomas (1981) 717-718.)

While these cases are argued in terms of how the government's acts function as an impairment of the individual's free exercise rights, as pointed out by Justice Rehnquist in his dissent in Thomas v. Review Board (720), it cannot be denied that these cases represent a significant level of support for religion. They in effect justify the payment of certain governmental benefits based upon the religious convictions of particular individuals. Moreover, there can be no claim that this accommodation can be made to

everyone. It is specific to religion.

Religion can be supported in non-financial ways under the existing accommodation doctrine as well. In Zorach v. Clauson (1952) a release time program which allowed students to leave school premises during regular school hours in order to receive religious instruction was attacked under the Establishment Clause and found constitutional. Similarly, in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos (1987) the exemption for religious organizations from certain provisions of the Civil Rights Act of 1964 provided by law was found not to intrude upon the Establishment Clause prohibitions. While the Court in both of these cases could legitimately deny that the expenditure of public funds was at stake, it cannot be denied that they supported the religious activities of the religions involved. In both cases, individuals or religious organizations are being exempted from the requirement of generally applicable laws in order to satisfy their religious mission. As asserted by the Court in Corp. of the Presiding Bishop, "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence" (337, emphasis in original).

An important feature of all of these cases is that the support being offered is conferred on a nondiscriminatory basis. It is open to any and all religions. Moreover, in distinction from some of the cases to be discussed in the next chapter, the Court recognized religion as a valued social good, if not a fundamental right. Thus, though not well recognized, the principle of nondiscriminatory support for religion being allowable

under the Establishment Clause is already present in existing Supreme Court jurisprudence.

The theory of deep diversity would clearly support this line of cases. The accommodation of religion so as to facilitate its functions as a social good is clearly an aspect of the recognition due religion. At the same time, nondiscrimination among religions is a necessary requirement of deep diversity so as to avoid the problem of preference as previously discussed.

Support for Secular Activities by Religious Groups

The second way in which governmental support for religion arises is in relation to the mixed nature of many activities undertaken by religious organizations. As public organizations interested in human welfare, many religious groups are involved with and sponsor many public service programs such as orphanages, hospitals, food kitchens, drug rehabilitation programs, and, of course, educational institutions. The state is also extremely interested in these areas and has, over the years, enacted many aid programs to assist organizations working in these areas in their work. The question is, should religious organizations be precluded from benefiting from these aid programs by virtue of the Establishment Clause?

To make a blanket prohibition against religious organizations participating in these programs would, on its face, be discriminatory towards religion and therefore suspect (Sherbert v. Verner (1963)). Yet, there remains the issue of the Establishment Clause to be addressed. The approach taken by the Court in these cases is that if the public

service activity can be separated out from the domain of religion, the state can support it; if it is tainted by religion, it cannot. The problem, as noted by Justice Brennan in a concurring opinion, is that:

> the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable, ongoing government entanglement in religious affairs...Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity (Corp. of the Presiding Bishop (1987) 343).

The Court is thus in a double bind. On the one hand, it is seeking to protect religious freedom by avoiding any state action that would directly advance a particular religious activity and potentially harm other religions. On the other hand, its efforts to avoid advancing a particular religion itself represents a direct threat to religious freedom.

Cases dealing with religiously run educational institutions, among the most litigated under the Establishment Clause, exemplify this problem. Most private primary and secondary schools in the United States are religiously affiliated (primarily Roman Catholic). While the existence of these schools reflect, in part, the value placed upon education by these religions, it must be admitted that they are also intended to advance religion in the course of their teaching (Walz (1970) 671). It is this latter fact which is the obvious source of conflict in these cases.

It is interesting to note at the outset that because religiously affiliated primary and secondary schools constitute the majority of all private schools (involving up to 96% of all students in one case,(Mueller v. Allen (1983)), efforts to fund any type of private education has at times been impaired (e.g. Lemon v. Kurtzman (1971); Committee for

Public Education v. Nyquist (1973)). While it can be argued that private education represents a threat to public education as a possible diversion of assets away from the public school system and the state could determine that while private education is a freedom which must be allowed (Pierce v. Society of Sisters (1925)), private education is an activity which should not be supported by the state. Against this stands the argument that private education offers a level of choice and diversity which cannot be easily accommodated by the public schools and the fact that the current public school system could not absorb all of the affected students if the private school system were abruptly shut down. Moreover, in that the parents of private school children are obviously willing to pay for private education, state funding which is still supplemented by parental contributions could be said to be an educational bargain, where a low investment by the state reaps a highly educated group of students and citizens. Finally, because private school parents pay taxes to support education, it may be considered as only fair that the state offer some educational support back to these parents. For all these reasons, the state could reasonably justify aiding private education.

In principle, the fact that religion is involved does not alter the values society gains from private education any more than would the existence of private schools sponsored by a particular, socially accepted non-religious cultural group. As noted before, deep diversity does not require the acceptance of all cultures or religions. Racial intolerance, for example, is a reasonable grounds for refusing public support as is recognized in current jurisprudence. (Bob Jones University v. U.S. (1983)). If religion is a social good in a diverse society, then its presence in private education should be

equally valued. The question is whether or not the Establishment Clause allows such support.

Given the current, articulated understanding of the Court that the direct support of specifically religious activities is precluded (Everson v. Board of Education (1943)), the Court has been forced to draw fine lines distinguishing what elements of education in private religious schools is secular, and therefore allowable, and what is not. Drawing such lines, as has been repeatedly noted by the Court "is not easy" (Board of Education v. Allen (1968) 242). The results of this effort are a confusing, sometimes seemingly contradictory, series of cases that at times boarders on the absurd.

> For example, the State may lend to parochial school children geography textbooks that contain maps of the United States but the State may not lend maps of the United States for use in geography class. [A science book is permissible, a science kit is not.] A State may lend textbooks on American colonial history, but it may not lend a film on George Washington or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services' conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws. (Wallace v. Jaffee, (1985) 110, 111, Rehnquist, J. dissent. Notes and cites omitted.)

This is clearly an unsatisfactory state of affairs.

Under the theory of deep diversity, this effort to draw fine lines would be considered largely unnecessary. For example, if a religion was acting against a strongly identified interest of society, support could simply be withheld from that organization for that reason without seeking to identify what is or is not a religious act. The fact that religion was involved would not be determinative. Moreover, it may also be argued that in many instances the theory of deep diversity would support precluding such line drawing. Many cultural groups receive state funding in support of activities which are directed towards advancing and sustaining that culture, often in the form of arts, education, or social support programming, while it is argued that religion cannot be supported in advancing its interests by educating its youth. In that under the theory of deep diversity religions would be recognized as cultures, principles of equality would demand that religions receive treatment equivalent to that accorded any other cultural group. Indeed, in that religious freedom is generally recognized as a "fundamental" right and receives special recognition within the Constitution, this rejection of negatively discriminatory treatment may be said to command even greater respect.

This approach demands an answer to the question as to whether or not the Establishment Clause allows or precludes the direct support of religious activities. While many of the cases discussed to this point would support the position that the state can support religion, it is a question that needs to be confronted directly.

Direct Support for Religion

In a majority of the cases discussed to this point, the Court has gone to great

lengths to argue that the actions it has supported are actions which are not intended directly to support religion. Instead, these acts are characterized as efforts to remove a state sponsored impairment to religion (e.g. Thomas (1981); Hobbie (1987)), the support given is for strictly secular services being rendered by the religious organization (e.g. Meek v. Pittenger (1975); Committee for Public Education v. Regan (1980)) or that such support is incidental or ancillary to an otherwise valid act of government (McGowan v. Maryland (1961) (Sunday closing laws); Everson (1947)).

At the same time there exists an important line of cases that argue that the state can support religion (e.g. Zorach (1952); Corp. of the Presiding Bishop (1987)). These cases require that the support given be proffered on a non-discriminatory basis and they suggest that whether or not the support offered involves an expenditure of public funds is an important factor. (In both Zorach and Corp. of the Presiding Bishop there was no such expenditure and support was allowed.) The question then becomes, is the expenditure of public funds a necessary limitation? The answer to this question is no. This can be demonstrated in three ways.

First, as has been previously argued in connection with the unemployment compensation cases, the results of these cases do in fact require the expenditure of public funds in support of religious freedom. In order to accommodate the rights of certain religious believers, the state is required to accept certain religious justifications that would qualify them to receive certain benefits which, absent those religious justifications, they would not be entitled to receive.

Second, in Walz v. Tax Commissioner of the City of New York (1970), the

practice of granting tax exemptions to religious organizations was attacked under the Establishment Clause. The granting of tax exemptions to religious organizations is a wide spread, long standing practice, present in all 50 states and within the Federal income tax system. While the Court in its decisions simply denied that these exemptions are a form of public support for religion by lumping religion in with a host of other cultural, educational and social organizations that receive similar tax treatment (an analysis that is in some ways favored by the theory of deep diversity), the fact remains that religious organizations do receive a form of financial support from these tax exemptions. This fact can be viewed in two ways. First, waiving a tax payment that would otherwise be payable is equivalent to making a payment to that organization in the amount of that tax. Alternately, if one views taxes as a method of paying for the public services received by an organization, the waiver of those taxes means that the public services are being given to that religious organization "for free" or as donated services. Either interpretation necessitates the conclusion that the state is supporting religion through an expenditure of public funds. (Justice Brennan's arguments on this point in his concurring opinion are simply not logically persuasive. Walz (1970) 690, 691).

Finally, there is strong historical precedent for the allocation of public funds to support religion. From the time of the Constitution up through 1897, "Congress appropriated time and again public monies in support of sectarian Indian education carried on by religious organizations....This history shows the fallacy of the notion found in Everson that "no tax in any amount" may be levied for religious activities in any form" (Wallace v. Jaffee (1985) 103, 104, Rehnquist J., dissent, cite omitted). Leonard Levy's

distinction that this practice was directed towards non-citizens rather than toward U.S. citizens still does not rebut the fact that such direct aid was given by the Federal government to religion.

In summary, while the Court has not clearly asserted this fact, there is an important line of cases and precedents which recognize the right of the state to offer non-discriminatory support for religion both in terms of accommodation and financial aid.

Illustrative of the impact of this reasoning, it is under this line of cases that legislative chaplaincies could be supported. Many of the Establishment Clause cases are argued on an all or nothing basis. If an activity, such as prayer, offends a particular group, it is argued that the practice must be ended. This is in line with the general approach of the politics of diversity which has understandably focused exclusively upon ending the oppression faced by minorities. It looks exclusively at their rights and need for recognition. However, recognition and respect must be accorded in both directions, both towards the minority and the majority. Totally to preclude an activity discriminates against and fails to recognize the values of advocating that act. Totally rejecting the interests of a majority of legislators who desire to start their sessions with public prayer does not respect their values. Instead, if a legislative chaplaincy is desired, it must be designed in a way which respects the values of all legislators and, as representatives of the public, of the public at large. This can be accomplished, for example, where the chaplaincy involves a rotating group of leaders drawn from both a widely representative group of religions and non-religious groups. While religious leaders could use their appearances to lead prayer, non-religionists could use their time to present the thoughts

of their communities in a way similar to an understanding of prayer as a reflective communal moment. While prayer and non-prayer are not completely interchangeable, accepting both reflects a recognition of the diverse interests of all of the citizens without preference. Under this approach, the issue of public support is no longer of significant import as no preference is being shown by the state because it is truly non-discriminatory.

Necessary State Support

To assert that the state has the right or power to do something is not to say that it should or must. In this case, does the fact that the state can offer non-discriminatory support for religion lead to the further conclusions that it should or must?

The question as to whether the state should support religion is, of course, largely a question of policy which lies within the state's normal competence. It is up to the state to decide. Under the theory of deep diversity, there are strong arguments in favor of state support for religion. Insofar as religion is recognized as a social good, it deserves the same type of funding given to any other comparable good. The level or extent of such support given to any class of social goods is one based upon reasonable judgements.

At the same time, there are arguments which would support a state deciding not to give support or not to give a particular type of support. Specifically, one of the concerns raised in the Lemon test is whether or not the support given will result in substantial entanglement of the state with religion. In this case, the concern is that such governmental involvement may threaten the integrity and autonomy of religion (Corp. of the Presiding Bishop (1987) 343 Brennan, J. concur). As discussed in Chapter Two, one

of the acknowledged purposes of the Religion Clauses of the Constitution was to protect religion from governmental interference. It is feared that excessive entanglement may result in just such interference.

To a certain extent, application of the principles of deep diversity to the provision of support for religion would ease some of the concerns related to entanglement. Many of the aid programs that have been rejected because they might result in excessive governmental entanglement are the result of governmental efforts to supervise funded programs to assure that the programs are in fact secular and are not tainted by religion (Grand Rapids School District v. Ball (1985); Lemon (1971)). If religion can legitimately be supported, such supervisory activity, and its concomitant entanglement with religion, would be unnecessary. Nonetheless, governmental support must be viewed with the issue of entanglement or undue influence clearly in mind.

Whether or not the state must provide non-discriminatory support arises in two ways. First, it may arise in connection with the Free Exercise Clause in cases where a state action is identified as impairing an individual's right to the free exercise of their religion (an issue to be addressed in more detail in the next chapter.) Second, under the theory of deep diversity, it may arise in connection with a claim for equal protection under law. In that it is argued that religion is to be considered a culture, it follows that religion should be treated in an equivalent manner with any and all other cultures insofar as they may be comparable. While it may be appropriate at times to make some distinctions between cultures and to seek to support them in ways appropriate to their unique missions (such as the differing treatment of Quebec which Charles Taylor supports

as described in Chapter Five) to the extent that there are commonalities among them, they should be treated equally. For example, the state should not be able to support activities directed towards the survival of one culture (such as educational programs) and not support similar activities by religious groups.

Summary

The foregoing analysis supports the argument that the Establishment Clause should and can be interpreted as prohibiting the state from exhibiting any kind of preference for a particular religious creed or tradition through its public acts or laws. The theory of deep diversity, which supports this understanding, would support a stronger application of this principle than does existing Supreme Court jurisprudence, particularly in regard to the potential harm caused by these state actions, such as its secularization of religious symbols.

At the same time, the Establishment Clause need not be considered as a barrier to governmental support for religion, whether in the form of accommodation of religion or its direct financial support. Instead, the requirements imposed by the Establishment Clause, as witnessed by history and a significant line of Supreme Court cases, are that any support given must be given on a non-discriminatory basis and should not entail the kind of entanglement between religion and the state which would threaten the independence and autonomy of religion.

CHAPTER EIGHT

DEEP DIVERSITY AND THE FREE EXERCISE CLAUSE

What does the "free exercise of religion" mean? What is it that the Free Exercise Clause is attempting to protect? One cannot answer these questions without an understanding of what religion is and what social values it represents. Out of deference to the postulate of procedural liberalism that the state should not place itself in the position of determining the good, the Supreme Court has attempted to sidestep these questions. Instead, it has adopted a mechanistic approach to religious freedom that seeks to segregate religion from the state and transform religion into a private, personal right. Moreover, because it deems religion as a non-comprehensible value (Thomas v. Review Board (1981)), it has functionally denigrated the Free Exercise Clause to meaningless status, requiring that it be combined with other recognized and valued rights in order for it to be enforceable (Employment Div. v. Smith (1991)).

Nonetheless, upon careful examination, one discovers that there is a certain understanding of religion, a theology if you will, that underlies much Supreme Court jurisprudence. It understands religion as a personal act, a relationship between "man and his God." However, as argued in Chapter Three this theology, drawn from Jefferson, does not in fact reflect the lived reality of religion. Consequently, jurisprudence based upon it does not always address the reality of religion as a social institution and does not always protect legitimate free exercise claims.

In this chapter I will be looking specifically at issues related to the exercise of

religion. What exactly does that mean? I will then consider the various standards of judicial review that have been applied in free exercise cases and will suggest the standard of review that would be appropriate under the theory of deep diversity. I will also consider circumstantial issues which have impacted cases in this area but have largely been ignored by the standards of review commonly applied. Finally, I will consider the fear of religious conflict and strife which existing constitutional theory is intended to prevent to demonstrate how deep diversity would strengthen this effort.

The Free Exercise of Religion: Acts versus Opinions

What exactly does the phrase "the free exercise of religion" mean? What is it that the Constitution is attempting to protect? In essence, the question here is what is religion? In what way is it operationalized in human affairs?

Reynolds v. United States (1879), the first major case to consider the Free Exercise Clause set the stage for all subsequent Supreme Court decisions in this area. In it, the Court implicitly adopted the Jeffersonian theology that religion was a matter solely between "man and his God" and asserted that as a result of the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach all actions which were in violation of social duties or subversive of good order" (164). This statement not only denigrates religion as being "mere opinion," it effectively relegates it to the so-called private sphere. Any action taken at the behest of religion is excluded from constitutional protection and, instead, subject to value laden judgements of "social duty" and "good order" which will undoubtedly be made by the religious (or

non-religious) majority. Such a majority is not likely to reflect the interests of religious minorities (Goldman v. Weinberger (1986) 523-524, Brennan, J. dissent).

Admittedly, there is some administrative appeal to making such a bright line distinction. It is in action that conflicts will arise. Actions directed against the holding of religious beliefs identified as such can readily be identified and rejected as violating the Establishment Clause. Such activities as requiring a belief in God as a qualification for holding public office (Torasco v. Watkins (1961)) or mandatory school prayers (Engel v. Vitale (1962)) represent both the problematic establishment of religion and an effort to compel belief prohibited under the Establishment Clause.

Similarly, under the Reynolds analysis, one need not consider the nature of religious compunction in regulating any public action taken by a religious person. Underlying this proposition is not only a particular conception of religion but also a distrust of the individual and religion. In oft repeated language, the Court signalled this fear as follows:

> Can a man excuse his practices to the contrary [of existing law] because of his religious belief? To permit this would be to make the professed doctrine of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances" (Reynolds 166-167).

This assertion makes sense only in the context of a private, individualistic understanding of religion as being a matter between "man and his God." It ignores the reality that religion is generally a communal, lived reality that does not rest upon individual professions of conscience. That belief can, therefore, be tested against the standards of a particular community (though that, of course, would not answer all of the concerns of

the Court.)

The effort to restrict religion to the realm of abstract belief and private conscience is, of course, untenable. This fact has long been recognized by the Court. The exercise of religion frequently requires believers to act on their beliefs in a variety of ways. The "free exercise of religion often, if not invariably, requires the performance of (or abstention from) certain acts" (Cantwell v. Connecticut (1940) 877. Emphasis in original.) "[B]elief and action cannot be neatly confined in logic-tight compartments" (Wisconsin v. Yoder (1972) 220). "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause" (Employment Div. v. Smith (1990) 893, O'Connor, J., concur).

Standards of Judicial Review

To recognize that a right to act is embodied in the Free Exercise Clause does not mean that that right is absolute. It must be weighed against other interests with which it comes into conflict. The question for the Court when such conflicts arise is what standard of review is to be applied in weighing these conflicting interests? To which side of the equation is deference to be given? In developing this standard of review, deference is usually given according to the relative value of the rights in question -- the more important the right, the greater the justification required for its infringement.

With respect to religious freedom, "from the very beginning of the liberal tradition religious freedom has been considered a 'fundamental right'" (Taylor 1995, 176).

Thomas Jefferson called it "the most inalienable and sacred of all human rights" (Jefferson 1943, 958). It is one of a very limited number of rights that has been specifically singled out and given "preferential treatment" by the Constitution (Lamles Chapel v. Center Moriches (1993) 408, Scalia, J. dissent). The "First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a constitutional nor[m]" (Employment Div. v. Smith (1990) 901, O'Connor, J. dissent). It is, one must conclude, a very important right from the viewpoint of history and political philosophy.

The Court has, at least in principle, recognized this valuation. Historically, the standard to be applied has been formulated in a number of ways. In Wisconsin v. Yoder (1972) it is asserted the "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." In Thomas v. Review Board (1981) and Sherbert v. Verner (1963), it was held that "[i]n general, government may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest" (Thomas 718; Sherbert 406-408). In United States v. Lee (1982), the Court stated that "the State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest" (257-258). While each of these standards is somewhat different from the other (a difference which the Court would undoubtedly find more significant than most non-lawyers), they are all high standards of judgement -- the justification demanded of the state is relatively stringent.

Yet, along side these cases which assert the need for strong justification one finds

other cases which allow for relatively weak justifications for the infringement of religious freedom. In Prince v. Massachusetts (1944) the prohibition on an underage child distributing religious literature as a part of her religious duties as a Jehovah's Witness was supported as a "reasonable" exercise of state power relating to child labor laws. In Goldman v. Weinberger (1986) a regulation prohibiting the wearing of a yarmulke, which was variously described as "a silent devotion akin to prayer" (509), "one of the traditional religious obligations of a male orthodox Jew -- to cover his head before an omnipresent God" (513) and "an expression of respect for God...intended to keep the wearer aware of God's presence" (525) was allowed to stand in deference to the "professional judgement" of military officials (at 509) without further justification other than the opinion of those officials on the record. Similarly, in many prisoners' free exercise cases, impairment of the right has been allowed where it could be shown that the infringing rule was merely "reasonably related" to legitimate penological interests (Cooper 1995, 329). (With respect to Goldman and the prisoners' rights cases, while the Court has generally given significant deference to the activities of the military and the penal system based upon their special roles in society, such deference is not supposed to render the First Amendment "nugatory" (Goldman 507). Yet, as complained about in Justice Brennan's dissent, that is in effect what the Court has allowed.)

Even in cases where the Court has asserted that it is demanding a high standard of justification, many of the dissents in those cases have claimed that the Court did not live up to that standard in its actual judgement (e.g. Braunfeld v. Brown (1961) Brennan, J. concur & dissent; McGowan v. Maryland (1961) Douglas, J. dissent). For example,

in United States v. Lee (1982) the Court makes the general claim, without any type of empirical support, that the maintenance of a national social security system requires uniform application, the absence of which would make the program impossible to administer. However, as argued by Justice Stevens in his concurring opinion, there was nothing in the record to indicate that granting an exemption from social security employment taxes would have any significant impact on the social security system. Indeed, given the self-supporting nature of the Amish community, it could reasonably be assumed that their exemption would have little effect or may even be economically beneficial (262). Thus, while the social security tax system is undeniably an important governmental interest, the interest could be fully served without infringing upon the Amish free exercise right.

In recent years, the Court has moved away from this high standard and has refused to demand a compelling state interest in its decisions (Bowen v. Roy (1986); Lyng v. Northwest Indian Cemetery Protective Assoc. (1986); O'Lone v. Estate of Shabazz (1987)). In Employment Div. v. Smith (1990) the Court came up with a new standard of review that divides the process of review into two parts. It first looks at a particular law to determine if it is "facially neutral." If so, it is deemed to pass constitutional muster. If not, then it must be subjected to a strict scrutiny, compelling state interest test (878; also see, Church of the Lukumi Babalu (1993)). Indeed, in Smith the Court in its opinion effectively rendered the Free Exercise Clause largely meaningless by asserting that it must be combined with another, more valued right (such as free speech or free assembly) in order to receive substantial protection.

The main difficulty with Smith is that taking a narrow view of the law and basing one's judgement upon whether or not it is facially neutral and generally applicable (a qualifier added in Church of the Lukumi Babalu) fails to consider the impact of that law upon the free exercise of religion. While the majority opinion asserted that the Court has never applied the compelling state interest test to laws according to the incidental effect that a generally applicable law may have on a protected right, Justice O'Connor in her concurring opinion disagreed citing Rodgers v. Lodge (1982) - which held that a race neutral law that "bears more heavily on one race than another" may violate the Equal Protection Clause (at 618)) and Castenada v. Partida (1977) -- which looked at the effect in grand jury selection (at 492-495).

Effect is an important indicator of a problem. For example, it seems reasonable to believe that if a legislative body wished to discriminate against a particular religion in the current United States legal climate, they would not do so openly. They would cloth it in facially neutral, generally applicable language. (Though, surprisingly, that was not the case in Church of the Lukumi Babalu (1995)). Moreover, it is through a law's effects that even unintentional discrimination and preference can be exposed. For example, in Goldman v. Weinberger (1986) the regulations governing military dress were generally applicable and designed to result in a fairly uniform appearance. Part of the argument for these regulations was that the military was seeking to create a sense of unity and esprit de corps by limiting the exposure of difference among the soldiers. Captain Weinberger's wearing a yarmulke symbolized one such difference - that of his being an Orthodox Jew - which was what the regulations were attempting to avoid. Based upon

the fact that Captain Weinberger was denied the right to wear a yarmulke, Justice Brennan undertook a detailed analysis of those regulations which revealed that they allowed certain non-conformities to dress, such as the wearing of rings (which could signal affiliation with certain groups or communities), an identity bracelet, and necklaces (including such things as religious medallions) so long as the necklace was worn inside the clothing so that it could not be seen (518). In essence, Brennan argued, these allowable variations were in conformity with the religious values of the majority. "[U]nder the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths" (521).

Furthermore, this process is almost inevitable unless it is challenged based upon a law's effects.

> Definitions of necessity are influenced by decionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs or values of minorities when these needs and values differ from those of the majority....A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar (523-524).

It is against this tendency that the Court must act -- yet the tendency is revealed only in its effect.

A Deep Diversity Standard of Review

The application of the theory of deep diversity would not require a substantial revision of the compelling state interest test as was put forward in such cases as Thomas v. Review Board (1981), Wisconsin v. Yoder (1972), or Sherbert v. Verner (1963).

What it would do is offer some refinements and address some of the concerns which have inhibited the Court's recognition of free exercise claims.

First, the theory of deep diversity would recognize the free exercise of religions as an important fundamental right. However, it would characterize this as more than a right, classifying it equally as a social good deserving of the highest degree of deference within the limits imposed by other, equally important social goods.

Second, the theory of deep diversity would support adopting a compelling state interest test essentially along the lines articulated by Justice O'Connor in her dissenting opinion in Goldman (1986).

> First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential" or that the interest will not "otherwise be served." (530. Emphasis in original.).

This standard is particularly stringent in its demand that the government bears the burden of proof in both aspects of the test and that it must prove that the free exercise claim in fact is harmful. "[T]he government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual" (530).

It is interesting to note that this standard has been adopted by Congress in its enactment of the Religious Freedom Restoration Act. This act, passed by large majorities in both houses of Congress and with substantial public and political support, is intended to counter the trend in Court opinions like Smith that many perceive to be a threat to

religious freedom (Richardson 1997).

Circumstantial Issues

As previously noted, in attempting to formulate an appropriate standard of review the Court did adopt a compelling state interest test for a number of years. It was, however, a standard more honored in breach than in practice. In attempting to apply that standard, decisions were frequently shaped and determined by concerns that did not easily fit within the parameters of the standard and, as a result of this, the standard itself was subsequently abandoned. Among the most important of these circumstantial issues would be: the indeterminacy of religious belief; and concern over the doctrine of equal treatment under law.

Indeterminacy of Religious Belief

In attempting to determine the scope of the Free Exercise Clause, the Court has been hampered by its concern about how to evaluate religious belief. There are three aspects to this problem.

First, as articulated in Reynolds (1879), it is the general understanding of the Court that the state is precluded from enacting any law with respect to belief. While there is merit in the idea that the state should not involve itself too deeply in issues of belief, the absoluteness of this standard has removed belief from explicit judicial consideration. The Court is thereby precluded from considering the values implicit in certain beliefs in its efforts to balance any conflicts between those beliefs (which are

simply classified as religious) and the identified, articulated social values with which they conflict. This is like a debate between one well respected person who simply states "This is so because I say it is" and another who presents clearly articulated reasons in support of her position. While respect for the former may generate some support for that position, the latter is likely to be more persuasive.

Second, as Robert Carter has argued, religion frequently operates according to a radically different epistemology than that of the secular world (Carter 1993). Religious belief in God, the Ultimate Reality or Nirvana cannot be explained according to the terms of empirical reason. As a consequence of this, and in admitted deference to religion, the Court has deemed itself incompetent to judge religious beliefs. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection" (Thomas v. Review Board (1981) 714). "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith" (Hernandez v. Commissioner (1989) 699). Again, while this position has merit, the absoluteness of its formulation precludes consideration of what can be rationally justified and argued.

Finally, there is a degree of skepticism about the legitimacy of individual belief. As discussed in connection with the use of controlled substances, there appears to be a fear that assertions of religious belief may be used to justify personal desires to avoid application of otherwise applicable law. This problem arises in part out of the theology of religion as being a private, individualist activity. It is on this basis that the Court can assert, as it did in Reynolds (1878) that deference to religious belief would "in

effect...permit every citizen to become a law unto himself" (167).

The difficulty for the Court is that these three concerns cannot be readily incorporated into its normal standards of review. Yet belief is a necessary element in the calculus of decision making. The real question is what criteria should be used in judging religious belief? Given the legitimate need to grant strong deference to religious belief, what standard can be applied that would not, in the end, be discriminatory towards it? There are a number of answers to these questions.

First, the First Amendment cannot be considered an absolute shield for religious belief any more than it can act as an absolute shield for pornography or other forms of unacceptable speech. Deep diversity does not and can not counsel absolute acceptance of all religious belief. It would be unacceptable to allow the assassination of Salmon Rushdie as a blasphemer to stand as a legitimate and acceptable exercise of religious freedom. Hence, religious beliefs can be judged according to standards of specific identifiable harm to others much the way free speech is judged.

Second, to assert that religion operates according to an alternate epistemology does not mean that judgements of value cannot be made according to a secular epistemology. For example, the fact that the ten commandments are part of a fundamental religious belief system for Jews and Christians does not preclude secular approval of such commandments as those against killing, stealing or lying. More problematic, perhaps, are those beliefs which cannot be similarly directly translated into secular values. For instance, the wearing of a yarmulke has religious meaning for the individual which cannot be measured by the Court as an immediate social value. However, insofar as religion is

recognized as a secular, social good, the Court can recognize the wearing of the yarmulke as both an expression of the religion in its "world building" (Berger 1967) and as an act of community building and sustenance. Because this community has value, acts in support of it can be valued for that purpose.

Finally, because deep diversity rests upon a valuation of the character forming function of religion, religious belief can be evaluated in terms of that religious community. While some accommodation should be allowed for individual beliefs, those beliefs must stand in relation to all other beliefs of individuals within that identified culture. That is to say, an individual asserting a specific belief that is not linked to a specific religious community or culture would be judged according to the standards of the general society or culture. On the other hand, for those who stake their beliefs upon adherence to a particular religious community, it is that community which stands behind a particular belief and justifies giving it special deference under the theory of deep diversity. As a standard imposed by a living community, it is the witness of that community which testifies as to its utility and value. To focus solely on the individual would be both destructive to communities and ultimately to the individual who needs community to help shape and form her/his identity.

Equal Treatment Under Law

The second problem for the Court is that it operates out of an understanding of equality requiring equal treatment of all citizens that has been characterized as "strict equality." While this is most often framed in terms of the individual, such as the

assumption in Reynolds that granting a religious exemption to one individual would entail granting to every individual a similar right according to their own professed beliefs, it has also been applied to groups. For example, in Goldman (1986), one of the arguments which the Court appears to have given great weight is that if they granted Orthodox Jews an exemption to the dress code to wear a yarmulke (which everyone admitted was a relatively discreet and unobtrusive adornment) they would be required to recognized the right of a Sikh to wear a turban, a Satchidananda Ashram-Integral Yogi to wear a saffron robe or a Rastafarian to wear dreadlocks (512, Stevens, J. concur.).

A number of points deserve to be made here, using Goldman as an example. First, in Goldman it was assumed that the existing dress code was neutral and non-discriminatory. In fact, as argued by Justice Brennan in his dissent, the existing dress code favored one religious group and discriminated against all others. If such discrimination could be not justified, then strict equality itself would require that the code be adjusted to remove this favorable treatment so as to treat all equally. It is unclear that this is even possible. Second, the asserted need for uniformity must itself be questioned. While unity and esprit de corps are desirable goals for the military, the United States is a pluralist country. To deny this, as asserted by the politics of diversity, is to discriminate against important aspects of those individuals who are not members of the favored majority. On the other hand, if diversity is expressed as a value then that value could serve as a unifying force in place of the homogenized, depersonalized standard that was supposedly being put forward by the code. Indeed, it could be made a unifying value for the whole society. Third, again as argued by Justice Brennan, "[b]urdens

placed on the free exercise of members of one faith must be justified independently of burdens placed on the members of another. It is not enough to say that Jews cannot wear yarmulkes simply because Rastafarians might not be able to wear dreadlocks" (Goldman 521-522, Brennan, J. dissent). There may be utilitarian grounds to prohibit dreadlocks in terms of health and safety that do not apply to the wearing of a yarmulke. Hence, justice would require that each group be treated individually according to their own unique needs. Otherwise, they are not receiving due recognition of their individual or cultural/religious rights claims to the free exercise of their religion.

This pressure towards strict equality can be seen working in a slightly different direction in the conscientious objector cases of United States v. Seeger (1965) and Welsh v. United States (1970). While not strictly decided on constitutional grounds, in each of these cases the Court sought to interpret the draft laws in ways which were quite expansive and shifted the focus away from conventional religious justifications. The Court held that "the test of belief 'in a relation to a Supreme Being' [the statutory standard for conscientious objector status in the draft statute] is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption" (Seeger (1965) 184).

This approach can be justified on grounds of religious freedom and pluralism as a way of recognizing the diversity of religions. As argued by the Court:

> This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets (176).

However, as indicated in the latter part of this quote, the concern here is not strictly limited to the issue of religious diversity; there is an additional pressure towards accommodating the demands of strict equality. The Court is, in essence, limiting the importance of religion as a determining factor.

While there may be a certain social value in recognizing and supporting such a quasi-religious belief, the problem is that it is coming at the expense of religion and the values that the Free Exercise Clause should be interpreted to support. The religious exemptions to combat service that have historically been granted have been linked not to an individual's religious beliefs but the beliefs of the religious community of which that individual is a member. This is clearly in accord with the theory of deep diversity in that it serves as recognition of a character forming community. By shifting the focus to the individual, attention to the values represented by the religious community can be lost. Equally, it represents a further erosion in the value which is identified with religion. Instead of arguing that society is honoring the religious values of particular communities, the statement is that we are simply respecting the conscience of the individual, and religion is made largely irrelevant to the inquiry.

As previously discussed, the theory of deep diversity would reject strict equality as a false ideal. Giving individuals the benefit of equal recognition may and often will require that they be accorded differing treatment according to the demands of their diverse communities as opposed to being treated according to an artificial, universal norm. This would remove the issue of equal treatment as a circumstantial issue in free exercise cases, freeing the Court to focus upon the values of the community instead of

worrying that their decisions will give a license to all to claim identical privileges or the need to denigrate religion as a discriminatory factor.

Religious Conflict

The existing approach to religious freedom in the United States is often justified as an effort to avoid religious strife (Aguilar v. Felton (1985) 416, Powell, J. concur.; Lee v. Weisman (1992) 607, Blackmun, J. concur.). Only "anguish, hardship and bitter strife result [when] religious groups struggle to gain governmental approval" (Engel v. Vitale (1962) 429). Such a struggle can "strain a political system to the breaking point" (Walz v. Tax Commissioner (1970) 694).

Belfast, Bosnia, and the Middle East bear terrible witness to the horrors and virulence of religious strife. And they are hardly isolated examples. It must be admitted that the United States has largely avoided this type of tragedy. It has done so through a two pronged approach. Under existing jurisprudence, the Establishment Clause has rendered the government powerless to advance the parochial interests of any religious group that might seek to use its power to advance their religious creed. At the same time, the Free Exercise Clause is intended to serve as a shield for religious groups and their activities against infringement by governmental actions that might bypass the safeguards of the Establishment Clause. At the same time, because the Establishment Clause lessens the risk that a religious majority could use the instrument of the state to oppress other religions, the Free Exercise Clause can be used to justify the involvement of religion in the public sphere. As noted by Washington in his Farewell Address

(McBrien 1987, 27), among many others, religion can be considered a great social good in supporting a strong, positive moral environment through the creation of a moral citizenry.

This dualistic approach is clearly in accord with the general governmental design scheme of the framers of the Constitution which embodied a "policy of supplying by opposite and rival interests, the defect of better motives" (Federalist No. 51 (Madison)). However, the First Amendment was intended to supply more than a simple structural system of checks and balances. It was anticipated that the Religion Clauses would facilitate religious pluralism as a way of avoiding the "factionalism" so feared by Madison (Federalist No. 10 (Madison)). By encouraging the existence of a large number of religions, no single religion could become so dominant as to represent a threat to all of the others.

History would, at first glance, appear to demonstrate that this has generally been the case (Goldman (1986) 523, Brennan, J. dissent.). Yet, that history may mask problems that are only now coming to be recognized. While religious pluralism has been expressed as a value throughout American history, that pluralism was understood as primarily a pluralism among Christian sects. It did not necessarily extend to non-Christians (Story 1858, Vol II, 664). The United States is now being called upon to recognize and respect a multitude of non-Christian religions in unprecedented numbers (Davis 1994) and the evidence is that the Court is failing to do so (see, for example, Lying v. Northwest Indian (1988); Goldman v. Weinberger (1986); Employment Div. v. Smith (1990)). Many believe that minority religions are not being protected

(Richardson 1997).

To a certain extent, applying the theory of deep diversity to the interpretation of the Free Exercise Clause does not represent a rejection of the theoretical polity of pluralism (as opposed to its application), but rather a refinement and advancement of it. It provides additional tools for understanding the values of religious pluralism and methods for resolving many of the conflicts which may arise. It does so in a number of ways.

First, because the theory of deep diversity is predicated upon the values of community and diversity, it allows the state not only to accept diversity but to encourage it. Instead of placing the state in the position of a passive, neutral forum in which religious pluralism can develop, the state can actively support emerging and existing religions in their struggle for survival.

Second, the approach offered under the theory of deep diversity allows the government to directly confront issues of potential or actual conflict. It provides a framework in which to evaluate religious belief that is both respectful of that belief and of the general social concerns with which that belief may conflict. Because belief can be assessed in terms of its value (both positive and negative) it can more adequately be weighed in terms of its potential harm, as, for example, where it could lead to conflict, against its social value.

Third, it may be argued that one of the causes of religious strife is the fear of religious oppression or persecution. For example, it is widely argued that marginalization is a form of oppression and represents a threat to the survival of a culture such as

religion. As evidenced by the situation of Quebec in the 1960s and 1970s, this can lead to open conflict as the cultural group struggles to free itself from that oppression (Taylor 1995). By supporting cultural religious diversity, this form of oppression and the threat of strife it entails can be removed.

Finally, again as evidenced by the situation in Quebec, recognition is an important human need (Taylor 1995). Even where the threat to survival has been met and overcome, the threat of conflict remains unless due recognition is given to the formerly oppressed group. The theory of deep diversity not only facilitates such recognition -- it requires it. Each and every religion would be valued as a social good.

Summary

As was the case with the Establishment Clause, jurisprudence in regards to the Free Exercise Clause is marked by inconsistencies and incongruities. There is an appalling lack of a coherent vision about what the Free Exercise Clause means and is intended to protect. While there is a significant body of thought within this jurisprudence which would offer strong protection to the free exercise right, many of the decisions fail to live up to this standard even in cases in which a high standard is acknowledged. In part, this discrepancy can be traced to what I have identified as circumstantial factors, such as strict equality, that cannot be accommodated within the normal standards of judgement being applied in these cases.

The theory of deep diversity can be used to rectify these problems. First, the theory would support the recognition of the free exercise of religion as a fundamental

right and would further support the application of a high standard of judicial review. Second, it can provide a framework for analyzing free exercise issues that understands religious freedom not only as a right, but also as a value to be weighed in comparison with other values with which it might conflict. Finally, it can be used to formulate policies that would avoid religious strife in ways that are supportive of religion as opposed to the current practice which in many ways appears to mask potential strife by denying religion a place in public judgment.

CHAPTER NINE

RELIGIOUS PLURALISM AND POSTMODERNIST AMERICA

In the foregoing discussion I have outlined the theory of deep diversity, I have analyzed how existing jurisprudence can be understood as being supportive of deep diversity, and I have described how a deep diversity analysis would alter that jurisprudence. In this chapter I will consider to what extent and upon what basis the theory of deep diversity can be adopted by the Court as an appropriate frame of analysis in religious freedom cases. I will also consider on what grounds it should be adopted and some of the broader implications which the theory of deep diversity offers.

Deep Diversity as a Constitutional Standard

In considering whether or not the theory of deep diversity can appropriately be adopted by the Supreme Court as a theoretical approach to religious freedom issues, there are two areas of concern which need to be addressed. First it is necessary to determine whether or not the theory conforms to the meaning of or norms established by the Religion Clauses of the United States Constitution. Second, it is necessary to consider how the theory fits into the historical standards of religious freedom cases decided by the Court. In particular, it is necessary to consider how the theory would affect the principle of precedent or stare decisis.

Constitutional Bases

In terms of determining how the theory conforms to the requirements of the Constitution, it must be noted that throughout this dissertation I have adopted a modified version of the interpretive standard of original intent as discussed in Chapter Two. That is to say, it is assumed that constitutional interpretation is required to conform to the intent of the framers of the Constitution, insofar as that intent can be determined, subject to such qualifications as are required by changes in understanding and context which have arisen since the time of the Constitution's adoption.

In the course of this dissertation, it has been argued that the actual interpretation of the Religion Clauses adopted by the Court is both flawed and inadequate based in part upon a flawed understanding of religion as a private, individualistic affair and upon changes wrought by the incorporation doctrine under the Fourteenth Amendment. The Court has, in various instances, attempted to apply a somewhat mechanistic interpretation of the Religion Clauses (Reynolds (1879)), a purely historical analysis (Chambers v. Marsh (1983)), or a form of analysis that has virtually rendered the Free Exercise Clause meaningless (Employment Div. v. Smith (1990)). This inconsistency demonstrates exactly how inadequate is its understanding of the Religion Clauses.

Despite the vagueness of the Religion Clauses and the inadequacy of the historical records relating to its enactment, it has been asserted in the foregoing discussion that it is possible to determine the general parameters of the original intent behind the Religion Clauses. Those parameters, as previously discussed, can be summarized as follows.

First, it is fairly clear that the Religion Clauses were enacted to protect religion

from interference by the state and not to protect the state from religion. Both of the Religion Clauses can be read in support of this contention. The establishment of a single religion, proscribed by the Establishment Clause, would by definition impair the freedom of all other religions not so favored by the state. On the other hand, the Free Exercise Clause represents a further shield against state interference by guaranteeing the rights of individuals to practice their religion as against any state power to regulate it. In both cases, it is the beliefs and practices of religion that are being protected.

Second, religion was recognized by the framers and ratifiers of the First Amendment as an important social value which could be supported by the state in spite of the way in which the Establishment Clause was drafted. When the First Amendment was drafted and ratified, many of the states had established religions supported by the state. The limitation on established religion was explicitly limited to the Federal government and a proposal that the Religion Clauses be explicitly applied to the states was specifically rejected. The expansion of this limitation to cover the states under the incorporation doctrine is problematic in this regard and, in many ways, would justify a somewhat more liberal interpretation of the permissibility of governmental support for religion if such justification were required (though it has been argued that such justification is not necessary for the type of support advocated by the theory of deep diversity.) Additional support for this interpretation can be found within historical precedent from that time of the First Amendment's enactment where the Federal government has directly supported religion in terms of such activities as the establishment of legislative chaplaincies and in support given to sectarian missionary activities directed

towards Native Americans. While one may question the legitimacy of these acts of support (for which the theory of deep diversity would provide justification) the point here is that it was within the original intent of the Religion Clauses that religion could and should be supported as a public good.

Third, there is substantial evidence that the framers and ratifiers of the First Amendment considered the United States to be a religiously pluralistic country and that the Religion Clauses were intended to protect and support religious pluralism as a bulwark against religious factionalism. It must be admitted that this understanding of religious pluralism on the part of the framers of the Constitution was somewhat flawed in that it appears to have extended for the most part to an acceptance of a pluralism of only Christian sects, as evidenced by the constitutional treatise of Justice Story (1858). Nonetheless, it is an interesting fact that the Religion Clauses were drafted using the term "religion" rather than that of the "Church," which would more clearly identify it with Christianity. Thus, a more expansive reading of the Religion Clauses to embrace our contemporary understanding of religion, though perhaps differing from the original understanding, is not out of line with it.

Fourth, there is nothing in the Constitution which requires that religion be made subservient to the demands of strict equality or that it is a lesser right needing the supplementation of other rights in order to justify its protection. Indeed, freedom of religion was singled out for special recognition and protection as the first of the rights to be identified. To recognize and support that right does not entail any constitutionally cognizable discrimination either in favor of those claiming that right nor against those

who do not share that belief. Hence, to refrain from protecting the free exercise right due to concerns about such issues as equality and equal treatment represents a misinterpretation of the demands of the Constitution and the Religion Clauses.

Finally, the fact that religious freedom is set forth within a general scheme of rights in relation to governmental authority requires that the right of religious freedom be understood in similar terms and measures. This would include, for example, the fact that the right of religious freedom cannot be considered as an absolute right, but rather as one right which can and must be balanced against other rights and social interests with which it may come into conflict.

As has been repeatedly asserted throughout this dissertation, the theory of deep diversity is designed to be supportive of all of these principles of religious freedom. As a theory premised upon the need to accord religion due recognition, it is naturally supportive of safeguarding that freedom from undue governmental interference. It asserts as a basic premise that religion and cultures in general are social goods which must be valued and supported as such. As a general theory which is supportive of diversity, it argues that the state must not only tolerate religious pluralism through the provision of a neutral forum for its existence, it provides arguments justifying the state's active support in creating and sustaining that pluralism. It both recognizes religion as a fundamental right that must be protected and denies the claims of strict equality which have in the past impaired the recognition of religious rights. Finally, it not only accepts the need to find ways to balance religious rights with other social rights and interests with which they might conflict, it also provides a mechanism of accomplishing that balance.

Moreover, instead of simply framing religious rights in a negative sense (i.e. as a right against governmental interference), it also identifies religion as a social good and provides judicially cognizable grounds for judging the value of religion in comparison with other social goods.

Precedential Bases

"In constitutional law, as in all law, there is great virtue in stability. Governments need to know their powers, and citizens need to know their rights; expectations about either should not be lightly upset" (Bork 1990, 157). In order to provide this stability, the Anglo-American common law system historically developed an understanding of judicial decision making that required all judges to resolve all subsequent cases according to the principles and standards of judgement set forth in prior cases of a similar nature (Cox 1987). The theory is that the courts are not making policy or law but rather are simply interpreting in ever greater detail the laws that have been passed by the legislative branch of government. As such, the continuity of the law demands that each such clarification and elaboration be grounded within the historical body of law on this topic.

The Supreme Court is not bound by the principle of precedent (often referred to as the doctrine of stare decisis) (Maltz 1980). As Felix Frankfurter observed, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it" (Graves v. New York (1939) 491-492, Frankfurter, J. concur.). "[I]t is ...not only [the Court's] prerogative but also [its] duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question" (Mitchell

v. W.T. Grant Co. (1974) 627-628, Powell, J. concur.). Nonetheless, the doctrine of stare decisis deserves some respect and deference, not only on grounds of assuring the stability of law but also in terms of respect for the judicial process. When the Court in the case of Brown v. Board of Education (1954) overruled Plessy v. Ferguson (1896) thereby rejecting over fifty years of established legal doctrine, opponents of the Brown decision "were able to say, 'The desegregation decision was not law but only the dictate of nine men. In time, with nine different men, the Court will return to its earlier decisions.' The departure from established law thus had some tendency to impair the legitimacy and authority of the Court's decision" (Cox 1987, 258-259).

As has been carefully noted and delineated, the theory of deep diversity does not represent a radical departure from existing religious freedom jurisprudence, but rather offers a refinement and advancement of it. While the theory would argue that some decisions deserve to be overturned (such as Employment Div. v. Smith (1990), and Lynch v. Donnelly (1984)), much existing precedent can be accommodated within the deep diversity approach subject to some reinterpretation of the rationales given for those decisions. Indeed, it has been argued that there is a substantial body of thought within existing jurisprudence that can be directly cited in support of the principles of deep diversity.

It should also be noted that the theory of deep diversity would offer a greater stability to the law in this area than is afforded by existing jurisprudence in that it would provide a coherent theoretical understanding of the decisions being made. Instead of decisions resting upon what I have referred to as circumstantial issues that are not directly

addressed by the opinions of the court, it would make the decision making process more transparent by incorporating those issues within the matrix of the decision itself. Thus, the adoption of the theory of deep diversity could be easily justified.

The Need for the Theory of Deep Diversity

The discussion throughout this dissertation has focused primarily upon the nature of deep diversity and how a deep diversity analysis may or may not apply to existing decisions within the area of religious freedom and the constitutional provisions of the Religion Clauses. However, the more fundamental question is whether we should be concerned with deep diversity or not. What advantages does it offer over the current jurisprudence in this area?

Americans are, with some justification, proud of their history of religious freedom and tolerance. As observed by Justice Brennan,

> through the Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and to acceptance of religious pluralism is one of our greatest achievements in that noble endeavor. Almost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries and draws to our shores refugees from religious persecution from around the world. (Goldman (1986) 523, Brennan, J. dissent.)

In offering the theory of deep diversity, I am not rejecting this claim. What I am suggesting is that the theory of deep diversity offers a better, more coherent way of achieving this "noble objective."

There are a number of problems with the existing approach to religious freedom which the theory of deep diversity is designed to address. These problems can be

summarized as follows.

First, as argued in Chapter Three, most religions exist as a communitarian reality. They bind their members into a faith community which may or may not have the additional level of a formal social organization. Existing jurisprudence is, for the most part, based upon an individualistic, privativistic understanding of religion as a relationship between "man and his God." Because such an understanding does not conform to the reality of lived religion, the Court has repeatedly found itself trying to accommodate the needs of religion within an intellectual understanding that does not adequately accommodate those needs, a fact that the Court has struggled with but never articulated. Deep diversity both recognizes this communal, publicly lived reality of religion and supports religion insofar as it facilitates the state to allow religious organizations a greater autonomy over their communal life. Concomitantly, it also frees individuals to participate more fully in that communal life by allowing religious community membership to mediate the individual's relationship with the general society and the state.

Second, existing jurisprudence is predicated upon an atomistic understanding of the individual and operates according to the standard of strict equality in relationship to all individuals. Yet, we are increasingly aware that this understanding is flawed. Humans are naturally and inherently members of one or more cultures (Young 1990). Moreover, those cultures are constitutive of the individual (Taylor 1989b). Individualistic legal perspectives fail to address this, not only in terms of religion but elsewhere as well. Because existing jurisprudence is based upon this individualistic understanding inherent in procedural liberalism, there is no way for the Court to take into consideration issues

of culture or to consider the role of culture in social interaction. The theory of deep diversity both recognizes the importance of culture and provides a mechanism whereby the role of culture can be considered and incorporated within the decision making process.

Third, and somewhat related to the foregoing, existing religious freedom jurisprudence is primarily framed in terms of rights and rights language discourse. There is a substantial body of criticism directed against the rights discourse (Glendon 1991; Hutchinson 1995). In essence, the basic complaint against the rights discourse is that it fails to encompass the reciprocal demand of rights: that rights also entail duties and obligations. The rights discourse separates the individual from all relationships except to that of the self, the rights holder. Because the theory of deep diversity posits the individual as being a part of a culture(s) and being in part constituted by that culture(s), it recognizes and supports that individual's obligations and duties towards the culture(s) of which that individual is a member.

At the same time, the theory of deep diversity shifts the focus of discussion away from a negative approach, that is, what the state cannot do because of the rights held by an individual, to a positive approach which considers religious freedom as a value to be weighed in relation to other social values. As such, the duties and obligations of the individual to their religious tradition and the duties and obligations of that religious tradition to society as a whole can be considered and appreciated. The theory thus supports the social integration of the individual and religious community within society, as opposed to the distancing and atomizing effect of the rights discourse approach.

Fourth, the free expression and no establishment provisions of the First Amendment, to quote John C. Calhoun, were "the twin children of social necessity, the necessity of creating a social environment, protected by law, in which men of differing religious faiths might live together in peace" (Murray 1960, 57). Arguments which point to history as proof of the success of this approach are, it has been suggested, flawed in that the primary beneficiaries of this form of religious tolerance have been the plurality of Christian sects. Minority religions have suffered and continue to suffer from a significant level of intolerance and oppression.

As the number of minority religions increases in the United States and as the politics of difference, which increasingly identifies individuals with smaller and smaller cultures, becomes the norm in postmodernist America, deep diversity is better suited to supporting harmonious relations in the midst of such a diverse environment. It does so first, by addressing the perceived threat of diversity. In the procedural liberal view, difference is seen as divisive. Society needs some level of commonality, something which binds all individuals to that society. The recognition of difference is seen as antithetical to this need. What deep diversity can do is to facilitate the recognition that not all differences represent a threat to the common community, a recognition that can be obstructed by a self identity that views any variance from individualist norms as a potential threat to that identity, a step onto the proverbial "slippery slope." In place of this self identity, the theory of deep diversity offers a new national identity created around the concept of diversity. It allows for a common identity grounded in some necessary elements of common society along with a self conception which sees unity in

freedom and diversity. Here, difference based upon religion is not seen as divisive but as a differing good being contributed to the common society by that religion.

At the same time, the theory of deep diversity also helps to limit (though not eliminate) conflicts among religious communities. It does so by according due "recognition" to each religion which should help ease some of the tensions which may lead to conflict and strife. It also argues for the removal of false conflicts, those which are not necessary for the good of the common society. Demands for uniformity in terms of appearances or most religious practices is clearly one such type of false conflict.

At the same time, the issue of living in a common community will inevitably result in some significant conflicts among differing cultures. There will be unavoidable conflicts over such issues as health and safety and, more problematic, public morals. While liberal theory in arguing against state actions based upon controversial conceptions of the "good" (Larmore 1987) may provide some assistance in how to handle the issue of public morals conflicts within the common community, it does not provide a dispositive answer. Even its most ardent advocates admit that political action will frequently entail compromising this standard to one of a majoritarian consensus on what is the good that may be legislated (Larmore 1987, 68).

While difficult decisions remain, the theory of deep diversity does provide a mechanism in which this conflict can be addressed. First, by identifying religion as a social good, it seeks to eliminate false conflicts. Second, it provides methods by which religion and religious freedom can be judged. Based upon the concept of actual harm, it acknowledges that some religious tenets and practices are unacceptable and can be

judged as such. At the same time, by recognizing the value of religion, it reframes the discussion towards a positive balancing of competing social goods which should facilitate efforts of accommodation as opposed to a negative framework which encourages an attitude of determining which right or good should prevail.

In summary, the theory of deep diversity does not represent a rejection of the ideals of religious freedom expressed in the Constitution and held by most Americans, but rather an affirmation and advancement of it. It is designed to advance those ideals in the context of an increasingly pluralistic and postmodernist society.

The Application of Deep Diversity

The focus in this dissertation has been upon how the theory of deep diversity can be applied to the issue of religious freedom in Supreme Court jurisprudence. According to the line of arguments developed to this point, the theory can be adopted by the Supreme Court with relative ease and it should prove functionally effective in resolving many of the problems identified in existing jurisprudence. However, this application is only a partial fulfillment of the demands of the theory and to limit it as such would in fact represent a violation of some of the basic tenets of the theory itself.

In order for the theory of deep diversity to truly achieve its aims, it is necessary that the concept of deep diversity be adopted as a social norm for society as a whole in place of the norms put forth by procedural liberalism. The law, no matter how important or influential, is only one aspect of this social normative process. There are a number of things which are needed to achieve this.

First, the theory's application by the Court cannot be limited solely to the issue of religion and religious freedom. While religion and religious freedom are deserving of special attention, as required by its special place within the Constitution, to single out religion as having special, unique status would violate the basic understanding put forth within the theory of deep diversity that society should recognize and support all those cultures which serve a character forming function for its citizens. Culture is divisive when it gives special status to one group without a similar status (though not necessarily similar treatment) being given to all other cultural groups. To "recognize" only religion means that one is failing to recognize all other cultures which serve a similar function for their members "world-building" (Berger 1967). While the grounds for applying the theory to such cultures as ethnic groups, racial groups, women, and groups held together by non-heterosexual orientations will require slightly differing formulations of the constitutional standards to be applied, they must nonetheless be recognized as cultures so as to create a general atmosphere of pluralistic tolerance.

Similarly, religionists, as the beneficiaries of deep diversity protection, cannot stand apart from this process. For them to claim special status would again be extremely divisive. One of the problems with the current politics of difference is the perception that each group is claiming power at the expense of all others -- particularly at the expense of the majority. The beneficiaries of recognition must themselves recognize others. This will require a certain level of compromise and accommodation on the part of all members of society. For example, as discussed in relation to the issue of legislative chaplaincies in Chapter Seven, it may be inappropriate to totally preclude the use of public prayer at

the start of each session, because such a preclusion in fact represents the interests of only those individuals opposed to such prayer. Instead, the theory of deep diversity would argue for the implementation of a system that in some way reflects the beliefs of all of the members of the legislature and its citizenry. This could entail opening some sessions with prayer and others with the reflections drawn from non-religious cultures.

Finally, the government itself should be encouraged to adopt the approach offered by the theory of deep diversity in both its legislative and executive functions. A significant level of social, governmental activity escapes judicial notice and protection (Abernathy 1989). The general government, with its far more expansive mandate, is in a much better position to advance the premises of deep diversity in this rapidly changing world than is the Court.

In relation to actions by both the Court and government, certain limitations on the law must be noted. As suggested by Harry Clor (1996), the law cannot create a new ethos for which there is no support within the larger community. The law, whether expressed by the Court or by government, can merely articulate, elucidate and support that ethos that is already present to some degree within society. However, this is not a major objection to the adoption of the theory of deep diversity. As suggested by the foregoing analysis, the principles upon which deep diversity are based are already present in the United States in a generally vague and more or less articulate form. The existence of many of the rationales supportive of deep diversity found in existing jurisprudence are, it can be argued, one reflection of certain commonly held public attitudes upon which the public adoption of deep diversity can be promoted. Moreover, the Religious Freedom

Restoration Act, which is highly compatible with the theory of deep diversity, received wide public support, again evidencing the existence of a strong consensus supportive of the principles of deep diversity. This is not to say that there are not conflicting, countervailing tendencies present. Instead, what is required in this situation is a theoretical understanding upon which this consensus can be built and advanced and through which conflicts between competing ideas can be mediated and understood.

Admittedly, the program of change suggested here is ambitious, to say the least. It is unlikely that the United States or its legal system will significantly alter its individualistic approach in the foreseeable future, and if it does so, it will take a significant period of time for this change to take place. The theory of deep diversity, nonetheless, offers a viable starting point for such change. Moreover, this deep diversity analysis is offered not just to the United States but to anyone viewing the United States as an example of liberal governance but whose experience is less individualistic and hence, for whom the United States provides an imperfect exemplar. As suggested by Taylor (1993), this would include virtually the entire world outside of the United States.

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