Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?

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JUDICIARY?

Rodney K. Smith*

I. INTRODUCTION

The United States Supreme Court has given mixed signals regarding its role in protecting religious liberty on Free Exercise and Establishment Clause grounds. This article discusses one such signal — a signal given in the Establishment Clause context.

I argue that the Court is moving toward using the term “conscience,” as opposed to “religion,” in Establishment Clause analysis. This move may portend a larger agenda for the Court — one that might well expand protection for religious and related liberty. However, the interrelated nature of the Supreme Court’s Establishment and Free Exercise Clause jurisprudence limits one’s ability to predict with confidence the Court’s direction.

Section II of this article endeavors to place Establishment Clause analysis in a doctrinal context, using two continuums to aid in that enterprise. The section explores the doctrinal categories and relates them to notions of endorsement and coercion.

* Rodney K. Smith, Dean and Professor, Capital University Law and Graduate Center. I am grateful to Professors David Gregory, Don Hughes, Dan Kobil, Tim Lytton and members of the Capital University Law School faculty who critiqued an early version of this paper as a part of our faculty development series, for their many helpful comments. They, of course, are not responsible for the errors and inadequacies that no doubt remain. I would also like to thank Jeff Hickman, Tony Kaye and the editorial staff at the Case Western Reserve Law Review, my research assistants, Hu Guang and Moses Ndjarakana and my secretary, Linda Rodichok, for their assistance in preparing the manuscript for publication.
Section III documents the Court's use of a conscience-based category for permissible government accommodation of religious activity under the Establishment Clause. In using the broader term conscience, as opposed to the more restrictive term religion, the Court may be providing the doctrinal basis for an expanded future accommodation of conscience.

Section IV poses several questions regarding the Court's possible move to a conscience based test, even though the Court may not intend such an ambitious project at all. Indeed, there is substantial evidence that the Court is inclined to defer to government power, whether accommodating religious exercise under the Establishment Clause or in restricting it by rejecting free exercise challenges to government action. Nevertheless, even if conscience is used to buttress a deferential interpretation of the Establishment Clause, the other branches of government might begin to facilitate the exercise of conscience through accommodations permitted under the Court's interpretation of the Establishment Clause. Despite a restricted reading by the Court of the Free Exercise Clause, an expanded reading of the Establishment Clause together with a Congress willing to facilitate the exercise of religious liberty might provide the basis for a revitalization of religious liberty. Relatedly, a conscience-based interpretation of the Establishment Clause would permit efforts under state constitutions to accommodate the exercise of conscience, and thereby increase liberty. If such a project to promote the liberty of conscience under the Establishment Clause is in its initial stages, the Court should answer the questions noted in Section IV.

A complete delineation of a theory, which might provide the foundation for a major move toward protecting the right of conscience, is beyond the scope of this article. Nevertheless, I offer some reasons why such answers should be sought and why a project seeking to promote the right of conscience is worthwhile.

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1. The limited agenda described in this article is sufficiently extensive and daunting. The editors of this law review are willing to indulge my elaboration of some of the problems that attend what may be a very major move on the part of the Court in developing Establishment Clause analysis. Answering those questions, however, is beyond the scope of a single article and the time currently available to the writer, who lives another life as a law school dean.
II. CATEGORIES AVAILABLE TO THE COURT IN DEVELOPING ESTABLISHMENT CLAUSE DOCTRINE

A. Introduction

In two recent Establishment Clause cases, the Supreme Court has evidenced its inclination to permit government accommodation of matters of conscience. Before discussing those cases, however, it will be helpful to develop the context into which they fit, by examining various potential Establishment Clause categories.

I previously have expounded on these categories in some detail and will, therefore, merely summarize them in this article. After placing the views on a continuum, I will construct a related continuum that stretches from government endorsement and sponsorship of religion through accommodation and neutrality and on to complete exclusion of religion from the public sector. I will briefly discuss the point on the continuum at which respect for religious exercises is maximized and coercion is minimized. I will then place two recent Establishment Clause cases within that framework.

B. Various Views of the Establishment Clause

At one end of the continuum is the theocratic view that government may promote a particular religion. Essentially, this view provides that the government may promote a national religion, excluding all others. This view would give the government the broadest power relative to promotion of a religion in the public sector. It should be noted, as well, that such a preferential view (a view preferring one religion over all others) could be implemented in a tolerant (tolerating other nonpreferred religions and religious exercise generally) or an intolerant manner (refusing to tolerate nonpreferred religions and religious exercise generally).

2. See Rodney K. Smith, Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock, 65 ST. JOHN'S L. REV. 245, 247-52 (1991) [hereinafter Smith, Response]; Rodney K. Smith, Establishment Clause Analysis: A Liberty Maximizing Proposal, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463, 488-509 (1990) [hereinafter Smith, Liberty]. Throughout this article, and particularly in this section, I engage in what appears to be a vain exercise — I repeatedly cite to my own work. Reflecting upon that exercise, I have concluded that it is better to risk the appearance of vanity than to exhaustively reiterate past work, without citation, unduly trying the patience of the reader and diverting attention from the project at hand.

3. See Rodney K. Smith, PUBLIC PRAYER AND THE CONSTITUTION 102-03 (1987) (arguing that such a view is inconsistent with the Framers' intent). Such a theocratic view has never been adopted by the Supreme Court.

4. See id. at 40 (stating that the common view of the government's role in religion
Moving away from the preferentialist view, the next position on the continuum is the view that government may promote nondenominational Christianity, but may not prefer a particular sect in doing so. This view may, in turn, extend from the view that government may promote nondenominational Christianity of a Protestant sort to a more inclusive view that would include other views of Christianity, including Roman Catholic, Mormon, Jehovah Witness and other versions of non-Protestant Christianity. It may also be tolerant or nontolerant of other views, although Justice Story argued for a tolerant version. The next, and somewhat related, point on the continuum would permit the government to promote religion of a Judaeo-Christian sort, and would permit promotion of Judaism together with Christianity. A final related, and somewhat broadened, category would include all the Jerusalem-based religions, including Judaism, Christianity and Islam.

The next points on the continuum represent three views that I have labelled nonpreferentialist: nonpreferentialism as to religion, nonpreferentialism as to matters of conscience, and nonpreference between religion and nonreligion. Professor Laycock has labelled the third position, nonpreference between religion and nonreligion, substantive neutrality.

The nonpreferentialism as to religion view would permit government to facilitate or accommodate religion, so long as it did so in a manner that did not prefer one religion over another. Thus, benefits conferred or exemption from government sanctions offered to one religion would have to be offered to all others.

5. I have previously referred to this view as the Story view, naming it after Justice Joseph Story, its major early proponent. Smith, supra note 3, at 109-10; Smith, Liberty, supra note 2, at 490.


7. See Michael J. Perry, Love and Power 78 (1991) (noting that these religions are both political and prophetic).

8. See generally Smith, Response, supra note 2, at 250-52 (defining nonpreferentialism); Smith, Liberty, supra note 2, at 492 (discussing nonpreferentialism).

9. Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 Depaul L. Rev. 993, 1001 (1990). The label — neutrality or nonpreference between religion — is not of great consequence. Nevertheless, since Professor Laycock's view focuses on both equality of impact and facial equality, the view may more appropriately be designated as a nonpreferentialist view. See Smith, Response, supra note 2, at 270 n.93 (arguing that the examination of actual inequalities of impact is nonpreferential analysis).

10. But see Smith, Liberty, supra note 2, at 502 (stating that the government is likely to give accommodation which benefits only one religion, under the guise of treating all
The nonpreferentialism as to matters of conscience position, the view that government may accommodate conscience when it does so in a manner that does not prefer one form of conscience over another, broadens the class being accommodated from religion to conscience. In doing so, some of the definitional problems that arise when the class is limited to religions are minimized, although other problems arise.

The final nonpreferentialist position — the position that government must accommodate religion and nonreligion alike — broadens the class being accommodated even further. Not only does it preclude government from discriminating against religion in general legislation, but it also requires that nonreligion or nonreligious views be afforded the same weight as religious ones in any accommodation.

The final view on the continuum is the view that government may do nothing to accommodate or otherwise permit religion to have any role in the public sector. This exclusionary view has been...
referred to as the strict separationist view. Because this view seeks to separate or exclude all religion from the public sector and from that which is secular, it has been contended that it is hostile to religion and religious exercise, particularly given the increasingly pervasive nature of the public sector. However, since the elected officials who make the policy decisions probably cannot check religious views at the door of the legislature, this view may be impractical. At a minimum, it may require that religious language and actions be veiled when used in the public sector, but may not really eliminate undisclosed religion or religious discourse from the decisionmaking process.

The continuum delineating various Establishment Clause views may be represented as follows:

<table>
<thead>
<tr>
<th>Promotion of a particular religion</th>
<th>Nondenominationalism</th>
<th>Nonpreference among Religions, Conscience, Religion / Nonreligion</th>
<th>Strict Separation</th>
</tr>
</thead>
</table>

The views representing government promotion of religion — promotion of a particular religion or nondenominational Christian, Judaeo-Christian, or Jerusalem-based religions — can be categorized as forms of government endorsement or sponsorship of religion. Each of those views provides for one form or another of government sponsorship or endorsement of religion or religious activity.

Nonpreference as to religion and conscience views may be categorized as being more accommodating in nature, in that they permit the government to accommodate religion or conscience so long as it does so without preferring one religion or matter of conscience over another. While the nonpreference as to religion and

14. See id. at 496-99 (defining strict separation).
16. See generally PERRY, supra note 7, at 3 (discussing "the proper relation of morality to politics in a morally pluralistic society.")
nonreligion view is accommodationist in nature, it may also be referred to as neutral. Finally, the strict separationist view is exclusionary as it excludes religion entirely from the public sector.

A short example may help clarify the nature of each of these categories, stretching from endorsement to exclusion. In my capacity as Dean, I recently received a call from a student. He complained that our law school is Christian (we are affiliated with the Evangelical Lutheran Church in America), yet we fail to place religious symbols within our facility. He added that he was particularly concerned that we did not have any Christian symbols, other than a Christmas tree, up in our building over the winter holidays. The caller closed by noting that, while Christian symbols were conspicuously (this is his word) absent in our facility, symbols reflecting Judaism were not - making reference to the Menorah placed in our building by the Jewish Students Association. I responded that we would permit Christian symbols to be placed throughout the building on terms similar to those applied in permitting the placement of other religious symbols, but I added that the administration did not feel that it was responsible for placing such symbols in the building. It is clear that the student wanted the administration to place its imprimatur on the placement of Christian religious symbols throughout the building. Not surprisingly, perhaps, I countered with an accommodationist position, inviting Christian students to place their symbols throughout the facility on terms similar to those followed by other student groups. In turn, the breadth of the groups permitted to place symbols throughout the building would indicate whether we were taking an accommodationist or neutral view. Finally, had I advocated the removal of all religious symbols from the building, I would have supported the strict separationist or exclusionary position.

A parallel continuum, stretching from endorsement and sponsorship to exclusion, helps to clarify further the role that the various categories set forth in the prior continuum assume:

<table>
<thead>
<tr>
<th>Sponsorship</th>
<th>Accommodation</th>
<th>Exclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Promotion</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A third and parallel conceptualization will help clarify matters further. This conceptualization tracks the prior continuum and focuses on the issue of coercion. Beginning at the endorsement or sponsorship end of the continuum, the incidence of government
coercion is high. For example, if government sponsors or endorses a particular religion, those not belonging to the sponsored sect will be coerced. When a particular religion or group of religions receive preferential treatment from the government, other religionists and nonreligionists are deprived of a benefit and may be coerced into allegiance to the sponsored religion in order to receive the benefit. The incidence of coercion at this point on the continuum is further exacerbated in the event of the use of sanctions (as opposed to the conferral of a benefit) against nonreligionists and religionists belonging to a nonsponsored sect. Obviously, the broader the class being preferred or sponsored and the greater the tolerance exercised, the less coercion that would necessarily be present.

Coercion would arguably be lessened in the area of the continuum representing the accommodationist positions, particularly at the points on the continuum that represent nonpreference as to matters of conscience and nonpreference between religion and nonreligion. The incidence of coercion would be somewhat higher at the nonpreference as to religion point of the continuum, because other matters of conscience and nonreligious views would not receive the same benefits as religious matters and sanctions might be imposed on strongly held nonreligious views that would be exempted or otherwise protected if they were religious in nature. The incidence of coercion as to matters of religion at the nonpreference point of the continuum would be further exacerbated by difficulties of definition that might exclude some Eastern and other forms of religion from the protected class.

The strict separationist position on the continuum would also be more coercive than the nonpreference as to matters of conscience and neutrality (nonpreference between religion and nonreligion) positions. While the strict separationist position would not be coercive as to nonreligious views, it would be coercive as to religious and related views, because such views would not be afforded the same benefits as nonreligious views and sanctions might be imposed on religious and related views that would not be equally applicable to nonreligious views. Thus, coercion is potentially greatest at the two extremes and is likely to be lessened at the accommodationist center.

This conceptualization representing the incidence of coercion may be helpful, but it raises far more problems than the conceptualizations noted on the preceding continuums. Coercion is itself an
elusive concept. It is elusive, because in some sense nearly all law coerces. By its nature, law often coerces in that it either provides a benefit to or imposes a sanction on some designated class or category. Those sanctioned or those who are not permitted to receive the benefit provided under some legal framework are coerced in some measure. Furthermore, it is not possible to make a distinction for the purposes of coercion analysis between religious-based and nonreligious-based coercion (i.e., it is not possible to draw a clear distinction between secular and non-secular purposes). In this regard, Professor Michael Perry has noted that:

It is virtually never the case that coercive legislation is grounded, or need be grounded, on (or solely on) such a [non-secular] reason. Coercive legislation is virtually always based (in part, at least) on a belief that the prohibited way of acting or living involves either physical or psychological harm (or both), whether to persons who live or act the prohibited way, to other persons or entities, or to both. That is, coercive legislation, like legislation generally, virtually always has an “earthly” or “worldly” or, to use the Supreme Court’s word, “secular” purpose: a purpose (goal, objective) intelligible or comprehensible in earthly terms as distinct from solely “heavenly” or “otherworldly” or “spiritual” terms. Basil Mitchell’s observation is relevant here: “Christians [for example] would presumably want to argue . . . that the Christian revelation does not require us to interpret the nature of man in ways for which there is otherwise no warrant but rather affords us a deeper understanding of man as he essentially is.”

These two difficulties — nearly all law coerces and coercion cannot be conclusively grounded on a distinction between religious and secular purposes — inhere in any coercion-based Establishment Clause analysis. Furthermore, as discussed subsequently, coercion is at best a predicate in search of a subject — coercion must be defined in light of what is being coerced. Nevertheless, it does

17. See infra part III.B (discussing the difficulties in a coercion-based analysis).
18. PERRY, supra note 7, at 115 (citations omitted).
19. See infra part III.B. It might be argued, however, that the problem of proving a coercive purpose might be cured by examining the intent of the lawmakers. If the lawmakers intended to benefit or burden a specific act of conscience, that intention would render the legislative act in question invalid. Determining the intent or motive of a legislative body can be quite elusive and often not satisfactory. Cf. Rogers v. Lodge, 458 U.S.
appear evident that the incidence of coercion (as to religion and nonreligion) is minimized near the accommodationist middle of the first continuum.

Before turning to the recent Establishment Clause cases to be discussed in this article, a final distinction needs to be drawn. This distinction is based on the theory of interpretation used by the Court in deciding such cases. I have previously argued, with some dismay, that the Court appears to be engaged in judicial review that is more concerned with deferring to the majoritarian branches of government than it is with protecting the liberty of conscience. The Establishment Clause cases must be read with this caveat in mind: the Court may be less concerned with the liberty of conscience than with merely creating a doctrine that permits them to defer to legislative determinations in virtually all areas, including the legislation related to matters of religion and conscience.

III. THE MOVEMENT TOWARD A CONSCIENCE-BASED ESTABLISHMENT CLAUSE JURISPRUDENCE

Members of the Court referred to the right of, or an individual's interest in, conscience in a number of early cases. Recently, however, the discussion of conscience in major Establishment Clause cases has accelerated and now seems to dominate. In Texas Monthly v. Bullock and Lee v. Weisman, two significant recent cases in the Establishment Clause area, the use of conscience has essentially displaced the use of religion as the term of choice for the Court in explicating its doctrinal analysis. An examination of this phenomenon in each of these cases is in order.

A. Texas Monthly

In Texas Monthly, the Court held that a sales tax exemption for 

613, 645-47 (1981) (Stevens, J., dissenting) (arguing that searching for a legislative motive to discriminate will under-protect minorities).


and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith,"\textsuperscript{24} violated the Establishment Clause of the First Amendment because Texas denied a like exemption for certain other nonreligious publications.\textsuperscript{25}

In \textit{Texas Monthly}, there were four opinions written: a plurality opinion written by Justice Brennan and joined by Justices Marshall and Stevens, a concurring opinion by Justice White, a concurrence by Justice Blackmun which was joined by Justice O'Connor, and a dissent written by Justice Scalia and joined by Chief Justice Rehnquist and Justice Kennedy.\textsuperscript{26}

Justice Brennan, joined by Justices Marshall and Stevens, wrote the plurality opinion and concluded that:

If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption we upheld in \textit{Walz}. By contrast, if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not be reserved for publications dealing solely with religious issues, let alone restricted to publications advocating rather than criticizing religious belief or activity, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause.\textsuperscript{27}

\textsuperscript{24} \textit{Texas Monthly}, 489 U.S. at 5 (alteration in original) (citing TEX. TAX CODE ANN. § 151.312 (West 1982) (amended 1989)).

\textsuperscript{25} \textit{Id.} at 15. \textit{See also} Smith, \textit{Response, supra} note 2, at 263-69 (discussing Texas Monthly).

\textsuperscript{26} \textit{It might be argued that, since Justice Marshall has been replaced by Justice Thomas and Justice Brennan has been replaced by Justice Souter, the majority in Texas Monthly may be fragile, given that Justice Souter joined in Justice Kennedy's opinion in \textit{Weisman}, which tracks the "conscience" analysis in Texas Monthly.}

\textsuperscript{27} \textit{Texas Monthly}, 489 U.S. at 15-16 (citation omitted). Justice Brennan refers to endorsement, as opposed to noncoercion, as the government action being questioned. Since this article focuses on the reasons for protecting conscience, the distinction between the endorsement test articulated initially by Justice O'Connor and referred to by Justice Brennan in Texas Monthly and noncoercion as articulated by Justice Kennedy in \textit{Weisman}, is not pertinent. However, for a strong critique of the endorsement test, as formulated by
While it is clear that Justices Brennan, Marshall and Stevens rejected the view that government may offer financial aid, in the form of a tax exemption, to religious groups alone, it is equally clear that such an exemption might be extended to religious groups so long as they were a part of a larger class.

In this regard, Justice Brennan suggests that a sales tax exemption statute could include religious groups and pass constitutional muster if the exemption included "an extended range of associations whose publications were substantially devoted to" the accommodation of reflection and discussion about questions of ultimate value or the contours of a meaningful life. While one might well quibble with Justice Brennan's broadening of the class necessary to permit the exemption, his willingness to allow Texas to accommodate reflection about questions of "ultimate value and the contours of a good or meaningful life," demonstrates a willingness to respect matters of conscience.

Justice Brennan has seemed to conflate nonpreferential accommodation between religion and nonreligion (a very broad category) and nonpreferential accommodation of matters of conscience. Accommodation based on nonpreference between religion and nonreligion would largely render such legislative distinctions meaningless, because the category of religion and nonreligion includes a universe of possibilities (i.e., all it does is insure that religion or conscience need not be discriminated against in a general statutory scheme providing for an exemption). Such an exemption would be little or no exemption at all, because the class exempted would be so large that it would merely confirm that a very broad class of material (e.g., in Texas Monthly, literature) would not be taxed. This, however, does not appear to be the thrust of Justice Brennan's opinion. Rather, he seems to focus on a conscience-

Justice O'Connor, see Steven D. Smith, Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 MICH. L. REV. 266, 300-01 (1987) (questioning the ambiguity and indeterminancy of the test). I would assert that both the endorsement and the noncoercion tests are necessarily indeterminate, unless the term they apply to, conscience or religion, is clarified. See infra notes 50-54 and accompanying text.

29. Id.
30. See also Walz v. Tax Comm'n, 397 U.S. 664, 687-89 (1967) (Brennan, J., concurring) (discussing the reasons for granting tax exemptions to religious organizations).
31. Smith, Response, supra note 2, at 265.
32. Smith, Liberty, supra note 2, at 507.
based class for accommodation purposes.

Justice White’s concurring opinion was based on the Free Speech Clause and offered little insight regarding the issue of whether the Court focuses on conscience in Establishment Clause analysis. He did join the majority in *Walz v. Tax Commission* and apparently would favor accommodation of religious groups on the basis of a broader definition that encompassed conscience, and not just religion. Whether he would permit a more restrictive class or category than that accommodated in *Walz* remains unclear, however.

Justice O’Connor joined in Justice Blackmun’s concurring opinion. Justice Blackmun’s opinion was critical because without the votes of Justices Blackmun and O’Connor, the Texas statute, with its emphasis on the more restrictive category of religion, as opposed to the broader category of conscience, would have been upheld against the Establishment Clause claim. In his opinion, Justice Blackmun stated:

> It is possible for a State to write a tax-exemption statute consistent with both values [free exercise and establishment]: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by non-religious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong.

Thus, for Justices Blackmun and O’Connor, had Texas drafted their exemption to include “matters of conscience,” it would have survived the Establishment Clause challenge.

Justices Scalia and Kennedy, together with Chief Justice Rehnquist, the dissenters in *Texas Monthly*, disagreed and would have upheld the statute as drafted. Writing in dissent, Justice Scalia

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34. 397 U.S. 664, 672-73 (1967).
35. *Texas Monthly*, 489 U.S. at 27-28 (Blackmun, J. concurring). However, at the conclusion of his opinion, Justice Blackmun enigmatically stated that had the statute included atheistic literature, it “might survive Establishment Clause scrutiny.” *Id.* at 29. A tax exemption statute that exempted religious, including atheistic, literature would not necessarily extend to all matters of conscience. It is unclear, therefore, how broad the exemption would have to be drawn to satisfy Justices Blackmun and O’Connor. It is very clear, however, that a statute protecting or accommodating matters of conscience would survive an Establishment Clause challenge.
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drew a distinction between direct subsidies to religion, which were disfavored because they divert income from believers and nonbelievers alike, and exemptions for religion generally, which were permitted because "the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions."\(^{36}\) Scalia, Kennedy and Rehnquist, therefore, would protect exemptions for religion, and would not require expansion of the exempted class to the broader category of conscience.

It appears, however, that all of the Justices in \textit{Texas Monthly} would uphold an exemption for or accommodation of matters of conscience against an Establishment Clause challenge, provided that definition was drawn broadly enough. An exemption based on religion alone, however, would be subject to being invalidated on Establishment Clause grounds.\(^{37}\)

B. \textit{Lee v. Weisman}\(^ {38}\)

In a five to four decision, the Court in \textit{Weisman} held that including a cleric who offers prayers as part of an official public school graduation violates the religion provision of the First Amendment. Four opinions were written: Justice Kennedy's opinion for the Court (joined by Justices Blackmun, Stevens, O'Connor and Souter); Justice Blackmun's concurrence (joined by Justices Stevens and O'Connor); Justice Souter's concurrence (joined by Justices Stevens and O'Connor); and Justice Scalia's dissenting opinion (joined by Chief Justice Rehnquist and Justices White and Thomas). An examination of these opinions will again demonstrate that the Court permits government to accommodate, and perhaps may even be inclined to protect, matters of conscience.

In his opinion for the Court, Justice Kennedy stressed that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."\(^ {39}\) He noted, as well, that: "One timeless

\(^{36}\) \textit{Id.} at 43 (Scalia, J., dissenting) (quoting Donald A. Giannella, \textit{Religious Liberty, Nonestablishment and Doctrinal Development}, 81 HARV. L. REV. 513, 553 (1968)). Justice Scalia's distinction between income and subsidies is a bit strained, because the sales tax lost due to the exemption would merely increase tax burdens elsewhere, thereby requiring that the nonbeliever make up some of the lost revenue. \textit{See} Smith, \textit{Response, supra} note 2, at 267 (stating that Justice Scalia's distinction has carried weight with the Court).

\(^{37}\) \textit{See supra} note 27 and accompanying text.


\(^{39}\) \textit{Id.} at 2658. It is unclear whether such "subtle coercive pressure[s]" arise in other
lesson [of the First Amendment] is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.\textsuperscript{40} In rejecting the Government's argument in support of the graduation prayer practice, Justice Kennedy specifically noted that it gave "insufficient recognition to the real conflict of conscience faced by the young student."\textsuperscript{41}

The majority invoked the Establishment Clause to protect the freedom of conscience from coercion. Justice Kennedy did limit the Court's opinion, in this regard, however, by noting that:

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause.\textsuperscript{42}

The Court's qualification of the extent to which it would protect the freedom of conscience from coercion in other cases under the aegis of the Establishment Clause, reveals a certain uneasiness on the part of the potentially weak, five-person majority in \textit{Weisman}. Some of this uneasiness evidenced by Justice Kennedy's equivocation might have been allayed had he distinguished between cultural and governmental coercion of conscience. Cultural coercion of conscience is typically coercion of a private sort and may be permissible, even though it may exact a significant price in terms of its implications for the unfettered development of conscience.\textsuperscript{43}
The majority culture often imposes a significant price for the person whose conscience causes her to run counter to that culture. While this cost may be mitigated statutorily, it is pervasive. When, however, cultural coercion is supplemented or endorsed by public action, it becomes almost overwhelming, carrying the imprimatur of the state, and indicating to the individual whose conscience is tested, that her conscience is devalued by the government. For a democratic organ of government to act in such a manner devalues the participation of one of its members and demands a level of homogeneity that demeans the democratic process. Had Justice Kennedy recognized this distinction between government action and private cultural coercion, it might have helped clarify his qualification of the extent to which the right of conscience is protected by the First Amendment. It may have added support for the need to protect against government coercion of conscience, as well. Even without articulating this distinction, however, it is clear that Justice Kennedy, and the four Justices joining with him in *Weisman*, view the Establishment Clause as providing significant limitations on governmental coercion of conscience.

In his concurrence, which was joined by Justices Stevens and O'Connor, Justice Blackmun emphasized that the Court's "[c]ases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced." Justice Blackmun would opt for an endorsement test, but he is equally concerned with protecting conscience in
Establishment Clause analysis. In this regard, he acknowledges that: "There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience[,] and even subtle pressure diminishes the right of each individual to choose voluntarily what to believe." He adds that any time government "puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." Therefore, use of the endorsement test does not diminish the emphasis on conscience (as opposed to the term religion) in the Court's Establishment Clause jurisprudence.

Justice Souter, who is joined by Justices Stevens and O'Connor (but not Blackmun), clarifies this point. Referring to the Texas Monthly decision, Justice Souter rejects the "nonpreferential" state promotion of religion, whether or not there is proof of coercion in the record, but he repeatedly emphasizes that this conclusion is based on the freedom of conscience of believer and nonbeliever alike. Thus, while Justice Souter seems to opt for the view that government may not distinguish between believers and nonbelievers (nonpreference between religion and nonreligion), he otherwise focuses on conscience, as being the applicable term for Establishment Clause purposes.

The dissenting Justices, on the other hand, supported the prayer practice in Weisman, arguing that it did not constitute actual gov-
ernment coercion. Writing for the dissenters, Justice Scalia conclud-
ed that:

Needless to say, no one should be compelled [to participate in the prayer], but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily . . . . To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.53

Justice Scalia obviously sees little harm in government “encourage-
ment” for a “public culture” that is religiously based. Thus, not only does he refuse to distinguish between private culture and public encouragement of that culture that may psychologically infringe (he prefers the term “offend”) on one’s conscience, he also would permit government to use the undeniable force of majority culture to unify society.

Justice Scalia focuses largely on perceived deficiencies in the majority’s invocation of a “psychological coercion” test,54 in invalidating the graduation prayer. He writes little about the right of conscience, preferring no doubt, as evidenced by his opinion in Texas Monthly, to use the more restrictive term religion, and to use religion to unify society, even if psychological coercion might result.55

Despite a solid contingent of dissenters in both cases, Weisman and Texas Monthly demonstrate that the Court is willing to permit

53. Weisman, 112 S. Ct. at 2686 (Scalia, J., dissenting).
54. Id. at 2679.
55. Justice Scalia makes light of the use of “psychological coercion,” id., at one point asserting that the majority engaged in a “psycho-journey” beyond the competence of the Court. Id. at 2684. It should be noted, however, that courts engage in “psycho-journey[s]” in many areas (e.g., insanity and competency determinations) and have done so for a long time. His concern, therefore, must be with using the device in the area of conscience or religion. One is left on such a basis to wonder whether a party could marshal any proof of coercion sufficient to demonstrate an infringement on conscience, despite Justice Scalia’s assertion that “maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate.” Id. at 2682. Indeed, particularly when his opinion in Weisman is read in con-
junction with his opinion for the Court in Employment Division v. Smith, 494 U.S. 872 (1990) (prohibiting the use of peyote for religious purposes), it appears that Justice Scalia balances civic needs over matters of conscience in virtually all instances. Additionally, Justice Scalia’s refusal to look to psychology and theology in making First Amendment determinations deprives religion and conscience of much of its essence.
government accommodation of conscience under the aegis of the Establishment Clause. In Employment Division v. Smith, the Court refused to recognize the right of members of the Native American Church to use peyote as a sacrament, when that use violated state drug laws. This indicates an unwillingness on the part of the Court to permit exemptions from general laws in order to further the free exercise of religion. Nevertheless, the Court is willing to focus on the notion of conscience in Establishment Clause cases and often refers to that notion as a right. Unfortunately, however, the Court has been distracted by disagreements over coercion and endorsement, and has ignored the need to pursue questions raised by the use of conscience — the term of preference for the majority in Establishment Clause analysis. In the remainder of the article, I focus on definitional and philosophical issues related to conscience. These must be addressed regardless of whether or not the Court chooses to use an endorsement or a coercion test as a predicate to the term of choice, conscience.

IV. CONSCIENCE IN ESTABLISHMENT CLAUSE ANALYSIS:
PROBLEMS THAT MUST BE ADDRESSED

With his opinion for the Court in Weisman, Justice Kennedy has articulated a coercion as to matters of conscience test that needs further explication. This raises a number of difficult problems which must be addressed, regarding both conscience and coercion. In this section of this article, I delineate some of those problems, looking first at definitional and related problems that must be confronted in explicating a conscience-based theory or doctrine, and then examining problems that arise related to development of the concept of coercion. While not necessarily exhaustive, these problems demonstrate that a conscience-based doctrine is, at best, in its formative stage as a theoretical basis for Establishment Clause analysis.

A. Problems Related to "Conscience"

A number of definitional and related problems will have to be

57. Since Justice Kennedy's vote is the critical fifth vote (the swing vote), the coercion test is likely to prevail, particularly if it can be concluded that it is more permissive than the endorsement test in allowing government to accommodate. It is likely, for example, that Justice Kennedy will join the dissenters in a case that would violate the endorsement test but did not violate his coercion test. The coercion test, therefore, controls.
dealt with in the development of a conscience-based theory of the Establishment Clause.

1. "Conscience": The Definitional Challenge

In the words of one author, "the courts have avoided the quagmire of defining religion," for the purposes of First Amendment analysis. While this is an overstatement, in that there have been some admirable judicial efforts to give definition to "religion" for the purposes of First Amendment analysis, the Supreme Court has largely avoided this definitional issue. Commentators have been even more willing to try their hands at comprehensive definitions, or definitional frameworks, although they have enjoyed little success in having their ideas embodied in caselaw.

Similar definitional efforts relative to conscience as a conceptual basis for First Amendment purposes appear to be underway. As previously noted, in the Texas Monthly case, two variants of a definition of an accommodationist doctrine based on conscience were proffered. The view of Justice Brennan would protect all groups that contribute to cultural, intellectual and moral betterment or that promote reflection and discussion about questions of ultimate value and the contours of a good and meaningful life. The view of Justice Blackmun would accommodate such matters of conscience as life and death, good and evil, right and wrong. Undoubtedly, problems of the sort that have plagued efforts to define religion will pose a challenge for those seeking to define conscience.

a. The Problem of Transcendence and Immanence

Professor Tribe notes that the Supreme Court initially defined

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59. See, e.g., Malnak v. Yogi, 592 F.2d 197, 201 (3d. Cir. 1979) (Adams, J., concurring) ("[T]he traditional definition [of religion] was grounded upon a Theistic perception of religion.").
62. See supra notes 26, 30 and accompanying text.
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religion restrictively, but that with increased religious pluralism, it has wrestled to articulate a more expansive definition. Tribe also asserts that "for many [theologians] there has been a shift in religious thought from a theocentric, transcendental perspective to forms of religious consciousness that stress the immanence of meaning in the natural order." Rising pluralism and changes in theological outlook, together with the very complexity and politicization of law itself, have combined to make the definitional task all the more daunting.

Defining conscience presents similar difficulties. One theologian has noted that, "So striking is the lack of consensus on the meaning of 'conscience,' . . . that one might seriously question its usefulness in ethical reflection. And yet 'conscience' will not go away." Professor Conn, however, goes on to assert that developmental and philosophical understanding of "conscience as self-transcending subjectivity involv[ing] radical personal conversion as a normative criterion of authenticity," is possible. Like law, theology is having to bridge the transcendent, in all its abstraction, with the immanent, more subjective, aspects of conscience.

Analytic philosophy, with its emphasis on abstract concepts and conceptions, which are typically transcendent, will no doubt be helpful in developing a viable definition of conscience, but it cannot complete the definitional venture. Professor Michael Perry has demonstrated the limits of a noncoherentist view of the rational

64. Id. at 1180.
65. Drawing on the work of Professor Walzer, Professor Michelman has noted the "cosmic but local" nature of the law, placed as it is between philosophy and politics. See Michelman, supra note 43, at 1321-24. He also argues that the separation of legal conceptions of property, in a transcendent or abstract sense, from politics is inappropriate. Like property conceptions, theological or philosophical conceptions of religion or conscience are "cosmic but local," and defy the legal penchant for clear-cut, abstract definition.
67. Id. at 2.
68. In the non-legal context, Lewis Thomas has said:

'It is illusion to think that there is anything fragile about the life of the earth; surely this is the toughest membrane imaginable in the universe, opaque to probability, impermeable to death. We are the delicate part, transient and vulnerable as cilia. Nor is it a new thing for man to be above the rest of life; this has been his most consistent intellectual exertion down the millennia. As illusion, it has never worked out to his satisfaction in the past, any more than it does today. Man is embedded in nature.

enterprise in his book *Love and Power*. While Perry does not direct his comments to the specific definitional enterprise being discussed in this section, his points are applicable. Perry sets the stage by quoting Richard Rorty:

[A]t times like that of Auschwitz, when history is in upheaval and traditional institutions and patterns of behavior are collapsing, we want something which stands beyond history and institutions . . . . I have been urging . . . that we try not to want something which stands beyond history and institutions . . . . [A] belief can still regulate action, can still be thought worth dying for, among people who are quite aware that this belief is caused by nothing deeper than contingent historical circumstance.

Such realism, with its regard for the subjective and immanent, however, does not adequately address the call of religion or conscience. In making this point, Perry quotes Professor Jackson for the observation that: "The pull toward religious faith is at best a residue of metaphysical realism and of the craving for metaphysical comfort. The taste for the transcendent usually associated with a religious personality will find little place in a Rortian world." Rorty's world recognizes the immanent, but fails to give much room for the transcendent, and therefore offers little solace for the conscience, with its transcendent aspects.

Conscience is at once transcendent, drawing as it does on abstract conceptions (commandments, doctrines, covenants, etc.), and immanent, relating as it does to the subjective position of the actor. For example, questions of sincerity often arise in the context of conscience. To question the sincerity of one's act of conscience is to acknowledge its immanence, while to recognize one's adherence to principles or doctrines acknowledges its transcendence.

In a more epistemological sense, as Perry argues, a coherentist conception of rationality acknowledges subjectivity and immanence:

Just as materials and purposes constrain our toolmak-

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69. See Perry, supra note 7, at 52-65.
70. Id. at 62-63 (quoting Richard Rorty, *Contingency, Irony and Solidarity* 189 (1989)).
71. Id. at 63 (quoting Timothy Jackson, The Theory and Practice of Discomfort: Richard Rorty and Pragmatism, 51 Thomist 270, 279 (1987)).
ing, the world ("as it is whatever we think about it"), in conjunction both with our interests (including our "human" interests: the interests we human beings have in common with each other as members of the same species) and with our projects (especially our communal projects, for example, space exploration), is a constraint on our theory-making and language-making. The coherentist conception of rationality neither entails nor presupposes to the contrary.

Hilary Putnam, whose views on the rationality (which are coherentist) and on truth (which are internalist), . . . has written that "my view is not a view in which the mind makes up the world . . . . If one must use metaphorical language, then let the metaphor be this: the mind and the world jointly make up the mind and the world."73

As Perry notes, a coherentist view of rationality accounts for the interplay of the immanent and the transcendent.74 In such a world, the effort to define conscience may be trying but it is not doomed to fail. While a definition must account for the interplay between the transcendent and immanent aspects of conscience, this interplay does not itself doom the definitional enterprise. Indeed, to be reflective of conscience in all its aspects, a definition would have to take into account both the transcendent and the immanent dimensions of conscience.

b. The Nature of the Freedom of Conscience

We must examine the nature of conscience from two perspectives: (1) its substantive content; and (2) whether it is a right or something else. In this section, I will deal with the latter issue, and will deal with the former point in the following section.

As developed to date by the Court, it is unclear whether conscience in Establishment Clause analysis functions as a right or simply as a privilege to receive certain benefits or to be exempted from certain obligations under an accommodationist rationale. If the exemptions and benefits provided are rights, they are very weak rights, in the sense that they run more to government than to the individual or the group. The only sense in which an individual or

73. PERRY, supra note 7, at 59 (footnotes omitted) (quoting HILARY PUTNAM, TRUTH AND HISTORY xi (1981)).

74. A debate over the appropriate view of rationality is beyond the scope of this article. I defer, therefore, to the points made by Professor Perry, finding them to be quite congenial to my own and adequate to the purposes of this article. See id. ch. 4.
group may be said to have a right is the extent to which government must accommodate equally or nonpreferentially when it decides to accommodate. Thus, it might be said that government is the right-holder—government may accommodate, but is not required to do so, and is only limited (required to act equally or nonpreferentially) when it chooses to accommodate—and the private individual or group is dependent on the largess of the government in permitting them to exercise that right.

The only remaining sense in which it might be said that a right is being created with the use of conscience in the Establishment Clause context would be to argue that citizens opposed to any form of establishment are being protected against governmental accommodations of religion, except in those instances when the accommodation is nonpreferential as to matters of conscience. This, of course, would not constitute a right of conscience. Rather, it would be a right to be free from government support of religion, except under limited circumstances.

If, however, conscience is utilized in the free exercise as well as the establishment context, it would be more accurate to say that it is a right of an individual or a group, in that it is a right that is a direct limitation upon government action (i.e., it is a side-constraint, constraining government from acting in certain ways). Since, however, the Court has not recognized conscience in the free exercise context, other than in the limited statutory case of conscientious objectors, at this time it would be inaccurate to say that the Court has recognized a right of conscience in any significant sense. 75

c. The Substantive Content or Nature of Conscience

Professor Sandel has recently articulated two distinct theoretical bases for a right of conscience: a choice-based right and an obligation-based right. In describing the predominant justification for a

75. Given the Court's reluctance to broaden the right of free exercise from religion to conscience, such a move would have to be legislative, as was the case in the conscientious objector context. In considering the Religious Restoration Act (an act designed to overrule the doctrine set forth in the Smith case), Congress might do well to consider broadening the protection from religion to conscience, thereby making the freedom of conscience a statutory right. By broadening the free exercise right to include matters of conscience, as well as religion, Congress could do much to help further human rights and would also be taking a significant step in the direction of creating a unified theory of the religion provision. Conscience-based theory also might eliminate the historic tension between the Free Exercise and Establishment Clauses.
right of conscience in our legal and political thought — a justification based on individual choice — Sandel states that:

This version of liberalism [which is premised on the idea that government should be neutral on the question of the good life] is defined by the claim that the right is prior to the good, and in two senses: first, individual rights cannot be sacrificed for the sake of the general good; and second, the principles of justice that specify these rights cannot be premised on any particular vision of the good life. What justifies the rights is not that they maximize the general welfare or otherwise promote the good, but rather that they comprise a fair framework within which individuals can choose their own values and ends, consistent with a similar liberty for others.76

After reviewing a number of Supreme Court cases dealing with religious liberty, Professor Sandel opines that, “The Court’s tendency to assimilate religious liberty to liberty in general reflects the aspiration to neutrality; people should be free to pursue their own interests and ends, whatever they are, consistent with a similar liberty for others.”77

Professor Sandel goes on to refer to this as a “voluntarist” basis or justification for the right of conscience, arguing as well that such a version tends to conflate the right of conscience with a general right to liberty Sandel concludes that the Court’s jurisprudence in the First Amendment area is largely dominated by this choice-based or voluntarist justification. He does acknowledge, however, that, “The Court has on occasion accorded greater respect to the claims of encumbered selves.”78

Sandel argues further in this regard that “freedom of conscience and freedom of choice are not the same; where conscience dictates, choice decides. Where the freedom of conscience is at stake, the relevant right is to exercise a duty, not make a choice.”79 Thus, Professor Sandel argues against the contemporary liberal view that “religious liberty serves the broader mission of protecting individu-

77. Id. at 91.
78. Id. at 90.
79. Id. at 88.
al autonomy," by asserting that:

Protecting religion as a "life-style," as one among the values that an independent self may have, may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity. Treating persons as "self-originating sources of valid claims" may thus fail to respect persons bound by duties derived from sources other than themselves. Sandel, therefore, opts for an obligation-based as opposed to a choice-based justification for the right of conscience.

Obligation and choice as bases for a right or some other interest in conscience give rise to differing benefits and achieve differing purposes. A right of conscience based on voluntarism and choice respects autonomy — the right of an individual to develop his or her own selfhood or identity. Purposes achieved by a choice-based theory of conscience emphasize individualism and are solicitous of choice. A choice-based right of conscience is, therefore, quite congenial with individual rights theories.

An obligation-based theory, on the other hand, is more congenial with communitarian notions. Under an obligation-based theory, the individual is bound to obey certain commandments, covenants or duties — duties often incumbent on members of the community of which one is a part. The benefits of an obligation-based theory of conscience, therefore, are different in nature from those spawned by a choice-based theory. Obligation based theories emphasize the benefits of community responsibility while choice-based theories emphasize the benefits of autonomy.

80. Id.
81. Id. at 89.
82. See, e.g., ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 1-5 (1974) (arguing that the importance of personal choice and autonomy rights limits the State's role to protecting individual liberties). Such a view is also quite congenial with Professor Lamasky's view that individuals should be protected in their project pursuits. Loren S. Lamasky, Compensation and the Bounds of Rights, in COMPENSATORY JUSTICE 13 (John W. Chapman ed., 1991).
83. While his work regarding the notion of obligation does not center on conscience as a concept, Professor Robert M. Cover wrote a very thoughtful piece regarding obligation in Jewish jurisprudence. Cover pointed out that:

In a jurisprudence of mitzvoth (obligation) the loaded, evocative edge is at the assignment of responsibility. It is to the parent paying tuition, the householder paying his assessment, that the Law speaks eloquently and persuasively. It is
While Sandel is no doubt correct in distinguishing between the choice and obligation bases for a right of conscience, given the differing roles and benefits of each, the bases are not necessarily mutually exclusive. Actions based on conscience are often both obligation and choice based.

In my religion, for example, I am obligated (expected) to obey certain commandments (e.g., I am to refrain from drinking alcoholic beverages). If the government were to require that I imbibe, it would violate my right of conscience. It can be said that my act of conscience is obligation-based, with an emphasis on duty, as are virtually all acts of conscience. Thus, and to use another example, a conscientious objector to war objects on the ground that he or she is duty-bound (obligated) to preserve life. In that sense, the conscientious objector’s conscience is a matter of obligation, not simply a matter of choice.  


Cover acknowledges, however, that:

If there is a comparative rhetorical advantage to mitzvoth (obligation) in the realm of communal entitlements, there is, it seems to me, a corresponding comparative rhetorical advantage to rights (autonomy) in the area of political participation. The myth of social contract is a myth of co-equal autonomous, voluntary acts . . . . However, in a jurisprudence of mitzvoth one must first create an argument for equality of obligation and only as a result of that come to equality of participation. The fact is that there might be important reasons which justify distinctions in obligations (e.g., the capacity to bear children) which nonetheless do not in any straightforward way mitigate against complete equality of participation. The rights rhetoric goes to the nub of this matter because it is keyed to the projection of personality among indifferent or hostile others. The reality of such indifference, hostility or oppression is what the rhetoric of responsibility obscures. At its best it obscures it by, in fact, removing or mitigating the causes. At its worst it is the ideological mask of familiar oppressions.

*Id.* at 73.

On this point, Cover stresses:

When I am asked to reflect upon Judaism and human rights, therefore, the first thought that comes to mind is that the categories are wrong. I do not mean, of course, that basic ideas of human dignity and worth are not powerfully expressed in the Jewish legal and literary traditions. Rather, I mean that because it is a legal tradition Judaism has its own categories for expressing through law the worth and dignity of each human being. And the categories are not closely analogous to "human rights." The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system’s "rights," is the word "mitzvah" which literally means commandment but has a general meaning closer to "incumbent obligation."

*Id.* at 65. Cover, no doubt, would be much more reluctant than I am to argue for a
In another sense, however, my action is a matter of choice. We choose which commandments or doctrines that we will follow as a matter of conscience (i.e., I can choose to deny my conscience or the conscience of my community as they relate to a particular doctrine). In some sense, I also chose my religion or conscience as a matter of association. However, my relationship with religion might be better characterized as a dynamic one: In some senses I choose my religion (I voluntarily choose to be bound to its doctrine when I become a part of the sect or group or reconfirm my membership by each new act of fidelity to a commandment or more of the group), while in other senses it binds my choice (having chosen my religion, I am bound by its doctrine if I am to be faithful). This dynamic is complicated further by the fact that my religion may act as culture, subtly coercing my choices. For example, having been born into my faith, which I share with my wife, my children feel the tug of our religious culture, calling on them to conform. While we, as their parents, want them to choose our religion, we fully recognize that they are influenced daily by our family and church activities to adhere to the doctrine and obey the commandments (i.e., in some sense their capacity for choice is constrained by our doctrine and the culture of which they are a part by virtue of birth). 85

dynamic between choice, with all of its implications for rights theory, and obligation, with its nexus to communitarian theories. Nevertheless, I am inclined to believe that much of what he says regarding obligation can be imported into rights dialogue, particularly if we recognize a vibrant right of association, but that is a project beyond the scope of this article.

85. I believe that my view differs slightly from that espoused by Professor Itzhak Englard. In a conversation that I had with Professor Englard during a recent visit to Israel, Professor Englard asserted that he was born a Jew, and therefore under Jewish law, he is a Jew as a matter of obligation. Conversation with Itzhak Englard, Professor of Law, Hebrew University of Jerusalem, in Jerusalem, Israel (May 4, 1992). His children are also Jewish by birth and concomitant obligation. When asked, however, whether choice had a place in his children's identity as Jews, Professor Englard stressed that he wanted them to choose to be Jewish, as well, and to find peace with that choice even though their exercise of that limited choice has little or no impact on their identity. It was clear that he meant more than that if they leave the Jewish faith, they would retain aspects of Jewish culture; he meant that if they were to adopt (choose) another faith, they would have denied a part of themselves by failing to live true to their obligations as Jews. To deny these obligations would be to disregard one's own selfhood and would itself violate conscience. It would constitute a choice that denies one's identity as a person and a Jew — a mixed identity of Jew and self that is inextricable and incumbent on the individual from birth.

Such a view, recognizing as it does the supremacy of obligation and, at best, a very limited role for choice, highlights the tension that can exist between choice-based and
In explicating any theory of conscience, the Court must face the kinds of issues that arise in determining whether (and to what extent) conscience is choice or obligation based. Even if one concedes there is an interactive relationship between choice and obligation—one that is not necessarily mutually exclusive—it must be conceded that the bases are not identical and tensions may arise that will have to be dealt with in formulating doctrine based on a theory of conscience.

d. The Textual and Originalist Problem

Given the text of the First Amendment—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—the Court's increased reliance on the broader term "conscience" would seem to be either ill-conceived or a judicial usurpation. Historical evidence related to the adoption of the religion provision of the First Amendment may not support broadening of the protection afforded under the religion provision to include matters of conscience. The evidence, however, is ambiguous.

James Madison introduced the initial version of the Bill of Rights, which included the following provision related to religious liberty:

The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

No state shall violate the equal rights of conscience.

This provision, as introduced by Madison, sets forth a right of conscience. The fact that the conscience language was dropped from the version ultimately adopted and ratified, having been replaced with a specific reference to religion, would seem to support the conclusion that the framers and ratifiers had considered and rejected the use of broader conscience language.

The actual history related to the adoption of the religion provi-

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obligation-based theories of conscience. It also demonstrates that government adoption of a choice or rights-based theory of conscience may constitute a preference for one religion over another. The Jewish faith, with its reliance on obligation and near-disdain for choice as to such matters, would be placed at some disadvantage if the government adopts a choice-based theory of conscience.

86. U.S. CONST. amend. I (emphasis added).
87. 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789).
sion of the First Amendment is ambiguous, however. In fact, during the course of the debates and votes regarding various proposals of a religion provision, the word conscience was repeatedly used and was never directly criticized. Thus, while the right of conscience language was dropped from the terminology of the provision ultimately adopted, it is not clear that the dropping of that language evidences an intent on the part of the framers and ratifiers to provide for a right limited to religion.

There are three reasons why the right of conscience language could have been dropped without intending to constrain the right being protected to the more limited category of religion. First, the framers may have focused on protecting religion, because they felt that it was in greater jeopardy than was a right of conscience, which may have been less controversial (i.e., they may simply have been trying to confirm that religious exercise was being protected, assuming that other rights of conscience would be protected in the process, as well). Second, in a related sense, many of the fram-

88. See, for example, id. at 758, summarizing Madison’s first statement during the debates on the religion provision:

[H]e apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions who [sic] seemed to entertain an opinion that under the clause of the [Con]stitution, which gave power to Congress to make all laws necessary and proper to carry into execution the [Con]stitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended .... Id. (emphasis added). From his introductory remarks, we learn that Madison doubted whether such an amendment was necessary to protect the right of conscience, but he nevertheless proposed it to allay misgivings that had surfaced in many of the states.

Numerous other references to a right of conscience occurred during the course of the debates. The initial version of the religion provision (the version proposed by Fisher Ames) provided, “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” 1 ANNALS OF CONG. 766 (Joseph Gales ed., 1789). The first provision considered in the Senate also included the “infringe on rights of conscience” language. SMITH, supra note 3, at 87. Indeed, the “rights of conscience” language was repeatedly referred to and was never disputed. The controversy centered on other matters and language. It must be acknowledged, however, that the Senate rejected versions of the provision that included the right of conscience language and adopted a version that did not include that language. Id. at 88-89. Unfortunately, however, the Senate record included only votes on proposals and did not include substance of the debate itself. Similarly, there are no records of the conversations that ensued in the Conference Committee. For a full discussion of the debates, see id. at 73-105.

89. In a similar vein, I have previously noted that:

While the final provision [coming out of the Conference committee and
ers were natural lawyers and products of the enlightenment. They may well have believed that rights could be expanded but not contracted (in a ratchet-like sense), and that the right of religious exercise would be expanded to provide for a broader right of conscience, both at the state and the national levels. Finally, in a

adopted by Congress] is similar to the Ames proposal, which had been adopted in the House and which provided that “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the right of conscience,” there are some significant differences. To begin with, the rights-of-conscience language is not included. It will be recalled that the version of the amendment proposed by the Committee of Eleven (“no religion shall be established by law, nor shall the equal rights of conscience be infringed”) included the conscience language but did not include the free-exercise language. Since there is no express indication as to why this language was deleted, one can only speculate as to why the conference committee deleted it. It might be argued that the provision was superfluous, since the free-exercise language seems to support essentially the same right. On the other hand, it could be argued with some force that the framers had specifically intended to provide special protection to the exercise of conventional religious conviction, without extending equal solicitude for rights of conscience that were not religious in nature. Viewed in this light, it may have constituted an effort to satisfy those who were fearful that the amendment would unduly benefit the nonreligious. Whatever justification or justifications existed for dropping the conscience language, at a minimum it would seem likely that the framers in the conference committee desired to make the provision sufficiently innocuous to receive ready support in Congress and the states. In this sense, two conclusions can be drawn. First, it would seem that the committee clearly wanted to protect the free and equal exercise of religion but may have intentionally stopped short of extending such broad protection of general rights of conscience. Second, even advocates of a broad right of conscience, such as Madison, may have been reasonably satisfied with the provision as adopted, because it was broad enough to leave open the possibility of being elaborated into a generalized right of conscience at some time in the future.

SMITH, supra note 3, at 91-92.

90. I have previously distinguished between deferential originalists (judges and other interpreters of the Constitution who look at text and history in a limiting sense — if the text and history do not specifically permit the Court to extend a right, they are prohibited from doing so and must defer to the majoritarian branches of government) and originalists who endeavor to remain true to the natural rights or libertarian aspirations of the Framers in interpreting the Constitution. Smith, Liberty, supra note 2, at 466-81. In that article I defend a broader interpretation of the religion provision of the First Amendment:

[R]ather than deferring to the legislature, or to democratic institutions, in deciding among the various alternatives derived in an originalist analysis, a judge should seek to maximize liberty where possible. Under such a theory, the courts may expand individual liberty, where to do so does not otherwise unduly jeopardize the equal liberty of another. But the judiciary may not restrict efforts by the legislature or democratic institutions to maximize or facilitate liberty unless those legislative efforts are clearly outside the perimeters disclosed by originalist analysis. Such a view is consistent both with the framers' and ratifiers' intentions (in that one accepts the perimeters established by conventional originalist analysis) and their broad, overriding libertarian aspirations (in
more limited sense, the use of the broader term "conscience" in Establishment Clause analysis does much to protect against an establishment of religion — the class receiving benefits is expanded to ensure that religion is not being directly benefited (to the exclusion of other like groups) — and is, therefore, consistent with the purposes of the establishment portion of the religion provision.

This third reason draws a distinction between the Free Exercise and Establishment Clauses that deserves further, albeit brief, elaboration. In this article, I have often spoken of a broad right of conscience. However, the real issue in the Weisman and Texas Monthly cases is the Establishment, as opposed to the Free Exercise, Clause. Those Establishment Clause cases have recognized a broader category — that of conscience. Free exercise cases have not broadened the protection afforded by that clause in a similar fashion.91 In order to protect against establishment when the government engages in accommodation of religion, the use of the broader category of conscience precludes the government from preferring religion over other forms of conscience and is consistent with the framers' nonestablishment of religion intentions.

e. The Attenuation Problem

In a recent article, Professor Cole Durham describes the attenuation of conscience problem:

One of the major hazards in our century is that the notion of conscience is gradually becoming so broad and vague that it is being emptied of any meaningful content. This process began innocently enough in the conscientious objector cases. There, the notion of conscience was defined

that in selecting from among various interpretive possibilities disclosed through originalist analysis the judiciary remains true to the aspirations of the framers when it engages in liberty-maximizing analysis).

Id. at 477-78; see also Suzanna Sherry, The Founder's Unwritten Constitution, 54 U. CHI. L. REV. 1127 (1987) (discussing the Framers' decisionmaking approach to interpreting the Constitution). When the history is either ambiguous or congenial to a liberty-maximizing reading of a provision, the Court is true to the aspirations of the Framers when it so interprets the provision. In this regard, reading the religion provision broadly to protect a right of conscience is consistent with the libertarian aspirations of the Framers. See David N. Mayer, The English Radical Whig Origins of American Constitutionalism, 70 WASH. U. L.Q. 131 (1992); David N. Mayer, The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McCaffee, 16 SO. ILL. L.J. 313 (1992).

91. Indeed, free exercise was severely and regretfully limited by the Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), upholding a state prohibition on the sacramental use of peyote.
as "[a] sincere and meaningful [belief which] 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." Extending the notion of conscience in this direction is obviously reasonable, because conscience does not always wear religious garb. The difficulty comes when conscience is extended to cover any deeply felt psychological state experienced at moments of decision.92

Others have recognized the attenuation problem. Elder Dallin Oaks, for example, has argued that, as the regulatory state has grown and become more pervasive in the lives of the citizenry, it has had to accommodate religious exercise, but as it has done so, with each additional accommodation, the regulatory vortex has been widened and free exercise has been limited.93 The irony, therefore, of expanding the Establishment Clause to permit accommodations of conscience may be that religious freedom (particularly free exercise) may be subject to increased regulation. This is particularly true when, as today, the Court is deferentialist in its theory of judicial review — deferring to majoritarian decisions in the area of religion and conscience.

The attenuation problem raises significant questions for the proponent of religious liberty. If expanding accommodation under the Establishment Clause to include matters of conscience dilutes religious liberty under the Free Exercise Clause, such an expansion is unwarranted.94 Care must be taken to ensure that in developing

94. I have argued against what might be called equilibrium theories of the Free Exercise and Establishment Clauses asserting that:

The equilibrium objection, or the notion that the state may expand its regulatory authority to the same degree that it accommodates a right of conscience for establishment purposes, is countered by noting that if the free exercise right were expanded to include a wider right of conscience, together with the establishment clause, the government could be limited in its efforts to expand its regulatory domain to matters of conscience. Such a limitation on regulatory authority would, at least theoretically, expand rather than contract the free exercise right. . . . [R]ather than maintaining a constant equilibrium in terms of the combined amount of exercise and accommodation that may exist in our system at any point in time, a broader definition could expand both exercise and accommodation, thereby increasing religious liberty as a whole.

Smith, Liberty, supra note 2, at 503. The broader right would arguably be less controversial and would draw support from a larger political base. It would, therefore, be of great-
a viable definition of conscience, religious liberty is not depreciated. Indeed, if recognizing conscience under the Establishment Clause attenuates and ultimately dilutes religious freedom by providing for such a broad protected category (or group of recipients of accommodation) that government is reluctant to provide any accommodation, either in the form of benefits or exemptions from sanctions, much more will have been lost than will have been gained. By placing accommodation of matters of conscience on the continuum between nonpreference among religions and nonpreference between religion and nonreligion, one can get a sense, however, that the class of recipients of the benefits of accommodation can be limited so as to protect against the problem of attenuation.

The history of the draft cases — the use of a right of conscience as a justification for exemption from the draft during the Vietnam war — further supports the conclusion that the attenuation problem, while existent, may be overstated. Courts and draft boards used conscience language to formulate exemptions for conscientious objectors to what was then an unpopular war. If the nation could fight an unpopular war while providing an exemption for conscientious objectors (a class broader than religious objectors), it no doubt could provide exemptions to less significant (at least in terms of life and death and public furor) general laws. Nevertheless, consideration of the attenuation problem is in order in formulating a theory of conscience for First Amendment purposes.

f. The Need for the Court to Explain the Move to Conscience

In the Texas Monthly and Weisman cases, the Court evidenced an inclination to move toward an Establishment Clause jurisprudence based on accommodation (in a nonpreferential way) of conscience; however, the Justices have neither justified nor explained the reasons supporting such a move. Conscience is a broad term, and the Court needs to clarify the reasons why it has used the term conscience in its recent Establishment Clause cases.

It might be maintained that there is no need for such express clarification of purposes, because the purposes can ultimately be gleaned from the decisions themselves on a case-by-case basis.

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er appeal to the majoritarian branches of government and might well constitute a better candidate for enactment, resulting in increased accommodation of religious and related exercise.
This would be true, perhaps, if the Court is making the move for purely intuitive (as opposed to well thought out) purposes and is willing to let the purposes distill over time. Even if the Court prefers a course of distillation based on a series of acts of intuition, the Court should clarify its purposes soon after they have been distilled. This has not happened to date, however, and must occur if the Court is to develop a viable theory. Purposes may distill over time, but it would be duplicitous, or at least inappropriate, for the Court to refuse to acknowledge those purposes as they develop. For litigants to understand and act upon the religion provision, those purposes must be articulated.

g. The Problem of Non-Neutrality

The move to an Establishment Clause jurisprudence (or a unified theory — including free exercise) based on conscience is not neutral. As demonstrated by the first continuum, nonpreference as to matters of conscience is a choice among many alternatives. As the prior section emphasizes, the move to conscience entails policy choices — choices that need to be clarified, both in terms of explicating the reasons for making the choice and the nature of the choice itself.

The move is not neutral in another significant sense. As Professor Durham has noted:

[N]o sooner does one start down [the path of utilizing conscience as the relevant category for First Amendment purposes] than one begins to worry that the idea of conscience may not be such a neutral idea after all. This “notional institution” may be more central for Protestants than for Catholics and Jews, and appears almost irrelevant to certain forms of Native American religions. If this is true, conscience may be neither as universal nor as neutral as initial reflection might suggest.

Durham nevertheless concludes that:

[W]e should not be too quick to dismiss conscience as a

95. By “nature,” I am referring to the need to articulate the meaning of conscience (i.e., what constitutes conscience for such purposes and what does not). The nature of conscience with its transcendent and immanent aspects is more susceptible to case by case elucidation than is the purpose for the move itself, which ought to be articulated at the outset (or as soon thereafter as possible).

96. Durham, supra note 92, at 77.
central organizing category. It may well be that conscience is experienced differently and that different importance is attached to conscience by Protestants than by Catholics or Jews or Native Americans. But it does not follow that it is simply absent. The difficulty may lie more in the elusiveness of conscience — its affinity for concrete practical judgment as opposed to grand system, and its tendency to resist being bottled up in conventional moral categories. The fact that conscience may speak several languages does not mean that it does not speak.\textsuperscript{97}

While the problem of the very neutrality of the concept of conscience might be avoided on grounds like those articulated by Durham, such grounds merely beg anew prior questions. First, is it possible or viable to define conscience broadly enough to include all religious traditions and more? Second, if defining conscience so broadly is possible and viable, how are the problems of transcendence and immanence (i.e., to use Durham's phrase, "its tendency to resist being bottled up in conventional moral categories") and of attenuation to be resolved?

h. Edification and the Role of Conscience: The Merits of the Task

There are many reasons why the Court's apparent efforts to accommodate conscience are noteworthy and may be of significant benefit. Some of the benefits of an obligation-based (a heightened sense of responsibility and the building of community) and a choice-based (autonomy and the development of self) theory of conscience were previously highlighted.\textsuperscript{98} There are other benefits as well.

If one concedes that there are limits to the noetic enterprise as a means of resolving many of the major personal and political issues that we confront in contemporary society,\textsuperscript{99} there must be a role for other forms of dialogue. Professor Michael J. Perry has proposed what he terms "ecumenical politics," which he describes as a politics "in which beliefs about human good, including disput-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See supra notes 79-88 and accompanying text.
\item See supra notes 67-69 and accompanying text for a discussion of the limits of rational or analytic discourse in resolving many of the major issues that must be faced in today's complex world.
\end{enumerate}
\end{footnotesize}
ed beliefs are central.”100 Perry goes on to argue that ecumenical politics are necessarily dialogical in nature101 and that there are many reasons why such dialogue should be taken seriously.102

Even the proponent of purely rational analysis might acknowledge that the facilitation of conscience-based moral dialogue may be of benefit. Put otherwise, she might concede that there may (as opposed to must) be something to such dialogue — that rationality may have its limits as a means of resolving some significant issues that must, nevertheless, be decided in the political sphere (e.g., abortion).103 Such issues have to be decided, however provisionally, and rational discourse has not proven capable of giving us even a tentative shared answer. The proponent of rational analysis and dialogue might concede, therefore, that conscience-based dialogue may assist participants in the decisionmaking process.

In the concluding portions of this section, I would like to elaborate a fifth reason why such “ecumenical political dialogue” (to use Perry’s term) or “conscience-based political dialogue” (to use a term more congenial to the substance of this article) is worthwhile. I refer to that benefit as the benefit of edification.

To edify is to “instruct and improve [especially] in moral and religious knowledge[; to] enlighten.”104 Edification has its deriva-

100. PERRY, supra note 7, at 43.
101. Id. at 127. Perry notes that, “the principal constituents of ecumenical politics are two practices: a certain kind of dialogue and a certain kind of tolerance.” Id. For an elaboration of the nature of and benefits derived from ecumenical dialogue, see id. at 83-127.
102. Perry’s reasons include: (1) a political community that permits members of different religious and moral communities to make political choices and engage in politics must have a common dialogue if it is to avoid political violence; (2) we come to “the truest knowledge of ourselves — of who we truly are, both as individuals and as members of communities, and of how we should therefore live our lives, of what choices we should make — dialogically, not monologically;” (3) we come to “the fullest knowledge of ourself as thus embedded [in a complex network of independent human relationships] — of who I am in relation to others, of what I need or desire from others, of what is being asked or demanded of me by others, of what I have to offer others, and so on — dialogically, not monologically;” and (4) “Any community or person for which or whom love of neighbor is a constitutive ideal should understand that openness to the Other — to the stranger, the outsider — in deliberative dialogue facilitates as well as expresses such love: I can hardly love the Other — the real other, in all her particularity — unless I listen to her and, in listening, gain in knowledge of her, of who she truly is and what she needs or desires; and unless having listened, I then respond to her.” Id. at 49-50.

It is interesting that Perry offers reasons supporting such dialogue that draw on both the obligation-based (responsibility and community) and choice-based (autonomy) justifications for a right of conscience.
103. See supra notes 71-76 and accompanying text.
104. WEBSTER’S THIRD INTERNATIONAL DICTIONARY 723 (1986).
tion in the Latin term “aedificare,” which has been defined as “to instruct or improve spiritually . . . to erect a house.” Conscience-based dialogue has a potential of edifying, of improving the dialogue regarding moral matters. To extend the house metaphor a bit, analytical reasoning provides us with the materials and many of the plans necessary to build a moral house, but conscience-based dialogue can edify (i.e. help us complete the house, at least until the next addition, renovation or demolition is in order).

When all else fails in bringing us the provisional cloture necessary on moral issues, like abortion or nuclear armament, turning to conscience-based contributions to the dialogue may help. Some issues are so richly complex and involve so many different values that enlightenment may need to be sought from other non- or extra-rational sources such as conscience. Conscience-based dialogue in this sense may have the further virtue of performing a melding function whereby the heart and the mind become one in purpose. While I use the term edification because it seems to capture the melding of mind and heart, the term inspiration might also be descriptive of this process. There are times, for example, when, after much contemplation, I am unable to resolve perplexing problems but, later on, I am able to resolve the problem in a moment of inspiration. In that moment I come to understand the course I should follow — my heart and mind are unified in purpose, and my understanding is enlightened.

A nonpersonal example is in order. After initially assuming the leadership role in the Montgomery bus boycott, Dr. Martin Luther King, Jr. became disheartened and fearful over the ramifications (both seen and unseen) of his role. One particularly troubling night, after having received a late night call (one of many) threatening his life, Dr. King relates that he had the following experience:

I sat there and thought about a beautiful little daughter who had just been born . . . . She was the darling of my

105. Id.
106. One of my favorite scriptures refers to this process. In the Gospel of Luke, it is recorded that shortly after the birth of Christ and the occurrence of a number of prophetic events, Mary “kept all these things, and pondered them in her heart.” Luke 2:19 (King James). The heart assisted in the pondering process, a process typically conceived of as residing in the mind.
107. David J. Carrow, King’s biographer, notes that Dr. King was “rattled” when the caller threatened, “Nigger, we are tired of you and your mess now, and if you aren’t out of this town in three days, we’re going to blow your brains out, and blow up your house.” DAVID J. CARROW, BEARING THE CROSS 57-58 (1988).
life. I'd come in night after night and see that little gentle smile. And I sat at that table thinking about that little girl and thinking about the fact that she could be taken away from me any minute.

And I started thinking about a dedicated, devoted and loyal wife, who was over there asleep. And she could be taken from me, or I could be taken from her. And I got to the point that I couldn't take it any longer. I was weak. Something said to me, you can't call on Daddy now, he's up in Atlanta a hundred and seventy-five miles away. You can't even call on Mama now. You've got to call on that something in that person that your Daddy used to tell you about, that power that can make a way out of no way.

And I discovered then that religion had to become real to me, and I had to know God for myself. And I bowed down over that cup of coffee. I never will forget it . . . I prayed a prayer, and I prayed out loud that night. I said, 'Lord, I'm down here trying to do what's right. I think I'm right. I think the cause that we represent is right. But Lord, I must confess that I'm weak now. I'm faltering. I'm losing my courage. And I can't let the people see me like this because if they see me weak and losing my courage, they will begin to get weak.'

Then, after, this prayer, King notes that:

'It seemed at that moment that I could hear an inner voice saying to me, 'Martin Luther, stand up for righteousness. Stand up for justice. Stand up for truth. And lo I will be with you, even until the end of the world.' . . . I heard the voice of Jesus saying still to fight on. He promised never to leave me, never to leave me alone.'

This experience gave Dr. King new strength. He had reached closure — he was certain as to the course he should follow.109

I would submit that this experience for Dr. King decided that he had to continue to lead the boycott constitutes a classic case of the kind of edification that comes from a conscience-based dialogue, whether with one's self or with others. Dr. King went into

108. Id. at 58.
109. Id.
110. As to this experience, Dr. King states that, "Almost at once my fears began to go. My uncertainty disappeared." Id.
the room undecided, but inclined as a rational matter, to give up his leadership role for his family's sake. While reflecting upon this possibility and his fear, Dr. King's conscience made it possible for him to reach provisional cloture in his dialogue with himself on a pressing moral issue.

On another level, it is evident that Dr. King's conscience-based involvement in the boycott, and in the civil rights movement generally, informed the national dialogue. His words, filled as they were with hope and understanding and motivated by a deep commitment to conscience, performed an edifying function in our national dialogue. He was able to edify others — religious and non-religious alike — to help them come to provisional cloture regarding civil rights. Thus, conscience can edify, individually and collectively. A call to one's conscience, especially when spoken in a form consistent with an ecumenical public dialogue of the sort Professor Michael Perry favors, can assist us in dealing with pressing social and moral issues — it can help bring us as a political community to provisional cloture.

What happens, however, when one loses — when one speaks from conscience in the public discourse and then loses when the decision is made? Is the downside of losing in such a dialogue so high that we should preclude participants in the dialogue from speaking from conscience? I think not for three reasons. First, as previously noted, precluding one from sharing those ideas in a form that may edify is to limit the dialogue in ways that may prevent us from reaching provisional cloture in public discourse on issues that must be decided, however tentatively. Second, to permit some to speak from ideology, with all its excesses, while precluding others from speaking from conscience may be more offensive to the conscience-based speaker than losing. Third, and relatedly, if the dialogue is governed by principles of respect for other views, which includes efforts to understand and be edified by the views of others, a sense of due process will be felt by all participants. They will appreciate that their voices were heard and understood even though they may have been provisionally rejected. Such rejections, while poignant and personally trying, are not necessarily debilitating.

111. Perry also advocates that the dialogue should be governed by two "cardinal dialogic virtues: public intelligibility and public accessibility." PERRY, supra note 7, at 105.
Given that there would seemingly be at least as much lost by precluding conscience-based dialogue from the public discourse as there would be from permitting it to have a place in such dialogue, and given the potential for edification that may attend the admitting of such dialogue to the public discourse, there are few reasons other than outright hostility to permitting matters of conscience to contribute to the public discourse that would justify such exclusion. This is not, of course, to discount the need for limitations like those set forth by Professor Perry in governing such dialogue.112 Indeed, those limits should be included on the Court's agenda in formulating a conscience-based First Amendment doctrine.

B. Coercion

Justice Kennedy, writing for the majority in Weisman, utilized the concept of coercion in developing an Establishment Clause test.113 As was the case with the Court's utilization of the term conscience, the use of coercion raises a number of questions that will have to be resolved in the elaboration of a viable Establishment Clause analysis or theory. In this section, I briefly raise those issues.

1. The Need for a Definition of Coercion

As was the case with the term conscience, the notion of coercion must be defined. Justice Kennedy's majority opinion and Justice Scalia's dissent both applied a coercion analysis. Justice Kennedy refers to subtle coercion in invalidating the graduation prayer in Weisman,114 while Justice Scalia relies on direct proof of actual coercion.115 While a definition of what counts as coercion may be distilled through a series of cases, the Court should confront the definitional issue at the outset, in order to inform

112. See PERRY, supra note 7, at 83-127. I may not agree with all of the limits set by Perry, but I think his exhaustive study provides a very sound starting point; providing a better point of departure than those proposed by individuals who would exclude conscience-based dialogue; see Edward B. Foley, Political Liberalism and Establishment Clause Jurisprudence, 43 CASE W. RES. L. REV. 963 (1993), or those who would permit it without limit, in hopes that it might entirely coopt or control the dialogue, turning our nation into a theocratic state.


115. Id. at 2678-86 (Scalia, J., dissenting).
litigants regarding the nature of record necessary to prove coercion.

2. The Need for a Theory of Coercion

The Court needs to formulate a theory of coercion. Coercion can be normative and not merely descriptive — a definition of coercion without an exploration of the theoretical underpinnings of such a definition will be insufficient.

Coercion may be defined as being forced to act against one’s will. That definition, however, begs the question — it simply substitutes will for coercion, leaving will undelineated — and fails to recognize that law often (perhaps, always) coerces in some respect. Law coerces by limiting choices or reallocating resources, benefitting some and burdening others, thereby influencing their choices. A viable definition of coercion will have to be supplemented with a theory that explains why some government actions, coercing as they must, are acceptable and others are not.

The theory will also have to take into account the extent to which private as well as public coercion is permissible. Culture and even biology (our genetic makeup) may be said to be coercive. The same sorts of problems with transcendence and immanence that are faced in the context of explicating the term conscience will also have to be faced in developing a viable theory of coercion.

Coercion, without definitional and theoretical elaboration, is an unbridled term. Indeed, it is by its nature expansive. Government, culture and nature alike coerce at virtually every turn. Coercion, therefore, needs to be defined and combined with some other term such as conscience or religion to determine whether that which is to be protected is being coerced and whether that specific form of coercion is permissible.

3. Developmental and Related Problems

One of the most perplexing issues raised in the context of the religion provision of the First Amendment has to do with children and their development of the tools necessary to become expressive.

116. See ALAN R. WHITE, GROUNDS OF LIABILITY: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 48-62 (1985) (demonstrating that voluntariness, involuntariness, and non-voluntariness are conceptually distinct).

117. Professor Michael Paulsen’s article is a good initial effort to explicate a theory of coercion, although his theoretical exposition seems to fail to recognize the explicit limits on coercion as a useful term when it is used without reference to what is being coerced. See Michael S. Paulsen, Lemon is Dead, 43 CASE W. RES. L. REV. 795 (1993).
individuals (to become autonomous in any meaningful sense). Put otherwise, serious issues regarding the autonomy of children, in light of the role of parents and government, often arise. Government no doubt has a significant role in assuring that children gain the tools necessary to become expressive, autonomous individuals. This role, which is largely effectuated by mandatory schooling, however, can put the government into direct conflict with the role of the family and the church or other similar groups and institutions. In coercion terms, government must assume some role in insuring that children are given the tools necessary to make choices in the first instance, even though this role is itself coercive. In some sense, nevertheless, this role is prior to any coercion analysis. How can a law coerce one's choice if one does not have the tools necessary to make an informed choice in the first instance? In other senses, it is inextricable from any coercion analysis because the tools of expression (reading and writing, for example) are imbedded in the teaching process and that process is itself coercive in some measure at nearly every turn. For example, one may have to learn to read to make choices from the panoply of alternatives available in contemporary society, but the selection of the materials used to teach reading is itself potentially coercive. One does not simply learn to read, one also learns from the substance of that which he or she is reading, and that learning can be coercive in that the substance read may influence choices to be made. Thus, in

118. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 213-214 (1972) (balancing the religious interests of parents and children with the State's interest in education). In a related sense, Bruce C. Hafen has argued that:

Individuals are not left totally to their own resources in the personal quest for purpose. The right freely to pursue personal meaning is embodied primarily in the values of the First Amendment, which are usually regarded as a set of individual liberties. Yet the tradition of the First Amendment also recognizes and protects certain intermediate structures — those "intellectual and moral associations" — that are carriers of meaning and developers of the tools necessary to explore meaning. Thus, the First Amendment and related constitutional sources should protect not only individual religious liberty, but the institutional liberty of churches; not only personal academic freedom, but the institutional liberty of schools and colleges; not only individual freedom of speech, but the associational or institutional freedom of groups and newspapers; not only the personal right to seek meaning and education, but the institutional role of the family to direct the moral, intellectual, and spiritual development of its children. The "little platoons" are a deliberate part of the structure, for they nurture the values that ultimately sustain the entire system — as well as sustaining the personal quest of each citizen.

Bruce C. Hafen, Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures, 48 OHIO ST. L.J. 663, 698 (1987) (citation omitted).
examining which types of coercion are acceptable for definitional and theoretical purposes, the Court will have to explore the implications for individual development, as well as for government, family, churches and other similar institutions inherent in any such enterprise.

V. COERCION AND CONSCIENCE IN THE WEISMAN CASE

The Court did not fare particularly well in raising or responding to the sorts of questions raised in the preceding sections regarding conscience and coercion in rendering its decision in Weisman. Neither Justice Kennedy, writing for the majority, nor Justice Scalia, writing in dissent, offered much if any definitional or theoretical support for their respective positions. What may be learned must be gleaned from examining the interplay between the incomplete doctrinal exposition contained in the various opinions and the application of that doctrine to the particular facts of the case.119

In his opinion, Justice Kennedy refers to coercion and to conscience. He defines neither term, however, nor does he do much to place either term in its historical context, as a matter of precedent or textual exegesis. Justice Scalia does not fare much better. While he refrains from analyzing conscience at all, preferring to focus on what he considers to be actual coercion, and after ridiculing Justice Kennedy for relying on psychological and related materials,120 Justice Scalia's analysis turns simply on his assertion, which is little more than an ipse dixit, that there was no proof of actual coercion in the record.121

Given the lack of rigor in the analyses and the paucity of justificatory theory set forth in the opinions in Weisman,122 one

119. It must be noted that the Weisman case did not arise in a vacuum; other cases have influenced its doctrinal direction. A full examination of those cases, however, is beyond the scope of this article.
121. Id. at 2683.
122. What the justices did in Weisman, however, is not unlike what they do in virtually all cases, especially cases that are decided during a period of major or revolutionary doctrinal change or flux. See Robert J. Lipkin, The Anatomy of Constitutional Revolutions, 68 Neb. L. Rev. 701, 705-07 (1989) (arguing that courts decide cases based on pragmatism as well as coherence with past precedent). This may be a very sensible way of permitting doctrine and theory to develop. However, at some point during the course of that development the questions raised in the preceding sections will have to be answered. They should also be grist for the thinking processes of the Justices as they consider future cases, in which doctrine and theory will evolve.
would have to engage in speculation to try to derive answers from the opinions to the questions raised in the preceding sections of this article. It may be enough, for present purposes, therefore, to indicate that the very presence of the term of conscience, juxtaposed as it is to the notion of coercion in *Weisman*, may reveal that new Establishment Clause doctrine and theory may be in its incipient stages.

V. CONCLUSION

I am pleased that the Supreme Court is beginning to utilize the term conscience in its Establishment Clause analysis.\(^{123}\) While there are many issues that must be resolved, including the relationship between the notions of conscience and coercion, this move in the Establishment Clause concept may well be a good one. By addressing some of the issues raised in this article, Justice Kennedy and others favoring such an approach might do much to solidify the role of a conscience-based theory in developing Establishment Clause doctrine. We may even one day have a theory of substance sufficient to put an end to the wandering of a wayward judiciary in its effort to formulate coherent Establishment Clause doctrine.

\(^{123}\) Unfortunately, the Court is less willing to use the same language in the free exercise context. In fact, given how deferential the Court has been to the majoritarian branches of government in regulating religious matters, so long as other rights are not involved or there is no evidence of actual intent to discriminate against a religion or group of religions, the use of conscience may be particularly significant. Since the Court is so inclined to permit the majoritarian branches of government great latitude in the free exercise area, proponents of First Amendment freedom may have to turn their energy to efforts like the Religious Freedom Restoration Act to maintain a vibrant right of conscience. When the majoritarian branches act in this regard to accommodate religion or conscience, they will be subject to the strictures of the Establishment Clause, which I argue throughout this article now require that the class protected be broadened to include like forms of conscience. If the Court continues to minimize protection under the Free Exercise Clause, the day may soon be upon us that the Court's entire work relative to the religion provision of the First Amendment will focus on the Establishment Clause and that work will be conscience-based (i.e., if the government act accommodates conscience in a nonpreferential manner, it will be permitted).