***Jihad* and the Constitution:**

The First Amendment Implications of

Combating Religiously Motivated Terrorism

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The obligation of Allah is upon us to wage Jihad for the sake of Allah. It is one of the obligations which we must undoubtedly fulfill . . . and we conquer the lands of the infidels and we spread Islam by calling the infidels to Allah and if they stand in our way, then we wage Jihad for the sake of Allah.

—Sheik Omar Abdel Rahman, speaking in Detroit in 1991¹

The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. . . . Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.

—Justice William O. Douglas, *United States v. Ballard*²

In interpreting the Free Exercise Clause of the U.S. Constitution,³ the Supreme Court has established that individuals have an unassailable right to maintain any religious beliefs they choose.⁴ Secular tribunals must refrain from judging the validity of religious beliefs,⁵ and the state may not interfere with the internal doctrinal deliberations of religious bodies.⁶ Perhaps the

1. *Jihad in America* (WNET television broadcast, Nov. 21, 1994), available in LEXIS, News Library, Cumwvs File.

2. 322 U.S. 78, 87 (1944).

3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

4. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

5. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944) (prohibiting jury from inquiring into validity of defendants' religious beliefs).

6. See, e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871) (prohibiting courts from participating in internal church debates over dogma).

Supreme Court has developed this belief-friendly interpretation of the First Amendment because religious ideas rarely have imperiled the nation's existence. While the state occasionally has scrutinized "radical" religions with unpopular beliefs and practices,⁷ spiritual groups historically have not threatened U.S. national security.

The Middle East, however, has not enjoyed such a pleasant state of affairs. The menace of violent *jihad*⁸ undertaken by adherents of radical Islamic fundamentalism presently jeopardizes secular governments in that region.⁹ To counter this threat, nations such as Algeria, Egypt, and Tunisia have cracked down brutally on violent and nonviolent fundamentalists alike, resorting to military strikes against mosques, detention and trial without due process, and routine torture of prisoners.¹⁰ Leaders in the region have justified these actions by insisting that maintaining a liberal respect for human rights is impossible in societies torn apart by religious violence. As Egyptian President Hosni Mubarak stated defiantly: "I refuse to allow human rights to become a slogan to protect terrorists."¹¹

Ominously, events in the last few years suggest that the threat of violence posed by radical sects in the Middle East has now arrived in the United States. The February 1993 bombing of the World Trade Center painfully demonstrated the vulnerability of the United States to terrorists with ties to radical Islamic groups. In July of that same year, the Federal Bureau of Investigation (FBI) broke up an extensive terrorist plot inspired by the radical Islamic fundamentalist teachings of Sheik Omar Abdel Rahman,¹² a blind Egyptian

7. For example, in the nineteenth century, the federal government considered Mormonism to be a socially unacceptable religion and acted to suppress some of its practices. See *infra* note 114.

8. *Jihad* is the Islamic concept of "struggle." Some radical sects interpret it as "holy war." For these sects, waging *jihad* often includes the use of terrorism and violence, whereby the spiritual quest to create a "universalistic Islamic state" justifies recourse to political warfare. Thus, radical Islamic fundamentalist terrorists' actions that appear to be politically motivated are really means to the achievement of larger religious goals. Furthermore, some radical Islamic fundamentalists consider *jihad* to be a passionate spiritual quest that knows no end until total victory is achieved. See AMIR TAHERI, *HOLY TERROR: INSIDE THE WORLD OF ISLAMIC TERRORISM* 14-18 (1987).

9. Terrorists and those who support them represent a tiny minority within the Islamic community. As one author has stated:

A comparison could be made with the Inquisition, which, although rooted in a strict reading of Christianity, did not encompass the much wider universe of Christ's message. The vast majority of Muslims would probably not see their beliefs, hopes, and aspirations reflected in the action of suicide bombers in Beirut or the throwing into the sea of a crippled American passenger on the *Achille Lauro*.

Id. at 11. Therefore, this Note will refer to those who engage in violent acts in the name of Islam as adherents of "radical Islamic fundamentalism" to distinguish them from the vast majority of the Muslim community.

10. See, e.g., Andrew Borowiec, *Tunisia Still Fears Fundamentalism: Nation Nervously Watches Algeria*, WASH. TIMES, June 29, 1994, at A14; Youssef M. Ibrahim, *Algeria Is Seen Edging Toward Breakup*, N.Y. TIMES, Apr. 4, 1994, at A7; Kim Murphy, *Martyr, Schoolgirl, Soldier, Terrorist: The Battle for Egypt*, L.A. TIMES, Nov. 27, 1994, Magazine, at 28.

11. Stanley Reed, *The Battle for Egypt*, FOREIGN AFF., Sept.-Oct. 1993, at 94, 103.

12. English transliterations of Arabic words often vary widely. For the sake of consistency, this Note will use the spellings employed in the reported pretrial decisions of the *Rahman* prosecution.

cleric living in New Jersey. Rahman and nine codefendants were convicted in federal court on October 1, 1995, for conspiring to wage a “war of urban terrorism”¹³ against the United States in the name of *jihad*.¹⁴ On January 17, 1996, Judge Michael Mukasey handed Rahman a life sentence for his role in the crime.¹⁵

Because of the seriousness of the plot, the *Rahman* trial is widely considered to be the most important international-terrorism prosecution ever conducted in the United States.¹⁶ The case is perhaps most noteworthy, however, for the manner in which the federal government responded to the conspiracy—by charging each defendant with sedition. The government accused Rahman of inciting his followers to wage religious warfare, and, as evidence of this incitement, it presented to the jury recordings of the Sheik’s fervent sermons. Needless to say, for the government to dust off its sedition laws and employ them against a cleric raises disturbing questions about the scope of religious freedom in the United States. Such prosecutorial tactics probably were justified in the *Rahman* case, given the grave nature of the plot that the FBI exposed. In less dramatic instances of “subversive” preaching, however, the use of a sedition charge may impair religious freedom more than it protects national security.

The arrival of religiously motivated terrorism in the United States poses the question of whether the free exercise rights guaranteed by the Constitution can withstand the challenge of spiritual doctrines that threaten the nation’s security. This Note argues that the Supreme Court’s limited definition of religious belief—rooted in individualism, not communitarianism¹⁷—gives the government the latitude to employ sedition laws to censor the sermons of both peaceful and violent religious leaders. By regulating the content of religious teachings in such a manner, the government essentially can outlaw certain beliefs. Unfortunately, secular courts cannot police this broad governmental power effectively since they are ill-equipped to distinguish between those religious doctrines that endanger national security and those that do not. Therefore, to ensure that the state criminalizes only those religious beliefs that truly threaten the nation, this Note proposes that a religious exception should be added to the “clear and present danger” test, the Court’s present seditious-speech standard. Before the state can suppress “subversive” religious speech under the test, it should be forced to prove that the speech reasonably led to

13. *United States v. Rahman*, 854 F. Supp. 254, 259 (S.D.N.Y. 1994) (pretrial order) (quoting Rahman Indictment ¶ 9).

14. See *infra* text accompanying notes 21–24.

15. Joseph P. Fried, *Sheik Draws Life in Plot to Bomb Public Buildings*, N.Y. TIMES, Jan. 18, 1996, at A1.

16. See, e.g., Robert L. Jackson, *Terror Plot Trial Opens for Sheik, Eleven Followers*, L.A. TIMES, Jan. 31, 1995, at A20.

17. This Note uses the word “communitarianism” to refer to activities that are group oriented.

overt acts committed against the government.¹⁸ Only by carving out such a protection for belief can the United States hope to avoid the Middle Eastern approach of gutting spiritual freedom in an attempt to protect society from “dangerous” faiths.

To place these issues in their proper context, Part I of this Note discusses the *Rahman* case as a model for future religiously motivated terrorism prosecutions. Part II identifies the constitutional right implicated in religious sedition prosecutions by describing the special position of spiritual belief in the Supreme Court’s free exercise jurisprudence. Part III presents the problem posed by the application of the Supreme Court’s individualistic definition of spiritual belief to religiously motivated terrorism prosecutions: Disturbingly, the definition allows the state to attack constitutionally sacred beliefs by regulating group spiritual expression through the “clear and present danger” standard. Given that practical considerations—most importantly the danger of terrorism itself—require that the definition remain unchanged, Part IV proposes a “backdoor” solution to the problem that avoids a redefinition of belief by instead altering the “clear and present danger” test to include an overt act requirement.

I. RELIGIOUSLY MOTIVATED TERRORISM IN THE UNITED STATES

The *Rahman* case exemplifies the uncomfortable interplay between religious freedom and national security. The prosecution of Sheik Rahman for the content of both his sermons and his religious advice demonstrates how in religiously motivated terrorism cases the government can potentially infringe upon spiritual liberties by labeling religious speech as “seditious.” The *Rahman* case may illustrate the prosecutorial tool—the use of sedition charges—that the government will employ in subsequent terrorism trials.

While the United States has witnessed isolated incidents of religious violence in the past, organized, doctrinally driven terrorism targeted at innocent bystanders currently threatens the nation. The 1993 bombing of the World Trade Center by a group of terrorists with loose ties to Sheik Rahman’s mosque¹⁹ provides the most spectacular and, to date, most deadly example of this phenomenon. In 1994, four defendants were each sentenced to 240 years

18. This Note raises general concerns about the constitutional implications of religious sedition charges. It does not find fault with the result of the *Rahman* case, however. Specifically, the overt act proposal in this Note would constrain the government in a case against a more questionably “dangerous” preacher than the Sheik, but it would not have affected the outcome of the *Rahman* case.

19. See James C. McKinley, Jr., *Mountains of Evidence Leave Some Questions*, N.Y. TIMES, Oct. 2, 1995, at B5 (noting Trade Center bombers had weak ties to Sheik Rahman). Although both the Rahman plot and the World Trade Center bombing involved defendants from the same religious circles, the two trials were separate affairs.

in prison for their roles in the bombing, which resulted in six deaths.²⁰ During the trial, however, the government chose not to delve very deeply into the religious beliefs that may have motivated the bombing.

By contrast, the radical Islamic fundamentalist ideologies of the defendants permeated the recent terrorism trial of Sheik Omar Abdel Rahman and nine coconspirators. The group was convicted of participating in an extensive plot “to levy a war of urban terrorism against the United States, to oppose by force the authority of the United States, and by force to prevent, hinder and delay the execution of laws of the United States.”²¹ Inspired by Rahman’s fiery sermonizing, members of the group assassinated a radical anti-Arab rabbi, Meir Kahane, in November 1990²² and plotted to blow up the United Nations and New York federal buildings, destroy the Lincoln and Holland tunnels in New York City, and kill Egyptian President Hosni Mubarak while he was on an official visit to the United States.²³ Law enforcement authorities arrested most of the defendants (but not Rahman himself) in a garage in Queens, New York, on June 24, 1993, while they were mixing explosives for an enormous bomb to be used in the scheme.²⁴

The distinguishing feature of the *Rahman* case was the unusual charge employed by the government against each defendant—seditious conspiracy.²⁵ The seditious conspiracy statute, a rarely used criminal provision that originates from a Civil War law aimed at secessionists, allows defendants to be convicted simply for concocting general plots against the government, thus relieving the prosecution of any need to prove specific subversive acts.²⁶ As one commentator has noted, “‘Essentially seditious conspiracy deals with a crime of the mind,’ . . . ‘[I]t allows a conviction based on a sense that there is antipathy or hatred. You don’t have to do anything; you just have to think

20. Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. TIMES, May 25, 1994, at A1.

21. United States v. Rahman, 854 F. Supp. 254, 259 (S.D.N.Y. 1994) (pretrial order) (quoting Rahman Indictment ¶ 9).

22. One of the defendants in the *Rahman* case, El Sayyid A. Nosair, stood trial for this assassination in state court and was convicted only on weapons charges. He was then convicted for the murder in the federal *Rahman* case. Joseph P. Fried, *Bomb Trial Ends: Jury Finds Men Planned Four-Year Campaign of Urban Violence*, N.Y. TIMES, Oct. 2, 1995, at A1.

23. Eleanor Randolph, “Megatrial” Prompts Questions of Fairness, WASH. POST, Nov. 20, 1994, at A25.

24. Robert D. McFadden, *Eight Seized as Suspects in Plot to Bomb New York Targets and Kill Political Figures*, N.Y. TIMES, June 25, 1993, at A1.

25. The seditious conspiracy statute provides:

If two or more persons . . . conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than \$20,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 2384 (1988), amended by 18 U.S.C.A. § 2384 (West Supp. 1995).

Rahman was convicted under the 1988 version of the seditious conspiracy statute quoted above.

26. Seth Faison, *Prosecutors Pick a Law From Past*, N.Y. TIMES, Aug. 26, 1993, at B5.

it.”²⁷ Although modern-day sedition trials are almost unheard of,²⁸ the breadth and severity of the seditious conspiracy statute make it a logical tool for future religiously motivated terrorism prosecutions.²⁹

As its name implies, the seditious conspiracy law is technically a conspiracy statute and thus contemplates some type of criminal agreement.³⁰ In Rahman’s case, however, prosecutors interpreted the agreement requirement rather loosely, as they charged the Sheik with inciting his followers to undertake subversive actions rather than making specific terrorist plans with them. Rahman did not participate in either the actual plotting against the government or the preparatory activities undertaken by his fellow defendants.³¹ Instead, he was convicted for providing religious encouragement to his coconspirators, both in a general sense and about the shape of their specific plans.³² As Andrew McCarthy, one of the federal prosecutors on the case, stated: “‘There is a difference between being the engineer of a specific act and someone who is the spiritual and ideological leader of the conspiracy,’ . . . ‘What the evidence I think sensibly shows is that there is an

27. Kevin Fedarko, *The Imaginary Apocalypse: A U.S. Court Finds a Blind Muslim Cleric and Nine of His Followers Guilty of “Seditious Conspiracy” to Conduct a Bombing Spree Throughout New York City*, TIME (int’l ed.), Oct. 16, 1995, at 46, 46 (quoting Fordham University Law Professor Tracy Higgins).

28. Commenting on the Rahman case, the *American Bar Association Journal* noted: “Charging a defendant with sedition in the modern-day United States might seem as archaic as making him walk the plank.” Jeff Barge, *Sedition Prosecutions Rarely Successful*, A.B.A. J., Oct. 1994, at 16, 16.

29. See Faison, *supra* note 26, at B5 (noting that law enables prosecutors to “cast a wider legal net”); Richard Pérez-Peña, *A Gamble Pays Off as the Prosecution Uses an Obscure 19th-Century Law*, N.Y. TIMES, Oct. 2, 1995, at B5 (noting prosecutors feel seditious conspiracy statute provides them with several advantages in attacking terrorism).

30. See PAUL MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.02 (1995) (noting that proof of agreement is essential to conspiracy).

31. The taped evidence revealed that at one point Rahman’s actions almost amounted to the specific formulation of a plot. When asked by a conspirator if an attack on the United Nations building would be “licit or illicit,” Rahman responded that it would be “licit” but “bad for Muslims.” He suggested that the plotters instead “inflict damage on the American Army itself.” Joseph P. Fried, *Sheik and Nine Followers Guilty of a Conspiracy of Terrorism*, N.Y. TIMES, Oct. 2, 1995, at A1, B4. Characteristically, however, Rahman carefully framed the question as one involving an interpretation of Islamic law.

32. The federal seditious advocacy statute, which criminalizes advocating the violent overthrow of the government, is relevant to this type of criminal activity. See 18 U.S.C.A. § 2385 (West Supp. 1995) (“Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . [s]hall be fined under this title or imprisoned not more than twenty years . . .”).

In Rahman’s case, the seditious conspiracy statute operated as a charge of seditious advocacy, convicting him for advocating violence and inciting his followers rather than reaching specific criminal agreements with them. See Pérez-Peña, *supra* note 29, at B5 (noting government saw seditious conspiracy charge as means of prosecuting Rahman even though he could not be tied to any specific criminal acts and did nothing more than talk about plot). Using the same evidence, prosecutors might have been able to charge Rahman under the federal seditious advocacy statute, except that the plot in which Rahman was involved was aimed more at “levying a war”—one of the targets of the seditious conspiracy statute—than at “overthrowing the government”—the target of the seditious advocacy law. Compare 18 U.S.C. § 2384 (1988), amended by 18 U.S.C.A. § 2384 (West Supp. 1995) (referring to “levying war”) with 18 U.S.C. § 2385 (1988), amended by 18 U.S.C.A. § 2385 (West Supp. 1995) (referring to “overthrowing the government”).

organization for terrorism in the United States. It's [sic] designer is the sheik."³³

On its face, the *Rahman* case may raise no difficult constitutional questions not already settled by the Supreme Court's rulings on the general legality of sedition statutes.³⁴ A closer examination of the evidence presented during the trial, however, reveals how terrorism prosecutions like Rahman's can implicate spiritual freedom by criminalizing the content of religious speech. To prove the seditious conspiracy charge against Rahman, the government showed the jury a videotape of one of the Sheik's fiery sermons in which he urged Muslims to wage war against all of Islam's enemies, including the United States. The tape portrayed Rahman arguing, "Jihad is fighting the enemy, fighting the enemies for God's sake."³⁵ Another tape introduced by the prosecution portrayed Rahman exhorting his followers, "The Koran makes [terrorism] among the means to perform jihad in [sic] the sake of Allah, which is to terrorize the enemies of God [who are] our enemies too We must be terrorists and must terrorize the enemies of Islam and frighten them and . . . disturb them."³⁶ Additionally, the government argued that Rahman not only encouraged his congregants to wage *jihad* against the United States, but also gave them religious advice about their specific criminal plans by stating which schemes would be in accord with Islam.³⁷ Although the evidence sometimes seemed to blur the distinction between Rahman's religious and political views, given the frequent overlap between the two inherent in *jihad*,³⁸ Rahman's radical view of Islamic fundamentalism must have motivated his actions. Thus, Rahman was prosecuted essentially because of the content of his sermons and his religious advice. Indeed, the religious nature of the evidence presented against Rahman led one of his attorneys to argue that the federal government, terrified by the arrival of radical Islam in the United States, prosecuted Rahman to suppress his religious views. As Rahman's attorney asserted, "[T]his is clearly religious speech, nothing more—he violated no law, . . . 'The only reason he's on trial is because it's a Muslim who's saying this.'"³⁹

While the *Rahman* case itself raises several interesting questions about religious freedom, it is most useful as a prototype for future religiously motivated terrorism prosecutions. Trials like Rahman's are likely to occur with

33. McKinley, *supra* note 19, at B5.

34. See, e.g., *Dennis v. United States*, 341 U.S. 494, 502–08 (1951) (arguing that speech may not be protected by First Amendment if it creates danger to nation); STEPHEN M. KOHN, *AMERICAN POLITICAL PRISONERS* 22 (1994) (noting that sedition laws still remain in force).

35. James C. McKinley, Jr., *Sheik's Talk at Issue in Trial*, N.Y. TIMES, Mar. 1, 1995, at B2.

36. Gail Appleson, *Sheik Heard Endorsing Terrorism Against Foes*, CHI. SUN-TIMES, Feb. 3, 1995, at 25.

37. Eleanor Randolph, "Jihad" Plot Defendants Facing Trial, WASH. POST, Jan. 8, 1995, at A14.

38. See *supra* note 8.

39. Nadia Abou el-Magd & David Kocieniewski, *Sheik Urged "City Battles,"* NEWSDAY (New York), Mar. 1, 1995, at A21 (quoting attorney Abdeen Jabara's reference to Rahman's speeches read by prosecution to jurors).

increasing frequency in the United States. With the end of the Cold War and the rise of radical Islamic fundamentalism in the Middle East, U.S. officials now consider terrorism to be a top national security concern.⁴⁰ The recent, controversial public television documentary, *Jihad in America*, chronicled an alleged network of radical Islamic fundamentalist groups in the United States bent on waging religious warfare.⁴¹ Most disturbing of the program's images was footage purportedly taken at a radical Islamic summer camp in the Midwest where young children are taught how to wage violent *jihad* in the United States.⁴² If such claims are true, then the *Rahman* prosecution will likely be the beginning, rather than the end, of America's domestic confrontation with radical Islamic fundamentalist violence.

Moreover, religious violence is by no means confined to radical Islamic sects. The issues raised by the *Rahman* case could just as easily resurface next in the context of Christian, rather than Islamic, fundamentalism. Substitute the words "Jesus Christ" for "Allah" and "abortionists" for "infidels" in Sheik Rahman's sermons, and the danger posed by radical fundamentalism of a different stripe becomes evident. In recent years, members of radical Christian groups have violently expressed their religious opposition to abortion through attacks on women's clinics and the murder of health care workers.⁴³ Jewish Zionist organizations,⁴⁴ Native American groups,⁴⁵ and a host of other spiritual bodies conceivably could join the fray in the name of their faiths and thereby subject their leaders to possible sedition charges. While the *Rahman* case provides a dramatic example of governmental criminalization of religious sermons, concern for the prosecutorial tactics employed in the case should not be confined to the narrow realm of radical Islamic fundamentalism.

40. See, e.g., Ron Martz, *Experts See New Trends in Terrorism*, ATLANTA J. & CONST., Aug. 5, 1994, at A8 (quoting FBI counterterrorism expert Oliver Revell: "'Islamic fundamentalists, without question, are one of the greatest threats to the United States . . .'"); Pierre Thomas and Thomas W. Lippman, *U.S. Plans New Ways to Fight Terrorism*, CHI. SUN-TIMES, Nov. 14, 1993, at 31 (arguing that, as sole remaining superpower, United States now faces increased threat of terrorism).

41. See *Jihad in America*, *supra* note 1. The U.S. Islamic community has heavily criticized this documentary for presenting a biased picture of Muslims in the United States. For commentary on the program, see *Jihad in America*, WASH. TIMES, Nov. 18, 1994, at A24.

42. See *Jihad in America*, *supra* note 1. Of course, these groups do not represent the peaceful and law-abiding mainstream Islamic community in the United States.

43. See Colleen O'Connor, *Abortion Clinics Face Increase in Violence*, DALLAS MORNING NEWS, Jan. 30, 1994, at 1A (noting influence of Christian fundamentalism on rising abortion-clinic violence).

44. See Alison Mitchell, *Citing Increased Bias and Crime, Jewish Militant Groups Live*, N.Y. TIMES, Mar. 2, 1992, at B1 (describing rise of Jewish militant groups in United States). Jewish militants have their own "summer camps" for teaching young boys military skills. See Joe Sexton, *Assassination of Rabin Raises Alarm Over Role of Kahane's Violent Followers in U.S.*, N.Y. TIMES, Nov. 13, 1995, at A10.

45. See, e.g., PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* 39-40 (1991) (describing spiritual roots of American Indian Movement, radical Native American organization that had violent confrontations with federal government in 1970s).

II. THE HALLOWED CONSTITUTIONAL POSITION OF RELIGIOUS BELIEF

Religiously motivated terrorism trials therefore threaten to become oft-repeated battles over the danger posed by particular spiritual doctrines. To understand the serious ways in which these prosecutions can affect religious freedom, the unique position of spiritual belief in the Supreme Court's Free Exercise Clause jurisprudence must first be examined. The special status of belief under the Court's primary free exercise test—the belief/conduct paradigm—and the distinctions the Court has drawn between religious and secular thought both demonstrate the premium accorded religious belief.

A. *The Special Status of Religious Belief Under the Belief/Conduct Paradigm*

The notion that religious belief and religious conduct are distinguishable pervades the Supreme Court's Free Exercise Clause jurisprudence. Although the state may regulate religious *conduct*, religious *belief* enjoys total protection from governmental intrusion:

Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. . . . Thus the [First] Amendment embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.⁴⁶

The Supreme Court first articulated the belief/conduct distinction over a century ago in a case upholding a Mormon's polygamy conviction, *Reynolds v. United States*.⁴⁷ Since then, the Court has consistently stood by its position that the state absolutely may not intrude upon the sacred realm of religious consciousness.⁴⁸ Accordingly, the Court has declined to examine the merits or veracity of particular religious beliefs.⁴⁹ At least according to the Court's

46. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

47. 98 U.S. 145, 166 (1878) (“Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”).

48. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) (“This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs . . .”); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (“The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.”); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such.”).

49. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981):

The determination of what is a “religious” belief or practice is more often than not a difficult and delicate task However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

See also *United States v. Ballard*, 322 U.S. 78, 86 (1944) (“Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.”).

rhetoric, religious belief holds an inviolable position in the U.S. constitutional system.

Yet while language touting the inviolability of religious belief permeates the Court's free exercise jurisprudence, the Court rarely invalidates governmental actions for infringing upon religious belief. One commentator has argued that in the last century, the Court has negated state actions explicitly on "belief" grounds in only four instances.⁵⁰ In general, it seldom relies on the absolute sanctity of religious belief to resolve free exercise questions.

Instead, the Supreme Court usually classifies an activity brought before it as "conduct" rather than "belief."⁵¹ Prior to 1990, the Court used a rather exacting standard to determine the legality of public regulations affecting religion, requiring that a regulation constitute the "least restrictive means of achieving some compelling state interest" in order to justify interference with spiritual conduct.⁵² In practice, however, the Court granted greater deference to the government when analyzing regulations of religious conduct than it did when assessing other types of regulations also governed by "compelling state interest" tests, such as race-based classifications.⁵³ For example, the government successfully claimed that its interests were sufficient to prevent military personnel from wearing religious headgear while on duty;⁵⁴ to penalize a university for racially discriminatory admissions processes inspired by its religious doctrine;⁵⁵ to force a group of Native Americans to obtain Social Security numbers despite the dictates of their spiritual beliefs;⁵⁶ and to maintain a system of Sunday blue laws, regardless of their adverse effects on Sabbatarians.⁵⁷ Nonetheless, before 1990, the Court employed at least some level of heightened scrutiny of state activity affecting religious conduct. In so doing, it allowed Amish children to leave school before completing the

50. Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 728-31 (1993). The four cases are *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down conviction of Jehovah's Witnesses for refusing to carry New Hampshire's slogan, "Live Free or Die," on their automobiles' license plates); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (invalidating Maryland statute requiring political candidates to declare belief in God); *United States v. Ballard*, 322 U.S. 78 (1944) (prohibiting jury instruction requiring jurors to assess validity of defendants' religious views); and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (annulling statute mandating salute of flag in schools because of objections of Jehovah's Witnesses).

51. See, e.g., *McDaniel*, 435 U.S. at 626-29 (invalidating state prohibition against ministers' serving as elected officials as an impermissible regulation of religious conduct, but explicitly refusing to do so on grounds that prohibition hampered religious belief).

52. See *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

53. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990) (noting disparity and claiming that "[t]he 'compelling interest' standard is a misnomer").

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

55. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

56. *Bowen v. Roy*, 476 U.S. 693 (1986).

57. *Braunfeld v. Brown*, 366 U.S. 599 (1961).

otherwise compulsory number of years of schooling,⁵⁸ permitted ministers to serve as elected officials despite a state constitutional provision disqualifying them from such positions,⁵⁹ and prohibited a state from denying unemployment compensation to an individual fired for refusing to work on her Sabbath.⁶⁰

In 1990, however, the Supreme Court abandoned the free exercise “compelling state interest” test in a heavily criticized opinion,⁶¹ *Employment Division v. Smith*.⁶² Holding that the Free Exercise Clause did not exempt the religious use of peyote from state criminal drug laws, the Court maintained that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁶³ Justice Scalia, writing for the majority, distinguished the previous “compelling state interest” cases by arguing that they were hybrid situations that also involved other constitutionally protected interests.⁶⁴ Under this newer, more deferential standard of review, the Court’s free exercise jurisprudence has focused primarily upon the intentionally discriminatory application of laws that facially do not single out religious sects for adverse treatment.⁶⁵ Importantly, however, despite making religious *conduct* more prone to state regulation, the *Smith* Court continued to assert in dicta the absolute sanctity of religious *belief*: “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all ‘governmental regulation of religious *beliefs* as such.’”⁶⁶

The belief/conduct distinction therefore reflects the Court’s strong rhetorical concern for religious belief. Despite recently relaxing the constraints upon governmental regulation of religious conduct, the Court has not strayed from its firm standard exempting religious belief from all state encroachment.

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

59. *McDaniel v. Paty*, 435 U.S. 618 (1978).

60. *Sherbert v. Verner*, 374 U.S. 398 (1963).

61. See *McConnell*, *supra* note 53, at 1111 (describing petition for rehearing “joined by an unusually broad-based coalition of religious and civil liberties groups from right to left and over a hundred constitutional law scholars”).

62. 494 U.S. 872 (1990).

63. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

64. *Id.* at 881. Scalia distinguished *Yoder*, for example, by arguing that the case involved both free exercise rights and parents’ rights “to direct the education of their children.” *Id.*

65. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993) (invalidating facially neutral ordinance administered so as to prohibit ritual animal sacrifice by Santeria religion).

66. *Smith*, 494 U.S. at 877 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)); see also *Lukumi*, 113 S. Ct. at 2227 (“[A] law targeting religious beliefs as such is never permissible . . .”).

B. *The Different Treatment of Religious and Secular Beliefs*

Although the belief/conduct paradigm confers special protection upon religious belief, the unique status of religious thought becomes most apparent when contrasted with the law's treatment of secular belief. The Supreme Court has characterized spiritual beliefs as mysterious. Not viewing secular beliefs in a similar manner, however, the Court has refused to extend to secular belief the same exceptional privileges that it has granted to religious views.

Exemptions from state regulations that the Court has granted on account of religious belief demonstrate the unique nature of spiritualism in its jurisprudence. In *Sherbert v. Verner*,⁶⁷ *Wisconsin v. Yoder*,⁶⁸ and *Wooley v. Maynard*,⁶⁹ the Court excused citizens from complying with facially neutral state laws that infringed upon their religious beliefs. The Court most likely would not have been so accommodating to merely political viewpoints.⁷⁰ For example, the Supreme Court has not allowed a state to prohibit ministers from serving as elected officials but has permitted the government to exclude Communists from leadership positions in labor unions.⁷¹

The Supreme Court has based much of this deference to religious belief on the assumption that courts are not competent to weigh the relative merits of spiritual claims, which may be tested only in the realm of the individual soul.⁷² Because the state cannot judge the validity of the internal deliberations that relate an individual to her maker, the government must confine its review of ideas to public affairs.⁷³ On the other hand, society is more competent to judge purely secular claims through its deliberative processes. Secular thoughts, in contrast to religious beliefs, exist in the "marketplace" of ideas where they

67. 374 U.S. 398 (1963) (forbidding denial of unemployment benefits to Seventh Day-Adventist discharged for refusing to work on her Sabbath).

68. 406 U.S. 205 (1972) (allowing Amish children to leave school after eighth grade because of parents' religious beliefs).

69. 430 U.S. 705 (1977) (permitting Jehovah's Witnesses to refuse to display state slogan, "Live Free or Die," on license plates because slogan contradicted their moral, political, and religious beliefs).

70. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 717 (1986); see also Gabriel Moens, *The Action-Belief Dichotomy and Freedom of Religion*, 12 SYDNEY L. REV. 195, 209 (1989) ("[I]f the [successful] claims of the Amish defendants [in *Yoder*] had been based only on philosophical and personal rather than religious rejection of contemporary secular values . . . these claims would have to yield to the exigencies of ordered liberty."). Although these exemptions occurred in cases involving conduct motivated by belief, rather than pure belief itself, the discrepancy between the Court's treatment of religiously inspired actions and politically motivated actions nevertheless highlights the special status of religious belief.

71. Compare *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating prohibition on ministers) with *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950) (upholding prohibition on Communists).

72. See *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."); *infra* notes 129-38 and accompanying text.

73. See A. Stephen Boyan, Jr., *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 490 (1968) ("Government officials have no special competence to judge the beliefs of other men which relate them to their fellow men and the universe, and which help them distinguish right from wrong. . . . The competence of government, according to the Constitution, is with public affairs.").

compete for acceptance.⁷⁴ The secular marketplace functions not only to promote discussion about public affairs,⁷⁵ but also to eliminate false ideas.⁷⁶ Accordingly, when necessary for society, the state may enter the marketplace to establish and defend general secular standards of conduct.⁷⁷ Public policy dictates that while religious beliefs may be internal and unquestionable, secular ideas must be open, testable, and, in rare circumstances, proscribable. As a result, the Court has explicitly refused to confer upon secular thought the inviolability of religious belief.⁷⁸

Hence, both the belief/conduct paradigm and the contrast between religious and secular thought confirm the special status of spiritual belief. As the Court has interpreted the Free Exercise Clause, religious belief is sacred and inviolable, strictly protected from the meddling of the state. How the Court actually has defined belief, however, profoundly limits the potential reach of this rule.

III. THE CONSTITUTIONAL PROBLEM: THE SUPREME COURT'S INFLEXIBLE DEFINITION OF BELIEF HAMPERS GROUP RELIGIOUS FREEDOMS

Although the absolute protection of religious belief forms the professed nucleus of the Supreme Court's religious freedom jurisprudence, the way that the Court has defined "belief" creates a problem for spiritual groups. Individualism provides the basis for the Court's conception of protected belief. According to the Court, those ideas that reside solely within the individual mind constitute "belief." This definition of belief, however, excludes group and associational activities, such as worship, that are critical to the existence of religious thought. As a result, the government can regulate these activities without running afoul of the absolutism of the belief/conduct paradigm. Unfortunately, by censoring the content of worship, the government can effectively eradicate certain religious beliefs. While this interpretation of belief therefore poses serious problems for religious groups, expanding the Court's restrictive definition to include both a communitarian and individualist orientation could prove disastrous from a practical standpoint. To alter the

74. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (arguing that debate on secular ideas needs to be open and vigorous); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (noting that unacceptable secular ideas should be ferreted out by marketplace).

75. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (arguing "debate on public issues should be uninhibited, robust, and wide-open"); *Jones v. Opelika*, 316 U.S. 584, 594 (1942) (identifying "principal bases of democracy" as "knowledge and discussion").

76. See *Douds*, 339 U.S. at 396 ("Speech may be fought with speech. Falsehoods and fallacies must be exposed . . .").

77. See, e.g., Hamilton, *supra* note 50, at 766–67; Moens, *supra* note 70, at 210.

78. See *Douds*, 339 U.S. at 409–10 (rejecting creation of secular First Amendment "fetish of beliefs"). This disparity may originate from the intent of the framers of the First Amendment to single out religious thought for special protection as a check against the rampant secular authority of the state. See Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 808–13 (1958).

definition in that way might lead to rampant religious exemptions from important governmental regulations. Religious groups are thus placed in a predicament: The Court's definition of belief subjects their doctrines and tenets to governmental regulation, but courts most likely would resist any efforts to change that definition.

A. *The Court's Strictly Individualist Interpretation of Religious Belief*

The Supreme Court's interpretation of "belief," whether secular or religious, focuses on its purely internal, personal nature.⁷⁹ The Court views belief as lacking any external or expressive character; rather, belief leads a lonely existence within the confines of the individual mind.⁸⁰ Thus, the state offends the sanctity of belief only when it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."⁸¹ For example, in recognizing draftees' personal, spiritual opposition to war, the Court's conscientious-objector cases epitomize its understanding of religion as a function of the personal beliefs of individuals, devoid of any institutional or communal character.⁸² According to the Court, belief is lodged in congregants, not congregations.

This individualistic definition of belief drastically limits the range of governmental activities subject to review under the belief prong of the belief/conduct paradigm. In some very rare instances, the government has impermissibly invaded the internal realm of belief by forcing citizens to express opinions in opposition to their religious convictions.⁸³ But in general, as noted by Professor Laurence Tribe, the only way that the state conceivably could assault the private domain of religious belief would be through "government-mandated or state-immunized brainwashing."⁸⁴

The Court's conception of belief therefore excludes fundamental yet external aspects of religious consciousness, such as worship, sermons, and proselytizing. The Court places regulation of these activities on the conduct side of the belief/conduct divide, since such activities lack internal and

79. See Hamilton, *supra* note 50, at 763 ("[W]ithin the solitary spaces of the inner soul there is freedom.").

80. See Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 495-96 (1991).

81. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

82. See, e.g., *Gillette v. United States*, 401 U.S. 437, 454 (1971) (emphasizing "individual conscientious belief, not . . . sectarian affiliation"); *Welsh v. United States*, 398 U.S. 333, 339-40 (1970) (determining religious nature of belief by significance to individual, rather than by institutional standard); *United States v. Seeger*, 380 U.S. 163, 176 (1965) (defining religious belief as individual relationship with higher "power or being").

83. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (prohibiting state from forcing citizen to express "Live Free or Die"); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (forbidding state from compelling public officials to declare belief in God); *Barnette*, 319 U.S. at 624 (prohibiting state from requiring Jehovah's Witness schoolchildren to salute flag).

84. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 1184 (2d ed. 1988).

individualistic characteristics. For example, in *Widmar v. Vincent*, a case brought by a Christian student organization challenging its exclusion from public-university facilities, the Court expressly classified religious worship as plain speech—in other words, conduct—subject only to the First Amendment protections granted to secular expression.⁸⁵ While *Widmar* is the most explicit example of this technique, the analysis of worship under simple free speech tests dates back to the Jehovah's Witness cases of the 1940s,⁸⁶ in which the Court essentially ignored the free exercise interests implicated by the Witnesses' public activities and scrutinized them instead under the general rubric of the First Amendment.⁸⁷ Because worship is treated as expressive conduct rather than absolutely protected belief, the Court's free expression jurisprudence allows the state to regulate its content and the time, place, and manner of its utterance.

B. *The Problems Raised by Excluding the Communitarian Nature of Religious Consciousness from the Court's Definition of Belief*

The Supreme Court's individualistic interpretation of belief closely relates to its larger constitutional vision. The Court's definition reflects its general embrace of modern, "liberal" political theory, which emphasizes the protection of individual liberty and property.⁸⁸ Proponents of the liberal tradition seek the creation of strong central governments and regard religious institutions as a potential threat to the state's authority.⁸⁹ Thus, liberalism strives to confine religious liberties to the realm of individual consciousness, where they would have less influence on the public sphere.⁹⁰

Liberty's roots, however, extend beyond the simple liberal notion of individualism. The theory of "civic republicanism," which involves safeguarding those institutions and aspects of communal life that advance the public good, competes with the liberal political tradition.⁹¹ Civic

85. 454 U.S. 263, 269 (1981); see also William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 560 (1983) ("[T]he Court implied that the religious aspects of the litigant's speech in *Widmar* would be constitutionally irrelevant to the litigant's claim. After *Widmar*, religious speech is speech—no more, no less.").

86. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141 (1943) (protecting free expression aspect of door-to-door religious solicitation); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (permitting ban on unlicensed religious parade as valid time, place, and manner restriction).

87. See Tushnet, *supra* note 70, at 714; see also Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 40–41 (1961) (applying this analysis specifically to *Cox* case).

88. See Tushnet, *supra* note 70, at 730–35. For a fuller discussion of the influence of liberal thought upon American institutions, see generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

89. See Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 125–26 (1992).

90. See Tushnet, *supra* note 70, at 731–32.

91. See generally Richard H. Fallon, Jr., *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989) (analyzing republican theory); Tushnet, *supra* note 70, at 735–38 (describing tradition of civic republicanism). For a discussion comparing the liberal and republican traditions, see MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 4–17 (1988).

republicanism considers groups and communities, not just individuals, to be the linchpins of a free society. According to the republican tradition, liberty and freedom strengthen intermediary institutions, entities that promote the public good independent of the state.

Although today the Court focuses on liberal definitions of rights, the Framers apparently envisioned a political system in which liberalism and republicanism would act in tandem to protect both individuals and groups.⁹² As Professor Akhil Amar has suggested, the Bill of Rights originally was not envisioned as a purely liberal, individualistic text:

Of course, individual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.⁹³

Unfortunately, because liberalism subsequently achieved a preferred jurisprudential status, the Court has largely disregarded the original combination of liberal and republican influences upon constitutional values.⁹⁴ It now defines most rights, religious or otherwise, in individual terms.

Religious freedom, however, is perhaps the one value in which an acknowledgment of the republican/communitarian basis of liberty is most essential. Religion often includes both individuality and collectivity at its core.⁹⁵ While some form of purely "individual religious consciousness" is conceptually possible, spirituality is frequently more vibrant when experienced in a group setting.⁹⁶ Religion does not have to be either a purely individualistic or a purely collective endeavor; rather, as reflected in the Framers' general constitutional vision, it can be a combination of both. In fact, some commentators have argued that the Free Exercise Clause was created specifically to safeguard the associational nature of religion and thereby to

92. See, e.g., Hall, *supra* note 89, at 93; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558 (1988).

93. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991).

94. See Tushnet, *supra* note 70, at 730.

95. See Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1008–09 (1983).

96. See Hall, *supra* note 89, at 133. Although individualism may be the hallmark of some faiths, particularly Protestant ones, it certainly is not a universal value. Many other Christian groups, for example, place communality above individualism. See 2 ERNST TROELTSCH, *THE SOCIAL TEACHINGS OF THE CHRISTIAN CHURCHES* 993–1013 (Olive Wyon trans., MacMillan Co. 1931) (1931) (surveying differences in values among Christian groups).

ensure the presence of a power structure to compete with the state's authority.⁹⁷

Aside from reasons of original intent, associational and institutional aspects of religious thought also belong in a definition of belief for several practical reasons. First, the centrality of worship to many religions justifies some form of communitarian understanding of spiritualism, since worship frequently requires social interaction.⁹⁸ While worship may at first glance resemble conduct more than belief, upon closer examination the resemblance does not appear to be so clear. For many creeds, the faith must be witnessed and expressed in word and deed, necessitating interaction with the community.⁹⁹ In such religions, belief resides in the collective consciousness of the faithful, not alone in their individual minds. Hence, to protect individual thoughts but not group expression leaves these beliefs without effective protection.

Second, certain religions have developed complex spiritual theories over thousands of years. Such beliefs might not continue to exist if adherents could not disseminate them freely to the next generation. Complex religious doctrines cannot be expected to spring forth spontaneously in individuals' minds. Moreover, religions often require counseling and instruction to help the faithful understand particularly abstract doctrines. Absent such group discussion, doctrines could be mangled by misunderstanding. Thus, if a religious doctrine cannot be disseminated and discussed freely by the group that developed it, it might cease to exist.

Finally, congregants themselves often do not think of churches as aggregations of individual beliefs. Often no majoritarianism or democracy with respect to ultimate questions of faith exists within a religious group. Rather, adherents of particular creeds regard churches as moral units in and of themselves.¹⁰⁰ Church members frequently band together initially because they prefer group to individual consciousness. Interpreting spirituality as inherently individualistic therefore denies the wishes of many of the very people that the Free Exercise Clause was designed to protect.¹⁰¹

Hence, discounting the group-oriented aspects of religious belief risks depriving faith of a characteristic at least as vital to its existence as individualism.¹⁰² Of course, the solution to this deficiency is not to exclude individualism from the definition of belief. Rather, if the Court wishes to

97. See, e.g., John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 588 (1990); see also Joseph M. Dodge II, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 726-27 (1969).

98. See 2 TROELTSCH, *supra* note 96, at 1006-07; Dodge, *supra* note 97, at 697-98.

99. See PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 22-23 (1964).

100. See Garvey, *supra* note 97, at 581-82.

101. See *id.* at 588.

102. See Dodge, *supra* note 97, at 725-28. At times, the Court inadvertently has recognized the group-oriented nature of belief: "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added).

protect religion, as *religion*, republican principles would have to be recognized and included in its free exercise jurisprudence.¹⁰³ Liberal, individualistic notions of religious rights alone cannot protect the integral communitarian aspects of religious belief.¹⁰⁴

C. *The Danger Posed to Group Religious Beliefs by the Court's Purely Individualistic Definition of Belief*

The Supreme Court's notion that the government only infringes upon religious "belief" when it invades the domain of the individual mind ignores evidence that the existence of religious belief often depends upon the associational and expressive practices of groups. State actions that effectively proscribe religious worship or counseling can therefore suppress certain group beliefs. Prosecutions of religiously motivated terrorism, which may employ content-based standards such as the "clear and present danger" test to censor "subversive" religious speech, illustrate this hazard. While historically the government has refrained from regulating spiritual beliefs, the threat of terrorism may inspire it to start taking a more aggressive stance toward "radical" faiths—a move that could have dramatic consequences for the sanctity of belief but that would not run afoul of current free exercise jurisprudence.

1. *The "Clear and Present Danger" Test as a Regulator of Religious Thought*

Aside from regulating the time, place, and manner of religious speech, the main way the government can regulate worship is through laws aimed at its content. By labeling specific ideas uttered by clerics as "dangerous," the state can employ content-based standards to "outlaw" certain religious beliefs.

According to *Widmar v. Vincent*,¹⁰⁵ group religious worship constitutes simple speech for constitutional purposes. Thus, governmental regulations that attempt to proscribe the content of worship must be predicated upon state interests sufficiently compelling to curtail free expression rights.¹⁰⁶ The same constitutional tests the Court uses when analyzing secular speech therefore pertain to regulations of "subversive" worship as well.

The free speech test that most logically would apply to subversive worship is the "clear and present danger" standard, the Court's present seditious speech

103. See Boyan, *supra* note 73, at 487–88 (promoting adoption of institutional definition of religion in addition to more individualistic or operational notion); Glendon & Yanes, *supra* note 80, at 537 (arguing for consideration of associational and individual aspects of religious freedom).

104. See Garet, *supra* note 95, at 1012; Hall, *supra* note 89, at 122.

105. 454 U.S. 263 (1981).

106. *Id.* at 269–70.

test. Justice Holmes first articulated the test in *Schenck v. United States*, a sedition case from World War I: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."¹⁰⁷ Since *Schenck*, the Court has generally adhered to the "clear and present danger" standard and has focused primarily on the test's proper application.¹⁰⁸ Although the standard has changed over the years,¹⁰⁹ the current design of the "clear and present danger" test tolerates mere advocacy of violence in the abstract. The government may criminalize particular utterances only when it can prove both that a speaker intended to incite "imminent lawless action" and that his or her speech was likely to produce such a result.¹¹⁰

Applying the "clear and present danger" test to the *Rahman* prosecution illustrates how the use of seditious speech tests to regulate "subversive" religious sermons might operate in practice. According to the Supreme Court, one must first classify the Sheik's sermonizing and counseling as conduct, not belief.¹¹¹ The analysis then would switch from free exercise considerations to the appropriate free expression test. Since delivering sermons or counseling followers is not illegal per se, a content-based inquiry into the danger posed by Rahman's words—most appropriately the "clear and present danger" test—becomes necessary. Rahman definitely breached the "clear and present danger" standard by instructing his impassioned followers to wage violent *jihad* against the United States, because the plot uncovered by the FBI proved that his statements created an imminent danger to the nation's security. Hence, Rahman's conviction stands on solid First Amendment grounds.¹¹²

While the charges against Rahman may not offend a simple reading of the "clear and present danger" test, this prosecution nevertheless led the

107. 249 U.S. 47, 52 (1919) (emphasis added).

108. Holmes first expressed his disapproval of the Court's application of his test in *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting) (arguing that majority incorrectly applies clear and present danger test to case with no showing of imminent threat to national security arising out of defendant's speech). He repeated his criticism in *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting) (criticizing Court for upholding conviction without proof of immediate danger to state).

109. See Tom Hentoff, Note, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1455–57 (1991).

110. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also *Yates v. United States*, 354 U.S. 298, 324–26 (1957).

111. See *supra* text accompanying notes 85–87.

112. The pretrial rulings in the *Rahman* case support a reading of the Supreme Court's jurisprudence that would allow the state to attack seditious religious speech using secular speech principles. In denying Rahman's motion to dismiss his indictment because the charges involved the performance of his pastoral functions, U.S. District Judge Michael Mukasey ruled: "[T]hat speech—even speech that includes reference to religion—may play a part in the commission of a crime does not insulate such crime from prosecution. '[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself.'" *United States v. Rahman*, No. S3 93 Cr. 181, 1994 WL 388927, at *1 (S.D.N.Y. July 22, 1994) (denying motion to dismiss) (second alteration in original) (quoting *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970)).

government into the uncharted territory of regulating the substance of particular religious doctrines. Essentially, Rahman was prosecuted because the government disapproved of one of the prominent teachings of radical Islamic fundamentalism, namely *jihad*. The *content* of Rahman's beliefs drew the government's attention; had he urged his followers merely to observe *Ramadan*, he certainly would not have been subject to federal imprisonment. While the *Rahman* prosecution may not have implicated "belief" in the internal sense recognized by the Court, the state acted to suppress that religion by criminalizing the expression of a faith's central tenet.¹¹³ To jail a cleric for spreading a radical but central spiritual doctrine within a religious community is effectively to outlaw the beliefs of that sect.

2. *The Unprecedented Nature of Content-Based Regulations of Religious Belief*

Although the Court's individualistic definition of belief allows the government to "censor" the doctrines of organized religions, the state has not yet tested the scope of this power.¹¹⁴ As the *Rahman* case illustrates—for good or for bad—that history of restraint may now be at an end.

In the last century, the government has exhibited a remarkable reluctance to regulate religious thought. While state activities in the past may have indirectly hampered group religious beliefs,¹¹⁵ the government has refrained from targeting spiritual thoughts themselves. According to Professor Leo Pfeffer, governmental actions against heretical or unorthodox religious doctrines are essentially unheard of:

As far as is known, Congress has never enacted any law proscribing or limiting religious unorthodoxy. Nor, with the exception of three Bible belt anti-evolution statutes that quickly became dead-letter laws, has any state apparently done so. . . . [T]here is no record after the Revolutionary War and after the adoption of state constitutions having bills of rights guaranteeing religious freedom of any person being prosecuted for religious expression or worship deemed to be

113. See *supra* text accompanying notes 98–101. Of course, Rahman probably deserved such a penalty. The danger created by Rahman's teachings likely left the government no choice but to put an end to them.

114. Congress's attack upon Mormonism in the nineteenth century represents one notable, though dated, exception to this claim. In an effort to suppress the practice and doctrine of polygamy, Congress revoked the corporate charter of the Mormon Church and confiscated much of its property. The Supreme Court's opinion upholding this legislation is notable for the remarkable level of contempt that the Justices displayed for the religious philosophy of the Mormons. See *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 48–49 (1890). Since the Court decided the case well before it developed the bulk of its free exercise jurisprudence or the "clear and present danger" standard, however, the case is of limited usefulness for illuminating the modern shape of religious liberties. Nevertheless, the case does illustrate the Supreme Court's willingness to characterize regulations attacking religious doctrines as implicating conduct and not belief.

115. See, e.g., Edward Egan Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491 (1991) (describing effect of state law on Christian Science belief in faith healing).

unorthodox or heretical. Nor is there evidence of legislation toward that end.¹¹⁶

Furthermore, as Professor Tribe has noted, the government does not launch frontal assaults on religious belief: "Short of government-mandated or state-immunized brainwashing—whether called 'deprogramming' or given some other name—the state does not directly attack citizens' religious beliefs. Rather, the state rewards or punishes beliefs indirectly, by encouraging or discouraging actions that are based on those beliefs."¹¹⁷

In light of this background, the use of sedition charges against preachers presents a truly novel situation for the nation's courts. Whereas in the past, communism, syndicalism, and anarchism represented the ideological threats to the government, today a new danger rooted in religion may be emerging. The compelling state interest in preserving national security that the courts recognized when siding against the free expression of subversive *political* ideas earlier in the twentieth century now may resurface in the context of subversive *religious* ideas. The combination of this compelling interest and the opening provided by the individualistic definition of belief may place "radical" religious beliefs squarely in the path of a government committed to defending itself.

Indeed, the Supreme Court probably has not anticipated how its treatment of worship as speech may be used to suppress religious doctrines for national security reasons. The Court has previously suggested that the government may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities;"¹¹⁸ nor can the state assess the validity of particular religious beliefs in its judicial proceedings.¹¹⁹ Moreover, despite its individualistic bent, the Court has refrained from regulating the content of religious ceremonies: "[I]t [is not] in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."¹²⁰ This refusal to monitor and control the content of religious sermons and ceremonies, however, may be based upon the fact that the Court has never been presented with a strong enough reason to do so. Religiously motivated terrorism could very well become that reason.

116. Leo Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1131–32 (1973) (footnotes omitted).

117. TRIBE, *supra* note 84, § 14-6, at 1184 (footnotes omitted).

118. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citation omitted).

119. *See United States v. Ballard*, 322 U.S. 78, 86–88 (1944).

120. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (striking down conviction of Jehovah's Witness for addressing religious meeting in local park).

D. *The Root of the Problem: An Inappropriate but Unalterable Definition of Belief*

Even though religious belief holds an unassailable position in the Supreme Court's jurisprudence, the preceding discussion has demonstrated that the individualistic definition of belief permits the state to regulate and thus effectively "outlaw" the doctrines of organized religions. For the Court to provide truly comprehensive protection to religious belief, this limited definition of belief would have to be expanded to include communal considerations. Although superficially appealing, such a solution to the threat posed to organized religions by the "clear and present danger" test is both unlikely and unwise.

One reason that the Court has refused to include communal elements in its definition of belief—apart from its general bent towards liberal political theory—is the rash of new exemptions from important governmental regulations that such a redefinition would warrant. The Court presumably fears that expanding the definition of belief to include more religious activities might create a situation of liberty run amok: "The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the *scope* of that protection since to do so might leave government powerless to vindicate compelling state interests."¹²¹ If "belief" included group spiritual activities such as worship or proselytizing, then a host of religious practices might be exempted from important state regulations for the general health and safety of the community.¹²²

In fact, the danger to national security posed by religiously motivated terrorism represents the best argument against expanding the definition of belief to provide absolute protection for group activities. As illustrated by the treatment of peyote in the *Smith* case,¹²³ the Court seems particularly reluctant to grant religious exemptions from neutral criminal laws. When the force of the criminal law is combined with interests of national security—as in terrorism prosecutions—the arguments for spiritual exemptions grow even weaker. In a sense, this balancing of interests is only fair; it would be illogical, unwise, and unjust for the system to jail an anarchist who advocates the forceful overthrow of the government, but completely exempt from penalty a

121. *McDaniel v. Paty*, 435 U.S. 618, 627 n.7 (1978).

122. For example, although the Court recently has struck down a local ordinance discriminatorily applied to eliminate the worship practice of animal sacrifice, it acknowledged that a narrower law applied neutrally could be used to regulate such sacrifices for reasons of hygiene and public health. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2229–30 (1993). If the Court extended absolute protection to all worship practices, the state would be powerless to regulate sacrifices in the interests of public health.

123. *See supra* text accompanying notes 61–66.

cleric who utters the same idea couched in spiritual terms.¹²⁴ To grant a religious exemption in the latter case would unduly intrude upon the state's legitimate interest in self-preservation. As noted by Justice Reed in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*: "Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense."¹²⁵

Hence, the weight of practicality, rather than constitutionality, justifies retaining a narrow definition of belief. This result, while utilitarian, still leaves organized religions with a problem. The Court has acknowledged that the absolute protection of belief is vital to the free exercise of religion, and clearly "belief" involves both communal and personal elements. Yet the Court's insistence upon a purely individualistic definition of belief allows the state to regulate the doctrines of religious groups. Nevertheless, the Court's definition will likely endure—and for good reason. Thus, while the Court's current free exercise jurisprudence imperils the legitimate interests of organized faiths, dramatically changing that jurisprudence could imperil the rest of society.

IV. PLACING LIMITS ON THE GOVERNMENT'S POWER

The Supreme Court must allow the government to stop someone as dangerous as Sheik Rahman. But what about less "subversive" preachers? Under the "clear and present danger" test, the state possesses an expansive power to regulate religious thought. As long as a jury can be convinced that some religious idea—one that is more than likely foreign to them—poses a danger to the nation, the government can suppress that belief. Unfortunately, one cannot place much confidence in the ability of the courts—even when they act in good faith—to confine the government's investigations to truly seditious doctrines. Therefore, a limit must be placed upon this governmental power in order to defend religious beliefs that may be different but not dangerous.

In attempting to find solutions to the constitutional problems posed by counterterrorism, one should keep in mind the competing interests that must be balanced. On the one hand, measures that unduly burden the state's ability to address national security threats could have disastrous consequences. That the target of a counterterrorism investigation or prosecution is a religious figure should not significantly hamper the government's ability to take appropriate measures to ensure the nation's safety. On the other hand, the present state of the law gives the government enormous power to attack religious beliefs, a power that could be misapplied to innocent believers. Therefore, the legal context in which counterterrorism tactics operate should be fashioned to

124. The cleric may deserve some form of additional protection, but he or she should not be completely immune from prosecution. See *infra* Part IV.

125. 344 U.S. 94, 109 (1952).

guarantee that the state's devastatingly powerful tools are employed only against those religious groups that truly threaten the nation. Crafting a religious speech exception to the "clear and present danger" test would achieve this result by requiring the state to prove the existence of an overt act undertaken in furtherance of antigovernmental goals before the state can criminalize religious beliefs.

A. *Problems in Applying the "Clear and Present Danger" Test to Religious Speech*

Although the "clear and present danger" standard is the accepted constitutional test for analyzing seditious speech, it is not an adequate check on the government in religious sedition cases. No serious problem would arise if the Court's individualistic definition of belief allowed the state to proscribe dangerous religious beliefs and no others. Then the government could be trusted—subject to judicial review of course—to combat only those ideas that pose a "clear and present danger" to the nation. But due to the nature of religious beliefs, neither courts nor prosecutors are well positioned to determine which beliefs are truly "dangerous." Consequently, "innocent" beliefs may be swept away in the national-security current. Furthermore, if courts come to view houses of worship as locations that are "imminently dangerous" per se, then applying the current "clear and present danger" test to religious beliefs would risk the almost automatic proscription of certain religious utterances.

1. *Incompetence of Secular Courts to Interpret Religious Speech*

The greatest problem with applying the "clear and present danger" test to religious speech is the very operation of the imminent-lawlessness standard.¹²⁶ The test allows the government to criminalize speech once it is clear that the speech threatens imminent harm to the nation.¹²⁷ This requirement, however, presupposes that in assessing the likely impact of the targeted speech, courts can understand the speech's meaning. While the state frequently and reasonably considers the meaning and validity of competing ideas in the realm of secular speech,¹²⁸ it is far less competent to interpret spiritual utterances.

The secular machinery of the state is simply ill-equipped to understand and analyze religious speech. According to the Supreme Court, religious beliefs

126. See *supra* text accompanying note 110.

127. See Hentoff, *supra* note 109, at 1455 (stating that test requires harmful consequences of speech to be "imminent" and "grave").

128. See *supra* text accompanying notes 74–77.

involve matters of mystery, not legal fact.¹²⁹ Hence, religious beliefs can “be beyond the ken of mortals” to understand.¹³⁰ Secular courts’ ignorance renders them unable to evaluate scriptural evidence or to discern the meaning of religious terms.¹³¹ Consequently, as the Pennsylvania Supreme Court noted almost 150 years ago, for secular tribunals to investigate certain “matters of faith [or] doctrine” would be to “involve themselves in a sea of uncertainty and doubt.”¹³² Roscoe Pound, sitting as a commissioner of the Nebraska Supreme Court, acknowledged this judicial deficiency while analyzing the evidence in a case involving an internal church dispute: “The books [about canon law] in evidence, and the witnesses who testified with regard to them, take many things for granted, of which the court is ignorant, and we should feel greatly embarrassed were it necessary for us to attempt to construe them.”¹³³ After demonstrating the judiciary’s institutional weakness in such affairs, Professor Zechariah Chafee, Jr., issued his famous warning to courts to avoid rushing into “the Dismal Swamp of obscure [religious] rules and doctrines.”¹³⁴

Because courts realize their inability to weigh religious claims or to analyze spiritual beliefs, they generally have refused to decide cases that would require them to conduct extensive evaluations of religious doctrines. For example, the Supreme Court has forbidden the judiciary from reviewing internal, church doctrinal disputes:¹³⁵ “Courts are not arbiters of scriptural interpretation.”¹³⁶ Similarly, juries may not determine whether religious claims are fraudulent,¹³⁷ and courts will not recognize a cause of action for clergy malpractice.¹³⁸

129. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940), *overruled on other grounds by* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (expanding scope of religious liberty beyond that of *Gobitis*).

130. *United States v. Ballard*, 322 U.S. 78, 86–87 (1944) (“Religious experiences which are as real as life to some may be incomprehensible to others. . . . [T]hey may be beyond the ken of mortals . . .”).

131. See, e.g., John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 869 (1984) (demonstrating difficulty courts could encounter in ascertaining meaning of simple Jewish term “kosher”).

132. *German Reformed Church v. Seibert*, 3 Pa. 282, 291 (1846).

133. *Bonacum v. Harrington*, 91 N.W. 886, 887 (Neb. 1902).

134. Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1024 (1930); see also MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 79 (1968) (“It is impossible to see how American courts could possibly permit themselves to investigate theological mysteries.”); Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1328 (1980) (“Although civil courts have an expertise in the tasks of interpreting documents and discovering the intentions of parties to contracts, that expertise presumably does not extend to ecclesiastical matters.”).

135. See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (arguing that courts must defer to highest ecclesiastical tribunals within church when resolving disputes over doctrine); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1871) (holding that courts cannot participate in internal church debates over dogma).

136. *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

137. See *United States v. Ballard*, 322 U.S. 78, 86–87 (1944).

138. See *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994) (“Indeed, a cause of action for clergy malpractice has been rejected uniformly by the states that have considered it. . . . [T]his unanimity is based

An inquiry regarding the "imminent danger" posed by violent religious speech would lead courts at least as deep into the "Dismal Swamp" as would the aforementioned activities for which courts consider themselves incompetent. To determine if spiritual doctrines pose a "clear and present danger" to the state, courts would have to undertake exhaustive investigations into the meanings of particular religious beliefs, investigations that they are plainly ill-equipped to conduct. The judiciary would be faced with difficult question after difficult question, each requiring a specialized understanding of imponderable religious beliefs, an expertise that secular courts clearly lack.

For example, in assessing whether the "clear and present danger" test proscribes certain religious speech, courts first would have to determine whether the speech calls for some concrete action, or whether it simply is spiritual imagery. In other words, is the violence spoken about merely symbolic, designed to add color to the religious experience? Or does the doctrine genuinely call for war in terms cryptic to outsiders? The world's religions are filled with violent imagery and symbolism.¹³⁹ For instance, the Old Testament contains the following passage: "God is a just judge, / And God is angry *with the wicked* every day. / If he does not turn back, / He will sharpen His sword; / He bends His bow and makes it ready. / He also prepares for Himself instruments of death; / He makes His arrows into fiery shafts."¹⁴⁰ This is precisely the type of metaphorical language that the judiciary is incompetent to interpret. Is this passage a call for war against the unrighteous? Or is it simply a graphic way to urge followers not to stray from the true path? Courts assessing religious doctrines for seditious content must therefore determine what place specific ideas have in a faith; congregants may understand some violent religious utterances to be simple literary devices, while they may regard others as advocating specific actions. Deciding into which category a particular belief fits would require courts to conduct deep and difficult inquiries into the targeted sect's theology.

Even if a court could conclude that a religious utterance is not merely imagery but rather a call for harm to befall a target, it then would have to determine the form that the religion believed the harm would take. Does the doctrine call for violence or physical attack? Or does it merely promote damnation, psychological injury, or even just bad luck? For example, the Koran states: "O Prophet, strive against the disbelievers and the hypocrites and press hard on them. Their abode is hell and an evil destination it is."¹⁴¹ A court interpreting this verse delivered by a radical Islamic fundamentalist

on the difficulty that would be encountered in evaluating such a claim without entangling the civil courts in extensive investigation and evaluation of religious tenets.").

139. See generally JAMES A. AHO, RELIGIOUS MYTHOLOGY AND THE ART OF WAR (1981) (surveying violent images contained in world religions).

140. *Psalms* 7:11-13 (emphasis added).

141. *Qur'an* 9:73 (Muhammad Zafrulla Khan trans., 1970).

would face the hard task of ascertaining the meaning of “press hard.” Does the doctrine urge a grisly death for all disbelievers, or does “press hard” simply describe disbelievers’ treatment in the afterlife? Even if a court concludes that a religious group clearly wishes ill upon some target, ascertaining whether the penalty encouraged by the faith represents a “clear and present danger” could be extremely difficult.

Even if a court could establish that a belief is not merely imagery and that it calls for actual violence, it then would have to divine who the instrumentality of the violence was meant to be. Does the doctrine encourage believers themselves to inflict harm upon the target, or will a deity perform the deed, perhaps acting through angels or forces of nature? The Book of Revelations, for example, includes this depiction of the final battle at the end of the world: “And I saw the beast, the kings of the earth, and their armies, gathered together to make war against Him who sat on the horse and against His army.”¹⁴² Even if a court clearly understood that “Him who sat on the horse” refers to some deity or force of good, what exactly is “His army?” If a radical Christian group argued that the “army” soon would destroy all nonbelievers, to whom would they believe “army” referred? Courts would have to investigate the group’s theology to decide whether individual believers or heavenly forces are supposed to do the Lord’s bidding. Simply because the members of a religious group wish harm upon some target does not necessarily mean that they themselves pose a danger to it.

Even if a court concludes that a religious belief is not merely imagery, that it calls for actual violence, and that believers will execute the attack, the “clear and present danger” test’s imminence requirement would still remain to be satisfied. That is, does the belief call for violence today or at some later date? Suppose a survivalist religious doctrine advocated the murder of all infidels when Armageddon arrives. To apply the “clear and present danger” test, courts would be forced to examine survivalist dogma to determine when Armageddon is supposed to come. Similarly, the Koran states:

We never punish a people until after We have sent a Messenger. Before We decide to destroy a township, We command the affluent section of its people to adopt the ways of righteousness, whereupon they decide on disobedience. Thus the sentence becomes due against it, and We destroy it utterly.¹⁴³

What if a radical Islamic terrorist group that encouraged violence raised as its defense to a sedition charge that the harm it advocated certainly was not

142. *Revelations* 19:19.

143. *Qur'an* 17:15–16 (Muhammad Zafrulla Khan trans., 1970).

imminent, since it never issued any warning?¹⁴⁴ Courts then would have to investigate Islamic theology to determine whether any of the group's utterances could qualify as a warning, or whether the passage applied to terrorist activities at all.

This cataloging of problematic judicial inquiries is by no means exhaustive; courts undoubtedly would have to conduct a myriad of additional investigations into religious beliefs when attempting to apply the "clear and present danger" standard to abstract spiritual speech. Secular courts simply have too many opportunities to reach incorrect conclusions about the religious beliefs before them. Thus, the problem with the "clear and present danger" test as applied to religious speech lies not so much in a bigoted FBI's targeting minority faiths, but rather in a well-meaning but underqualified judiciary's misconstruing and misinterpreting as violent what are actually peaceful religious doctrines.

An example may illustrate this problem more fully. Violent religious imagery fills the Judeo-Christian canon.¹⁴⁵ Since courts and juries are likely to be well versed in the Judeo-Christian ethic, however, they probably would understand that using such symbolism in a religious ceremony poses no real danger to society. But what about unpopular or less familiar creeds? During his struggle against colonial rule in India, Gandhi repeatedly likened the British government to the Hindu figure Ravana, a monster possessing the attributes of Satan.¹⁴⁶ Drawing upon the legend of Ravana and other Hindu texts, Gandhi urged Hindus to participate in a struggle against the evil forces of the colonial regime.¹⁴⁷ The secular British government, unfamiliar with Hindu dogma and frightened by a non-Christian faith, could easily have jumped to the conclusion that Gandhi's language created a "clear and present danger" of "imminent" violence. Of course, nothing would have been farther from the truth. In fact, Gandhi argued that violence was the way of Satan and that to fight the British through violent means would be to submit to the forces of the Devil.¹⁴⁸

Hence, secular courts cannot determine which religious beliefs in the abstract pose a "clear and present danger" to society. Awe and mystery surround religious doctrines; that the state could hope to understand and classify them by their likely violent impact is overly optimistic.

144. In such an instance, this defense might be fallacious because the passage is written from the standpoint of God and not Muslims in general. This interpretation of the passage, however, is itself certainly open to debate.

145. For a discussion of the history of violent imagery in the Judeo-Christian tradition, see AHO, *supra* note 139, at 80-100, 165-81, 194-217.

146. See William W. Emilsen, *Wrestling the Serpent: Gandhi, Amritsar and the British Empire*, 24 RELIGION 143, 147 (1994).

147. See *id.*

148. See *id.* at 149.

2. The Problem of "Imminence Per Se"

Despite the Court's prioritizing of religious over secular beliefs, the "clear and present danger" test may actually permit the government to proscribe religious ideas more easily than secular ones. Because courts may regard certain religious settings as dangerous by their very nature, the test might lead them to criminalize "subversive" religious speech almost automatically.

In analyzing violent ideology, the Supreme Court has drawn a sharp distinction between mere theoretical advocacy and actual incitement. As the Court stated in *Noto v. United States*, "[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."¹⁴⁹ Hence, the state may not punish abstract advocacy of violence, but it may prohibit attempts to incite people to undertake imminent lawless action.¹⁵⁰ For example, although the government cannot close down a college seminar on violent Marxist theory, it may prohibit a labor leader from urging a mob of angry anarchists to burn down city hall.

Interestingly, while the imminent-lawlessness standard may protect violent secular ideologies lodged in nonincendiary settings, it might permit the total prohibition of certain religious utterances. People often express religious belief most vibrantly through communal activity among a congregation of the faithful.¹⁵¹ By definition, priestly sermons do not advocate ideas in the abstract; rather, they are designed to compel followers to take certain moral actions. Generally, a cleric disseminating a religious tenet to his or her followers fully intends to induce them to abide by it. Moreover, congregants do not listen to these teachings out of academic interest, but instead use them to structure their lives. Viewed from the outside, religious services therefore could appear to courts to be occasions for incitement delivered by an earnest orator to a frenzied, impassioned throng.¹⁵² From a structural perspective, sermons and worship logically resemble the regulable incitement of the mob of anarchists more than they do the nonregulable college seminar about Marxism. Thus, courts applying the "clear and present danger" test might construe almost all religious speech as per se imminently dangerous.

Consequently, because religious belief often finds expression in group settings, the imminence requirement of the "clear and present danger" test could lose its bite when applied to religious speech. Unlike secular thought,

149. 367 U.S. 290, 297-98 (1961).

150. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

151. See *supra* text accompanying notes 95-99.

152. Worshipers in some religions often work themselves into a frenzied passion. For a discussion of religious enthusiasm in various Christian sects, see Douglas Davies, *Christianity, in WORSHIP* 35, 54-56 (Jean Holm & John Bowker eds., 1994).

which can thrive in a nonincendiary setting such as the classroom, the state almost always may be able to regulate group religious beliefs because they frequently are lodged in inherently "imminently dangerous" settings.¹⁵³ Thus, despite the Court's hierarchy favoring religious belief, the "clear and present danger" test paradoxically may allow the state to proscribe spiritual ideas more easily than it can censor secular thoughts.

B. *Crafting a Religious Exception to the "Clear and Present Danger" Test*

The conventional "clear and present danger" test is therefore an inappropriate tool for evaluating "seditious" religious speech. Courts cannot apply the standard accurately and the test may allow for the proscription of religious speech too easily. Of course, many constitutional tests are imperfect. In this instance, however, the impropriety of the "clear and present danger" test is compounded by the fact that the utterances to which it would be applied are effectively religious beliefs, which lie at the core of the Free Exercise Clause and merit greater constitutional protection than do secular beliefs. Unfortunately, according to the Supreme Court's definition of belief, once expressed externally, even peaceful religious doctrines do not qualify for absolute constitutional protection. Therefore, the best solution to this problem may be to safeguard group religious beliefs through the "back door," by adding an overt act requirement to the "clear and present danger" test as applied to religious speech.

1. *The Distinction Between Secular and Religious Overt Act Requirements*

Currently, the "clear and present danger" test contains no overt act requirement.¹⁵⁴ Indeed, the seditious conspiracy law, the criminal statute that the government will likely employ in future religiously motivated terrorism prosecutions, does not require the state to prove that defendants committed any specific acts in furtherance of their conspiracy.¹⁵⁵ From time to time,

153. Although the government may not criminalize teaching about violent religious creeds as an academic subject, religious belief requires dissemination in a religious environment in order to serve its purpose. Marxism need not lose its persuasive appeal when studied in a political theory class. In the classroom, students can reach their own conclusions about the worth of Marxism and can decide whether to order their political lives around its theory. Hence, political theory taught in the secular classroom does not lose its political character. A comparative religion class, by contrast, might strip Islamic fundamentalist ideas of their religious appeal. College classes would secularize the faith and turn it into nothing more than sociology, thus performing none of the spiritual functions of religious beliefs.

154. See *Dennis v. United States*, 341 U.S. 494, 509 (1951) (upholding conviction for advocating overthrow of government before any overt acts were undertaken in furtherance of goal).

155. See *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986) (acknowledging that seditious conspiracy statute requires no overt act).

Supreme Court Justices¹⁵⁶ and commentators¹⁵⁷ have argued for an overt act requirement for the “clear and present danger” test in order to promote vibrant political expression. The Court, however, has rejected their arguments, asserting that the state should not be powerless to prevent crimes that are still in their formative stages:

Obviously, [“clear and present danger”] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.¹⁵⁸

The Court’s reluctance to add an overt act requirement to the “clear and present danger” test may well be justifiable. Because the government can understand the threat posed by secular ideas,¹⁵⁹ preventing the spread of dangerous speech may be essential to national security. The Court’s past rejections of an overt act requirement, however, have occurred solely in the context of secular speech. The actual criminalization of religious speech through the use of the “clear and present danger” standard presents a novel situation to the nation’s courts.¹⁶⁰ In this uncharted territory, an overt act requirement exclusively for religious utterances makes sense. Not only is the government especially unable to understand religious speech, but also the constitutional value implicated by religious sedition prosecutions—the inviolability of religious belief—is of even greater importance than the sanctity of the political beliefs targeted in secular sedition cases.

2. *The Mechanics of an Overt Act Requirement for Religious Speech*

The “clear and present danger” test therefore should be modified to require an overt act before the state can criminalize a spiritual utterance. To jail a cleric for preaching a seditious sermon, the state first should be obligated to prove that the cleric’s congregants took some identifiable action in reasonable

156. See *Dennis*, 341 U.S. at 590–91 (Douglas, J., dissenting) (arguing that First Amendment requires overt act before speech can be criminalized).

157. See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 137 (1984) (arguing that standard should require “complicity” in illegal acts rather than simple advocacy).

158. *Dennis*, 341 U.S. at 509.

159. See *supra* text accompanying notes 74–77.

160. At times, the Court has alluded to the possibility of applying the “clear and present danger” test to religious activities, but it never has fully applied the standard. See, e.g., *Taylor v. Mississippi*, 319 U.S. 583, 589–90 (1943) (denying that religious defendants posed “clear and present danger” to state); *Cantwell v. Connecticut*, 310 U.S. 296, 308–09 (1940) (acknowledging that state can punish speech that causes “clear and present danger” but denying that religious defendants uttered such speech).

furtherance of the sedition. This requirement would prevent the state from mistakenly censoring sermons that have no potential for causing it harm. The overt act could take many forms, including a trip to "case" a target, the purchase of weapons, or the construction of explosive devices.¹⁶¹ Whatever the shape of the overt act, it need only be sufficient to confirm that certain religious teachings were actually seditious.¹⁶² If no reasonable nexus between the cleric's speech and the subversive acts of his or her followers exists—that is, if the congregants acted irrationally after hearing a sermon—then this standard would preclude prosecution of the preacher.

This proposal would require courts to make inquiries into religious belief no deeper than the ones they already must conduct in most free exercise cases. To apply the overt act requirement, courts might have to decide if particular subversive speech is actually religious. But judges are accustomed to determining whether a claimant has a character of religiosity, a relatively neutral task.¹⁶³ Additionally, courts might have to screen out secular radicals who cloak their sedition in religious terms. Otherwise, a group of violent anarchists could seek enhanced constitutional protection by peppering their seditious speech with references to Buddhism. Again, however, in the course of deciding free exercise cases, courts have looked to objective criteria to determine the sincerity of "religious" claims. Courts rely on these criteria to avoid substantive inquiries into underlying religious beliefs.¹⁶⁴ Thus, while courts might have to ask tangential questions about religious beliefs when deciding whether to apply the overt act requirement, these questions would not require the comprehensive evaluations of spiritual matters that courts are incompetent to undertake.¹⁶⁵

161. Sheik Rahman's codefendants were arrested while mixing explosives for a bomb.

162. In this sense, the overt act requirement for religious sedition proposed by this Note would function like the overt act traditionally required in conspiracy prosecutions. Because criminal agreements can be difficult to pinpoint, the state often must prove the occurrence of an overt act as evidence that the conspiracy actually exists. *See United States v. Offutt*, 127 F.2d 336, 340 (D.C. Cir. 1942) (arguing that overt act is a "manifestation that a conspiracy is at work"). Similarly, the overt act in the religious sedition context would confirm the existence of "dangerous" beliefs.

163. Since most free exercise cases require a threshold determination of whether a claimant is religious, courts have created neutral tests that help them make this decision without delving too deeply into particular religious doctrines. *See, e.g., Africa v. Pennsylvania*, 662 F.2d 1025, 1036–37 (3d Cir. 1981) (holding philosophy of MOVE organization did not amount to religion); *Malnak v. Yogi*, 592 F.2d 197, 213–14 (3d Cir. 1979) (determining that school course called "Science of Creative Intelligences—Transcendental Meditation" involved religious instruction); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (determining that plaintiff's preference for cat food did not amount to religious creed).

164. These objective criteria to determine sincerity include inconsistent prior acts of the claimant, the size and history of the religion, and the existence of evidence indicating the presence of material incentives to fraudulently profess a belief. *See International Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981).

165. *See Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (arguing that courts cannot evaluate truthfulness of beliefs but can determine whether they are religious and whether they are sincerely held); *see also United States v. Seeger*, 380 U.S. 163, 185 (1965) (noting that courts must weigh sincerity and religiosity in deciding religious claims).

In addition, the “reasonable nexus” standard under which this proposal would operate might require some minor explorations of religious belief. In order to protect clerics from lunatics who wrongly interpret their sermons to justify violent acts, this Note suggests that for a prosecution to succeed a reasonable relationship between the speech and the overt act must exist.¹⁶⁶ Obviously, deciding that a follower irrationally interpreted a particular religious doctrine would lead a court far beyond its realm of expertise. Much like the inquiries into religious sincerity that courts presently conduct, however, this reasonability determination could be made by looking to objective criteria.¹⁶⁷ To determine whether a violent follower acted under a reasonable interpretation of a religious belief, courts could investigate the history of violence within the sect, evidence of similar doctrinal interpretations by other followers, or the existence of prior violent acts by the preacher in question.

Of course, adding an overt act requirement to the “clear and present danger” test would tie a preacher’s criminality to the bad acts of his or her followers. The danger that a congregation of people schooled in the relevant religious doctrines will misinterpret the preacher’s words, however, is far less than the danger of misinterpretation by an inept judiciary. Moreover, the “clear and present danger” test already defines a speaker’s crime partially by reference to the audience’s external circumstances: Spreading seditious advocacy among a troop of Cub Scouts is surely not as serious a criminal act as spreading it among a cell of revolutionary anarchists.

Nevertheless, this proposal may not be perfectly airtight. On rare occasions, the overt act requirement might protect preachers who utter sedition so clear that no court could misinterpret it, but whose followers commit no overt acts. For example, a cleric could state: “I hereby do advocate and encourage the overthrow of the U.S. government through the use of force.”¹⁶⁸ The overwhelming need to provide some form of protection to group religious beliefs, however, justifies a standard that occasionally might afford increased safety to the “clearly” seditious cleric. In fact, in the secular realm, suppressing “clear” seditious advocacy has not been very useful from a national security perspective anyway.¹⁶⁹ Moreover, the determination of whether certain

166. In most instances, the reasonability standard probably would be unnecessary because prosecutors would be highly unlikely to bring sedition charges against clearly law-abiding preachers for the subversive actions of their deranged followers.

167. Cf. *Barber*, 650 F.2d at 441 (describing neutral criteria that can be utilized to determine religious sincerity).

168. Of course, the speech in question would have to pass the court’s threshold determination of religiosity to obtain enhanced constitutional protection under this proposal. In the instance of “clear” sedition unencumbered by spiritual trappings, such a determination might be a difficult hurdle to clear.

169. The twentieth-century experience with advocacy-based attempts at preventing subversive actions has been less than encouraging. Although during World War I the government brought 2000 speech prosecutions aimed at subversive defendants, see William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 256 (1982), “[n]ot a single first-class German spy or revolutionary workingman was caught and convicted of an overt act designed to give direct aid or comfort to the enemy,” ZECHARIAH

speech constitutes "clear" religious sedition might depend upon the particular religious biases of individual courts. Thus, to exempt "clear" sedition from the overt act requirement might link the outcome of a sedition charge to a judge's own spiritual opinions.

3. *The Advantages of an Overt Act Requirement for Religious Speech*

The proposed overt act requirement for religious sedition cases would improve the current law in several ways. First and most importantly, the requirement would serve as an objective standard to assist the courts and the state in making what would otherwise be a very subjective determination of the imminence of harm posed by a particular religious belief. Secular tribunals' incompetence in religious matters renders ascertaining the threat created by spiritual doctrines difficult, if not impossible. The overt act requirement represents a neat solution to this problem. Secular courts would no longer have to inquire about the meaning or impact of particular religious beliefs; a "dangerous" religious utterance simply would be one that led to an identifiable overt act committed against the state. Innocent religions that may use violent religious imagery in their worship but that do not oppose the state's authority would thus be spared from criminal prosecution.

Second, the overt act requirement would preserve a realm in which "violent" religious ideologies could exist in the abstract. Without the requirement, courts might regard religious institutions as per se "imminently dangerous" settings and hence permit the almost automatic criminalization of all "subversive" religious beliefs uttered within them. The overt act requirement would allow radical religious creeds to exist as doctrines much like violent Marxism can exist in the college classroom. Only when a congregant took action to further the violent teachings of a belief could the state move to attack the doctrine in question.

Third, an overt act requirement also makes sense politically. The sedition charges against Sheik Rahman produced fears in some parts of the U.S. Muslim community that the government was placing Islam on trial.¹⁷⁰ Those fears might have been even greater, however, if the FBI had not exposed a massive terrorist plot on the verge of completion. As long as all religious sedition prosecutions require an overt act, the government will be able to identify to the public the actual subversive activities that it is attempting to combat. Moreover, prosecutors could assure peaceful religious groups that the government has neither the intention nor the power to criminalize their

CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 513 (1946) (quoting Charles Beard). Similar prosecutions in the 1950s and 1960s were equally unsuccessful. See Mayton, *supra*, at 256-57.

170. See Mae M. Cheng, *Verdict Stirs Fears: Muslims in Queens Wary of Hysteria*, *NEWSDAY* (New York), Oct. 2, 1995, at A14.

religious beliefs. Thus, the requirement might make religious sedition prosecutions less threatening to targeted spiritual communities.

Finally, the overt act requirement need not constrain the government's ability to defend itself. Rather than closing down avenues of prosecution, the requirement simply would help the state to identify those religions that truly pose threats to national security. Furthermore, this requirement should not unduly burden law enforcement. If the government can deploy sufficient resources to infiltrate a church, record its doctrines, and try to interpret them, detecting the existence of preparatory overt acts would not require much additional effort.

The *Rahman* case demonstrates how little an overt act requirement would constrain law enforcement in situations that do threaten national security. The FBI broke up the *Rahman* plot after the defendants actually had begun to mix the explosives to be used in the bombing—a sufficient overt act. Thus, the existence of an overt act requirement still would have allowed the government to break up the *Rahman* conspiracy.

A variety of complex factual situations may arise that will make difficult the determination of whether an overt act occurred or whether a cleric should be held accountable for his or her congregants' actions. But even if the overt act requirement does not safeguard every "innocent" religious doctrine, it still represents a vast improvement over the present state of the law. As it stands now, preachers more innocent than Sheik Rahman may be thrown in jail for uttering religious speech that led to no criminal activity but that an underqualified judiciary misconstrued as posing a danger to the state. Simply put, the potentially damaging effects of such prosecutions on the constitutional freedom of religious belief are frightening.

V. CONCLUSION

Although the Supreme Court places a premium on safeguarding religious belief, its individualistic definition of belief stops far short of providing a full range of protection to spiritual thought. As a result, the doctrines and beliefs of peaceful, organized religions stand open to regulation by the state when its secular machinery judges them "subversive." Because this individualistic definition is unlikely to change, "innocent" institutional religious beliefs should be protected by modifying the mechanism by which they may be labeled "dangerous." By adding an overt act requirement to the "clear and present danger" test as applied to religious speech, courts can defend the interests of organized religions without handcuffing the government in its efforts to address genuine national security threats. Some action to defend institutional religious interests is vital in the face of religiously motivated terrorism prosecutions; otherwise, the harm inflicted upon religion by Middle Eastern governments bent on combating violence could easily make its way to the United States.