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# Some thoughts on Perspective

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# SOME THOUGHTS ON PERSPECTIVE†

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To risk a dangerous paraphrase, it is a *Bill of Rights* we are interpreting, and that fact has consequences for interpretation. Just as with Chief Justice Marshall's reminder that it was *a constitution* being interpreted,[1] the intended function of the document is important in determining its meaning and application. The function of a Bill of Rights is to protect the minority—or the individual—from that majority (or coalition of minorities) which is the government; to provide shelter for the minority from the majority acting through the government. And from the perspective of the minority, that shelter is important whether the impingement by government is intentional or inadvertent. Thus, in interpreting the free exercise clause of the first amendment, the question of perspective is important. Do we perceive the issue from the perspective of the minority, or from that of the government?

Consider Frances Quaring, a Nebraska farm wife whose religious beliefs prohibit her use of photographs, "graven images" to her.[2] The state of Nebraska requires the driver's photograph to be on a driver's license, and prohibits driving without a valid driver's license. To follow both her religion and the law leaves Mrs. Quaring isolated on her farm; prohibited by her government from using an automobile, the primary mechanism of mobility in this country and the only one practically available to her. From the perspective of the government the driver's license law is perfectly neutral and rational, and has nothing to do with religion. From Mrs. Quaring's perspective, this law directly impinges on her religion; from her perspective it is oppression based upon exercise of religion.

A reasonable and flexible government should have little trouble seeing the problem from Mrs. Quaring's perspective and granting her an exception. But government, particularly

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1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

2. Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984), *aff'd by an equally divided court* in Jensen v. Quaring, 105 S. Ct. 3492 (1985) (per curiam).

bureaucratic government, is not always reasonable, and frequently is not flexible. Nebraska granted no exception. The first amendment protects the "free exercise of religion." In applying that protection to Frances Quaring do we take her perspective or the government's; do we see neutrality or oppression? The function of a Bill of Rights as protecting the minority suggests, at least initially, that the minority perspective on the governmental action at issue is appropriate. From Mrs. Quaring's perspective this legal regulation is not neutral; it impacts upon her life and the exercise of her religion in a way entirely incommensurate with both its effect on others and with the intention of the legislature.

Current free exercise doctrine mandates that the individual's perspective be taken into account. Because the law impinges significantly upon Mrs. Quaring's practice of her religion, and because excepting her from the effect of the law does no significant damage to the interests served by the photo requirement, exemption for her from the requirement may be constitutionally compelled under the first amendment's guaranty of freedom of religion.[3] This current interpretation of the free exercise clause, allowing in some cases for exemption from laws which remain applicable to those with no religious objection, is what Professor West finds objectionable. I shall address below three of the arguments which are central to his critique,[4] and which I believe fail to take account of the importance of perspective and of the function of a Bill of Rights.[5]

## I. MAJORITY AND MINORITY

If one of the purposes of the religion clauses is to equalize minority and majority (or a coalition of minorities) in regard to the nexus between government and religion, then both intended and unintended governmental imposition on religion must be within the protection of the amendment.[6] The major-

3. *See, e.g.*, Frazee v. Illinois Dep't. of Employment Security, U.S. 109 S. Ct. 1514 (1989); Bowen v. Roy, 476 U.S. 693 (1986); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). The Eighth Circuit held that an exemption for Mrs. Quaring was required, Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) and this was affirmed by an equally divided Supreme Court, Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam).

4. West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

5. Some of the arguments and observations presented below are elaborated in Pepper, *A Brief for the Free Exercise Clause*, forthcoming in J.L. & RELIGION.

6. Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966

ity (or a coalition of minorities) will not pass laws that impinge on their own religion intentionally, but they also will not do so inadvertently. (As Professor West quotes: "If Catholic or Jewish beliefs prohibited photos on drivers' licenses, would they be required?")[7] The smaller the minority, the more likely that inadvertent imposition will occur. And the smaller the minority, the more likely that inadvertent imposition will change to uncaring imposition if the matter is brought up. The first amendment, under this view, provides to small minorities the same protection in regard to freedom of religion that larger minorities and majorities receive through the political process.[8]

Perspective is thus important, if not determinative. Professor West's response to this majority/minority equalizing interpretation of the religion clauses is therefore quite revealing: "There are now no majority religions in America, unless one is willing to ignore all the many different varieties of Christianity that exist in this country."[9] Can one not recognize the "many varieties of Christianity," yet still understand that they function as a homogenous "majority" in regard to most enacted law and its effect on minority religions? Professor West's contrary view, which I found surprising (to say the least), is indeed likely to lead to the kind of constricted interpretation of the free exercise clause which he suggests. If there is no majority (or coalition of minorities behaving as a majority), then there is obviously little need for a Bill of Rights.

It is also a view which I would suggest only a member of the Protestant Christian majority would have; a view quite different from that likely to be held by one who is not a Protestant, and certainly quite different from one who is not a Christian. Because it exemplifies how majorities—the "ins"—can simply fail to perceive the "outs," it also demonstrates why the first amendment's protection is necessary both for intentional discrimination and unintentional, the failure to notice that what one perceives as harmless to oneself may be quite

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WIS. L. REV. 217, 291; Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 312-16.

7. West, *supra* note 4, at 617 n.121 (quoting Pepper, *supra* note 6, at 313).

8. This comment is not the place for the full argument supporting an interpretation of the free exercise clause which includes exemption from otherwise "neutral" laws. For defenses of this view, see Pepper, *supra* notes 5 and 6. *See also* Gedicks, *Towards a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99 (1989); Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989); McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

9. West, *supra* note 4, at 617.

harmful to another.[10] It is, in addition, a perspective which leaves out the reality of local majorities. I grew up as a non-Mormon in Utah, and can assure Professor West that that state has a functioning religious majority in regard to government. My first teaching position was at the University of Arkansas in Fayetteville, and I can assure him that that region of the country—sometimes called the "Bible Belt"—also has a religious majority which often affects government.

Before moving on, it should also be noted that Professor West's arguments against the minority/majority equalizing interpretation of the religion clauses are based entirely upon observations that suggest minorities *in general*, not just religious minorities, do not need special protection because the structure of our government and the realities of pluralist politics sufficiently disperse and diffuse power. This may or may not be true. But it is important to understand how far-reaching the suggestion is. It applies to all provisions of a Bill of Rights, not just the free exercise clause. It leads to the conclusion that no provision in the Bill of Rights need be interpreted as intended to protect minorities and individuals from majorities and government, because under this view no such protection is needed.[11] Both the adoption of the Bill of Rights itself and its modern constitutional interpretation are premised on a rejection of this point of view.

## II. NEUTRALITY

Professor West's first argument against exemptions is based upon the asserted principle that laws must be neutral in regard to religion and religions if they are to be constitutional under the first amendment.[12] As the preceding discussion should have demonstrated, neutrality is a matter of perspective. What from one perspective is a religiously neutral and eminently rational law concerning photos on drivers' licenses,

10. For a discussion of a similar set of issues concerned with perspective, see Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

11. James Madison at one time held this view, believing that because the federal government had only limited, specifically delineated powers under the Constitution, no bill of rights was needed. But its absence was much remarked upon during debates over ratification, and several state ratifying conventions requested such amendments to the Constitution (including Virginia). Madison, as it happened, took a leading role in the framing of the Bill of Rights. *See generally*, L. PFEFFER, CHURCH, STATE, AND FREEDOM 125-27 (rev. ed. 1967).

12. West, *supra* note 4, at 600-02. For a discussion of neutrality in religion clause doctrine, see McConnell, *supra* note 8, at 8-13.

from Mrs. Quaring's perspective is a drastic governmental restraint on her freedom because of her religious beliefs. What we see as a religiously neutral law mandating school attendance, the Amish see as oppression which prevents them from following the dictates of their religion.[13]

When seeking neutrality in regard to the nexus between law and religious practice, should one be looking primarily at the language of the provision, the intention of the lawmaker, or the consequences for the believer? Neutrality being in the eye of the beholder, the function of a Bill of Rights suggests that one hesitate before ignoring the minority's perception of a lack of neutrality. By mandating exceptions from some laws for some religious believers in appropriate circumstances, the first amendment can be seen to *create* equality, not undermine it. Exceptions create an equality in the religious impact of law. For almost everyone, mandatory public schooling or mandatory photos on driver's licenses *has no religious impact.* An exemption equalizes that lack of effect for the small minority upon whom there is a significant, unintended religious impact. The exemption leads to the religiously neutral result that there is equality in the religious impact of the law.

Excepting the religious minority from a legal provision thus creates equality and neutrality *with respect to religion.* The inequality which is so troubling, and which is the concern of those who see a lack of "neutrality" in such exemptions, is in regard to the secular effects and purposes of the legislation. That inequality is clearly trivial in regard to the Nebraska driver's license law; no one is going to feel deprived because their license must have a photo while Mrs. Quaring's need not. And there are so few who will seek an exception to the law that there will be no significant detriment to the effectiveness of the law in general. The same is true of exempting the Amish from the final two years of mandatory schooling. Very few want to avoid that law, and very few see any injustice or unfairness or lack of equality in fashioning an exception based upon the unique situation of the Amish. But this will not always be true of religion-based exemptions.

As the paragraph above suggests, if exceptions to "neutral" laws create equality in religious impact, and thus neutrality in regard to governmental impingement on religion, our

13. Wisconsin v. Yoder, 406 U.S. 205 (1972). I have discussed this case and the background of free exercise doctrine at some length in Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309 (1981).

"neutrality" concerns are diverted to two aspects of the secular effects of the law at issue. First, will exemptions significantly impede the government in reaching the purposes or goals of the law? That question is quite clearly part of the current first amendment doctrine on exemptions, the "compelling interest" balancing test. Rendering a law religiously "neutral" in impact through constitutionally mandated exceptions is only required if it does not do too much harm to the government's secular purpose for the law.[14] Second, will the exemption (required for religious equality) create a significant secular inequality? As noted, the inequality is of little consequence in cases such as photos on drivers' licenses or the attendance of Amish children for the last two years of mandatory schooling; but it may be quite important in cases such as exemptions from taxation or from penalties for racial discrimination in private education.[15] As with the first question, this issue moves us beyond Professor West's surface focus on neutrality and into the specifics of a balancing test.[16]

Note that as between religions and religious believers, a first amendment doctrine that requires exemptions is neutral: all believers get the benefit of the doctrine if a legal provision impinges on their religious practice in a way that meets the requirements of the balancing test. Obviously it is the minority which will benefit most from such a doctrine, for majorities are unlikely to impinge on their own religious practices or that of large minorities. (For example, the Catholic church did not need first amendment shelter for the use of sacramental wine during prohibition; the exception was granted in the legislation.[17]) But the result remains equality and neutrality among religions in regard to legal impositions on religious practice. The inequality and lack of neutrality is between those with reli-

14. *See, e.g.*, the cases cited at note 3, *supra*.

15. *See* Pepper, *supra* note 6, at 325-31.

16. Professor West notes, West, *supra* note 4, at 607, n.76, smaller religions tend to benefit more from exemption doctrine than do larger religions. This makes sense for two reasons related to the discussion above. First, the larger the religion, the more likely that it will protect itself through the political process, and thus have no need for judicial protection under the Bill of Rights. Second, the smaller the religion, the less damage an exemption will cause the governmental interests served by the legal provision at issue, and thus it is less likely that the government can show the required "compelling interest" in denying an exemption. *Quaring* provides a good example of both: a very small religion with no political clout and hence no legislative exemption, but a corresponding lack of any significant negative effect on the state's interests in photos on drivers' licenses.

17. National Prohibition Act, 27 U.S.C. § 12 (1927).

gious objections to the effect of a law and those who object on bases other than religious practice.

Professor West is troubled by this inequality, as well as that between religions:

> Inevitably . . . when the government gives exemptions to some religious persons that it does not give to all, that constitutes special or favored treatment for their religion or for them because of their religion.[18]

But that would seem to be exactly what the text of the first amendment calls for.[19] It does give special protection to religion, a guaranty of free exercise that is not granted to other kinds or areas of human action other than speech, press, and assembly, while also imposing a special disability on religion not imposed on anything else, namely the ban on religious establishments. Professor West's answer to this textual problem for his position takes us to section IV of his paper.

## III. "ORIGINAL MEANING" AND THE DOMAIN OF RELIGION

The final section of Professor West's paper is an historical, originalist argument against the possibility of exceptions being mandated under the free exercise clause.[20] Neither the Enlightenment nor the radical Protestant streams of thought contemplated religious exemptions, suggests Professor West, but they did agree that religion was an area in which the state had no power to legislate. The coherence of that understanding as a guide to interpretation of the first amendment depends upon agreement over what the realm of religion covers, what is within the realm of the state, and the absence of an overlap. But there is manifestly both an absence of such agreement and an overlap. Thus perspective again becomes the determining factor: from whose viewpoint do we determine what is in the realm of religion and what is in the realm of government? Professor West, with his majoritarian perspective, simply assumes that the majority or governmental perspective as to the dividing line is appropriate. Because the freedom granted is in a Bill of Rights, a document designed to protect the minority from the point of view of the majority translated into law, his assumption may well be wrong.

Is marriage within the realm of the state or the sphere of religion? The answer is clear: both. The Mormons saw polyg-

18. West, *supra* note 4, at 600.
19. *See infra* note 26.
20. West, *supra* note 4, at 623, pt. IV.

amy as a religious command and the federal bigamy law as intruding into the sphere of religion; the federal Congress saw marriage law as within the domain of the state. Was the criminalization of bigamy an impingement upon the free exercise of religion as applied to Mormon polygamy?[21] West's observation that the important historical figures all agreed with Locke that the civil magistrate had no jurisdiction in religious matters simply reframes the question, rather than provides an answer.[22]

Formal education of children may be an even better example. Two and three hundred years ago it was clearly within the sphere of religion; there was no such thing as secular or public education. Now education is primarily within the realm of the government. Elected school boards govern public education, and states regulate private education. For the Amish (among many others) education remains crucial to religion and clearly within its domain. Who is right?[23] And where would Roger Williams, James Madison and Thomas Jefferson place it?

The education example also highlights a more general difficulty. In an age of limited government, and in the framing of a constitution on the assumption of distinct and limited powers for government, the notion of government and religion as governing separate spheres is at least conceivable. In the age of the bureaucratic-regulatory state, with its ubiquity of law, regulation, and government, that conception strains the imagination. The requirement that you have a government license with your likeness on it before you can use a vehicle, and governmental limits on the hours of work and wages (among a myriad of other possible examples), certainly would startle the historical figures summoned and cited by Professor West. Might not the manifest radical expansion of the realm of the state and the

21. In Reynolds v. United States, 98 U.S. 145 (1878), the Supreme Court held Mormon polygamy unprotected by the first amendment. I discuss the case at some length in Pepper, *supra* note 13, at 317-26.

22. This example also shows that neutrality is not always an easy criterion to apply under the free exercise clause. The statute was religiously neutral in its terms, and bigamy was a traditional and long-standing crime. But this particular statute was clearly aimed by Congress at the Mormons. The federal Congress had refrained from criminalizing polygamy in the Utah territory before the Civil War because of concern that this would be a precedent in regard to federal authority over slavery in the territories. Both were categorized as "domestic institutions." *See* Linford, *The Mormons and the Law: The Polygamy Cases*, Part I, 9 UTAH L. REV. 308, 309-23 (1964).

23. The Supreme Court, applying the free exercise clause, held that mandatory school attendance laws could not be applied to the Amish after eighth grade. *See* Yoder v. Wisconsin, 406 U.S. 205 (1972).

consequent radical shrinkage of the domain of religion, under Professor West's assumption that the realms are separate and do not overlap, lead those figures to an interpretation of "free exercise of religion" which includes the possibility of constitutionally mandated exceptions to at least some of the welter of laws under the current regulatory state? After all, it is *a constitution* we are interpreting, and the contemporary reach of governmental regulation bears little resemblance to that of two hundred years ago.[24]

It should also be noted, before leaving this aspect of Professor West's argument, that the asserted unanimity of thought on the question of exceptions from neutral law is probably illusory. Locke and Jefferson certainly understood the issue as West has presented it, and narrowed the realm of religion quite drastically to belief and opinion.[25] Jefferson's Bill for Establishing Religious Freedom protected the freedom "to profess, and by argument to maintain . . . opinions in matters of religion," and stated that "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." But this limit, although available as a model, was not transferred into the first amendment, the language of which is far more absolute.[26] In addition to Jefferson's Bill, other contemporary documents provided clear models for such limiting language which could have been, but were not, used to limit the reach of the free exercise clause.[27]

The absence of such a limit may be explained in part by the fact that Madison, who had a more important role in framing

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24. The general limits and weaknesses of the originalist stance Professor West assumes in Part IV have been well developed, and debated, by others. *See, e.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). *See also* Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683 (1990), and Valauri, Everson v. Brown: *Hermeneutics, Framers' Intent, and the Establishment Clause*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 661 (1990) for a discussion of this question.

25. *See* M. MALBIN, RELIGION AND POLITICS 28-36 (1978); Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57 (1976).

26. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

27. The 1787 Ordinance for the Government of the Northwest Territory, for example, provided in part: "No person, *demeaning himself in a peaceable and orderly manner*, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory." *Quoted in* 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 480 (1950) (emphasis added).

the first amendment than anyone else,[28] seems to have had a far more expansive understanding of the realm of religion and its attendant freedom from government imposition. His suggested language for the 1776 Virginia Declaration of Rights stated:

> [A]ll men are entitled to the full and free exercise of [religion] according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be . . . subject to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.[29]

This language is more compatible with an exemption interpretation of "free exercise" than it is with a "facial neutrality of the law" interpretation, and is strikingly parallel to the current "compelling interest" balancing test. Madison was consistent over the years in articulating a very broad understanding of freedom of religion. In the first substantive paragraph of his famous *Remonstrance* (1785) he asserted:

> This duty [religion] is precedent, both in order of time and in degree of obligation, to the claims of Civil Society . . . We maintain therefore that in matters of Religion, no mans [sic] right is abridged by the institution of Civil Society and Religion is *wholly exempt* from its cognizance.[30] (emphasis added)

Application of either the 1776 or the 1785 passage to questions of exemption for the Amish from mandatory public education laws, exemption for the Mormons from bigamy law, or exemption for Mrs. Quaring from the driver's license photo requirement, leads to a rather different conclusion than does application of the language and thought of Jefferson and Locke. And if one is looking for a gloss for the free exercise clause, James Madison was far more involved in the framing and drafting of the first amendment than was Jefferson.[31]

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28. *See, e.g.*, Everson v. Board of Educ., 300 U.S. 1, 33-47 (1947); W.L. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 77-150 (1985); 1 A. STOKES, *supra* note 27, at 339-50 (1950).

29. Hunt, *James Madison and Religious Liberty*, AM. HIST. A. ANN. REP. FOR THE YEAR 1901, at 166-67 (1902).

30. Madison, *A Memorial and Remonstrance* (1785), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY (R.S. Alley ed. 1985), at 55, 56.

31. Madison was educated at Princeton in a politically active and vibrant strand of dissenting protestantism, and seems to have been far more intricately connected than Jefferson to the Christian intellectual tradition and

Whether the domain of religion is to be decided on some general, categorical, large-scale basis (and thus probably from a majoritarian point of view) or on a case by case basis taking into account the view of minorities under the specific law at issue, is one of the underlying issues both of first amendment interpretation and of the question of constitutionally mandated exemptions for religious exercise. It is a question of perspective, and a question not answered by the premise that the government has no authority to legislate in the area of religion.

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also to have been less hostile to religion than Jefferson. *See* W.L. MILLER, THE FIRST LIBERTY, *supra* note 28, at 87-95 (1985); Little, *supra* note 25.