BELIEVING PERSONS, PERSONAL BELIEVINGS: THE NEGLECTED CENTER OF THE FIRST AMENDMENT

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In this article Professor Smith addresses how our conception of what it means to be a person influences First Amendment law. The article explains how the conception of the person as a believer elucidates the values that the First Amendment protects thereby providing a justification for why speech and expression are protected, and providing guidance regarding the general direction the legal doctrine should take. After discussing the shortcomings of conceiving of the person as interest-bearer, autonomous agent, and citizen, the article proposes a conception of the person as believer, explaining how believing is essential to personhood. The article concludes by exploring the implications of the believing person for First Amendment jurisprudences, specifically advocating the older "category" approach and casting doubt on the "neutrality" position that has come to dominate modern First Amendment jurisprudences regarding both speech and religion.

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I. INTRODUCTION

It is a plain, if sometimes forgotten, fact that law (like "government" in Lincoln's famous description) is of, by, and for *people*—or, more stiffly, "persons"—so every body of law and legal discourse will necessarily embrace some conception, or perhaps multiple conceptions, of the person. Consequently, the most routine and practical efforts of lawyers, judges, and legislators presuppose answers to one of the most daunting questions that troubles philosophers and theologians: What is—or what does it mean to be—a "person?"

Lawyers, to be sure, rarely speculate self-consciously on such abstruse subjects; indeed, legal discourse sometimes seems deliberately calculated to obscure the fact that persons are involved.[1] Even so, conceptions of personhood will exercise a powerful if subtle effect on legal discourse and hence on law. Thus, Lon Fuller worried several decades ago about what he viewed as the pernicious effects on law of a conception of "the nature of man" taken over from the behavioral sciences. Fuller contended that many legal thinkers of his time had adopted a Skinnerian view that saw the person as "the helpless victim of outside forces."[2] And he argued that this depiction was undermining the efficacy of law, which depends on "the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for defaults."[3]

Fuller's general insight, though not the specific content of his argument, informs this article. I do not intend to criticize the behaviorist conception of the person that concerned Fuller or to promote the "responsible agent" conception that he advocated—not in those terms, at least. But I do mean to suggest that important areas of the law—and in particular the various modern jurisprudences that we have come to associate with the First Amendment[4]—have suffered by embracing conceptions of the person ill-advisedly imported from other disciplines or philosophical perspectives. These jurisprudences would be strengthened and enriched by a more self-conscious recognition of what I will call "the person as believer."

1. The theme is thoughtfully developed in JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW (1976).

2. LON L. FULLER, THE MORALITY OF LAW 167 (1964).

3. *Id.*

4. This article will not address the connection (which I suspect is real but convoluted) between modern First Amendment jurisprudences and the "original understanding" of the amendment. I have discussed the original meaning of the First Amendment's religion clauses at length elsewhere. *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17–54 (1995) [hereinafter SMITH, FOREORDAINED FAILURE].

A. Conceptions of the Person

Modern legal thought pervasively operates with some version or blend of three principal images of the person: the *person as interest-bearer,* the *person as autonomous agent* (or perhaps the person as *chooser*), and the *person as citizen*. These conceptions are not mutually exclusive, and any of them may or may not be accompanied by a corollary asserting that persons are "rational."[5] The first conception—of the person as a bearer of "interests"—resonates with thinking in the sciences and social sciences[6]—in evolutionary psychology[7] and economics,[8] for instance—and with the consequentialist or utilitarian ethical tradition associated with influential thinkers like Bentham. The second image is entirely orthodox in the liberal political and moral tradition that goes back to Locke and Kant and that is represented today by prominent thinkers such as Raz, Dworkin, and Rawls.[9] The third conception is thrust upon us by the very fact of the Constitution—which serves, after all, to constitute a political community whose full-standing members are, by definition, "citizens."

So it is hardly surprising that legal thinkers—including thinkers concerned with subjects such as freedom of speech and freedom of religion—have gravitated to these conceptions: they are the prevalent conceptions, and each of them *does* capture an aspect of personhood. Nonetheless, I will argue in this article that the conceptions of the person

5. The "interest-seeking" conception often is, but need not be, understood in terms of *rational* interest-seeking—of persons as "rational interest maximizers." In a Kantian version (but not in more emotivist or existentialist versions), the autonomy conception also implies rationality: the person is thought to be autonomous precisely through acting in accordance with "reason." Similarly, modern liberal theories often maintain that citizens are, or should be treated as, free, equal, and "rational."

6. Charles Lindblom describes the appeal of this conception from a scientific perspective: "People who use the terms *preference*, *wants*, *needs*, and *interests* often assume that they refer to some objective attributes of human beings, such as a person's metabolic rate. . . . These are bedrock facts about 'real' preferences or interests . . . ." CHARLES E. LINDBLOM, INQUIRY AND CHANGE 19 (1990).

7. *See, e.g.*, John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J. CONTEMP. LEGAL ISSUES 211, 213–23 (1997). Speaking from the perspective of evolutionary psychology, McGinnis asserts that "[t]he first premise of human nature is that individuals act out of self-interest." *Id.* at 213.

8. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–4 (5th ed. 1998) (economics "assum[es] that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest'" (footnote omitted)). Albert Alschuler observes that "[f]or economically minded scholars and others, the function of law, the market, and other social institutions is to achieve the maximum satisfaction of human wants regardless of their content." ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 4 (2000).

9. Joseph Raz sounds a familiar note when he explains that "[i]n today's conditions for most of the inhabitants of the industrialized world the good life is a successful *autonomous* life, that is life consisting in the successful pursuit of valuable activities and relationships *largely chosen by the person* involved." Joseph Raz, *Liberty and Trust*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 113, 113 (Robert P. George ed., 1996) (emphasis added); *see also* Elizabeth Mensch, *Christianity and the Roots of Liberalism*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 54, 54 (Michael W. McConnell et al. eds., 2001) (arguing that the "prevailing model of liberalism is the model of the autonomous private individual confronting a democratic state whose power is limited by the neutrality and rationality of law").

as interest-bearer and the person as chooser are ill-suited for First Amendment purposes, and that their migration into this field underlies some of the serious and familiar problems afflicting First Amendment jurisprudences. The third conception—that of the person as citizen—is not so much inappropriate as insufficient and unhelpful.

In this area we would be better served by embracing the conception of the *person as believer*. The image of the believing person is hardly novel in the tradition of American legal discourse. That image is easily discernible, for example, in the eloquent preamble to Thomas Jefferson's famous Virginia Bill for Religious Liberty[10] and in James Madison's *Memorial and Remonstrance*,[11] and it is palpably implicit in cherished statements such as the Declaration of Independence's "We hold these truths . . . ." In addition, it seems obvious that persons animated by strong beliefs have an indispensable role to play in First Amendment controversies. Who, after all, is doing the controversial or objectionable speaking? Who is bringing the free exercise claims to court?

Even so, and paradoxically, the conception of the person as believer suffers, it seems, from the opposed handicaps of being at once too wallflower familiar—and thus taken for granted and routinely overlooked—and too alien in an intellectual climate in which "believing" in any very strong sense is apt to be associated with naiveté or delusion.[12] Much of the traditional content that we associate with "belief"—with religious faiths such as orthodox Christianity and quasi-religious faiths such as Marxism or even optimistic, progressive liberalism—has been powerfully challenged. The direct challenges, though potent enough, are perhaps less threatening than the indirect but sweeping challenges that suggest that belief can best be understood as the product of psychological causes (projection, or the "will to power"), sociological influences (ideology, cultural conditioning), or even biological determinants.[13] These direct and indirect challenges to belief combine to make ours an age more con-

10. The preamble is animated by an insistence on protecting "the mind," "the field of opinion," "opinions and modes of thinking" against government coercion and, conversely, to prevent government from requiring any person to support "the propagation of opinions which he disbelieves." The bill is reprinted in THE SUPREME COURT ON CHURCH AND STATE 25 (Robert S. Alley ed., 1988).

11. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* THE SUPREME COURT ON CHURCH AND STATE, *supra* note 10, at 18 (arguing for religious freedom on the basis of respect for "the conviction and conscience of every man").

12. For recent expressions of this assessment of contemporary culture, see GREGG EASTERBROOK, BESIDE STILL WATERS: SEARCHING FOR MEANING IN AN AGE OF DOUBT (1998); HUSTON SMITH, WHY RELIGION MATTERS: THE FATE OF THE HUMAN SPIRIT IN AN AGE OF DISBELIEF (2001). *Cf.* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 3 (1995) ("Humanity has yet to recover from the empirical skepticism of Hume or the scathing attack on the capabilities of human knowledge and reason leveled by Nietzsche." (citations omitted)).

13. *Cf.* EDWARD O. WILSON, ON HUMAN NATURE 3 (1978) ("Traditional religious beliefs have been eroded, not so much by humiliating disproofs of their mythologies as by the growing awareness that beliefs are really enabling mechanisms for survival.").

genial to doubting than to believing: "Doubt," as Felipe Fernandez-Armesto puts it, "is the truth of our times."[14]

Indeed, suspension or refusal of belief often presents itself today not so much as a lamentable necessity as a sort of moral duty, or perhaps as a manifestation of high-toned intellectual refinement. The modern intellectual ethos, Nicholas Wolterstorff argues, was set by Locke, who held that we have an ethical as well as epistemic obligation to believe nothing beyond what is firmly established by hard evidence.[15] Academics in particular are likely to regard themselves as tough-minded, hard-headed people who nurture the conviction that the sort of "truth" we can legitimately aspire to is not to be spelled with a capital "T," and indeed is best understood as carrying scare quotation marks.[16] In this context, doubt does, and believing does not, carry an aura of depth and integrity. So a phrase like "true believer" will usually be uttered in a contemptuous or at least patronizing tone.

This tendency, already pervasive in academic contexts, may recently have been reinforced by the September 11, 2001 attacks and the resulting national reaction: in editorials, essays, and general conversation phrases like "true believer" or "believer" now appear regularly in conjunction with terms like "terrorism," "fundamentalism," and "fanaticism."[17] So it may now seem that belief—genuine, wholehearted belief—is not merely delusional; it is dangerous.

But academics also seem to have a special—some would say vested[18]—interest in the First Amendment. So it would be disconcerting to suppose that the revered tradition of the First Amendment revolves around, and has evolved out of respect for, the dubious character of "the believer."

14. FELIPE FERNANDEZ-ARMESTO, TRUTH: A HISTORY 206 (1997). Fernandez-Armesto's book aims to give a brief history of "how our society has come to lose faith in the reality of [truth] and lose interest in the search for it"—a condition he believes to be "the unique predicament of our times." *Id.* at 2–3.

15. *See* NICHOLAS WOLTERSTORFF, JOHN LOCKE AND THE ETHICS OF BELIEF (1996). For classic essays respectively supporting and criticizing this ethics of doubt, compare William Clifford, *The Ethics of Belief*, *reprinted in* PHILOSOPHY OF RELIGION 80 (Michael Peterson et al. eds., 2001) (arguing that "it is wrong always, everywhere, and for anyone, to believe anything upon insufficient evidence," *id.* at 85), with WILLIAM JAMES, *The Will to Believe*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 1 (1898) (criticizing as "*irrational*" the "snarling logicality" of the "pure intellectualism" represented by thinkers like Clifford as an impediment to the acknowledgment of truth, *id.* at 28).

16. For a characteristic expression by a legal scholar, see John Henry Schlegel, *No Lever and No Place to Stand (A Response to Christopher Shannon)*, 8 YALE J.L. & HUMAN. 513 (1996). "As best I can tell there is no truth," Schlegel reports, "only an absence of lies." Consequently, "[t]here is no longer (nor ever was there) a transcendental, transpersonal, transhistorical basis for our value judgments. We make them all up." In this situation, proceeding "without the aid of Truth," we should limit our inquiries to more "modest questions" about which ideas or values are "useful." *Id.* at 514–15.

17. *See, e.g.*, *Don't Call Them Fundamentalists*, CHI. TRIB., Mar. 15, 2002, at 8 (noting that Bob Jones University's president wants "to shed the school's fundamentalist label because the term has been equated with terrorists").

18. *See infra* note 58.

Whatever the causes, it seems that the person as believer has become a necessary but not quite welcome character in modern First Amendment discourse—an indispensable stage assistant but not the star of the show. This article is thus an effort in rehabilitation. I hope to nudge the believing person back toward the center of the First Amendment stage, and to show that our thinking about First Amendment commitments would be more cogent and persuasive if we acknowledged this centrality.[19]

B. An Apology for Theory

This rehabilitative effort will necessarily require an excursion into First Amendment theory and even, it may seem, into the kind of "foundational" theorizing that prevailed through much of the last century but that is now commonly viewed with suspicion or disdain.[20] We now live, it is said, in a "post-foundationalist world."[21] Given the prevailing mood, First Amendment scholars may even seek to enhance the appeal of their positions by protesting that those positions do *not* reflect or derive from any ambitious theory.[22] Since I have often been critical of "theory" and of the perceived need for "theory,"[23] a preliminary clarification of the

19. My reference here to an undifferentiated "First Amendment" is deliberate. Among other benefits, viewing the provision from the perspective of the believing person permits us to perceive an underlying unity among constitutional commitments to free expression, free exercise, and nonestablishment. Though often treated as independent or even conflicting, these commitments have a common textual source and a common early history, so it would be helpful to have an account that captures their common themes. *Cf.* Prince v. Massachusetts, 321 U.S. 158, 164–65 (1944) (asserting that "the great liberties insured by the First Article . . . are interwoven. . . . [T]hey have unity in the charter's prime place because they have unity in their human sources and functionings.").

20. Ronald Dworkin, perhaps the quintessential legal theorizer, laments what he sees as "a revolt from theory, in law and across the rest of the intellectual landscape." Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 375 (1997). Daniel Farber evinces this attitude with respect to First Amendment theory in particular. "The search for a foundational First Amendment 'brick' has been unavailing so far," Farber observes. "If so many thoughtful legal commentators have failed to identify *the* foundational value that supports a unified First Amendment theory, the prospects for future efforts may be dim." DANIEL A. FARBER, THE FIRST AMENDMENT 7 (1998). Farber's comment is a reprise of a view developed earlier and at greater length in Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987).

21. Victoria Kahn, *Early Modern Rights Talk*, 13 YALE J.L. & HUMAN. 391, 406 (2001).

22. Thus, in a recent article Jed Rubenfeld argues for what he describes—perhaps inaccurately, see *infra* note 276—as a radical reconceptualization of free speech doctrine, but he hastens to explain that the "reasons I am about to give do not purport to answer the 'big why.' . . . They explain why free speech purposivism is preferable to balancing without invoking any grand theory of the First Amendment . . . ." Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 787 (2001).

23. *See, e.g.*, SMITH, FOREORDAINED FAILURE, *supra* note 4, at 55–117; STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 45–57 (2001) [hereinafter SMITH, GETTING OVER EQUALITY]. Thomas Berg classifies—and criticizes—my work on the religion clauses as a kind of "anti-theory," Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 707–20 (1997), and Stephen Feldman treats that same work as reflecting "the postmodern assertion that all normative values or positions are culturally and socially contingent," STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 190–92 (2000). Of course, I do not necessarily endorse these characterizations.

purpose for which theory is being attempted (and, as importantly, of the purposes for which it is *not* being offered) seems in order.

A common and compelling criticism of "theory," in this and other areas, objects to the reductionist effort to bring an entire body of law and discourse under the governance of a single, controlling value or principle. Thus, Robert Post repudiates as "self-defeating" the kind of theorizing that seeks to find the "one true value" or to identify *the* "fundamental and essential rationale for protecting freedom of expression."[24] First Amendment problems, Post says, "resist[] resolution *tout court* and require[] instead situational and pragmatic adjustment."[25]

This view is widely shared,[26] and it seems so sensible that we might well wonder how anyone could ever have supposed otherwise. But the attraction of "single value" theories is also understandable: that is because a "single value" theory seems more likely to yield definite answers to specific First Amendment questions. Conversely, once we view the First Amendment as encompassing multiple (and likely incommensurable or even conflicting) rationales as well as "situational and pragmatic adjustment[s]," it becomes problematic to pretend to deduce conclusions in particular controversies from theory.[27] This limitation poses a serious embarrassment if the purpose of theory is to provide such concrete guidance—to tell courts, for example, how particular First Amendment controversies should be resolved.

And in fact it seems that many legal theorists have understood their enterprise in just this way. A common view holds, in essence, that Legal Realism demonstrated that conventional legal sources and reasoning cannot dictate definite results in actual cases—the conventional materials are "indeterminate," the argument runs—and so the task of theory is to do what conventional legal reasoning has proven incapable of doing.[28] Thus, Ronald Dworkin explains the necessity of theory by asserting the inadequacy of conventional legal reasoning to produce determinate results.[29] It is hardly surprising that First Amendment theorists might view their own project in these terms. Thus, in the twilight of what now may seem the Golden Age of free speech theorizing,[30] Ronald Cass observed

24. ROBERT C. POST, CONSTITUTIONAL DOMAINS 16 (1995).

25. *Id.* at 193.

26. *See, e.g.*, FARBER, *supra* note 20, at 7–8; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 129, 252 (1993 ed.); Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1570 (1999).

27. *Cf.* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1422 (1987) ("Absent agreement on a single value—whether it be utility, wealth, or freedom—to be maximized, we cannot achieve a truly coherent theoretical framework for decision.").

28. For a representative statement of this view, see Bruce Ackerman, Book Review, 103 DAEDALUS 119 (1974).

29. *See* Dworkin, *supra* note 20; *see also* RONALD DWORKIN, FREEDOM'S LAW 7–15, 37–38 (1996) [hereinafter DWORKIN, FREEDOM'S LAW].

30. By the 1970s and 1980s, the enterprise of free speech theorizing that began in the first half of the twentieth century with scholars like Zechariah Chaffee and Alexander Meiklejohn and gained

of such theories that "what seems to be their principal goal" was to "replace uncertainty with certainty," or to provide "clear guidelines for decisionmakers."[31]

As noted, the rejection of "single value" positions naturally leads to the further criticism that in the face of real world complexities, theory simply cannot accomplish this objective of dictating particular results in particular cases. But if theory was undertaken just for this purpose, its inability to achieve its objective will naturally lead to the conclusion that theory is pointless.

That conclusion may well be sound, at least with respect to a certain kind of theorizing. So I want to insist from the outset that this article has no pretensions of offering the kind of "grand theory" associated with theorists like Ackerman, Dworkin, and Epstein in their more ambitious moods.[32] I make no claim that the theoretical rationale to be developed based on "the believing person" is, as Daniel Farber puts it, "*the* foundational value"[33] underlying the First Amendment. On the contrary, although I will argue that the believing person is central to First Amendment commitments and that First Amendment jurisprudence has suffered by neglecting this central concern,[34] it also seems virtually certain that the Amendment, and the doctrines and decisions that have been rendered under it, reflect a variety of disparate rationales and interests. Consequently, identifying a central value underlying much First Amendment discourse will not be sufficient to dictate answers to specific legal questions.

Still, any conclusion that "theory is dead" (or impossible, or unnecessary) seems too sweeping; and if absorbed into legal culture, that conclusion may also have serious costs. Specifically, renunciation of the quest to identify the "one true value" supporting the First Amendment

momentum in later decades with thinkers like Thomas Emerson and Harry Kalven had produced a host of luminaries: a far from exhaustive list of scholars who became leading figures in the legal academy primarily on the basis of their free speech theorizing would include names like Baker, Blasi, Bollinger, Farber, Redish, Scanlon, Schauer, and Shiffrin. This list omits scholars like Larry Alexander, Robert Bork, Ronald Dworkin, John Ely, Kent Greenawalt, Robert Nagel, and Michael Perry who made significant contributions but were mainly noted for other work; it also excludes scholars such as Richard Delgado, Catharine MacKinnon, and Mari Matsuda whose work might better be described as a sort of "counter-tradition" challenging, or perhaps subverting, the "mainstream" free speech tradition. In the 1990s theorizing continued, of course, but usually in more muted terms, and the counter-tradition represented by thinkers like Delgado and MacKinnon arguably gained momentum while the "mainstream" tradition subsided.

31. Cass, *supra* note 27, at 1417. Cass criticized the theories for failing to achieve these objectives; s*ee also* THE FIRST AMENDMENT: A READER 36 (John H. Garvey and Frederick Schauer eds., 2d ed. 1996) ("The relevant text . . . is extraordinarily open-ended. We need a theory to apply it to concrete cases . . . .").

32. For a book-length study emphasizing and criticizing the "grand theory" dimension of six leading legal theorists (including Ackerman, Dworkin, and Epstein), see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002).

33. FARBER, *supra* note 20, at 7.

34. *See infra* text accompanying notes 117–234.

might naturally decline into the abandonment of the effort to justify *any* "true value" supporting First Amendment commitments: overly aggressive theorizing may give way to a kind of flaccid conventionalism which is content to observe that free speech or freedom of religion are values that happen to be widely embraced in our own culture. Post is persuasive (and also typical) in deprecating "single value" theories of the First Amendment; but elsewhere in his book he also laments the "palpable absence" in much recent legal scholarship of any "serious engagement with the question of why we really care about protecting freedom of expression."[35] Post asserts that "this lack of engagement is a real and practical problem."[36] Such a "lack of engagement," though, is a natural corollary of the view that "foundational" theorizing is unnecessary or futile.[37]

Disdain for "foundational" theorizing[38] exudes complacency, but it may also reflect a sort of underlying quiet desperation. We do not need any deep justification for constitutional commitments like the First Amendment, the prevailing view light-heartedly suggests;[39] and this is fortunate, because if we did need one we would be in deep trouble. Skepticism regarding the possibility of "foundational" theory is closely related to the general climate of distrust and skepticism about "truth" noted a moment ago.

Whether the undertone of despair is warranted presents a complicated issue, to which this article offers one specific response. But there is surely reason to wonder about the complacency. The aftermath to September 11 may have reinforced suspicions about "true believers," but it also showed how quickly cultural attitudes, including attitudes about is-

35. POST, *supra* note 24, at 28.

36. *Id.* at 298. Post's observations are immediately prompted by recent scholarship advocating the regulation of "hate speech." But a similar observation might be even more cogent in the context of his earlier discussion of what he calls the "collectivist theory" advocated in different versions by scholars such as Owen Fiss and Cass Sunstein; Post argues forcefully that this whole approach to the First Amendment is fundamentally out of sync with, and fails to appreciate the values underlying, "the received First Amendment tradition." *Id.* at 286. *See generally id.* ch. 7.

37. Whether Post's own work, which I think might be described as profoundly (in more than one sense) conventionalist (in more than one sense), contributes to the intellectual climate which generates the problem he complains of presents an interesting question, but one that need not be pursued here.

38. A lack of "serious engagement" and an avoidance of "foundational" questions are hardly limited to First Amendment scholarship. With respect to the constitutional commitment to "equality," for example, George Fletcher observes that

> [m]odern philosophical approaches toward equality . . . are strongly committed, vaguely, to some position on the spectrum, but they offer no reason why they are so intensely committed to this value. . . . In the contemporary liberal culture, equality is one of those values that has become so deeply held that it is neither questioned nor justified.

GEORGE P. FLETCHER, OUR SECRET CONSTITUTION 95–96 (2001).

39. *See* FARBER, *supra* note 20, at 7 ("The efforts to provide a 'foundation' for [free expression] are reminiscent of a joke about economists. 'An economist,' so the joke goes, 'is someone who tries to prove that what happens in practice is theoretically possible.' Similarly, a free speech theorist is someone who tries to *explain* a fact that we already know . . . ."); *cf.* Stephen Macedo, *In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, *in* NATURAL LAW AND PUBLIC REASON 11, 27 (Robert P. George & Christopher Wolfe eds., 2000) (arguing that public discourse need not appeal to controversial philosophical or religious premises because "[t]he fact is that America does enjoy a widespread consensus on basis guarantees that constitute the core of a political morality").

sues involving civil liberties, can shift. What was once taken for granted may suddenly seem very fragile.

But in fact even before September 11, First Amendment freedoms no longer seemed as solidly grounded as they once had. Thus, there is a widespread perception that judicial solicitude for the freedom of religion has slackened over the last decade or so.[40] And if formal legal protections for free speech remain basically intact, the situation in the academy is ambiguous. For the last decade or so, much of the scholarly effort has been devoted not so much to justifying or explicating First Amendment commitments as to qualifying or subverting those commitments—either in general[41] or in specific areas such as "hate speech" or pornography.[42] Alarmed by these developments, Amy Adler contends that a "new leftist movement mirrors the censorship of the right, leaving a large sector of speech doubly threatened. . . . Like a rebel band besieging an entrenched fortress, these new scholars—mostly women and people of color—are waging nothing less than a war on traditional First Amendment jurisprudence."[43]

This rhetoric, to be sure, may be unduly alarmist, and it may also underestimate the extent to which "traditional First Amendment jurisprudence" needs rethinking and revision. In any case, it seems not amiss in this situation to inquire whether basic First Amendment commitments can be defended or justified on anything that goes deeper than observations about the assumptions that happen to prevail within a legal culture at a given time—assumptions that seem increasingly frail. That inquiry animates this article.

These observations suggest a response to the persistent question: what is the point of "theory" if it does not tell courts how to decide actual cases? In fact, I will argue that although the believing-based rationale cannot logically dictate conclusions in particular controversies, it *does* provide valuable guidance regarding the general shape or direction that

40. Stephen Carter reports that "in recent years . . . the courts have more or less abandoned any serious protection of religious liberty as a distinct constitutional right." Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 9, at 25, 36. I do not mean to endorse this perception at this point, however, or to prejudge the question of whether a partial judicial withdrawal would be a good or bad development: elsewhere I have argued in favor of a reduced judicial role. *See, e.g.*, SMITH, GETTING OVER EQUALITY *supra* note 23, at 62–82.

41. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING TOO (1994). Fish's general position is conveyed in his comment on several Supreme Court decisions that he criticizes: "It is hard when reading these opinions not to feel that the entire enterprise has gone off the rails and that you are in the hands either of charlatans or idiots." *Id.* at 124.

42. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

43. Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1500 (1996). More recently, Adler argues that "developments in child pornography law have subverted traditional First Amendment principles." Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 926 (2001).

legal doctrine should take.[44] Specifically, the rationale casts doubt on the "neutrality" position that has come to dominate modern First Amendment jurisprudences regarding both speech and religion, and it suggests the wisdom of older "category" approaches.

But the more important response to the "why theorize?" question has already been indicated: the theorizing offered here seeks to address the problem of justification and to show that First Amendment freedoms are based on more than the cultural preferences that happen to prevail in the American constitutional system. This effort seems particularly imperative with respect to these particular freedoms, not only because they have long been regarded as especially important and are now under serious challenge, but because in the American constitutional tradition the First Amendment serves a peculiar symbolic function. Thus, William Marshall observes that

> [t]he First Amendment holds a uniquely esteemed place in the American experience. More than only a legal provision, the First Amendment "helps define who we are as a nation" and symbolizes the "American commitment to liberty under law." How we justify our commitment to the First Amendment, therefore, has implications far greater than doctrine or jurisprudence. It is a statement of what we view as central to ourselves.[45]

If Marshall is right, then complacency about the First Amendment and its "foundations" seems particularly misplaced.

C. The Argument

The argument will develop in three stages. Part II rehearses some familiar problems afflicting the standard justifications for special constitutional protection for First Amendment freedoms, and it relates these problems to the conceptions of the person implicit in these justifications.[46] Part III proposes a conception of the believing person, and elaborates on the nature of believing and on the importance of believing to personhood.[47] The final part explores implications of this conception of the person for First Amendment jurisprudences.[48]

44. *See infra* text accompanying notes 235–348.

45. Marshall, *supra* note 12, at 38 (citations omitted). For similar observations, see SUNSTEIN, *supra* note 26, at xi ("More than anything else in the Constitution, the First Amendment's protection of free speech and free press symbolizes the American commitment to liberty under law."); Blasi, *supra* note 26, at 1568 (describing freedom of speech as "the virtual linchpin of our constitutional culture").

46. *See infra* Part II.

47. *See infra* Part III.

48. *See infra* Part IV.

II. FIRST AMENDMENT PROBLEMS AND PERSONS

In this part, I will notice some familiar and major difficulties afflicting the effort to respond to a long-standing challenge in constitutional law. That challenge is to provide a convincing justification for giving heightened legal protection to particular activities or concerns—in this case, to expression and religion—beyond the generic protections afforded most human interests through democratic governance and ordinary "due process." Why, theorists have long tried to explain, is expression (or religion) special?[49] Why protect speech (or religious exercise) and not golf, or driving, or the ability to pursue the occupation of one's choice, or . . . whatever?

Debates surrounding these questions have generated volumes of analysis. My purpose here is not to enter into those debates in any detail, but merely to survey what have come to be recognized as standard problems in the effort to justify special protection for expression and religion, and then to connect these standard problems to the prevailing conceptions of personhood.

A. Problems with Consequentialist Justifications

Perhaps the most familiar kind of response to the demand for justification is consequentialist in character. In their familiar positive form,[50] consequentialist arguments maintain that a particular human concern or activity—expression, and religion—deserves special legal protection because it promotes valued interests.[51] Consequentialist justifications are nicely congruent with the instrumentalist assumptions that have been so influential in modern legal thought and that are conspicuously reflected, for example, in an array of constitutional doctrines.[52]

49. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY 120 (1986) (arguing that "any sound theory of free speech must . . . explain why [we have] a presumption against regulation of this one area of behavior, that is, the behavior of speech [when with few exceptions] nowhere else in life do we insist in this way on such a level of self-restraint"); Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 398, 403 (1999) ("This is the big issue confronting religion clause scholars today: to what extent must we treat religion as distinctive . . . ?").

50. Consequentialist arguments come in both positive and negative varieties. Positive arguments contend that speech (or religion) is valuable because it promotes especially important goods. Negative arguments maintain not that speech and religion are especially valuable, but rather that government is especially bad at regulating these activities, or that regulation is attended by special evils. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 80–81 (1982). A common rejoinder to negative theories, though one I cannot explore here, is that negative theories depend on some (at least implicit) positive account of the value of the interests in question.

51. *Cf.* SUNSTEIN, *supra* note 26, at 141 (discussing "the interests in speaker and listener autonomy"); *id*. at 145 (discussing "expressive interests," "deliberation interests," and "informational interests"); *id*. at 252 (asserting that free speech serves "diverse human interests").

52. *See generally* ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982). For a discussion of the prevalence of instrumentalist thinking in constitutional law, see ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 106–20 (1989).

Positive consequentialist justifications can be analyzed into two claims: first, that some interest associated with the protected activity is an especially important interest—more important or valuable than the general run of interests promoted by other human activities that do *not* receive special legal protection—and second, that heightened legal protection for the activity will in fact promote this especially important interest. Insofar as either or both of these claims may be contestable (as they typically are), a consequentialist justification is vulnerable.

Thus, perhaps the most common and influential rationale for free speech maintains that expression deserves special legal protection because unrestricted expression leads to *truth*—or, in tamer terms, to knowledge or "information."[53] Parallel arguments are sometimes offered for giving constitutional protection to freedom of religion.[54] This "truth" or "marketplace of ideas" rationale, as it is often called, has a venerable pedigree going back to classic expressions by luminaries such as Holmes, Mill, and Milton; and Frederick Schauer describes the rationale as "the predominant and most persevering" of the arguments for freedom of speech.[55] But the argument rests on the suppositions, first, that truth is an especially valuable human good, and second, that a policy of leaving speech unrestricted will as a general rule be more productive of truth (and less conducive to error) than a policy of regulating expression in ways that the regulators believe will promote these goods.

Both of these suppositions might be valid. The first supposition—that truth or knowledge is a preeminent good—seems plausible, but also contestable. Older encomiums to truth—such as Saint Thomas Aquinas's sanguine assertion that "[t]ruth must consequently be the ultimate end of the whole universe, and the consideration of the wise man aims principally at truth"[56]—resonate badly in the prevailing climate of doubt, suspicion, and hard-boiled pragmatism. To be sure, it is hardly surprising if academic theorists place special importance on the goods of knowledge or information, but others might rate alternative interests—vocational or economic interests, for example—at least as highly.[57]

The second supposition—namely, that freedom from regulation promotes the acquisition of truth—has over the centuries generated ex-

53. *See, e.g.*, Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991) (arguing that special protection for speech is justified because "information" is a "public good").

54. *See, e.g.*, JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 51 (1996).

55. SCHAUER, *supra* note 50, at 15; *see also* Marshall, *supra* note 12, at 1 ("The most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth.").

56. SAINT THOMAS AQUINAS, THE SUMMA CONTRA GENTILES 1.1 (The English Dominican Fathers trans., Burns Oates & Washbourne 1923).

57. *Cf.* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 46 (1960) (suggesting that "most men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds"). For a sustained and blunt argument that the "truth" justification for free speech simply reflects intellectuals' self-serving privileging of their own interests, see R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AMER. ECON. REV. 384 (1974).

hilarating rhetoric about the power of truth to prevail over error in a free fight, but modern critics are often skeptical.[58] For example, is the communicative free-for-all that prevails in, say, political campaigning or the advertising of competing products well calculated to help voters[59] or consumers apprehend the truth in these matters? In sum, the consequentialist "truth rationale" for freedom of speech seems to rest on suppositions that are at least highly debatable.

Some theorists try to avoid these objections by asserting that it is not truth or knowledge per se, but rather the *pursuit of truth or knowledge* as an intrinsically valuable activity, that the First Amendment promotes.[60] But it is not clear that anything is gained by this reformulation: insofar as regulation (as opposed to freedom) of speech or religion is better calculated to promote the *acquisition* of truth or knowledge, then it would seem that such regulation would also be conducive to the *pursuit* of these interests. Moreover, if pursuit of truth is distinguished from truth itself, the value's claim to human preeminence becomes even shakier.

If the truth rationale has been especially prominent in free speech theory, consequentialist justifications for giving special constitutional status to religion have more often focused on other goods, such as civic virtue or civil peace. As usual, the arguments depend on the propositions, first, that these are especially crucial benefits, and second, that a particular form of legal protection for religion will maximize these benefits. But once again, both propositions are controversial, and a long line of critics has found them wanting.[61]

For example, is it clear that religious citizens as a general rule exhibit more "civic virtue" than nonreligious citizens? Or, in modern America at least, is the risk to civil peace posed by the possibility that absent constitutional protection government might impose an official religion so threatening?[62] To be sure, religion *can* be a source of contention.

58. David Strauss asserts flatly that "[n]o matter how we define the ground rules, there is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable results." David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 349 (1991); *see also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12–17 (1989) (criticizing the argument that free speech promotes the achievement of "truth"); SCHAUER, *supra* note 50, at 26 (arguing that assumptions of "truth rationale" have been "largely discredited by history and by contemporary insights of psychology").

59. For a skeptical overview, see DAVE BARRY, DAVE BARRY HITS BELOW THE BELTWAY 115–21 (2001).

60. *See* GARVEY, *supra* note 54, at 66–69; *see also* Marshall, *supra* note 12.

61. An early critical assessment finding the standard rationales for nonestablishment wanting was Alan Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968); *see also* SMITH, FOREORDAINED FAILURE, *supra* note 4, at 99–117; John H. Garvey, *Free Exercise and the Values of Religious Liberty,* 19 CONN. L. REV. 779 (1986); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83.

62. *Cf.* Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring) ("At this point in the 20th century, we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control

In other contexts, though (when we are in a freedom of speech mode, for example), we may view the phenomena that comprise contention almost as positive goods: far from wringing our hands about the possibility of civil strife, we say that democracy thrives on public debate that is "robust," "vehement," and "caustic."[63] Critics argue in addition that religion has been no more generative of conflict in modern America than various other issues and movements—unionization, McCarthyism, the antiwar movement of the 1960s.[64]

Moreover, it is not clear that any particular constitutional provision on this subject is well calculated to eliminate contention: *excluding* religion from some area of the public domain can be as controversial as *including* it. Religion seems most disruptive today with respect to incendiary issues like abortion; but constitutional provisions addressed to ancient controversies over matters such as established churches seem almost wholly beside the point with respect to these controversies.

B. Problems with "Self-Determination" Justifications

Dissatisfied with consequentialist justifications, some proponents of the freedoms of expression and religion turn back to the individual speaker or religionist, emphasizing the importance of "self-determination," "self-realization," "self-fulfillment," "personal autonomy," or simply "liberty."[65] Although these justifications resonate with the American ethos of individualism and choice,[66] viewed as theoretical rationales they exhibit a familiar problem: critics argue that such rationales do not convincingly explain why particular human activities or choices—in particular, those involving speech or religion—deserve special legal protection not afforded other activities and choices.

No doubt people value the right to make choices in the realm of expression or religion, but they value the freedom to make many other kinds of choices as well. For some, a restriction on their choices in the realm of expression or religion might be especially irksome, but for other people restrictions on their ability to pursue a chosen vocation or avoca-

over our democratic processes—or even of deep political division along religious lines—is remote." (citation omitted)).

63. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

64. *See* Michael Smith, *supra* note 61, at 97.

65. *See, e.g.*, BAKER, *supra* note 58, at 47–48 ("self-fulfillment," "self-realization," "self-determination"); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 14–86 (1984) ("self-realization"); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214–15 (1972) (autonomy); Strauss, *supra* note 58, at 335 (autonomy). For a defense of religious freedom as an aspect of personal autonomy, see Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988); *see also* GARVEY, *supra* note 54, at 42–43 (describing autonomy rationale for religious freedom).

66. *See generally* LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE (1990). Friedman explains that we live in "a world in which the right to 'be oneself,' to *choose* oneself, is placed in a special and privileged position; in which *expression* is favored over *self-control* . . . ." *Id.* at 3.

tion might be at least as burdensome.[67] John Garvey notes that if a Jewish officer's sincere claim to be able to wear a yarmulke is understood to be grounded merely in his right of autonomy or self-realization, then another person's sincere claim that wearing a cowboy hat is essential to his own chosen self-conception should have equal dignity.[68]

Proponents of self-determination rationales might respond to this criticism by arguing that choices about expression and religion just *are* more important to personal autonomy than other kinds of choices, even if not everyone acknowledges this priority. For a religious Jew, wearing a yarmulke *is* more central to autonomy or self-determination, perhaps, than wearing a cowboy hat is to someone who fancies himself a contemporary Wyatt Earp. This claim hardly seems preposterous, but it is also incongruous with a rationale that emphasizes the significance of *self*-determination. After all, the very point of that rationale is that it is the individual who must choose what is central to her life and identity.[69] Put differently, the contention that some kinds of expression or activity just *are* intrinsically more fulfilling or "self-realizing" than others, whether people know it or not, effectively severs "self-fulfillment" from "self-determination" in a way that proponents of freedom of speech or religion are bound to view with alarm.

C. Problems with Democracy-Based Justifications

Another common justification for freedom of speech (and also, in more complicated ways that need not be explored here, for freedom of religion[70]) appeals to the meaning and necessities of democracy. Alex-

67. *Cf.* SCHAUER, *supra* note 50, at 56 ("If [the argument from self-fulfillment] supports a right to free speech, so too can it support a right to eat, a right to sleep, a right to shelter, a right to a decent wage, a right to interesting employment, a right to sexual satisfaction, and so on *ad infinitum*." (emphasis added)).

68. Garvey, *supra* note 61, at 791.

69. *See, e.g.*, REDISH, *supra* note 65, at 55–60. One response to this objection seeks to expand the category of "expression," or perhaps "religion," to include any choices that individuals might regard as especially important or central. In the abstract, the characterization is not wholly implausible: our choices, or at least those we regard as especially important, *are* "expressive" of our commitments, or of who we are, and they might even fit within a very broad understanding of "religion." In this vein, Frederick Schauer acknowledges that "virtually any activity may be a form of self-expression." But the expansion strategy is a self-defeating one, Schauer explains, because insofar as every activity and interest is counted as "expression" (or, we might add, as a manifestation of "religion"), then no activity or interest will have a claim to *special* or heightened legal protection. So enlarging the category of "expression" merely "causes freedom of speech to collapse into a principle of general liberty." SCHAUER, *supra* note 50, at 52. In short, the argument fails to justify *special* protection for any distinctive realm of "speech," or "religion."

70. *See, e.g.*, FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM 170 (1995) (arguing that "religious freedom is the necessary and sufficient constitutional principle of democracy"). A large literature has developed over the last several decades discussing the connection between religious freedom and liberal democracy. For a collection of essays on the subject by leading theorists, see RELIGION AND CONTEMPORARY LIBERALISM (Paul J. Weithman ed., 1997). I have discussed at some length one version of the argument justifying religious freedom by invoking a conception of democracy in SMITH, GETTING OVER EQUALITY, *supra* note 23, at 27–44.

ander Meiklejohn, a seminal modern free speech theorist, emphasized this rationale, comparing democracy to the traditional New England "town meeting";[71] and though differing dramatically both in the particulars of their positions and in the overall directions they take, a host of prominent modern theorists—Robert Bork, Dworkin, John Ely, Owen Fiss, Cass Sunstein, and Post among them—have followed in this general vein.[72] Often the democracy rationale is phrased in *instrumentalist* terms: democracy means self-government, and self-government cannot function unless citizens have the information necessary to deliberate and decide on public matters,[73] or at least to recognize and check the errors and abuses of government.[74] But the argument can also be understood in stronger, more *constitutive* terms. Thus, Dworkin argues that "[f]ree speech and democracy are connected not instrumentally but in a deeper way, because the dignity that freedom of speech protects is an essential component of democracy rightly conceived."[75]

Democracy-based rationales are often criticized for being too narrow in their scope, in more than one sense. Critics point out that a democracy rationale works only within a political regime that is, or is committed to being, democratic. So the rationale seems a poor candidate for supporting anything like free speech as a universal principle, or as a "human right."[76] Even within a regime with democratic commitments, moreover, the rationale seems most obviously to provide a justification for protecting *political* speech; the case for protecting other kinds of speech not so plainly related to the processes of self-government is more problematic. Thus, James Weinstein supports the democracy rationale but also concedes that it is too limited because, "[f]or instance, the expression of scientific or mathematical ideas generally has no direct connection with democratic self-governance."[77]

To be sure, speech outside the political domain has an indirect influence on political deliberation—by helping to shape attitudes and values, for example—but in that respect nonpolitical speech is not obviously

71. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 24–28 (1960).

72. Ronald Dworkin observes that "[i]t is the connection between free speech and democracy that has been the nerve of First Amendment jurisprudence." RONALD DWORKIN, SOVEREIGN VIRTUE 354 (2000) [hereinafter DWORKIN, SOVEREIGN VIRTUE].

73. This rationale is central to the seminal case of *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

74. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528.

75. DWORKIN, SOVEREIGN VIRTUE, *supra* note 72, at 354. Dworkin argues at greater length for the superiority of the "constitutive" over the "instrumental" justification in DWORKIN, FREEDOM'S LAW, *supra* note 29, at 195–213.

76. *See* Strauss, *supra* note 58, at 352; *see also* REDISH, *supra* note 65, at 19 (arguing that the democracy rationale for free speech "would have absolutely no relevance except in a democratic system").

77. James Weinstein, *Hate Speech, Viewpoint Neutrality, and the American Conception of Democracy*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN AMERICAN DEMOCRACY 146, 150 (Thomas R. Hensley ed., 2001); *see also* Strauss, *supra* note 58, at 351.

different from a variety of nonspeech activities that exert the same kind of influence. Consequently, a few proponents of the democracy rationale, such as Bork, have concluded that First Amendment protection should be limited to political speech.[78] And in fact, even within the category of political speech, the democracy rationale may justify only limited protection. Thus, Meiklejohn famously explained that what is essential in this view is "not that everyone shall speak but that everything worth saying shall be said."[79]

Objections criticizing the democracy rationale for its narrowness are related to a different type of criticism, which suggests that the rationale assumes too much, or begs the essential questions. Indeed, to justify something that is of value to individuals (free speech) on the ground that it is essential to a collective system or program (democracy) seems to confuse ends and means.[80] So it seems that the democracy rationale reverses the natural order of derivation. And indeed, we are as likely to say that democracy is good because it respects and protects freedom of speech (along with other rights) as that free speech is good because it is necessary for democracy.

Or perhaps we say both things. But then it seems that we fall into an embarrassing circularity. Why is freedom of speech desirable? Because it is necessary for democracy. So why is democracy a good form of government? Because it protects freedom of speech. The circularity is not avoided—rather, it hardens into something approaching a blatant tautology—if we assert with Dworkin that the connection between free speech and democracy is not merely "instrumental" but rather "constitu-

78. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27 (1971):

> I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like. . . . If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech.

79. MEIKLEJOHN, *supra* note 71, at 26. In addition, the rationale runs into the familiar conundrum that if the purpose of freedom of speech is to facilitate the people's right of self-government, this purpose would seem to be frustrated by a prohibition forbidding regulations on speech—even political speech—that the people may overwhelmingly favor. For a discussion of the problem, see SCHAUER, *supra* note 50, at 40–41. Noticing this conundrum, Ronald Dworkin argues that the instrumentalist version of the democracy rationale "cannot provide an intellectually acceptable justification even for the First Amendment's political core." DWORKIN, FREEDOM'S LAW, *supra* note 29, at 203.

80. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 672 (1988) (endorsing Brandeis's view that "the state exists for the benefit of its citizens and not vice versa"). Some theorists, however, seem to argue for just the opposite view. *See, e.g.*, OWEN FISS, THE IRONY OF FREE SPEECH 83 (1996) ("The autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, . . . but is rather a means to further the democratic values underlying the Bill of Rights."). In a similar vein, Stephen Carter argues that Stephen Macedo "is uninterested in constructing the state for the benefit of the people. He would rather construct the people for the benefit of the state." Carter, *supra* note 40, at 50.

tive": on this understanding, to say that freedom of speech must be preserved because it is essential to democracy seems much like contending that children must be taught to read because reading is essential to literacy.

At this point, qualifications are necessary. First, closely inspected, Dworkin's own argument seems to escape this charge of tautology, for a revealing reason to be noted very shortly. Second, the point of the foregoing discussion is not that democracy-based arguments are wrong, or that they have no value, but only that "democracy" serves awkwardly when it is conscripted to be the initial and fundamental premise for the argument. The democracy rationale may have considerable power, as its widespread appeal would indicate; but it appears not to be, as the philosophers say, "properly basic."

It seems, rather, that a First Amendment justification might better begin with some deeper value—one that would anchor and give meaning to the commitment to democracy.[81] From that deeper value, whatever it is, we might then be able to go directly to freedom of speech (and perhaps religion) *without* the mediation of "democracy." Or the path might be more circuitous, leading us along the route of democracy before reaching the destination of freedom of speech (or religion). Starting with a value or commitment more basic than democracy would allow us to avoid the circularity whereby free speech is justified on the basis of democracy and democracy is justified by invoking benefits like free speech. In addition, a more basic value might serve to deflect the objection that the democracy rationale for free speech has no force in regimes that are not democratic; the answer, crudely stated, would be that "they *should be*"—or that insofar as they are not democratic they are to that extent deficient.

Dworkin's own version of the democracy rationale recognizes as much. Dworkin's argument, though succinctly presented, seems to consist not simply of a definitional or tautological claim that free speech is constitutive of democracy, but rather of a more complex claim that attempts to anchor both free speech and democracy in something that goes beyond either. Thus, Dworkin argues that "freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that *government treat all its adult members*, except those who are incompetent, *as responsible moral agents*."[82] In short, Dworkin recognizes that though free speech and democracy are closely linked, neither can be justified simply by invoking the other. Both free speech and democracy, rather,

81. For a sustained argument to this effect, see REDISH, *supra* note 65, at 14–26.

82. DWORKIN, FREEDOM'S LAW, *supra* note 29, at 200 (emphasis added). Elsewhere, Dworkin describes as an "essential component of democracy" *not* free speech itself but rather "the *dignity* that freedom of speech protects." DWORKIN, SOVEREIGN VIRTUE, *supra* note 72, at 354 (emphasis added).

depend upon some commitment—specifically, Dworkin thinks, to treating persons as "responsible moral agents"—that runs deeper than both.[83]

D. Problems with Contractarian Justifications

During our nation's founding, arguments for rights (including rights involving religion and expression) were often made in contractarian terms. Legitimate governmental authority derives, as the Declaration of Independence said, from the consent of the governed; and this consent was linked to a "social contract" by which civil society and government were constructed out of a prepolitical "state of nature." But control over expression and religion (among other things) was said not to be included in the authority granted by this contract to the State.[84]

Social contract arguments are still offered and defended,[85] or vaguely alluded to,[86] and Rawls's famous device of deriving rights and principles of justice by speculating about the choices that would be made by citizens situated in an "original position" behind a "veil of ignorance" is a modern variation on this approach.[87] However, this sort of argument does not play nearly the role in modern thought that it did in the eighteenth century; even in Rawls's more recent work, the "original position" device seems to have been relegated to second chair in the argument.[88]

83. It is not clear that the same can be said of other "democracy" rationale theorists. *See supra* note 80. Though the point is far from clear, for instance, it appears to me that Robert Post treats collective self-government as the primary value, justifying a view of the person and a commitment to individual autonomy on the basis of that value, rather than vice versa. *See, e.g.*, POST, *supra* note 24, at 283–84 (explaining that we "assum[e] . . . that citizens are autonomous and self-determining" not because these assumptions are warranted as a descriptive matter—but rather because our commitment to democratic self-government requires "ascription" of such qualities); *id.* at 289 ("Quite beyond values of individual human liberty and person self-realization lies the significance of the *collective* virtue of self-government." (footnotes omitted)).

84. For an extended "state of nature"/social contract argument from the period, see ELISHA WILLIAMS, A SEASONABLE PLEA FOR THE LIBERTY OF CONSCIENCE 2–8 (1744). Madison's *Memorial and Remonstrance* made the point with respect to religion:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

Madison, *supra* note 11, at para. 1.

85. *See, e.g.*, Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 12–21 (1998); Vincent Philip Munoz, James Madison's Principle of Religious Liberty (Sept. 2001) (unpublished manuscript, on file with the University of Illinois Law Review).

86. *Cf.* Kathleen H. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992) ("Establishment of a civil public order was the social contract produced by religious truce.").

87. *See* JOHN RAWLS, A THEORY OF JUSTICE 11–12 (1971) ("My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant.")

88. In his *Political Liberalism*, for example, the "original position" appears briefly and then largely disappears until more than 300 pages into the work, after all the major claims and positions have already been set forth and argued for. JOHN RAWLS, POLITICAL LIBERALISM 22–38, 304–10

This decline reflects well-known shortcomings in the contractarian style of argument.

These shortcomings are so plain and familiar that stating them seems almost superfluous. The most obvious difficulty is that the "social contract" is not an actual fact, but rather a fiction. There never was a contract with actual terms that we can examine to see whether power over expression and religion was indeed withheld from government. Fictions may be useful, to be sure, but it is in the nature of fictions that we can shape them to be what we need or want them to be: Hobbes's social contract was not Locke's, or Rousseau's, or Rawls's. So we might treat the social contract either as conferring or as not conferring power over expression and religion; and there is no empirical reality or historical fact against which any particular version of the fiction can be checked.

In addition, even if a social contract had actually been entered into in the distant past, an obvious question looms: Why should that ancient contract bind us today? Even with legal agreements that *were* actually made—the Constitution, for example—we treat ourselves as free to amend, reinterpret, or ignore them. Why then should we be bound by a contract that was not actually made?

Lacking an actual social contract to which citizens have in fact consented, contract theorists often resort to a sort of ascriptive or constructive consent: government must exercise only the powers that subjects would "reasonably" consent to if given the choice. Rawls's "original position" device is one way of presenting this sort of claim.[89] But in this formulation of the argument, the ideas of contract and consent arguably cease to do any real work: they serve merely as a sort of imaginative lead-in—or perhaps as a sort of "loss leader"—to a discussion of what is "reasonable." Moreover, the "reasonable person" device is so open-ended, a familiar objection runs, as to be almost useless except as a (transparent) rhetorical device: what reasonable persons would reasonably consent to notoriously becomes little more than a euphemism for "what my morality or political views call for." Stanley Fish's remark seems apt here: commenting on the central argument of theorists like Amy Gutmann and Dennis Thompson, Fish observes that the "key word . . . is 'reasonable.' But all that is meant by the word is what my friends and I take to be so."[90]

These dismissive remarks may seem to give short shrift to a kind of justification that has been powerfully influential for centuries and that contributed to some of the most cherished achievements in American

(1993). Not all scholars follow Rawls's cue, however; some continue to try to squeeze strong substantive conclusions out of the "original position" scenario. *See, e.g.*, C. Edwin Baker, *Injustice and the Normative Nature of Meaning*, 60 MD. L. REV. 578, 579–83 (2001); Mark D. Rosen, *"Illiberal" Societal Cultures, Liberalism and American Constitutionalism*, 12 J. CONTEMP. LEGAL ISSUES 803, 811–31 (2002).

89. RAWLS, *supra* note 87, at 17–22.

90. *Cf.* STANLEY FISH, THE TROUBLE WITH PRINCIPLE 195 (1999).

law and politics.[91] I do not mean to deny that contractarian imagery can be useful as an expository device (which seems to be the function that the "original position" device now serves in Rawls). And perhaps a contractarian justification could do more substantial work: indeed, I will later try to suggest one way in which this might be done.[92] The challenge, though, is to show why a particular version of a fictional contract should be authoritative for us.

E. Conceptions of the Person in the Standard Justifications

Like all legal discourse, the standard justifications for First Amendment freedoms operate with a conception of the person. As noted, three conceptions are readily discernible in these justifications: the *person as interest-bearer,* the *person as autonomous agent* (or as *chooser*), and the *person as citizen*.

Often these conceptions are intermingled, and often they are tacit rather than explicit. For example, consequentialist justifications tend not to focus overtly on individual persons at all, but rather emphasize more general social phenomena (speech, religion) and the ostensible social consequences (knowledge, civic virtue, civil strife) of these phenomena.[93] Underlying these general phenomena, however, are persons: it is people, after all, who engage in speaking and in practicing religion, and who benefit or suffer from those activities. And a central image presupposed in consequentialist discourse is that of the person as interest-bearer—of an agent with needs, wants, interests, or preferences that will be affected by the protected activities. This image is sometimes made explicit, as when theorists discuss the range of interests under the headings of "speakers' interests," "audience interests," and "bystander interests."[94]

The democracy rationale, likewise, speaks mainly in systemic terms.[95] But of course the system of democracy is made up of persons. These persons stand in the relation of "citizens" to the democratic political regime (and may also be viewed as using politics to maximize their interests). In addition, Post argues that the democracy strand in the First Amendment tradition intrinsically presupposes "autonomous" persons.[96]

91. For a sophisticated reinterpretation of the contractarian position reflected in the Declaration and a defense against common criticisms, see MICHAEL ZUCKERT, THE NATURAL RIGHTS REPUBLIC 13–89 (1996).

92. *See infra* text accompanying note 99.

93. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963) (describing the "knowledge" or "truth" promoted by free speech as a "social good").

94. Thomas Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 520–21 (1979); *cf.* SUNSTEIN, *supra* note 26, at 145 (free speech should be analyzed in terms of "expressive interests," "deliberative interests," and "informational interests").

95. *Cf.* FISS, *supra* note 80, at 2 (advocating "a theory of the First Amendment . . . that emphasizes social, rather than individualistic, values").

96. *See* POST, *supra* note 24, at 188, 278; *see also* Weinstein, *supra* note 77, at 150 (arguing that at "the very foundation underlying the American concept of democracy" is the view that "government

By contrast, self-determination justifications focus self-consciously on persons; the immediate object of their concern is the individual speaker or religionist herself, rather than societal consequences or the "interests" that persons generally seek to realize.[97] And the image of the person typically presented in this kind of discourse is that of the person as chooser or as autonomous agent.[98]

In a similar vein, contractarian discourse projects the person as chooser back into a "state of nature" or an "original position" and then reflects on what choices this person would make. These imagined choices transform the hypothetical prepolitical person into a "citizen" in the political order formed as a result of such choices. The contractarian approach may couple this image of the person as chooser with an "interest-seeking" conception of the person. For example, Rawls's device of the "original position" operates on the assumption that individuals are rationally pursuing their own interests, and that deprived of information about their exact situation in life they will choose a society organized to promote the interests they may turn out to have. "[E]ach desires to protect his interests, his capacity to advance his conception of the good . . . ."[99]

In short, the leading rationales for First Amendment freedoms typically adopt or presuppose one or more of these standard modern conceptions of the person. Noticing the conceptions of the person that are implicit, and occasionally explicit, in these justifications suggests another way of understanding the vulnerability of the standard justifications.

If persons are understood mainly as agents seeking to maximize particular interests or preferences, it becomes prima facie implausible to maintain that a maximization policy would be best served by imposing strong and sweeping prohibitions limiting the power of citizens acting through government to regulate expression or religion. Clearly, people and the governments that act for them sometimes think that their interests will best be served by adopting regulations and restrictions in these areas; if they did not, controversies over freedom of speech or religion would not arise. Of course, people and governments might be wrong in supposing that such restrictions will serve their interests. So perhaps they should be restrained for their own good. But the case for such paternalistic restraints faces well-known difficulties in a context in which the assumption is that people do and should act to promote their own in-

must treat each individual as an equal, autonomous, and rational agent"); Robert Post, *Subsidized Speech*, 106 YALE L.J. 151, 154 (1996).

97. *See, e.g.*, Scanlon, *supra* note 65, at 214

98. David Strauss explains that his interpretation of the Free Speech Clause is based upon a conception of "human autonomy" in which "the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature." Strauss, *supra* note 58, at 355; *cf.* SCHAUER, *supra* note 50, at 68 (explaining that autonomy arguments are based on a "notion of individual sovereignty, or individual autonomy, now associated with Kant").

99. RAWLS, *supra* note 87, at 14.

terests: "*We* (the theorists, or the judges) know how to promote your interests better than *you* do" is always a suspect claim. Moreover, since the champions of free speech and free exercise are themselves often animated by hostility to paternalism,[100] it is ironic that their own principles should dissolve into a kind of paternalism on a different level. But this irony is a natural consequence of the conjunction of First Amendment commitments with an interest-seeking conception of the person.

The argument growing out of a view of the person as chooser creates a different kind of difficulty. The challenge now is not to justify restraints on government: it is easy enough to appreciate that government often interferes with choice—or that some people acting through government will sometimes interfere with the choices of other people. The basic difficulty now is to explain why one category of choices that people in fact value deserves more respect from the law than most other kinds of choices receive. As discussed, different people surely regard different kinds of choices as more important or more fundamental to their self-conception or life projects.[101] So justifications asserting the central importance of choices involving expression or religion to autonomy, by in effect telling people which choices are most important to them, seem inconsistent with the value of autonomy itself.

The conception of the person as "citizen" likewise has little power to justify restrictions on government. "Citizenship," after all, exists only relative to a "civitas," or a particular political community; consequently, the status of citizen gets its specific meaning and content from the political community that generates the status. Citizen is the dependent variable; the political community is the independent variable. As a result, the concept of citizen, in itself, can supply no independent vantage point—no discursive or rhetorical leverage—from which to criticize or exert force on the community.

To be sure, once a political community defines citizenship in a particular way, the concept as specified can provide a basis for criticizing or prescribing to the community—by arguing, for example, that the community must protect rights of a certain kind to honor its own citizenship commitments. But for a First Amendment theorist to assume a conception of citizenship that already entails rights to freedom of expression or religion would be to beg the very question at issue.

F. The Precarious First Amendment

In rehearsing these familiar difficulties, I of course do not pretend to have disposed of the arguments. As noted, the analysis of these issues often becomes quite intricate, and the preceding survey makes no pretense of having dealt with the assortment of thrusts and parries featured

100. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 13 (Currin V. Shields ed., 1956) (1859).
101. *See supra* text accompanying notes 65–69.

in the voluminous debates about freedom of speech or religion. A consoling and hence alluring conclusion is that although the standard justifications are perhaps not as compelling as we might wish, and although First Amendment theory may sometimes appear to be little more than "a weak assembly of platitudes,"[102] the justifications probably still have *some* persuasive force; and in combination with each other and with other more pragmatic arguments that I have not discussed—"slippery slope" or "breathing space" or governmental incompetence considerations, for example—they may be sufficient to justify our constitutional commitments to freedom of speech and freedom of religion.

That conclusion—reflecting, perhaps, a leap of First Amendment faith[103]—might be right. But it seems a tenuous and disappointing basis for what many have taken to be the preeminent commitments of our political order. As a result, as discussed earlier, First Amendment freedoms no longer seem as solidly grounded as they once did.[104] A thoughtful review of the current state of the discourse leads George Wright to conclude that "[t]he contemporary mainstream philosophical answer to the question of why we should revere, or even adhere at any significant cost, to the familiar institutions of freedom of speech, is so thin, so desiccated, so ultimately uninspiring that freedom of speech is ultimately rendered insecure."[105]

It is not surprising that thinkers associated with "radical" perspectives or self-declared opponents of "liberalism"—Fish, for example[106]—would find First Amendment conventions indefensible, incoherent, or anachronistic.[107] Thus, the subversion of traditional or classical First

102. SCHAUER, *supra* note 50, at 86. Schauer does not embrace this description, though his assessment of the justifications for a free speech principle does lead him to what seems a rather fragile endorsement of free speech depending heavily on claims about governmental incompetence. *Id.* at 85–86.

103. Or perhaps a Pascalian wager. Thus, Dworkin notes that for Judge Learned Hand, the First Amendment represented a "democratic wager," or a "bet 'on which we have staked our all.'" DWORKIN, SOVEREIGN VIRTUE, *supra* note 72, at 353.

104. *See supra* text accompanying notes 40–45.

105. R. GEORGE WRIGHT, THE FUTURE OF FREE SPEECH LAW 256 (1990). In a similar vein, after carefully examining what he regards as the most promising rationales for a right to freedom of speech, Larry Alexander confesses,

> I have searched for the scope and ground of a human right of freedom of expression and failed. In the end, I find my results terribly disappointing, for I count myself as a dyed-in-the-wool liberal and a champion of freedom of expression. I *know* that those tinhorn despots who jail their opposition are violating the opposition's human right of freedom of expression. On the other hand, I worry that my conclusion reflects only my dislike of tinhorn despots, or worse, only my dislike of their other policies. And I worry even more that if I were in their shoes, and I were quite certain that speech opposing me were both in error and harmful to the commonweal, I might shut down opposition speech. Like one of those thirty-second attack ads, which does not fool me, it may fool others.

Larry Alexander, *Freedom of Expression as Human Right*, *in* PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 86–87 (Tom Campbell, Jeff Goldsworthy & Adrienne Stone eds., forthcoming Oxford Univ. Press).

106. *See generally* FISH, *supra* note 41.

107. *See, e.g.*, RONALD K. L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (1996). Arguing that conventional free speech jurisprudence is pervaded by paradoxes, fictions, and outright

Amendment jurisprudence is sometimes interpreted as an "anti-liberal" project.[108] What is perhaps more unsettling is the erosion of support for First Amendment values among the champions of "liberalism." But in fact the contemporary liberalism associated with prominent thinkers like Rawls and Stephen Macedo has a discernibly censorial cast.

To be sure, these thinkers typically reaffirm the specific inherited protections for expression.[109] Under the heading of "public reason," however (and subject to qualifications and "provisos" that seem to shift with each new iteration of Rawls's position),[110] they seek to discourage or marginalize a wide range of public discourse appealing to "comprehensive views" or the "whole truth."[111] Indeed, Rawls acknowledges that if the constraints on public discourse that he advocates were *legally* enforced, they would be "incompatible with freedom of speech."[112]

Rawls avoids that incompatibility by insisting that the constraints he recommends would be enforced only by a "moral duty."[113] Good citizens in various contexts *ought* to avoid invoking their comprehensive views, or their views about the "whole truth," and this duty might even be sup-

lies, Collins and Skover conclude that "[t]he Madisonian First Amendment is going the way of agrarian America. Like the harmonious, wholesome, and romantic images of the farmer's life, traditional free speech values are overshadowed by modern technology and materialism." *Id.* at 215. Radically out of touch with contemporary culture, the First Amendment has become "a runaway engine of amusement, consumption, and passion." *Id.* at 213.

108. In this vein, Vincent Blasi reports that

> [t]he traditional liberal argument for free speech is now under fire from several directions. Critics from the left, the center, and the right find simplistic the claim that unregulated expression promotes the search for truth, the protection of self-government, the autonomy of individuals, and the control of concentrated power. Even if free speech does serve these values to a considerable degree, there are costs associated with liberty, costs the critics say are not sufficiently recognized in the standard liberal accounts. . . . [L]iberalism is seen as too doctrinaire, too optimistic about human capacities and intentions, too complacent, too inattentive to questions of responsibility and virtue. It is condemned, moreover, as elitist in its regard for intellectual inquiry and disregard for faith, affection, tradition, security, and sense of place. The liberal view of the First Amendment is said to ignore the badly skewed distribution of communicative power, the impact of technology, and the potential severity of nonphysical harms.

Vincent Blasi, *John Milton's Areopagitica and the Modern First Amendment*, 13 COMM. LAW. 1, 1, 12 (1996).

109. *See, e.g.*, RAWLS, *supra* note 87, at 340–56.

110. For a more extended analysis paying greater attention than is possible here to the limitations and provisos, see Steven D. Smith, Recovering (from) Enlightenment? (paper presented at the conference on America and the Enlightenment: Constitutionalism in the 21st Century, Institute of United States Studies, University of London, Nov. 16, 2001) (manuscript on file with author); *see also supra* notes 55–58, 69–73, 106–09; *infra* notes 111–15, 122–23 and accompanying text. For a spirited argument that the sort of liberalism associated with the "public reason" promoted in different versions by thinkers like Rawls, Macedo, Thomas Nagel, and Robert Audi threatens freedom of speech, see Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793 (1996).

111. Stephen Macedo explains that "philosophical and religious views . . . proceed from the point of view of a comprehensive conception of truth and the human good as a whole." But "in the modern world, . . . people disagree about the views of truth as a whole," and consequently such views are not appropriate bases for public discourse. Macedo, *supra* note 39, at 18.

112. *See* JOHN RAWLS, *Public Reason Revisited*, *in* THE LAW OF PEOPLES 136 (1999).

113. *See id.*

ported by cultural pressures;[114] but in the end citizens will not actually be *legally sanctioned* for transgressing their moral and civic duties. Even so, the general spirit and thrust of the modern enterprise contrast vividly with the views of a traditional champion of free speech like John Stuart Mill, who opposed social or cultural constraints on expression as fervently as he opposed formal legal restrictions.[115] And in a similar spirit, the overall thrust of this contemporary liberal theorizing seems calculated less to valorize and protect the exercise of religion than to keep religion from contaminating public discourse and public education.[116]

Once again, however, my purpose here is not to issue jeremiads or to pronounce judgment upon the standard justifications and criticisms of freedom of speech and religion. Perhaps the standard First Amendment justifications are still somewhat stronger than the criticisms and objections—perhaps not. My purpose is merely to note that the standard justifications encounter serious objections—objections that have not been convincingly or demonstrably refuted—and also to suggest that our commitment to these First Amendment freedoms might be better explained in other terms that the prevailing discourse causes us to overlook.

More specifically, our commitments might be better explained as a manifestation of respect for what I earlier called "the believing person."

III. THE PERSON AS BELIEVER

The central claim of this article is that the delicate condition of First Amendment freedoms reflects the adoption of unsuitable conceptions of the person, and that a different conception—that of "the person as believer"—is more apt for this area of law. The preceding section has focused on the critical or diagnostic aspect of that claim; the present part will try to advance the more affirmative claim by offering a depiction of the "believing person." The final part will then seek to solidify this approval by showing how the believing person is at the heart of our longstanding First Amendment commitments.[117]

114. Jeffrie Murphy points out that in the Rawlsian scheme, citizens who resist the constraints of public reason "are not to be coerced, but they are legitimately to be criticized—perhaps even made to feel bad or shunned—in short to be made the object of social but not legal pressure." Jeffrie G. Murphy, *Religious Conviction and Political Advocacy (A Commentary on Quinn)*, 78 THE MODERN SCHOOLMAN 125, 127 (2001).

115. MILL, *supra* note 100, at 7:

> Protection . . . against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development and, if possible, prevent the formation of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own.

116. *See, e.g.*, Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56 (1998).

117. *See infra* Part IV.

A caveat is required: the superiority of the "believing person" conception is not something that can be demonstrated, either logically or empirically. So although the following discussion contains a good deal of rather diverse argumentation, its overall ambition is not so much to advance an argument or demonstration as to offer a sort of sympathetic portrayal. My hope is that a reflection on the character of believing, and on the centrality of believing to personhood, will elicit approval based on understandings that readers already have, at least implicitly. For similar reasons, the discussion does not follow what might seem, in the abstract, the most logical or linear order, beginning by defining "belief," then defining "personhood," and then arguing for the connection between these components. If my claim is right that believing is central to what makes us persons and that believing is inherently personal, then neither "belief" nor "personhood" can be understood without the other: so there is no natural or necessary starting point. My assumption is that we all already have considerable experience with both *believing* and *persons*—and we do after all use these terms frequently without feeling any need to stop and define terms—but that a more back-and-forth reflection can deepen our understanding and appreciation of each—and of the essential connection between them.

A. Believing and Personhood

"All men by nature desire to know," Aristotle maintained;[118] but he might more aptly have said that all men—or all women and men—desire, and need, to *believe*. We need not struggle here with the old, perplexing challenge of defining the exact boundary between "believing" and "knowing." It should be sufficient for our purposes to say that knowing and believing are related or complementary capacities—and both are components of the relationship between persons and "truth"—but they are not the same thing. Sometimes they even conflict. And of the two, believing seems to be the more imperative—for human beings anyway. Indeed, we may even deliberately avoid knowing particular inconvenient things to preserve the possibility of believing other necessary things.[119]

Believing, it seems, is at the very core of what it means to be a human being.[120] We can appreciate its centrality by reflecting on three of its

118. RICHARD HOPE, ARISTOTLE'S METAPHYSICS 3 (1952).

119. *See generally* MIKE W. MARTIN, SELF-DECEPTION AND MORALITY (1986), especially chapter 6, *Vital Lies*. Martin observes that "[i]gnorance can be invigorating, knowledge enervating, and disillusionment destructive." *Id.* at 110.

120. This phrasing is meant to avoid creating the impression that what follows is intended as any sort of list of "necessary and sufficient conditions" for being a person, so that anyone lacking these qualifications is therefore not a person. We use the terms "person," "man," "human being," or "human" in different ways—sometimes in an either/or sense as terms of classification ("Corporations are not actually 'persons'"), but at other times as evaluative terms of degree ("John isn't the person that Mary is;" "I'm not half the man my father was"). This more evaluative usage is apparent, for example, in the common invocation in modern ethical theorizing of standards concerned with whether people

properties, or what we might call its necessity, human distinctiveness, and moral attractiveness.

1. The Necessity of Believing

To be human, and to go about the business of human life, is to be engaged in believing—in believing a whole host of things, some momentous, some mundane or trivial. To be sure, in saying that humans have a capacity to believe, we already imply that humans have a capacity to doubt—or to disbelieve: trying to make sense of either capacity (to believe, and to doubt) without the other is like trying to imagine a one-sided coin. Thus, someone without any capacity to doubt would seem to be almost as lacking in a characteristic aspect of humanity as someone without the capacity to believe. Still it is unlikely that doubt ever entirely dissolves the capacity to believe. A species of beings who had no capacity for believing would seem less than fully human; such humanoids would be, to borrow a phrase from T. S. Eliot, "hollow men."[121]

In this vein, Myles Burnyeat concludes after a thoughtful assessment of classical skepticism that "the supposed life without belief is not, after all, a possible life for man."[122] David Hume, the genial exemplar of the modern skeptic, agreed. We might roughly sum up Hume's stance as holding that it is impossible for us to know and impossible for us not to believe. Consequently,

> [the skeptic] cannot expect, that his philosophy will have any constant influence on the mind. . . . On the contrary, he must acknowledge . . . that all human life must perish, were his principles universally and steadily to prevail. All discourse, all action would immediately cease; and men remain in a total lethargy, till the necessities of nature, unsatisfied, put an end to their miserable existence. . . . And though a Pyrrhonian may throw himself or others into a momentary amazement or confusion by his profound reasonings; the first and most trivial event in life will put to flight all his doubts and scruples, and leave him the same, in every point of action and speculation, with the philosophers of every other sect, or with those who never concerned themselves in any philosophical researches.[123]

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are enabled to be—under different legal or political regimes, for example—"fully human," "really human," or "truly human." *See, e.g.*, MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 72–74 (2000). In one sense, this usage necessarily implies that people who live out their lives in regimes that fall short of this standard have not lived "truly human" or "fully human" lives, but the theorists presumably do not mean to suggest that such persons should be disqualified from being classified as "human," or as "persons."

121. T. S. ELIOT, POEMS 1909–1925, at 123 (1934).

122. MYLES BURNYEAT, *Can the Skeptic Live His Skepticism?*, *in* THE SKEPTICAL TRADITION 117, 141 (Myles Burnyeat ed., 1983).

123. David Hume, *An Enquiry Concerning Human Understanding*, *in* ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 160 (L. Selby-Bigge ed., 2d ed. 1902).

Yes, there are the odd reports of the Herculean skeptic—like Cratylus, for example, who "finally did not think it right to say anything but only moved his finger."[124] But we may fairly wonder whether the skeptical pretensions even of such flamboyant doubters could survive a rigorous cross-examination. "Tell us, Cratylus, (by spelling out an answer with your finger on this alphabet board) why you continue to eat the food your friends bring you. Do you believe the food is real? Do you believe it will preserve your life? Do you believe it is better to eat the food and live than starve to death?"

2. The Human Distinctiveness of Believing

To say that a function is necessary to human life is not yet to say that there is anything distinctive, much less admirable, about it: many necessary and less than inspirational functions—bodily excretion, for example—are shared with most other life forms. So philosophers have often tried to determine what is valuable and essential to personhood by asking what we might call the "distinctive feature" question. We might try to discern what is essential to human personhood, that is, by reflecting on how we differ from other creatures or entities that seem comparable in some respects. What are *we*, for example, that other animals are not? The comparison to animals is probably the most common;[125] but thinkers have sometimes invoked other comparisons as well—how do humans differ from angels, . . . or from gods?—and these thought experiments might be instructive even for those who do not accept the reality of angels or gods. An atheist can understand the point of Aristotle's remark that the person who cannot live in society with others is not fully human but instead is "either a beast or a god";[126] an agnostic can appreci-

124. OLIVER A. JOHNSON, SKEPTICISM AND COGNITIVISM 2 (1978) (quoting Aristotle).

125. Thomas Hurka explains the idea:

> These properties are important, the view says, because they separate us from other species; no other animal has them. And our good comes in their full development.
>
> Plato suggests this view in *Republic* I, where a thing's good is said to be whatever "it alone can perform, or perform better than anything else." Aristotle says human excellence cannot include nutrition or perception because these functions are shared by plants and animals. Kant defines "perfection" as the development of powers "characteristic of humanity (as distinguished from animality")." Even Marx wants to know how humans "distinguish themselves from animals" . . . .

THOMAS HURKA, PERFECTIONISM 10 (1993) (footnotes omitted). The approach has been employed by First Amendment theorists. *See, e.g.*, Emerson, *supra* note 93, at 879 ("Man is distinguished from other animals principally by the qualities of his mind."). And the inquiry has not been limited to Western thinkers. *See, e.g.*, LESLIE STEVENSON & DAVID L. HABERMAN, TEN THEORIES OF HUMAN NATURE 39 (3d ed. 1998) ("For Mencius, the thinking, compassionate heart is . . . what defines our essential humanness and sets us apart from animals.").

126. ARISTOTLE, POLITICS I.2 (Ernest Rhys ed., J. M. Dent & Sons et al. eds., 4th ed. 1928); *see also* STEVENSON & HABERMAN, *supra* note 125, at 121 (Kant "contrasts our human nature with the animals, on one side, and with the conception of a 'holy will,' on the other. . . . [W]e human beings are mixed creatures, midway between animals and angels.").

ate Madison's claim in Federalist 51 that "[i]f men were angels, no government would be necessary."[127]

In addition, a potentially valuable modern point of comparison is the computer. We might contemplate what is characteristically or distinctively human, that is, by asking what qualities or capacities we have that computers do not have.

Before trying to answer this "distinctive feature" question, we should pause to consider the point of asking it. As noted, the goal of this discussion is not to develop a set of "necessary and sufficient conditions" for personhood.[128] Neither does the discussion seek, in the way a biologist might, to propound a classification system in which the species of homo sapiens can be definitively distinguished from related species or entities. In our context, rather, the distinctive feature question is simply a tactic for moral reflection—for thinking about the properties or qualities that we place at the core of personhood, and that we at least tacitly invoke when we make familiar claims about, for example, human worth or human dignity. For this purpose, therefore, it would hardly matter if a feature that we take to be distinctive of persons is ultimately found to be possessed by other entities.[129] The point, in short, is finally not to demonstrate that animals, androids, or angels are *not* deserving of respect on a particular ground, but rather to illumine how persons *are* deserving of respect on that ground: the distinctive feature question is merely a device that has often seemed illuminating in that inquiry.[130]

Asked in this sense, the distinctive feature question surely does not yield any single answer. It might plausibly be claimed that "persons" are unique in their ability to laugh, to blush,[131] to strive for a better life, or to play golf. But the distinctive feature question does underscore the central importance for humans—and what seems to be the peculiarly human quality—of the *capacity to believe.* Indeed, this capacity supplies a more compelling answer to the question than do some of the more conventional answers.

127. THE FEDERALIST NO. 51 (James Madison).

128. *See supra* note 120.

129. Thomas Hurka makes a similar point in suggesting that philosophers have often conflated the question of what is *distinctive* about humans with the question of what is *essential* to human nature; and he suggests that the question about what is essential is ultimately more pertinent to moral inquiries. HURKA, *supra* note 125, at 11–17.

130. An analogy might be helpful here. People who have lived mostly in one country but then spend time in another country sometimes report upon returning that the experience, and the contrast, have caused them to appreciate more vividly the virtues of the place they have always known. The place they inhabit seems by comparison to have tastier food, or friendlier manners, or a more sensible language, or a better form of government. Such comparisons can be misguided, of course: through lack of knowledge or insight the returning traveler may simply have failed to understand or experience the food, manners, language, or politics of the country she has visited. This mistake may invalidate the traveler's *comparative* judgment, but it does not negate or invalidate her heightened appreciation of the virtues of her own domicile.

131. Mark Twain remarked that "[m]an is the Only Animal that blushes. Or needs to."

For example, perhaps noticing that animals were often stronger and faster than humans, classical thinkers like Aristotle often located our peculiar virtue in our ability to think, or in our rationality: man was the "rational animal."[132] A similar view is manifest in many modern thinkers as well—in Locke and Kant, for instance: humans have a special moral status because and insofar as they act in accordance with reason.[133] A great deal of modern political and ethical theorizing grows out of this premise.

But upon reflection, it seems unlikely that "rationality" adequately captures what is characteristically human.[134] For one thing, gods and angels have usually been described as possessing the trait of rationality—and in a purer, more exalted form than the meager allotment of rationality we humans possess. In addition, rationality is plausibly ascribed to at least some animals—dolphins, apes, perhaps bees and ants.[135] And computers would seem far more adept at carrying out many kinds of rational operations than even the most intelligent humans. If rationality is our glory and our defining feature, in short, then we seem in peril of being superseded.

We might react to rationalist excesses by stressing our capacity to feel—to love, hate, feel empathy or contempt; but this suggestion likewise seems insufficient. Emotions, it is true, distinguish us from computers: "Star Trek" episodes may portray androids that heroically strive to experience feelings, but even in fiction these efforts typically meet with limited, and dubious, success. ("Captain, is this what you call . . . sorrow?") Still, if emotion sets us apart from machines, it does not distinguish us from angels or gods. God, the scripture teaches, not only *feels* but indeed *is* Love.[136] Moreover, the capacity to feel—to love or hate—probably would not differentiate humans from animals. If you have doubts about this, just talk with a devoted pet owner, or watch the movie "White Fang" or any old episode of "Lassie."

Another perennial "distinctive feature" candidate is "freedom," or free will, but again this answer seems dubious. Judging by appearances, it would seem that at least highly developed animals—like dolphins or apes—surely make choices. And if the response is that this appearance is misleading because these animals are in fact "hard-wired" or "deter-

132. For a careful and largely supportive assessment of this view, see HURKA, *supra* note 125, at 39–51.

133. *See supra* note 125; *see also* WOLTERSTORFF, *supra* note 15, at 87 (explaining that for Locke, "to be human is to have Reason speaking within one. It is this that sets us off from the 'brutes.'").

134. *Cf.* JOHN HENRY NEWMAN, AN ESSAY IN AID OF A GRAMMAR OF ASSENT 90 (Nicholas Lash ed., Univ. Notre Dame Press 1979) (1870) ("After all, man is *not* a reasoning animal; he is a seeing, feeling, contemplating, acting animal.").

135. *See, e.g.*, ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS 14–28 (1999) (arguing that rationality and related complex capacities must be attributed to dolphins). *But cf.* HURKA, *supra* note 125, at 39 (arguing that human rationality is of a wholly different order of complexity and sophistication than nonhuman animal rationality).

136. 1 *John* 4:8 (King James).

mined" by their make-up and environment to act as they do, the response seems to prove too much. After all, it is an age-old question whether we humans are likewise "determined" by factors such as heredity and environment. In addition, in at least one major strand of theology, God is conceived of as being radically free—more free than humans.[137]

A similar objection applies to the claim that "sociability" is the distinctive core of human personhood. We are "social animals," to be sure; but so are bees and ants—not to mention the celestial company of cherubim and seraphim. And even computers are linked in complex networks.

Believing, by contrast, seems a more distinctively and solidly human quality.[138] We may never know for sure what goes on in an animal's consciousness, but it seems odd to say that an animal believes, at least in more than a very rudimentary way.[139] The oddity may be barely noticeable if we limit ourselves to mundane matters: it is at most only slightly strange to say, "That a robin believes there is a worm in the grass." If we distinguish more deliberately between genuine belief and what is merely complex behavior, the application to animals becomes more doubtful: "Does Fido *really believe* there is a bone buried there, or is he just acting out of habit or instinct?" And the incongruity becomes glaring if we think about believing in the full-blooded senses that we routinely use with respect to humans. "What are Flipper's deepest and most ultimate beliefs?" We can ask these questions about human beings; applied to other animals they seem ludicrous.

By the same token, philosophers can meaningfully debate the issue "Do computers think?"; even if you conclude that the negative answer is more plausible, you can still concede that the issue is interesting and contestable. But again, if someone were to pose the question "Do computers *believe*?"—or perhaps "This laptop *says* these numbers add up to *47.3734*, but I wonder whether it *really believes* that?"—we would surely think the question was a joke. Believing or disbelieving is just not the sort of thing that computers do.

137. For a discussion of the radical freedom attributed to God by thinkers such as Duns Scotus and William of Ockham, see STEVEN OZMENT, THE AGE OF REASON 1250–1550, at 33–39 (1980).

138. The discussion to this point may be misleading, I think—and it may in fact understate the case for belief—because believing seems to be an activity or capacity that is not so much *independent of* reasoning and feeling as it is *inclusive of* them—of *both* reasoning and feeling. Indeed, in complicated ways that we need not explore here, believing may also encompass qualities such as "freedom" or "choice." And believing surely has a social and political dimension, as Part IV will indicate. The ensuing discussion should serve to correct any impression that "believing" is a quality or capacity wholly distinct from the features with which I am contrasting it here.

139. In a discussion explicitly seeking to minimize the moral differences between humans and other animals, Alasdair MacIntyre argues that animals *are* capable of having beliefs, and he criticizes a variety of philosophical objections to that view. MACINTYRE, *supra* note 135, at 29–41. Even so, the sorts of animal beliefs that MacIntyre contends for are largely of the "the dog believes the cat is in the tree" variety (though he speculates that more intelligent animals such as dolphins or apes may be capable of more sophisticated beliefs). *Id.*

Indeed, it would even seem odd to say that God believes. In orthodox depictions, God knows. God is omniscient. God knows everything, fully, perfectly, indubitably; just for that reason (among others, probably), it seems inapt to say that God believes. "What does God believe about this?" is not the sort of question it makes sense to ask.

In short, the capacity to believe seems to be a distinctively human quality.[140]

3. The Moral Quality of Believing

Even if believing is a distinctively human feature, however, it does not automatically follow that the feature is a sound basis for assertions about, say, "human dignity," or about the "inviolability" or "sacredness" of persons.[141] Scientists might describe in precise terms exactly how the human genetic makeup is unique to the species; by itself, that description would have no necessary moral implications. Or it might turn out that what is most distinctively human is a morally abhorrent trait—a propensity for genocide, perhaps—that, far from grounding claims of human dignity or human rights, would best be eradicated.[142] To support moral claims, a distinctively human quality also needs to be admirable or attractive from a moral perspective.

Does the capacity for believing satisfy this requirement? At least as a preliminary matter, the case seems promising. I have already said that "believing" is not equivalent to "knowing." Nonetheless, believing is an orientation toward truth: to believe something is to believe it to be true. So a species possessing the distinctive quality of believing as a central feature would be a species that lives, not necessarily *in accord with* truth, but at least with *an orientation toward* truth. It seems not too much to assert a special dignity in a life lived with that sort of orientation.

But this is merely a preliminary, bare bones suggestion. To flesh it out, we need to consider more closely three aspects of believing. First, what does it mean to "believe?" We routinely use the term without feeling any need for precise definition (as I have been doing); but at this point the notion needs closer attention. Second, what is the content or

140. Indeed, the capacity to believe might underlie the proposition, vital to American democracy, that all humans are in some important sense of "equal worth." Theorists have difficulty justifying the proposition. They search for some morally significant quality with respect to which humans are equally situated, but most of the candidates, such as rationality or virtues of various kinds, seem unsuitable. Humans seem to possess these qualities in radically differing degrees or amounts. *See* FLETCHER, *supra* note 38, at 95–96; Patrick McKinley Brennan, *Arguing for Human Equality*, 18 J.L. & RELIGION 99 (2002). Arguably, however, normally constituted humans do not differ in their basic *capacity for belief*. So if this capacity is a central feature of human personhood, it seems plausible to assert a basic *human* equality.

141. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION 24–25 (1994).

142. *Cf.* HURKA, *supra* note 125, at 11 ("Humans have some attractive distinctive properties, but they have many others that are morally trivial. Humans may be uniquely rational, but they are also the only animals who make fires, despoil the environment, and kill things for fun.").

subject matter of belief: belief in what? Third, how does believing relate to the other dimensions of life—dimensions captured, for example, in the images of the person as interest-bearer, chooser, and citizen?

B. The Nature of Believing

The preceding subpart has suggested that believing is essential to persons. But what exactly is "believing?" What is it to "believe?"

1. Belief, Believing, and the Believing Person

We often talk about "beliefs"—notice that the term is a noun—in the abstract, almost as if beliefs were self-sufficient entities floating around in some sort of Platonic ether. For many purposes this usage works well enough: we can intelligibly refer to a "belief in magic," or a "belief that the world is flat," without even explicitly mentioning who it is that holds this belief. If we try to be more scrupulous, however, we will likely agree that beliefs do not exist all on their own; rather, they attach to or exist in persons. What exists in the world is not beliefs, strictly speaking, so much as "people with beliefs."

Indeed, if we want to be still more scrupulous, we might say that even this phrase—"people with beliefs"—may subtly mislead. The phrase may imply that "beliefs"—still a noun—exist within persons (in the brain, perhaps) as discrete little cognitive corpuscles, almost like blood cells or chromosomes. But this seems a bizarre depiction. It would be more faithful to reality to talk not about beliefs but rather about "believing"—a verb or, as in the phrase "the believing person," an adjective. Believing might more clearly indicate that what we are referring to has the character of an ongoing (though sometimes intermittent) psychological or perhaps psychophysical condition or activity.

Of course, it would be inconvenient to insist on banishing the word "belief" in favor of "believing." So in this essay I have used and will continue to use the term in all of its forms: noun, verb, adjective. But it is worth noting these variations to call attention to the inevitably and thoroughly personal character of the phenomenon we are discussing.[143]

2. The Dimensions of Believing

In some usages, to "believe" seems equivalent to giving cognitive assent to an idea or proposition. This notion of belief as cognitive assent

143. In a similar vein, John Henry Newman argued that "real assents," which he equated with believing, "are of a personal character, each individual having his own, and being known by them." NEWMAN, *supra* note 134, at 82, 86. By contrast, merely "notional assent" to abstract or merely verbal propositions reflect a common and less personal power of abstraction. *Id.* at 87. But "real assents" or beliefs are "peculiar and special. They depend on personal experience" and are "proper to the individual." *Id.* at 82.

is attractive because it encompasses a variety of mental states regarding a huge array of types of propositions. We may say we believe that Two plus Two equals Four, that a recession is imminent, or that Mars has two moons, or that God loves us. The common term "believe" works for this diverse list if we understand believe to mean simply cognitive assent to the propositional predicate of the respective sentences.

This virtue of inclusiveness is also a deficiency, however, because the notion of "assent" fails to convey the depth and variety of the phenomena. Assent encompasses by flattening the cognitive, affective, and even spiritual topography of our lives. We have already noted that believing denotes something that humans can and computers cannot plausibly be said to do, but the passive, dispassionate notion of "belief as assent" obscures this crucial distinction: even a computer, programmed to respond to a "true or false" test, might be said without much strain to assent to some propositions and not to others. In reality, however, believing is a many-splendored thing, and to appreciate it we need to move beyond assent to note its various dimensions. These dimensions include what we might call "objective" and "subjective" features.

a. The Objective Dimension

By the objective dimension of belief, I mean to describe the relations of the propositional content of a belief to "truth," or to "reality." Borrowing an off-putting but perhaps more descriptive term, we might describe this as the "veritistic" dimension of belief.[144]

Thus, beliefs have the quality of being true or false. In addition, beliefs have the quality of being "justified" or "unjustified"—the difference, obviously, is one of degree—depending on the availability of good evidence or cogent reasons for holding a particular belief.[145] Both sets of terms, "true/false" and "justified/unjustified," describe objective or "veritistic" qualities insofar as both address the relation of the belief to what we take to be an objective truth.

In many contexts, we are primarily concerned with these veritistic qualities. We want to know whether a particular belief or proposition is "true," or at least we want to know what evidence or reasons are available to support the belief. In these contexts, we naturally pay less attention to the believer and more to the belief—or to the content of the belief. However, the veritistic dimension alone does not explain the significance and meaning of belief—or of believing—in the life of the believer. We need to notice its subjective dimension as well.

144. *See* Alvin Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. PHIL. 113, 120 (1991).

145. These qualities are related—a solidly justified belief is presumably more likely to be true than an unjustified or meagerly justified one—but they are not identical. A belief might happen to be true even though there is no available evidence or reason to support it; conversely, a belief might turn out to be false even though all the available evidence seemed to favor it.

b. The Subjective Dimension

Belief has a subjective or perhaps existential dimension because believers are persons, not machines. They do not just idly or disinterestedly believe; rather, they believe for purposes; and their beliefs participate in a complex network of attitudes and commitments.[146] So if the objective dimension of a belief describes its relation to the truth—or perhaps to the world or to "the facts"—the subjective dimension reflects the belief's relation to the person, or to the believer.

The subjective dimension of believing has various aspects or components. These components will overlap, and any list will be to some extent arbitrary and redundant. Nonetheless, for present purposes it will be helpful to notice five subjective aspects of a belief, or of believing. We can think of these as the *conviction* component, the *attitudinal* component, the *attachment* aspect, the *motivational* aspect, and the *constitutive* component.

By the conviction component of belief, I refer to the degree of certitude felt by the believer. It might seem that this aspect is merely the believer's subjective appraisal of what I earlier called the objective or veritistic qualities of the belief; but that is not quite so. Normally, we might suppose, a person's subjective sense of a belief's truth should correspond to her appraisal of the evidence or reasons supporting the beliefs. But the correlation need not be exact. People often feel a degree of assurance about propositions for which, by their own admission, they can produce little in the way of evidence or reasons: "The heart has its reasons," Pascal observed, "of which reason knows nothing."[147] Conversely, people subjectively doubt propositions all the while acknowledging that the evidentiary support is substantial.[148]

The attitudinal component refers to an emotional quality that often attends beliefs, quite independent of any assessment of their truth. It is a familiar fact that in persons (as opposed to computers) ideas evoke not only cognitive assent or dissent, but also a variety of attitudes. These attitudes include (sometimes intense) liking or disliking. "I just love Maria's thesis." "I can't stand law-and-economics scholarship." (Can you imagine any similar statement being made of or by a computer?) Such statements might be taken merely as comments on the perceived truth or falsity of an idea; but in many contexts, this reductionist inter-

146. *Cf.* NEWMAN, *supra* note 134, at 87 ("Belief . . . has for its objects[] not only directly what is true, but inclusively what is beautiful, useful, admirable, heroic; objects which kindle devotion, rouse the passions, and attach the affections; and thus it leads the way to actions of every kind . . . .").

147. BLAISE PASCAL, PENSEES 154 (A. J. Krailsheimer trans., Penguin Books 1979) (1670).

148. In an even more impressive cognitive feat, people can sometimes even feel subjectively sure of something while believing on another, more objective or perhaps more "rational" level, that it is not so: hence the occasional persistent fear of ghosts even in people who "know" they are not real or the strong subjective suspicion of a spouse's infidelity even by someone who on another level is sure the suspicion is groundless. Conversely, the exclamation "I can't believe it!" is regularly asserted with respect to some state of affairs that the exclaimer is in fact acknowledging to be so.

pretation would clearly misrepresent their meaning. In fact, the attitudinal quality of a belief is not equivalent to, and may not even correlate with, a judgment about its probable truth. The statement "The Yankees are going to win" might be offered with despondent certainty—by a fatalistic Red Sox fan, for instance; coming from someone else (Rudolph Giuliani, maybe), the same statement might be tentative but jubilant. "God exists" will elicit different cognitive judgments, and will also provoke different attitudes: there are those who think the statement is happy but also, alas, false—"Would that it were so!"[149]—and others who despairingly believe it to be true.[150]

Related to attitude is the feature of attachment, or perhaps commitment. Some beliefs are held casually; the least inconvenience would lead us to relinquish them. At this moment I vaguely recall from grade school days that the planet Mars has two moons, but if you were to tell me that your brother's friend thinks she remembers reading a newspaper article reporting that one astronomer claims to have spotted a third, I would be happy to change my mind. Other beliefs are jealously guarded—even in the face of strong evidentiary or practical opposition: martyrdom is the ultimate instance.[151]

In a similar vein, beliefs carry with them, again in varying degrees, a motivational aspect, or a propensity to manifest themselves in action. "Every idea is an incitement," Holmes said.[152] He overstated the case: in reality, some but not all beliefs have a galvanizing quality. Nor do the differences depend solely on the content of the beliefs, but rather vary among believers: Jesus's Parable of the Sower[153] is in part a story about how the same ideas can produce radically different behaviors in different people.

Perhaps the most critical existential aspect of believing is its constitutive component, or its function in providing the believer with a conception of who she is. To some extent, who I am is determined by what I be-

149. *Cf.* A. N. WILSON, GOD'S FUNERAL 58 (1999) ("And the essence of all [Thomas Carlyle's] *saeva indignatio*, both on the page and in life, is encapsulated in those five desolate words in the Journal—'Oh, that I had faith!'").

150. *Cf. James* 2:19 (King James) ("Thou believest that there is one God; thou doest well. The demons also believe, and tremble."). In a related vein, Thomas Nagel observes "a fear of religion which has large and often pernicious consequences for modern intellectual life." THOMAS NAGEL, THE LAST WORD 130 (1997). And he adds:

> I speak from experience, being strongly subject to this fear myself: I want atheism to be true and am made uneasy by the fact that some of the most intelligent and well-informed people I know are religious believers. It isn't just that I don't believe in God and, naturally, hope that I'm right in my belief. It's that I hope there is no God! I don't want there to be a God; I don't want the universe to be like that.

Id.

151. *Cf.* BRAD S. GREGORY, SALVATION AT STAKE 124 (1999) ("In dying for their religious convictions, . . . martyrs proclaimed the transcendent importance of their beliefs.").

152. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

153. *Matthew* 13:3–8, 18–23 (King James).

lieve.[154] In this vein, Rawls acknowledges that "in their personal affairs, . . . [people] may regard it as simply unthinkable to view themselves apart from certain religious, philosophical, and moral convictions . . . ."[155]

I emphasize once again that there is nothing canonical about this list of subjective components. The components are obviously interrelated: a higher level of conviction is likely to correlate with a more intense motivational quality, and both components are likely to make a belief more central to a person's sense of identity. Indeed, all of the distinctions I have drawn here are meant to be merely illuminating: in life, beliefs do not come—or believing does not occur—with neatly labeled components.

c. The Unity of Believing

This point is easily overlooked because as a conceptual matter we do break belief into components (as I have been doing here). In some academic contexts, for instance, we may be indifferent to the subjective or existential dimension of beliefs. Indeed, though we may use the term "belief," we may not be interested in the phenomenon of believing at all, but rather in the propositional content of a belief—in the "idea" or "theory" or "proposition." Even in these contexts, though, we may casually use terms like "idea," "proposition," and "belief" interchangeably, and so it is tempting to say that the belief itself is limited to its propositional content, and that what I have been calling the subjective or existential components—the conviction, attitude, attachment, motivational, and constitutive features—are extraneous or accidental factors that may or may not happen to accompany belief.[156]

But this depiction distorts the human reality of believing. In fact, "believing" or "believing persons" do not come to us neatly carved into

154. Though this has become a familiar claim, and though it seems to contain an important truth, it is also a paradoxical claim that must be taken cautiously. Though in some sense a person's identity may be bound up with her beliefs, in other senses we manage to distinguish between the person and even her most central beliefs. The paradox is apparent in the sort of familiar report that says, "Since I converted to _____, I'm a new person." The statement asserts that the beliefs to which the person has become converted are constitutive of (a new) identity; at the same time, the "I" in the sentence supposes a continuous identity—an identity apparently independent of these constitutive beliefs—linking the old and new person.

155. RAWLS, *supra* note 87, at 31. Rawls's observation is especially credible, perhaps, because it is in a sense an admission against interest. The fact that moral and religious beliefs are constitutive of personal identity has often been noted as a criticism of Rawls's approach to justice, and Rawls continues to try to minimize the significance of this fact; his "political conception of the person" is calculated to abstract away from this belief-grounded "moral" sense of identity. *Id.* at 29–32.

156. Wilfred Cantwell Smith argues, however, that this "propositional" understanding of what it means to believe is of relatively recent origins. WILFRED CANTWELL SMITH, BELIEVING—AN HISTORICAL PERSPECTIVE 36–69 (1998). In the early Christian era, Smith explains, "*Credo* literally means 'I set my heart,'" and in medieval Anglo Saxon vocabulary the word meant "pretty much what its exact counterpart in German, *belieben*, still means today: namely, 'to hold dear,' 'to prize.' It signified to love, . . . to give allegiance, to be loyal to; to value highly." *Id.* at 41. Somewhat later, "the word 'believe' in English meant primarily to hold dear, to belove, to treasure . . . ." *Id.* at 45. Smith traces the "development towards propositionalism" and "towards the impersonal," *id.* at 52–53, that led to the more familiar depersonalized conception that prevails in many contexts today.

propositional and affective and constitutive subcategories. Rather, these are all dimensions of the phenomenon of believing. We can distinguish among them conceptually for some purposes (as I have been doing), just as we can distinguish between form and matter, or between an object's color and its shape, but in each instance we err if we suppose that one of these things exists in the world independent of the others.

In everyday life we readily acknowledge this fusion of dimensions. So we say that we "embrace" a belief, or that we "espouse" a theory—thus impliedly lifting cognitive assent into an act of passion, or even of marital union. The more common verb "hold" (as in "We hold these truths . . .") is less vivid but similarly suggestive. Or we say that someone believes an idea "passionately" or "fervently." Conversely, we do not merely disagree with disfavored ideas, but rather "reject," "dismiss," "deny," "negate," or even "repudiate" or "condemn" them. Contrary beliefs are said to be not merely inconsistent but also "incompatible" or "irreconcilable" (like divorcing spouses) or even "repugnant."

In short, our vocabulary of belief seems pervasively calculated to convey at once a cognitive and a more affective stance. And this vocabulary serves us for ordinary, unheated conversations; in more extreme situations, we deliberately search for words that will underscore even more forcefully the affective dimension of our response. So we "deride," "despise," "hate," "scorn," or "scoff at" ideas that we disapprove.[157]

In actual life, in short, the phenomenon of believing routinely exhibits both the objective and subjective dimensions, in inseverable union. Moreover, and most importantly, it is precisely because of this union that believing plays such a fundamental role in making us human. In their objective aspect, our beliefs orient us toward something beyond ourselves—to truth. But the objective dimension alone does not account for the centrality of believing to personhood. Computers can dispassionately assess the data, draw the conclusions, and calculate the probabilities of truth or falsity. We are human—persons—because these veritistic functions are

157. Given our recognition that beliefs are much more than cognitive assent, and are clothed with the subjective qualities of personality, it is not surprising that a large portion of our discourse addressing matters of belief is not calculated primarily to manifest or elicit cognitive assent, but rather expresses and engages other aspects of belief. The speech that occurs in political campaigns probably serves less to persuade opponents than to reinforce and intensify commitment and motivation on the part of those who are already convinced. Product advertisements often make no pretense of providing useful comparative information about a product—what does "We love to see you smile" tell us about hamburgers?—but rather and unapologetically appeal to our more purely subjective dimensions. Sunday sermons routinely expound on beliefs that parishioners already hold—and on which they have already heard countless homilies; the overriding purpose is manifestly not to convince but rather to deepen conviction and commitment. And reduced to its propositional content, even the most exquisite poetry becomes hackneyed ("This poem is saying that 'Nature is beautiful'"); its typical function, seemingly, is not to introduce or prove new truths so much as to help readers appreciate old truths in a new light, or with greater depth or enjoyment. Indeed, upon reflection, it seems that only a small fraction of our discourse is primarily addressed to providing or assessing objective justifications for propositions; the overwhelming bulk of our discourse—even our discourse that is in some direct sense concerned with "beliefs"—speaks to other dimensions and concerns.

inextricably combined with the existential functions of caring, liking, despising, committing, and defining ourselves in terms of what we believe.

Consequently, any account of believing that focuses solely on either the objective or the subjective dimension of believing while neglecting the other dimension will simplify or even falsify the reality, and will fail to perceive what it is that makes believing so central to personhood. As we will see, the standard First Amendment justifications are prone to one or the other of these opposite oversights.

C. Believing and Meaning

Thus far we have paid little attention to the content or subject matter of believing—to *what* persons believe in—beyond noting in passing that the content of belief can range from the trivial ("John is writing with a blue pen") to the lofty or momentous ("God loves us"). It is arguable that believing is a distinctive human quality regardless of the specific content of belief. But if we are concerned to understand what might make believing an especially morally laden capacity, we will naturally turn to the more momentous beliefs. And at the extreme on this continuum, we come to beliefs concerned with what is often described as "meaning," or perhaps "ultimate meaning" or "ultimate purpose"—beliefs that address, as we sometimes say, "the point of it all." Camus observed that "the meaning of life is the most urgent of questions,"[158] and beliefs that respond to that question are the weightiest of human concerns. In a popular classic expanding his experiences and observations in a Nazi concentration camp into a therapeutic philosophy that he called "logotherapy," the psychologist Viktor Frankl reached a similar conclusion: "the striving to find a meaning in one's life is the primary motivational force in man."[159]

Though the concepts are surely related, it seems that "meaning" is not simply equivalent to "self-fulfillment" or "self-realization."[160] Nor is the question of meaning typically concerned simply with the satisfaction of interests, or even with the pursuit of worthy goals. "One may fill one's days with honest, useful and charitable deeds, not doubting them to be of value," the philosopher R. W. Hepburn observes, "but without feeling

158. ALBERT CAMUS, *The Myth of Sisyphus*, *in* THE MYTH OF SISYPHUS AND OTHER ESSAYS 1, 4 (1955). In describing this question as "the most urgent," Camus did not mean to imply that it is either the most conspicuous or the most frequent occupant of our thoughts. On the contrary:

> Rising, streetcar, four hours in the office of the factory, meal, streetcar, four hours of work, meal sleep, and Monday Tuesday Wednesday Thursday Friday and Saturday according to the same rhythm—this path is easily followed most of the time. *But one day the "why" arises* . . . .

Id. at 10 (emphasis added).

159. VIKTOR E. FRANKL, MAN'S SEARCH FOR MEANING 154 (1968).

160. *See id.* at 175 (asserting that "the real aim of human existence cannot be found in what is called self-actualization. Human existence is essentially self-transcendence rather than self-actualization.").

that these give one's life meaning or purpose."[161] Consequently, a person can be highly successful in satisfying his or her mundane interests and yet feel a painful absence of meaning: Tolstoy's memorable *Confession,*[162] or a chapter in Mill's autobiography,[163] or the book of *Ecclesiastes*[164] are all testimonies to this predicament. Conversely, Frankl found both in his death camp experiences and in his psychotherapeutic practice that a "man is even ready to suffer, on the condition . . . that his suffering has a meaning."[165]

But if meaning is not to be understood either in terms of self-fulfillment or the achievement of interests, then what does it refer to? The very question may seem confused or even comical—something worthy of Monty Python lampoons. Not surprisingly, analytic philosophers have often tried to deconstruct the question, arguing that the inquiry "Is life meaningful?" is itself nonsensical or without meaning.[166] But analytical deconstruction seems feeble in the face of the powerful existential yearning for meaning. Thus, we may admire the acuteness of Antony Flew's analytical demolition of Tolstoy's narrative[167] and yet doubt that this analysis could have had any power to relieve Tolstoy's felt anxiety about the apparent purposelessness of his life. Indeed, Tolstoy himself conceded that "[t]he questions [about meaning] seemed so stupid, simple, and childish. [Nonetheless], the moment I touched upon them and tried to resolve them I was immediately convinced . . . that they were not childish and stupid questions but were the most important and profound questions in life . . . ."[168] The fact is that most humans do worry, at least

161. R. W. Hepburn, *Questions About the Meaning of Life*, *in* THE MEANING OF LIFE 261, 264 (E. D. Klemke ed., 2d ed. 2000) [hereinafter THE MEANING OF LIFE]).

162. *See* LEO TOLSTOY, *A Confession*, *in* A CONFESSION AND OTHER RELIGIOUS WRITINGS 17 (Jane Kentish trans., 1987). Tolstoy's narrative relates how despite his complete prosperity in terms of the typical "interests"—despite wealth, fame, literary achievement, domestic happiness—he came to feel paralyzed (to the point of contemplating suicide) by questions of meaning.

> Expressed another way the question can be put like this: why do I live? Why do I wish for anything, or do anything? Or expressed another way: is there any meaning in my life that will not be annihilated by the inevitability of death which awaits me?

Id. at 35.

163. JOHN STUART MILL, AUTOBIOGRAPHY 111–22 (John M. Robson ed., Penguin Books 1989) (1873).

164. *See, e.g.*, *Ecclesiastes* 2:9–11 (King James).

> So I was great, and increased more than all that were before me in Jerusalem; also my wisdom remained with me. And whatsoever mine eyes desired, I kept not from them. I withheld not my heart from any joy; for my heart rejoiced in all my labor; and this was my portion of all my labor. Then I looked on all the works that my hands had wrought, and on the labor that I had labored to do; and, behold, all *was* vanity and vexation of spirit, and *there was* no profit under the sun.

165. FRANKL, *supra* note 159, at 179.

166. *See, e.g.*, Hepburn, *supra* note 161, at 262 ("According to the interpretations being now worked out, questions about the meaning of life are, very often, conceptually obscure and confused. They are amalgams of logically diverse questions, some coherent and answerable, some neither. A life is not a statement, and cannot therefore have linguistic meaning.").

167. Antony Flew, *Tolstoi and the Meaning of Life*, *in* THE MEANING OF LIFE, *supra* note 161, at 209.

168. TOLSTOY, *supra* note 162, at 29.

occasionally, about whether life has "meaning" or "purpose" and, if so, what that meaning or purpose might be.[169]

And in any case, upon careful scrutiny the question of meaning does not in the end seem to be nonsensical. The philosopher John Wisdom makes a comparison to two kinds of questions we may sensibly ask when attending a play.

> Imagine that we come into a theatre after a play has started and are obliged to leave before it ends. We may then be puzzled by the part of the play that we are able to see. We may ask "What does it mean?" In this case we want to know what went before and what came after in order to understand the part we saw. But sometimes even when we have seen and heard a play from the beginning to the end we are still puzzled and still ask what does the whole thing mean. In this case we are not asking what came before or what came after, we are not asking about anything outside the play itself. We are, if you like, asking a very different sort of question from that we usually put with the words "What does it mean?" But we are still asking a real question, we are still asking a question which has sense and is not absurd. For our words express a wish to grasp the character, the significance of the whole play. . . . Is the play a tragedy, a comedy or a tale told by an idiot? The pattern is so complex, so bewildering, our grasp of it still so inadequate, that we don't know what to say, still less whether to call it good or bad. But this question is not senseless.[170]

Wisdom observes that we can ask these same kinds of questions about life itself. Thus, "with the words 'What is the meaning of it all?' we are trying to find the order in the drama of Time."[171]

If the question is understood in this way, the familiar answers can be assigned to several broad families. Perhaps the most common response holds, or hopes, that there is some transcendent or cosmic order in "the drama of Time" and that life derives its meaning from that cosmic order. This sort of view is commonly associated with "religion."[172] A different kind of answer denies any transcendent or cosmic order but maintains that no such order is needed; the regular pursuits of human existence are sufficient to give life a meaning or purpose.[173] Still a different answer

169. *Cf.* JOHN MACQUARRIE, IN SEARCH OF HUMANITY 160 (1983) ("Kant . . . was also wise enough to see that the questions which, as he put it, transcend our powers, cannot be ignored. They seem to be built into our humanity, and even if only implicitly we cannot help giving answers.").

170. John Wisdom, *The Meanings of the Questions of Life*, *in* THE MEANING OF LIFE, *supra* note 161, at 257, 258–59.

171. *Id.* at 259.

172. *See, e.g.*, TOLSTOY, *supra* note 162, at 65–67; *see also* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 14 (1998) ("One fundamental response to the problem of meaning is 'religious': the trust that the world is finally meaningful, meaningful in a way hospitable to our deepest yearnings.").

173. Mill described his own recovery from his "crisis" of meaning in these terms: "I gradually found that the ordinary incidents of life could again give me some pleasure; that I could again find enjoyment, not intense, but sufficient for cheerfulness, in sunshine and sky, in books, in conversation, in

agrees that there is no transcendent order and also doubts that ordinary human pursuits are sufficient to satisfy the demand for meaning: this sort of position has led thinkers like Camus to conclude that life is "absurd" and must be lived with a sort of (perhaps heroic, or perhaps pathetic) "despair."[174]

In this vein, Thomas Nagel suggests that the human need for a transcendent meaning can neither be relinquished nor satisfied, and the result of this dilemma is that our lives are "absurd."[175] Unlike Camus, however, Nagel does not embrace "despair." On the contrary, people who agonize about life's absurdity "betray a failure to appreciate the cosmic unimportance of the situation. If *sub specie aeternitatis* there is no reason to believe that anything matters, then that doesn't matter either, and we can approach our absurd lives with irony instead of heroism or despair."[176]

It is not the purpose of this article, obviously, to adjudicate among these competing responses to the age-old question of meaning. For present purposes, three observations are pertinent. First, our attempts to address the problem of "meaning" call upon us, as much as anything we do, to exercise our distinctively human capacity for believing. Whether we are calmly agnostic pragmatists, orthodox Christians, or defiant existentialists who alternately revel in and rage against the "absurdity" of life, we act on the basis of our beliefs about the nature of the world—beliefs that cannot be readily verified or falsified by mundane sources such as science.[177] Belief of some sort seems inescapable here: a mere suspension of belief in these matters may not be available as a working alternative, since issues of ultimate meaning and our response thereto

public affairs . . . ." MILL, *supra* note 163, at 117. In a similar vein, the analytic philosopher A. J. Ayer argued that, measured against aspirations for transcendent meaning, life must be judged "a fluke." A. J. AYER, THE MEANING OF LIFE 192 (1990). "So far as one can survey the Universe *sub specie aeternitatis* one has to agree with Macbeth. It *is* 'a tale, told by an idiot, full of sound and fury, signifying nothing.'" *Id.* at 197. With more modest ambitions, though, life could be meaningful enough.

> There are many ways in which a person's life may come to have a meaning for him in itself. He may find fulfillment in his work. . . . The same is true of the satisfaction which some people find in their domestic lives, with the factor of children and grandchildren playing its part. . . . There are hobbies, like chess or stamp collecting, which may become a passion.

Id. at 189.

174. CAMUS, *supra* note 158, at 40–41.

175. Thomas Nagel, *The Absurd*, *in* THE MEANING OF LIFE, *supra* note 161, at 176. This conclusion supplies Nagel's own response to the "distinctive feature" question considered earlier. "I would argue," he says, "that absurdity is one of the most human things about us: a manifestation of our most advanced and interesting characteristics." *Id.* at 185.

176. *Id. But cf.* TOLSTOY, *supra* note 162, at 33 ("Had I simply understood that life has no meaning I might have accepted it peacefully, knowing that it was my lot. But I could not be calmed by this.").

177. In this vein, John Macquarrie argues that "beliefs about the nature and destiny of the human being, his place and significance in the universe, about good and evil and the conduct of life, about God or the absence of God" are "transcendent" in the sense that they "transcend the level at which empirical evidences could, at least in principle, be decisive for establishing the truth or falsity of the beliefs, or even for establishing a very high degree of probability or improbability." MACQUARRIE, *supra* note 169, at 159.

present the kind of "forced choice" in which, as William James argued, refusal to believe something amounts in practice to believing the contrary.[178] Thus, John Macquarrie observes that "[e]ven the agnostic or the positivist who tries to suspend belief about matters where a scientific approach to the question is impossible can hardly avoid having some creed, some ultimate or transcendent beliefs by which he orients his life."[179]

Second, our capacity to form and live by beliefs regarding "ultimate meaning" is arguably that aspect of believing that is most dramatically and distinctively human. Indeed, perhaps more than anything else, an individual's particular believings in this realm make her not only "human" but the particular person she is. In this vein, Joseph Vining concurs with William James who approvingly quoted G. K. Chesterton: "[T]he most practical and important thing about a man is still his view of the universe. . . . [T]he question is not whether the theory of the cosmos affects matters, but whether, in the long run, anything else affects them."[180] The claim is contestable, surely, and probably nondemonstrable; but it is at the very least a plausible one.

Finally, and most crucially, it is in having and struggling to live in accordance with beliefs about ultimate meaning or purpose, even at the sacrifice of mundane "interests," that persons achieve their highest, most morally attractive stature. This claim is likewise nondemonstrable; I can only hope—and I believe—that reflection shows it to be credible. To be sure, different images of the believing person will be more or less alluring for different people. For some, the claim will seem most plausible when the beliefs about meaning are religious in nature; for others just the reverse will be true. But surely even the atheist can appreciate the moral nobility of a Mother Teresa—and not merely because she performed charitable service, but also because she acted selflessly on the basis of ultimate beliefs (however misguided the atheist may think those beliefs were). And, conversely, even the devout theist can sense, perhaps heroism, or at least a sort of solid, stolid virtue eliciting admiration in the existentialist model of the person who lives bravely and honestly even while sincerely believing that life is pointless and that all of his striving will be for naught (however deluded, and even incoherent, the theist may think

178. JAMES, *supra* note 15, at 19–31.

179. MACQUARRIE, *supra* note 169, at 169.

180. Joseph Vining, *The Cosmological Question*, *A Response to Milner S. Ball's All the Company of Heaven*, 94 MICH. L. REV. 2024, 2025 (1996); *see also* David F. Swenson, *The Dignity of Human Life*, *in* THE MEANING OF LIFE, *supra* note 161, at 21, 22 ("A view of life is . . . a personal expression of what a man essentially is in his own inmost self . . . . "); *cf.* JAMES, *supra* note 15, at xiii ("The most interesting and valuable things about a man are his ideals and over-beliefs."). Richard Weaver quotes Thomas Carlyle to similar effect:

> But the thing a man does practically believe (and this is often enough *without* asserting it even to himself, much less to others); the thing a man does practically lay to heart, and know for certain, concerning his vital relations to this mysterious Universe, and his duty and destiny there, that is in all cases the primary thing for him, and creatively determines all the rest.

RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES 18 (1948); *see also id.* at 3 (asserting that "world view is the most important thing about a man").

that philosophy to be). If this supposition is correct, then the claim made at the outset of this section—namely, that believing is central to what makes us "persons" in a morally valuable sense—will have been vindicated.[181]

D. Believing, Persons, and the Ideal of Integration

The foregoing discussion has suggested that believing is essential to personhood, and that it is central to what gives persons a distinctive moral value or dignity. As noted, though, believing is not sufficient to make a person: a person is more than just, to paraphrase Descartes, "a thing that believes." Moreover, there are other conceptions of the person—including those discussed earlier—that have their own validity: a person also makes choices, for example, and pursues her interests. In addition, persons are constituted in part by the quality of embodiment, and also by relations with other people and with a community: we are children and parents, sisters and brothers, friends and colleagues, citizens or strangers. Even if these other features do not as clearly distinguish persons from, say, animals or angels as the feature of believing does, they are still vital to personhood: it would be hard to imagine a human person, for example, who was not connected to a body or who was unrelated to other persons.

So, how do the quality of believing and the conception of the person as believer relate to other qualities and conceptions? One possible response would sternly subordinate other features and conceptions to the quality of believing, thus making the person's life a direct and unified expression of her deepest beliefs, with little or no remainder. Every aspect of life, in other words, would be incorporated into, or would become an immediate implementation of, the person's constitutive beliefs. Coaches are sometimes said to tell athletes to "eat, drink, sleep, and breathe" their sport; in a similar spirit, a person might subordinate every moment and every aspect of her life to expressing and serving her central beliefs. We might describe this interpretation of the role of belief as embracing an ideal of "monolithic dedication."

But while this ideal seems to suit a few heroic (or perhaps misguided) souls—the fanatically devoted monk, the political zealot, or perhaps the self-sacrificing terrorist—for most of us the ideal of monolithic dedication will seem not only unattractive, but indeed a sort of violent denial of personhood. The aspects of life that the ideal would require us

181. Consistent with this view, Andrew Koppleman argues that "religion" is a value deserving of special constitutional respect if but only if it is understood to refer to "all belief systems that make ultimate claims about the meaning of human existence;" this category would include "an atheistic philosophy such as Nietzsche's [which] does address man's nature and place in the universe." Andrew Koppleman, *Secular Purpose*, 88 VA. L. REV. 87, 134–35 (2002). Understood in that sense, Koppleman argues, "The religious need is a universal human need." *Id.* at 138.

to sacrifice will seem not superfluous, but rather essential to what it is to be a person.

Instead, we more often aspire to a different ideal that we might call the ideal of integration.[182] This ideal understands that although believing is essential to life, and to personhood, there is much more to a person's life than believing; and much of life is not in any immediate way regulated by or subordinated to central beliefs. You may be a Christian, a Buddhist, a socialist, or a Packers fan, and these commitments may be central to your conception of who you are; even so, they normally do not dictate what you do on a Tuesday evening, or with whom, or what you wear while doing it, or what music you listen to on the way. To be sure, none of these matters is intrinsically immune to creedal prescription; and indeed, many religions and philosophies do encompass teachings or practices regulating such things as association, eating, dress, and music. For most people, though, including most devout religionists, large areas of life encompassing a multitude of day-to-day activities are not directly controlled by core beliefs and commitments. Even so, those beliefs and commitments are central to the "I," or the "you," who makes these less ultimate choices and engages in these activities. So although many of your choices are not deduced from your central beliefs, many other choices—including many of the most important ones—*are* heavily influenced by them; and even in the large "discretionary" areas you try to live in a way that is at least compatible with these beliefs.

In short, your life is complex and multifaceted but still "integrated." At least in aspiration there is about it, as Stephen Carter says, a "sense of *wholeness*: a person of integrity, like a whole number, is a whole person, a person somehow undivided."[183] You are much more than just a "believing person"; still, without believing you would not be the person you are, and you would not even be—not as fully, at any rate—a "person" at all.

The ideal of integration is, as I have said, a moral aspiration—one that we fail to realize fully. Two familiar forms of failure need to be noted. First, and most obviously, we often fail to live consistently with our beliefs. This sort of failure to achieve the ideal of integration amounts to a kind of fractured personhood, or dissonance, or even disintegration. We notice this failure of integration when we say that someone is inconsistent, erratic, hypocritical, or "double-minded."[184]

Second, we might try to avoid this sort of dissonance by sacrificing our beliefs—by constantly changing them in chameleon fashion to fit the

182. It might be more economical to call this the ideal of "integrity," but I think that term sometimes connotes a notion of honesty that is part of, but narrower, than what I intend here.

183. STEPHEN L CARTER, INTEGRITY 7 (1996); *cf.* Clifford, *supra* note 15, at 83 (describing "[b]elief, that sacred faculty which prompts the decisions of our will, and knits into harmonious working all the compacted energies of our being").

184. *Cf. James* 1:8 (King James) ("A double-minded man is unstable in all his ways.").

way we happen to be living, or by marginalizing belief as a component of our self-understanding.[185] We might become "pragmatists" in an unflattering sense of that many-edged term—agents pursuing our day-to-day interests, oblivious to the question of larger truths or larger meanings. In this way, we conceivably might achieve a kind of inner harmony—or at least an avoidance of inner conflict. But if believing is a distinctive feature of personhood—a feature that separates us from animals, computers, and angels—then by marginalizing belief as a component of our identity, we would also have become less distinctively human, or less fully "persons." We might purchase quiescence by accepting a kind of creedal emptiness, thereby becoming "hollow men."

IV. THE BELIEVING PERSON AND THE FIRST AMENDMENT

Part II discussed some standard First Amendment problems and suggested that they are related to implicit conceptions of the person as interest-bearer, chooser, or citizen. Part III proposed on an alternative conception—that of the person as believer. This part considers, in a suggestive not comprehensive way,[186] how that alternative conception might inspire a more satisfactory First Amendment jurisprudence that would avoid difficulties growing out of the more familiar conceptions.

A. The Believing-Based Rationale

In this subpart, I will sketch the basic rationale, based on the "believing person" conception, for giving special respect to expression and religion. The next two subparts will address the implications of this rationale for legal protection and legal doctrine, first in the area of free

185. *Cf.* WEAVER, *supra* note 180, at 23 ("That it does not matter what a man believes is a statement heard on every side today. . . . The statement really means that it does not matter what a man believes so long as he does not take his beliefs seriously.").

186. Although the following discussion will address a number of the core and recurring controversies in First Amendment jurisprudence, there is a whole host of standard problems—some substantive (e.g., regulation of campaign financing, the "fighting words" exception) and some procedural (e.g., prior restraints, the overbreadth doctrine)—that will not be addressed. One omission deserves special mention: the discussion does not address the relationship between free speech and "belief formation." Much First Amendment theorizing *does* speak to this question, often in a conspicuously unsatisfactory or naive way. For example, autonomy rationales typically imply that because individuals have a right to come to (choose?) their own beliefs, government restrictions on communication are invalid because they shape or interfere with the information on which such belief formation or choices will be based. *See, e.g.*, Scanlon, *supra* note 65; Strauss, *supra* note 58. But of course the flow of information and instruction to any individual will inevitably be shaped, and severely limited, by a host of other institutions—parents, teachers, churches, the media—over which she has little choice or control, especially in her most "formative" stages. So any assumption that an individual's beliefs will be genuinely her own, or will be "authentic," so long as *the government* stays out of the process (as of course it cannot do in any case) seems incredible. Rather than address the daunting psychological, sociological, and ethical complexities of belief formation on the basis of such manifestly inadequate assumptions, it seems better simply to confess that although the believing-based rationale may have implications for belief formation, I have not worked out what those implications are.

speech and free exercise,[187] and then with regard to the "establishment" of religion.[188]

The basic rationale for respect can be understood in terms of three claims. First, a political community—or at least our political community—aspires to be a *community of persons*. Second, because believing is central to what makes us persons, a community of persons necessarily must seek to recognize and accept this dimension of our lives; it must try to be, so to speak, a community of and open to *believing* persons. Third, the recognition and acceptance of persons as believers entails, to some extent, a respect for the *manifestations of belief* by persons. After elaborating these claims, I will then suggest that the believing-based rationale serves to reorient and reinvigorate the standard but embattled First Amendment justifications considered in part II.

1. The Republic of Persons

Not every relationship involving human beings is, or even aspires to be, a relationship *of* persons—or of persons *as* persons. Some relationships or associations are grounded, rather, in what we might call the impersonal aspects of persons. In a factory, where people are hired to work on an assembly line, it is primarily the physical or mechanical performance of the workers that the employer cares about; and when a machine is developed that can perform the same operations more efficiently, the human workers will likely be replaced. The same may be true of an army, in which soldiers are viewed not in their full humanity but rather as fighting machines. On an athletic team and during a game, likewise, coaches and teammates may care mainly about an athlete's physical abilities and performance; indeed, the athlete herself may strive to become as much "like a machine" as possible. If all the players on a team manage to approximate this ideal, the team itself may be described, in approving tones sometimes approaching reverence, as "a machine."

We sometimes talk about the impersonal treatment of human beings as if this were morally offensive, and in many instances it surely is: someone who treats her friend or his spouse as a machine or "an object" is indeed reprehensible. But the matter is complicated, as the above examples indicate, because for many purposes we may want to be—and to be treated as—a kind of object.[189] A factory worker may understand that his job approval ratings will improve as he becomes more precisely "mechanical" in his work. And to say to an athlete "You're a machine" is usually to offer a compliment,[190] just as a similar description of a team

187. *See infra* Part IV.B.

188. *See infra* Part IV.C.

189. For a brief and provocative discussion of the question, see Jed Rubenfeld, *The Right of Privacy and the Right to Be Treated as an Object*, 89 GEO. L.J. 2099 (2001).

190. In a similar vein, Randy Johnson, one of the premier pitchers in recent years, is commonly and admiringly referred to as "the Big Unit," or sometimes simply as "the Unit."

("The Big Red Machine") is high praise. Conversely, in activities calling for precision and consistency, the phrase "I'm only human" will typically be offered as an admission of failure.

As Zenon Bankowski has argued, we often aspire to be more mechanical and less personal in some areas of our lives, perhaps to allow for more creative and concentrated personal focus in other areas of our lives.[191] The concert pianist, for example, spends hours perfecting his scales and arpeggios to a smooth, machine-like precision so that he can devote his undistracted human attention to the music itself. Bankowski's observation suggests that although there are areas of life—and perhaps associations—in which we do not object to and indeed aspire to machine-like status,[192] there are other areas of life—and presumably other associations (such as friendship or marriage)—in which we want to be, and to be treated as, persons in the fullest possible sense.

My claim is that the political community is an association in which we aspire to be, and to accept each other as, persons.[193] Some such notion is surely inherent in the ubiquitous if obscure adage that in the political community established by the Constitution, everyone should be treated with "equal concern and respect."[194] In short, the "more perfect union" established by "We the People"—the government "of the *people*, by the *people*, for the *people*"—is to be a union of *persons*, not of objects, machines, robots, or zombies.[195]

2. A Community of Believers

If believing is central to or even the distinctive feature of personhood, as part III has tried to elicit, then an association of persons must be an association that embraces "believing persons." It must be a community in which there is no incompatibility between membership and believing—in which the believing dimension of human existence is welcomed and respected, not suppressed or marginalized.

191. ZENON BANKOWSKI, LIVING LAWFULLY 124–25, 132–36 (2001).

192. *Id.* at 123 ("The notion of 'machine like behaviour' is a good metaphor here. It is something we sometimes want humans to perform and if they do not we count as a defect.").

193. This is not necessarily to say that the political community is the association in which we should be *most fully* persons in all respects. It seems more plausible to hold that the political community should be an association of *persons*—of full or actual persons—but that some aspects of our personality (our intimate and devotional aspects, for example) will be *more fully* manifest in other associations—such as the family, or perhaps a religious congregation.

194. In a similar vein, Ronald Dworkin argues that both free speech and democracy are grounded in a governmental obligation to treat every citizen as a "responsible moral agent." *See supra* note 82 and accompanying text.

195. Though the claim here is made specifically with respect to the political community formed under the U.S. Constitution, its scope is surely not so limited. One hardly needs to embrace Aristotle's sanguine view—that "the state or political community, which is the highest of all [communities], and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good," ARISTOTLE, POLITICS 1.1 (Ernest Rhys ed., J. M. Dent & Sons et al. eds., 4th ed. 1928)—to acknowledge that an association that at least in one sense is encompassing of other associations and that wields coercive force ought to aspire to be an association of "persons."

In this respect, the republic of persons is almost the antithesis of the kind of political community envisioned in the current school of liberal theory offered by thinkers like Rawls and Macedo. Though the versions differ in their details and qualifications, the animating vision is of a political community in which, at least on the most vital public matters, citizens try to set aside, or "bracket," their "comprehensive views" or their beliefs about the "whole truth" to deliberate and decide on the basis of a more generic and creedally austere "public reason."[196] In effect, this liberal aspiration drives a wedge between the person *as citizen* and the person *as believer*, or between what Rawls calls the "moral" and "political" conceptions of the person;[197] it thereby sponsors a sort of "disintegration" of the person. Commenting on the implications of Rawls's position, Jed Rubenfeld observes that "[i]t is as if we can only conceptualize the idea of fundamental rights by engaging in the same kind of dehumanization that the whole concept of fundamental rights was intended to oppose."[198]

In an essay defending the Rawlsian position, philosopher Philip Quinn comes close to conceding as much. Quinn acknowledges a group of people—including, he thinks, many but not all religious believers and also "Millian liberals and Marxist socialists"—who "as a matter of conviction want to live in ways tightly integrated around their comprehensive doctrines"; he calls such persons "integralists."[199] Rawlsian-style "political liberalism does impose special burdens on the integralists," Quinn admits: "It may even in the long run, to the extent that it comes to prevail in a society, doom integralist forms of life, religious and nonreligious alike, to extinction."[200] Quinn sees in this prospect "cause for regret," but he ruefully remarks with a Rawlsian shrug that "there is no social world without loss. . . . Even the relatively capacious culture and institutions of liberal democracy are bound to prove uncongenial to some valuable forms of life," he concludes, "and integralism of various stripes may be among them."[201]

In a highly pluralistic community, there is an obvious appeal to this strategy for overcoming potentially divisive differences of opinion by suppressing or publicly marginalizing strong belief in all of its richness and diversity. Indeed, some such homogenization strategy sometimes seems almost irresistible. Thus, Post's "public discourse" serves a function much like that of Rawls's "public reason," and is similarly insulated against the beliefs particular to individuals or communities.[202] Very much

196. *See generally* RAWLS, *supra* note 87, at 212–54; Macedo, *supra* note 39.

197. *See* RAWLS, *supra* note 87, at 29–31.

198. Rubenfeld, *supra* note 189, at 2101.

199. Philip L. Quinn, *Religious Citizens Within the Limits of Public Reason*, 78 MODERN SCHOOLMAN 105, 122 (2001).

200. *Id.* at 123.

201. *Id*.

202. *See, e.g.*, POST, *supra* note 24, at 139–50.

in a Rawlsian spirit, Post explains that "[i]f membership in a community is 'a constituent of . . . identity,' the effort to communicate through public discourse with those who do not share that identity must entail a constant effort to distance oneself from the assumptions and certitudes that define oneself and one's community."[203]

Insofar as believing is central to what it is to be a person, however, the result of this strategy, successfully implemented, would be a republic of artificial *citizens*, but not of *persons*. "These are the hollow men," or at least the hollow citizens.[204] So Quinn's wistful acceptance of the possible extinction of "integralist" ways of life as a cost of civic peace and cooperation brings to mind an old question: "For what is a man profited, if he shall gain the whole world, and lose his own soul?"[205] In this vein, and on the premise that "the life lived without attention to the basic question is life not worth living," Carter argues that "[w]hat the liberal state should never do . . . is design a way of testing either the input or the output of the state that freezes out Americans like myself, people who believe that their understanding of God's word is the appropriate guide for both their public and their private actions."[206]

In his famous reflection on the challenge of "faction," James Madison briefly contemplated an analogous solution—only to peremptorily dismiss it. The threat of competitive pluralism, or "faction," conceivably might be smothered at its source, Madison noted, either by eliminating the liberty in which pluralism thrives or "by giving to every citizen the same opinions, the same passions, and the same interests."[207] Both alternatives would in effect deflect the dangers of pluralism by achieving the sort of homogenization of citizens—the suppression of creedal and other differences within the public domain composed of and inhabited by "citizens"—that Rawls's and Macedo's "public reason" and Post's "public discourse" seek to achieve. But the first remedy, Madison quickly protested, would be "worse than the disease"; it would be like "wish[ing] the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."[208] And the second remedy of giving similar beliefs and passions to "every citizen" (or, we might say, to every person *as* citizen) was equally objectionable. "As long as the reason of man continues [to be] fallible" and as long as there is "diversity in the faculties of men," there will also be divergence in the "opinions and . . . passions" of persons; and far from suppressing these divergences in the interest of civil peace we should recognize that "[t]he protection of these faculties is the first object of government."[209] In sum, the purpose of government

203. *Id*. at 143 (footnotes omitted).
204. T. S. ELIOT, *The Hollow Men*, *supra* note 121, at 123–28.
205. *Matthew* 16:26 (King James).
206. Carter, *supra* note 40, at 53.
207. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).
208. *Id.*
209. *Id.*

was to protect the faculties and features that make citizens persons—and particular persons—so the pluralism manifest in "faction" was not to be controlled by suppressing or discouraging the exercise of those faculties.[210]

3. Belief and Its Manifestations

It is tempting (but a temptation to be resisted) to express the kind of claim advanced here—namely, that a community of persons must be hospitable to *believing* persons—in terms of a "right to believe," or a "freedom of belief." This characterization might then lead to the observation that constitutional law already recognizes such a right—indeed, the Supreme Court has said, more than once, that the "freedom of belief" is "absolute"[211]—and that in any case government is not likely to, or perhaps even able to,[212] infringe upon that freedom. Whether there should be a freedom of speech (or of religion) might then be posed as an independent question, calling for entirely independent justifications: the powerful arguments favoring recognition and acceptance of believing persons might be treated as spent, so that the effort to justify rights of expression and religious exercise must start from scratch.

The preceding discussion suggests that this unfortunate way of framing the issue is misleading in two ways. First, any strong distinction between belief and its manifestation in speech and action makes sense, if at all, only upon the supposition that "belief" is reducible to something like "cognitive assent." On that supposition, belief is a wholly "inner" phenomenon: whether I *believe X* and whether I *express or otherwise manifest* my belief in *X* appear to be two entirely separate questions. As discussed earlier, however, this picture of belief as cognitive assent is seriously deficient.[213] To be sure, believing typically includes cognitive assent. But believing also has a subjective or existential dimension involving conviction, commitment, and motivation that exist only insofar as belief is manifest in the believer's speaking and living. To reduce the phenomenon to inner cognitive assent is thus to do violence to the very nature of believing.

Imagine telling an enthusiastic child: "It is fine for you to be exuberant. But keep it to yourself; don't let your exuberance show in what you say or in how you behave. Be silently, passively exuberant." The instruction seems nonsensical: a hidden or completely internal and passive

210. *See also* Blasi, *supra* note 80, at 671–73 (explaining and endorsing Brandeis's view that "the final end of the State was to make men free to develop their faculties").

211. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Our cases have long recognized [that] . . . the freedom of individual belief . . . is absolute . . . .").

212. *Cf.* James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 92 n.10 (1991) ("In totalitarian regimes, you can also believe whatever you want. [H]ow can the government stop you?").

213. *See supra* notes 144–57 and accompanying text.

condition is just not what "exuberance" is. In a similar way, a denatured, disembodied, purely passive "believing" devoid of manifestation in utterance or action is simply not "belief" in a full sense: on this point, thinkers with as opposite perspectives on the ethics and nature of believing as William Clifford and William James converged.[214]

But even if believing is regarded as a purely internal condition separable from its outward manifestations, reducing the human significance of believing to a claim about a "right to believe" misses the point of the aspiration to establish a republic of *persons*. That aspiration understands that if believing is essential to personhood, then a position that allowed for a "right of belief" as an inner matter but did not extend that respect to the outer or public manifestations of belief would amount to saying that we put aside our character *as persons* when we appear and act in the public sphere.

We might put the point as a question: Why create a republic (a res publica) of *persons*, only to relegate the most distinctive feature of persons to the inner, private sphere? It is as if a conductor were to say that Yo-Yo Ma will be allowed to participate in the orchestra so long as he refrains from playing the cello. One objection might assert that Ma's identity is bound up with being a cellist, so it is not really even Yo-Yo Ma if he is not allowed to play his instrument. But if this characterization seems counterintuitive, the objection might be rephrased: Why admit Yo-Yo Ma to the orchestra and then not allow him to be and do what makes him most distinctively who he is? In a similar way, perhaps we can conceive of belief as a purely inner phenomenon (though I have suggested that this conception does violence to the actual, active nature of belief). But what would be the point of aspiring to create a community of persons and then adopting a political or legal protocol that excludes the most distinctive aspect of personhood or renders it invisible to the community?

In sum, recognition of the centrality of believing to personhood combines with the aspiration to create a community of persons to indicate that such a community must not merely license believing as a private or inward matter; it must welcome and embrace persons *as persons*—which is to say *as believers*. And this conclusion entails respect for belief as embodied in its outward, public manifestations.

Such respect will have its costs, of course, because the manifestations of belief in speech and action can often be contentious and injurious. So the argument hardly issues in any absolutist conclusion that belief-based speech or action must always receive complete legal protection: this is a concern we will return to shortly. For now, the point

214. *See* JAMES, *supra* note 15, at 29 n.1 (asserting that "belief is measured by action"); Clifford, *supra* note 15, at 82 ("Nor is that truly a belief at all which has not some influence upon the actions of him who holds it."); *cf.* CAMUS, *supra* note 158, at 6 (observing that "for a man who does not cheat, what he believes to be true must determine his action").

is merely that appreciation of the centrality of believing to personhood provides a powerful justification for the recognition and acceptance of believing persons, at least in a political community like ours.

4. Revisiting the Standard Justifications

The believing-based rationale can be clarified by a comparison to some of the standard First Amendment justifications and the conceptions of the person implicit in them. The comparison shows how those justifications half-consciously apprehend the central reason for respecting belief and its manifestations, but also how that apprehension becomes dimmed by the adoption of inappropriate conceptions of the person.

a. The "Truth Rationale"

In its modern versions the truth-based justification for free speech (and sometimes for freedom of religion) tends to presuppose an interest-seeking conception of the person and to assert that truth—or knowledge, or information—are especially important "interests." This position conveys an important insight—we do, after all, have an interest in acquiring knowledge and information—but it is vulnerable to the objections discussed in part II.[215] From the standpoint of the believing-based rationale, however, the "truth rationale" half-perceives but also distorts the central justification for freedom of expression and religion.

Believing something means believing it to be true. And it is because believing reflects a human orientation to truth, and especially to "ultimate" truth, that the species possessing this peculiar capacity is thought to be especially valuable, or to have an inherent "dignity." Still, it is not "truth" as an objective and abstract "interest" that is important from this perspective, but rather the phenomenon of believing; and believing is crucially important not because of its instrumental value as a means to what is ostensibly the real good—truth, or knowledge, or information—but rather because believing itself is essential to personhood. The typical truth rationale thus seems short-sighted because it tends to abstract truth from believing and to concentrate only on the objective and impersonal dimension of truth, thereby overlooking precisely that subjective or existential dimension that makes believing so important to human beings.

Once truth has been abstracted from believing, free speech theorists naturally conclude that if freedom of expression is not the system best calculated to maximize the production or acquisition of truth, then the truth rationale is to that extent simply unpersuasive: the freedoms for which the rationale is offered seem unable to "deliver the goods."[216] From the standpoint of the believing-based rationale, the mistake here

215. *See supra* notes 60–101 and accompanying text.
216. *See supra* note 58 and accompanying text.

lies in failing to recognize that it is *believing*, not truth per se, that is the immediate and intrinsic value.[217] Conversely, by emphasizing the importance of believing, the believing-based rationale is not vulnerable to the same criticisms questioning the instrumental efficacy of freedom in producing truth.

On the same assumptions that prompt them to treat truth or knowledge as "interests," modern theorists may interpret Mill's famous claim that even falsehood has value in producing a "livelier impression of [the] truth," and thus in avoiding "dead dogma,"[218] as a claim about the instrumental value of falsehood in generating cognitive understanding of a wider range of true propositions.[219] The interpretation fits awkwardly with Mill's language, but if the interest or good is "truth" then it seems that this must have been—or at least should have been—what he had in mind: how else would the argument even be relevant? Interpreted in this way, unfortunately, Mill's claim seems frail: thus, modern theorists often give it short shrift.[220] By contrast, the believing-based rationale permits a more faithful and charitable interpretation. As its language suggests, Mill's argument on this point is not primarily about how to generate more correct information; it focuses rather on the subjective quality of belief—on its vitality or liveliness—as an aspect of personhood.[221]

Understood in this way, Mill's claim seems both plausible and important. It is a common human experience that encountering other views, even (or perhaps especially) what we regard as erroneous ones, changes and deepens the character of our believing—even if the propositional content of our beliefs remains constant. "I always believed, . . ." we say, "but I never really understood (or, perhaps, never fully appreciated) until . . . ." And we understand that it is in gaining this fuller appreciation—this "livelier perception"—of what we take to be vital truths (as opposed to a mechanical assent to what was, not intrinsically but *to*

217. The problem is not avoided by maintaining, as some theorists do, that the "interest" is not in "truth" but instead in something like "the *pursuit* of truth." If restrictions on expression are calculated to promote the achievement of *truth*, then such restrictions would also seem conducive to the *pursuit* of truth. *See supra* note 60 and accompanying text.

218. MILL, *supra* note 100, at 21, 43.

219. *Cf.* Goldman, *supra* note 144, at 126:

> I suspect that the livelier impression of truth, of which Mill speaks, can be cashed out in terms of a grasp of a larger number of related truths. One learns not simply that answer A1 to question Q is correct, but that certain other answers, A2, A3, etc., have been offered to Q, what the arguments for and against these alternatives are, and why these alternatives are mistaken.

220. *See, e.g.*, SCHAUER, *supra* note 50, at 74–75.

221. *See, e.g.*, MILL, *supra* note 100, at 48 ("Instead of a vivid conception and living belief, there remain only a few phrases retained by rote . . . ."); *id.* at 50 (observing that "doctrines intrinsically fitted to make the deepest impression upon the mind may remain in it as dead beliefs, without being ever realized in the imagination, the feelings, or the understanding"); *cf.* Blasi, *supra* note 26, at 1572 (arguing that "[b]y energizing the experience of belief formation," free exchange can challenge "complacency about one's beliefs and the stasis that complacency engenders").

us, "dead dogma") that we become wiser, more mature, more complete persons.[222]

b. Self-Realization Justifications

Self-realization or self-fulfillment theories typically avoid the mistake of focusing only on the "objective" qualities of belief—but then err in the opposite direction. These theories recognize that it is not "truth" in the abstract that matters but rather, so to speak, truth to us, or *to me*. Often, unfortunately, these theories go on to erase the "truth" component altogether, leaving only the "to me."[223] If the truth rationale goes astray by concentrating exclusively on the objective dimension of our beliefs, self-realization justifications tend to err by fixating on the subjective character of believing at the expense of its objective dimension.

Thus, "self-realization" or "self-fulfillment" theorists typically adopt aggressively subjectivist or relativist stances with respect to the content of belief and expression. C. Edwin Baker insists that "truth" is "not objective," but rather is created or chosen by individuals.[224] Martin Redish is clear that because the purpose of free speech is "self-realization" rather than "truth," this more subjective purpose precludes qualitative or objective discriminations among different expressions: we cannot on subjectivist assumptions assign higher value to "great literature or eloquent political discourse" than to a "stream of obscenities."[225] If our neighbor reports that he finds the "stream of obscenities" more fulfilling or enabling than Plato's *Republic* or the *Federalist Papers,* then there is nothing cogent that we can say to him—nothing pertinent to the First Amendment value of "self-realization," at least—except that "perhaps that particular form of discourse is not our cup of tea."[226] He can respond in the same way, of course, and there is nothing more to be said.

This radically subjectivist stance resonates well with a strong commitment to "autonomy." After all, an objective truth that is true for us whether we like it or not might seem to limit our freedom to make ourselves as we choose.[227] As discussed, however, this stance also makes it

222. In a similar vein, Newman distinguished between "real" and merely "notional" assent: the former, earned through experience and actual reflection, is "stronger," "more vivid and forcible." NEWMAN, *supra* note 134, at 29–31.

223. *See, e.g.*, BAKER, *supra* note 58, at 12–13.

224. *Id.*

225. REDISH, *supra* note 65, at 55–60.

226. *Id*. at 58. Stephen Carter makes the same point, though in a caustic tone: "When the heavy metal group Cannibal Corpse sings about masturbating with the severed head of a murdered child, liberal theory possesses no tools with which to explain why such music is bad and is unable to accept the notion that people who derive utility from listening to such music should be discouraged from doing so." Carter, *supra* note 40, at 48.

227. *Cf.* Marshall, *supra* note 12, at 22 ("Arguably, humanity is free precisely because truth is not known. It is only because of the absence of discernible divine or natural law that humanity is free to create its own rules of conduct. Truth, on the other hand, presumably binds humanity to its precepts." (footnotes omitted)).

difficult to explain why those human activities most directly related to belief—expression, religious exercise—are intrinsically any more vital to autonomy than the whole range of other activities that humans choose to engage in.

In addition, we can now see that the aggressive subjectivism so often associated with self-determination approaches distorts the very nature of believing—and hence of much expression. In reality, the person who asserts with conviction "I believe that the 'Big Bang' theory is correct, . . . or that George W. Bush got more votes in Florida than Al Gore, . . . or that God exists" is not simply engaged in self-fulfillment or self-disclosure (though she may be doing that too); she intends to tell us something about what really happened, or about how the world really is (even for those who do not recognize this truth). Although "modern theorists try in every way possible to avoid" the point, Fish observes, the fact is that "[i]f you believe something you believe it to be true"[228]: that is *what it means* to "believe." If there is no "objective truth," consequently, then speakers and religionists animated by a (delusional) commitment to such (nonexistent) truth would seem to deserve special pity, perhaps contempt, but not special respect. Conversely, if the distinctive quality of human persons lies in their orientation toward truth as manifest in the phenomenon of believing, then it is plausible to suppose that this essential capacity might be the source of a distinctly human dignity.

c. The Democracy Rationale

As discussed earlier, the democracy rationale for freedom of expression, though pervasive in First Amendment discourse, also risks becoming circular, or even tautological.[229] Free speech is valuable because it is necessary to (or even constitutive of) democracy, we say; and democracy is a desirable form of government because it protects liberties such as the freedom of speech. In addition, democracy rationales fail to justify the common view that freedom of speech and religion are basic human rights, or are entailed by something like human dignity, rather than being merely incidents of one particular form of government. What is needed, it seems, is some deeper premise or value anchoring the commitment to democracy. That deeper value might then provide a criterion for assessing different forms of democracy—and also for justifying (whether directly or via a "democracy" rationale) respect for expression and religion.[230]

The conception of the person as believer helps to supply that deeper value. The ideal of democracy—of government "of the people, by the

228. Stanley Fish, *Mission Impossible: Setting the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2256 (1997).

229. *See supra* note 80 and accompanying text.

230. *See supra* notes 81–83 and accompanying text.

people, and for the people"—is one in which citizens are regarded as persons, not merely as subjects. And the conception of the person as believer offers a view of what it is that makes us, distinctively, persons.

Hence, the conception of the believing person and the ideal of democracy are mutually supporting. It is not just that communication of information is a precondition of effective voting, as free speech theorists have often (and correctly) observed.[231] Rather, respect for the capacity to believe and for the manifestation of belief in expression derives from the same source as the respect for the right to vote and to participate in governance. Both kinds of respect reflect dimensions of the aspiration to establish a "republic of *persons*."

d. Contractarian Justifications

"Social contract" justifications reflect the popular idea, most famously expressed in the Declaration of Independence, that the legitimate powers of government must be based on "consent." As noted, unfortunately, there is no actual social contract to do the work demanded by the argument, and formulations in terms of what hypothetical "reasonable persons" would consent to seem open-ended and question-begging. If you and I disagree about which interests we would in fact trade off in exchange for public protection of other interests, then our disagreement will simply replicate itself if we instead ask what "reasonable persons" would agree to exchange. A different outcome would emerge only if one of us were willing to admit that we are not in fact being "reasonable"; but if we were willing to admit this, the resort to a hypothetical contract would not be necessary. Likewise, if we differ over what government should in fact do (or be prohibited from doing), then the same difference will reappear if we ask what hypothetical persons "reasonably" would agree to allow government to do (or to prohibit it from doing).

This objection to the "social contract" approach seems cogent if persons are conceived of as interest-seekers who form a government to protect or promote their interests. Interests or preferences obviously differ from person to person, and people will naturally disagree about what interests a "reasonable person" would retain or, conversely, would cede over to collective regulation. There seems to be no impartial way to resolve such disagreements.[232]

The situation does not improve, but rather becomes even more intractable, if we think of persons as "autonomous," or as mere "choosers." The social contract is by hypothesis designed to exchange some features of unconstrained autonomy—the kind of autonomy associated with a hypothetical "state of nature"—for greater protection of autonomy in other respects. But if we know only that the contracting parties are autono-

231. *See, e.g.*, REDISH, *supra* note 65, at 25.

232. *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT 149–63 (1999).

mous, then we have no substantive criteria to guide us in considering how they would make such trade-offs. And, once again, importing such criteria under the "reasonableness" term of the "reasonable person" construct seems inconsistent with the ostensible commitment to "autonomy"; it is reminiscent of the parent who tells a daughter that the choice of a prom dress is her decision to make—so long, of course, as she chooses sensibly, . . . which is to say so long as she chooses the right one. "Autonomy," mediated by "reasonableness," becomes simply a cover for the imposition of the theorist's own preferred criteria on the pretext that everyone has somehow "consented" to them (even if only constructively or ascriptively).[233]

The conception of the believing person offers greater guidance. The capacity to believe, in this view, is not merely an "interest" that people have, and that they might choose either to retain or to trade off in exchange for other gains: on the contrary, that capacity is essential to personhood itself. So the capacity of believing might be placed in the category of the "unalienable," as the Declaration of Independence says,[234] since relinquishing it would amount to a sort of personal self-negation. Though we may not know which interests "reasonable persons" would relinquish in a social contract, we can be confident that they would not enter into a suicide pact—or into an arrangement that, while leaving them physically intact, negates *their very character as persons*. Similarly, we might plausibly surmise that persons would not charter an association possessing peremptory coercive force and aspiring to be a community of persons, while at the same time conferring on that association the power to eliminate or marginalize the very quality that makes the chartering parties "persons" in the first place.

In short, the conception of the believing person offers the prospect of rehabilitating contractarian justifications for a "right to believe" along with its corollaries regarding the manifestations of belief in expression and action. To be sure, a full account would require considerable elaboration and qualification. As noted, believing and its manifestations impose costs and constraints on others; so it is conceivable that reasonable contracting parties might enter into an agreement allowing for significant restrictions on the expression of belief. Indeed, it is imaginable that contracting parties, who are by hypothesis uncertain about how history and politics will unfold, might even grant the government power to extinguish some dangerous or destructive beliefs altogether—and thus, in a sense, some believers—for the benefit of others, just as they might allow government to impose capital punishment on some people if this were thought necessary to protect the lives of others.

What those parties could *not* reasonably agree to, it seems, is a government whose purpose is to support and administer a community of

233. *See supra* note 90 and accompanying text.

234. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

persons but which does not, at least as a general matter, regard belief and its manifestations as presumptively worthy of respect. Reasonable persons could not reasonably agree to establish a community of persons while creating a government that does not respect us *as persons*, or that does not respect that in us which *distinctively and essentially makes us persons*. This conclusion does not rest on speculative or tendentious characterizations of the "interests" that reasonable persons would or would not value; it merely asserts that reasonable persons would not enter into an agreement on terms that would frustrate the central objective of the agreement.

In sum, each of the standard justifications for freedom of expression and religion dimly reflects the central, believing-based rationale; but by overlooking the conception of the person as believer in favor of other, less auspicious conceptions, each of those justifications allows the central point to slip away. By restoring the believing person to her leading role, we can better appreciate the reasons why belief and its manifestations have been thought to deserve special respect, or to deserve the status of "human rights."

B. The Believing Person as a Subject of Legal Doctrine: Free Speech and Free Exercise

The preceding discussion has attempted to show how recognition of the centrality of believing to personhood can justify special respect for belief and its manifestations in the political community. But how should that respect be translated into legal doctrine?

The question is difficult in part because one person's expressive or religious manifestations of belief can conflict not only with the "interests" of others but also with their own ability to manifest belief, and indeed even with their very ability to believe.[235] The possibility of a religiously imposed duty involving human sacrifice provides a familiar if extreme example for making the point.[236] In addition, and as discussed in the Introduction, it is naïve to suppose that specific decisions or even specific doctrines can be deduced from any single theoretical rationale. In reality, doctrines and decisions will reflect convergences and conflicts among a variety of rationales and, at least as importantly, of pragmatic interests and concerns;[237] and all of these influences will be shaped by and filtered through longstanding legal and political traditions not readily re-

235. For a more extended discussion of this conflict, see SMITH, GETTING OVER EQUALITY, *supra* note 23, at 144–62.

236. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878).

237. *See supra* notes 25–45 and accompanying text; *cf.* WEINSTEIN, *supra* note 77, at 167 ("Much more than philosophers and law professors care to admit, legal doctrine is driven primarily by pragmatic judgment, not abstract theory.").

ducible to any clean theoretical articulation.[238] A theory that ignores these complexities and tries to micromanage from on high only loses credibility.

What a theoretical rationale can sensibly try to do is to explain why a particular activity or concern—such as expression or the exercise of religion—is deserving of special respect in the law. In this way, theory may support a sort of informing value to guide the formulation of doctrine.[239]

In this vein, I have already argued that a conception of the person as believer helps to explain why believing and its manifestations in expression and religion deserve special respect. That informing value does not dictate any particular set of constitutional doctrines; these will be and should be the evolving product of the variety of factors just noted. However, the believing-based rationale is not simply mute regarding the shape and content of doctrine; it provides a perspective from which to understand and assess some of the major controversies and developments in First Amendment doctrine. Before presenting that perspective, we need briefly to review those developments.

1. Balancing, Categorical, and Neutrality-Based Approaches

Free speech and free exercise doctrines at the close of the twentieth century reflected an amalgam of the balancing, category, and neutrality approaches advocated by different jurists and theorists. In the area of expression, balancing approaches suggest that legal protection ought to embody a sort of cost-benefit assessment of the value of speech as opposed to the interests that regulations might seek to promote. A leading example of this approach was the test adopted in *Dennis v. United States*, according to which legal protection for speech depends on "'whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[240] Critics of decisions like *Dennis*, worried that balancing was not feasible and that it would offer insufficient protection for expression,[241] have often favored more categorical approaches: in at least some versions "speech" enjoys,

238. For a discussion of the implications of tradition for legal doctrine and decisions implementing the value of "separationism," see Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. (forthcoming).

239. *Cf.* POST, *supra* note 24, at 288 ("We are thus thrown into a world of inconsistency and compromise. . . . Our main hope is to keep clearly in view the values that ought to guide our judgment . . . .").

240. 341 U.S. 494, 510 (1951) (citation omitted).

241. *See, e.g.*, Emerson, *supra* note 93, at 912–14; Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962). After a careful assessment, Frantz concluded that "[n]ot only does a 'balancing' First Amendment fail to protect freedom of speech, but it becomes a mechanism for rationalizing and validating the kinds of governmental action intended to be prohibited." *Id.* at 1449. For a recent and analytically ambitious argument that balancing is impossible in the domain of expression, see Alexander, *supra* note 105.

ostensibly, "absolute" protection.[242] This kind of position depends on drawing a line between "speech" and "conduct," or between "expression" and "action."[243] Moreover, since speech can cause severe harm, the more categorical approach has often tried to avoid unacceptable consequences by resorting to categorical distinctions differentiating the speech that is entitled to legal protection from kinds of speech that are presumptively unprotected, such as obscenity, "fighting words," and incitement.[244]

A similar interplay of balancing and categorical approaches prevailed for most of the latter twentieth century in free exercise jurisprudence.[245] Earlier precedents had drawn a sharp distinction between religious belief and conduct, offering legal protection that was supposedly "absolute" but that extended only to belief.[246] Later decisions began to say that religious conduct was also deserving of legal protection under a balancing test that, though never formulated in any canonical way, was sometimes described as a "compelling interest" test.[247] This approach still called upon courts to draw and apply categorical lines separating what was "religion" from what was not,[248] and distinguishing between government actions that imposed a cognizable burden on religion and those that did not.[249] In addition, the free exercise balancing test appeared to be qualified by categorical exclusions: it did not appear to apply, for example, in the prisons or the military.[250]

In the areas of both speech and free exercise, the lines required to implement a categorical approach proved to be elusive and unstable. It was notoriously difficult to draw and police the lines defining categories such as "fighting words" or obscenity: hence Justice Stewart's celebrated "I can't define it, but I know it when I see it."[251] Some Justices, such as Black and Douglas, purported to avoid this difficulty by giving "absolute" protection to speech while eschewing balancing or recognizing categorical exceptions; in practice, this approach could not provide absolute protection but instead operated to undermine the integrity of the "speech" vs. "conduct" line. Thus, faced with expression threatening in-

242. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 536–37 (1958) (Douglas, J., concurring); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

243. *See* Emerson, *supra* note 93, at 917.

244. The seminal statement was in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

245. I give here what I think is the conventional understanding of developments in free exercise doctrines. My own interpretation is somewhat different, *see* SMITH, GETTING OVER EQUALITY, *supra* note 23, at 91–103 , but for present purposes the differences need not be pressed.

246. *See* Reynolds v. United States, 98 U.S. 145, 162–68 (1878).

247. *See* Wisconsin v. Yoder, 406 U.S. 205, 221–29 (1972); Sherbert v. Verner, 374 U.S. 398, 493 (1963).

248. For perhaps the most determined and thoughtful judicial attempt to draw this line (albeit still a highly contestable one), see *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981).

249. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988) (holding that the Forest Service's building of a road in place that caused destruction of a Native American sacred site did not burden religion in a constitutional sense).

250. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (prison); Goldman v. Weinberger, 475 U.S. 503 (1986) (military).

251. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

ordinate harm, the ostensibly absolutist Justices might explain, for example, that the expression in a given case was not "pure speech" but rather "speech brigaded with action."[252] Theorists, for their part, have often found the speech/conduct distinction hopelessly problematic.[253] All expression involves conduct, after all, if only the moving of lips or of fingers on a keyboard; and conversely, any sort of conduct may be expressive. Catharine MacKinnon states the objection tersely: "Speech acts. . . . Acts speak."[254]

In the area of religion, likewise, neither court nor commentator ever devised any satisfactory definition distinguishing religion from what was not religion.[255] After its halting efforts in the draft exemption cases in the Vietnam War period,[256] the Supreme Court avoided further embarrassment by studiously avoiding the question. Nor was the line defining what counted as a burden on religion ever satisfactorily clarified.[257]

Perhaps reacting to the difficulties with balancing and category approaches, scholars and jurists in the latter part of the century shifted to a different theme: neutrality. In free speech jurisprudence, discussion in recent decades has mainly attempted to defend and implement the idea that government ought to be neutral regarding the content of expression. Hence, "content distinctions" are presumptively dubious, and "viewpoint-based restrictions . . . are almost automatically unconstitutional."[258] Modern free speech doctrine is a messy amalgam of the dominant neutrality approach combined with a residuum of the balancing and categorical approaches, resulting in what Post describes as a "vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections";[259] but much of the debate focuses, not surprisingly, on whether a breach of neutrality has occurred in a particular case.[260]

252. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 109 (1980) (footnotes omitted):

> Justice Douglas would say that was "speech brigaded with action" and therefore not protected, while Justice Black would call it "speech plus" or perhaps simply "not speech" and similarly deny it protection. The justices do themselves no credit here, for "answers" like this are simply not responsible. They refuse to display whatever reasoning in fact underlies the denial of protection, and by their transparent lack of principle substantially attenuate whatever hortatory value there was in the pronouncement that speech is always protected.

253. *See, e.g.*, Frederick Schauer, *On Deriving Is-Not from Ought-Not*, 64 U. COLO. L. REV. 1087, 1092 (1993) (agreeing with Stanley Fish that "there is no coherent distinction between speech and action"); Pierre Schlag, *How to Do Things with the First Amendment*, 64 U. COLO. L. REV. 1095, 1099–1100 (1993).

254. MACKINNON, *supra* note 42, at 30.

255. For an illuminating discussion of the difficulties, see George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983).

256. *See* Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

257. *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

258. SUNSTEIN, *supra* note 26, at 13; *see also* Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 698 (1996).

259. POST, *supra* note 24, at 297–98. Frederick Schauer has commented that as it becomes "increasingly intricate, . . . First Amendment doctrine is beginning to resemble the Internal Revenue

In free exercise doctrine, the shift has been more complete, and the resulting doctrine more orderly (which is not necessarily to say, of course, that it is more satisfactory). In this area, the older balancing-category composite has been repudiated outright in favor of a doctrine that holds that the Free Exercise Clause is not offended so long as government acts through laws that are "neutral" and "generally-applicable."[261] In the areas of both speech and religion, Justice Scalia has been the most determined proponent of the move to make neutrality the central if not exclusive doctrinal motif.[262]

2. The Mirage of Neutrality

Although neutrality doctrines are widely popular with both Justices and scholars, the common justifications for the approach exhibit a conspicuous fantasy-land quality. For example, the government's ostensible obligation to be neutral regarding the content of expression is sometimes linked to a version of the old argument that "truth" is best promoted through a *laissez faire* "marketplace of ideas": discrimination based on content or viewpoint is said to be objectionable because by "taking sides" government will distort or "skew" public debate.[263] Basically the same argument can be advanced under the banner of a "democracy" rationale: by placing its weight behind one view and opposing others, it is said, government distorts the democratic discourse that is supposed to shape public policy.[264] But these arguments promptly encounter a major embarrassment—one that afflicts nearly all contemporary free speech theories. The problem is that the obligation of neutrality is typically understood to apply only to overt governmental restrictions on speech—to government acting as censor, so to speak. But of course government is a massive participant in public discourse in other capacities—as speaker, for example, and as "patron": national, state, and local governments routinely and pervasively set the public school curriculum, or subsidize science and the arts, or issue their own information and judgments on a

Code." Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 309 (1983).

260. *See, e.g.*, Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001).

261. *See* Employment Div. v. Smith, 494 U.S. 872, 879–82 (1990).

262. Scalia authored the majority opinion in *Employment Division v. Smith*. For opinions by Scalia emphasizing "neutrality" in the free speech context, see R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (majority opinion); Barnes v. Glen Theatre Inc., 501 U.S. 560 (1991) (Scalia, J., concurring).

263. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 894–95 (1995) (Souter, J., dissenting); Geoffrey Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55 (1987).

264. *See, e.g.*, FISS, *supra* note 80, at 21; *see also* WEINSTEIN, *supra* note 77, at 155 (arguing that "viewpoint-discriminatory restrictions . . . can violate the basic precepts of democracy by skewing the debate on matters of public concern").

host of issues. And government's vast influence when it operates in these capacities is subject to no neutrality constraint.[265]

Sanford Levinson pointedly captures the unreality of this view:

> This image of the state as . . . benignly neutral . . . is quite naive, not least because it almost wholly fails to pay attention to the fact that the state is often an active participant in the intellectual marketplace. The easiest examples, of course, involve presidents giving major policy addresses or teachers using state-mandated textbooks within the public school system. Both regularly articulate, clothed in the full symbolic and actual authority of the state, highly contestable—and completely unneutral—views on important political and cultural matters. The danger facing those who disagree with the state's views comes, most often, not from any plausible fear of classic censorship—i.e., overt punishment for offering views repugnant to state authorities—but, rather, from being drowned out of the marketplace by the often superior resources of the state.[266]

Exaggerating only slightly, one might say that invalidating the occasional content-based regulation to ensure that government does not "skew public debate" is like forbidding professional wrestlers to frown at their opponents on the ground that civility and decorum should be preserved. Modern First Amendment law, with its professed concern to prevent government from "skewing" or influencing public discourse, seems like the proverbial hypocrite who "strain[s] at a gnat, and swallow[s] a camel."[267]

Theorists working on standard neutrality assumptions seem powerless to explain—or, in many cases, even to grasp—the incongruity. For example, provoked by the efforts of officials such as Senator Helms to limit state funding for the arts, Fiss easily sees the point—for a fleeting moment. "[I]n terms of the First Amendment," Fiss explains, "the public

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265. *See, e.g.*, *Rosenberger*, 515 U.S. at 833 ("When the State is the speaker, it may make content based choices. . . . [W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). Larry Alexander notices the conundrum:

> When government becomes an educator or patron of scholarship, research, and the arts, its tension with the First Amendment's central values is most acute. If the government may not establish an evaluative orthodoxy regarding citizens' exchanges of information, why may it do so when it speaks itself, as it does through public education, the funding of research, scholarship, the arts, public broadcasting, family planning counseling, and myriad other enterprises? . . . Why the government may monetarily subsidize speech that promotes live birth over abortion but may not subsidize labor speech by granting an exemption from a general ban on demonstrations near schools is a theoretical mystery.

Alexander, *supra* note 105.

266. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 79–80 (1998). Levinson further explains:

> The state may benefit from having more economic resources to articulate its position than do its opponents. But one should be aware that not the least valuable of the resources available to the state is its ability to legitimate certain arguments merely by virtue of being the state. From this perspective, the main threat posed by the state is that it will become an overweening tutor of the public, molding a distinct consciousness, and subtly (or not so subtly) delegitimizing others who would wish to play a similar tutelary role.

Id. at 80.

267. *Matthew* 23:24 (King James).

consequences of the regulatory and allocative actions of the state are roughly the same."[268] That is, whether government discourages a particular form or work of art by overtly censoring it or by denying it needed funding is "irrelevant to the constitutional interests protected and promoted by the First Amendment."[269] Fiss laments that the courts have seemed largely oblivious to this logic. Yet Fiss himself seems equally oblivious to the radical implications of the same logic in other crucial areas, such as public education.

In a related vein, Strauss notices that under his autonomy-based theory of free speech, government would in principle violate an individual's right to autonomy not only by censoring or restricting information but also by declining to disclose information or by issuing manipulative information: both sorts of actions interfere with the individual's supposedly sovereign right to form his own opinions free of government influence just as outright censorship does.[270] Yet though the cases support Strauss's insistence on neutrality with respect to governmental restrictions on expression, they are wholly unobliging in requiring neutrality in decisions about whether and how to disclose information within the government's possession: the cases leave the government free to withhold information or to release information selectively in order to influence (or manipulate) opinion. Strauss acknowledges the discrepancy but calmly observes that this "apparent weakness" in his theory "is shared by other justifications of freedom of expression" as well, and he surmises that the incongruity is probably attributable to "some institutional factor."[271] The casualness with which Strauss dismisses what seems a major gap in his position—and, as he correctly points out, in other leading theories—is striking.

A similar problem afflicts arguments for neutrality in the free exercise domain. Thus, Douglas Laycock defends a version of neutrality in the area of religion by invoking the value of religious autonomy: government should act (and constitutional doctrine should be structured) so as to "maximally separate[] government influence from religious choices."[272] Once again, however, this rationale squares badly with the actual role of government. As noted, government, as speaker, educator, and as dispenser of subsidies, gives massive support to some views and positions and not to others; and some of the views and positions supported by government undoubtedly bear on matters of religious belief.

268. FISS, *supra* note 80, at 34.

269. *Id.* at 34–35. Fiss acknowledges a difference on grounds of scarcity—not every would be artist can be subsidized—but nonetheless goes on to conclude that the same basic First Amendment standard should govern the state's "regulatory" and "allocative" actions affecting expression. *Id*. at 45.

270. Strauss, *supra* note 58, at 358–60.

271. *Id*. at 358.

272. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 74 (1997).

For example, if in accordance with Supreme Court decisions the public schools teach Darwinian evolution but not creationism,[273] government is surely throwing its considerable weight behind a position that is compatible with some religious (and secular) positions and incompatible with others; moreover, it is exercising this influence precisely on children usually thought to be especially susceptible to such influence. How can this pervasive governmental role be reconciled with a supposed neutrality constraint asserting that government must scrupulously avoid influencing people in matters of religion?[274]

The problems with neutrality approaches are discernible in a recent essay by Rubenfeld. Consistent with prevailing views opposing "discrimination" based on expressive content or religion, Rubenfeld argues that both free speech and free exercise jurisprudence are unified around a central and "absolute" prohibition: government must not act for the purpose of disfavoring the content of expression.[275] But *why* should government be subject to this limitation? Seemingly cognizant of the objections to neutrality positions, Rubenfeld explicitly declines to offer any fundamental or ambitious theoretical justification for his position.[276] Instead, he primarily relies on two more modest kinds of arguments. A positive argument that runs throughout the essay appears to maintain that a neutrality-oriented and "purposivist" construction of the First Amendment generates good results, or perhaps that it fits our intuitions about how actual or hypothetical cases should be decided. A negative

273. The Court has not said that public schools *must* teach Darwinism, but it has invalidated a state law forbidding the teaching of Darwinism, Epperson v. Arkansas, 393 U.S. 97 (1968), and another state law mandating a "balanced treatment" of evolution and creationism, Edwards v. Aguillard, 482 U.S. 578 (1987).

274. Recognizing that government cannot possibly be generally "neutral" even with respect to religion, theorists may argue that government should be "explicitly" neutral or noncommittal even if it will of necessity "implicitly" favor some religious or secular views over others. *See, e.g.*, GAMWELL, *supra* note 70, at 185–205; *see also* Kent Greenawalt, *Teaching of, and Teaching About Religion*, 18 J.L. & POL. (forthcoming). But the distinction between an "explicit" and an "implicit" message is elusive; moreover, it is hardly clear why an "implicit" teaching is less troublesome than an explicit one. Indeed, an implicit favoritism, by being less detectable in the way of "subliminal" messages, might conceivably be *more* threatening to autonomy. For further discussion, see Steven D. Smith, *Barrette's Big Blunder*, CHI. KENT. L. REV. (forthcoming).

275. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001). Although Rubenfeld claims that this proposal "calls for a reconceptualization of the basic structure of free speech law" and that it supports a "profound rethinking of a number of First Amendment issues," in fact Rubenfeld's position seems very much in line with the "content neutrality" approach that has dominated free speech jurisprudence for the past several decades. *Id.* at 778, 787.

276. As noted, Rubenfeld leads off his first attempt at justification with "[a] warning: The five reasons I am about to give do not purport to answer the 'big why'. . . . They explain why free speech purposivism is preferable to balancing without invoking any grand theory of the First Amendment . . . ." *Id.* at 787. Later, Rubenfeld returns to the question and attempts to justify his position by invoking an "anti-orthodoxy principle." *Id.* at 821. This principle, he acknowledges, comes "[n]ot from moral philosophy. Nor from rumination on the necessary or ideal conditions of democracy." Instead, it "emerges from the First Amendment's paradigm cases." *Id.* While arguing that this method of justification is "deeply engrained" in our constitutional practices, however, Rubenfeld openly concedes that "I will not defend here paradigm-case reasoning as a method of constitutional interpretation." *Id.*

argument, to which Rubenfeld in fact devotes more explicit attention, insists that purposivist neutrality is preferable to the alternative—which is, in his view, balancing.[277] Thus, arguing that "[t]he alternative to purposivism is balancing,"[278] Rubenfeld subjects the balancing approach to heavy criticism.

Both the positive and negative arguments seem frail. The intuitions supporting the positive argument are eminently contestable; indeed, Rubenfeld's apparent confidence that readers will share his intuitions about proper outcomes is hard to fathom.[279] And in any case the essay does not try to explain the basis or the underlying justification for such intuitions. The negative argument is more persuasive in showing that any precise or finely calibrated balancing is impossible, but it does not defeat the possibility (arguably a more necessary and realistic one) of a crude sort of "balancing" that merely amounts to the recognition that in the real world ugly situations may arise—the demagogue addressing a lynch mob is a typical example[280]—in which a "compelling interest" in avoiding an immediate and overwhelming danger posed by speech demands that ordinary protections be suspended. Indeed, despite his energetic defense of an "absolute" principle, Rubenfeld himself seems to recognize that qualifications will be necessary. His effort to explain why, even with ostensibly absolute protection, speech can nonetheless be limited in an "incitement" situation[281] is strikingly reminiscent of Justice Douglas's old "speech brigaded with action" qualification, and is vulnerable to exactly the same criticisms.[282]

Although offered in defense of a version of the dominant neutrality-oriented approach, therefore, in fact Rubenfeld's essay serves—albeit in-

277. *Id*. at 787–93.

278. *Id*. at 832.

279. For example, Rubenfeld works out the results of his position for issues such as begging (constitutionally protected), constitutional protection for campaign financing as articulated in *Buckley v. Valeo,* 424 U.S. 1 (1976) (correct in its basic holdings), *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (upholding freedom of association as against a state antidiscrimination law was clearly wrong), obscenity and pornography (constitutionally protected), and commercial speech (entitled to full, not lesser, protection). *See id.* at 798–817, 823–24, 830. These conclusions are all obviously controversial, thus undermining any suggestion that purposivist neutrality accounts for our intuitions about specific results. More fundamentally, Rubenfeld tries to support his views largely by arguing that they justify "absolute" protection for speech while balancing does not. For example, he observes that the costs of speech "might conceivably be, someday, a *complete breakdown in social order,"* and in this circumstance a balancing approach would justify regulating speech. *Id.* at 793 (emphasis added). Rubenfeld treats it as a virtue of his position that it ostensibly would not permit regulation of speech even to avoid such a "complete breakdown." Surely, though, Rubenfeld's intuitions on this point are idiosyncratic.

280. *See, e.g.*, ELY, *supra* note 252, at 109 (asserting that "one simply cannot be granted a constitutional right to stand on the steps of an inadequately guarded jail and urge a mob to lynch the prisoner within").

281. Rubenfeld argues that even under an ostensibly absolutist construction such speech can be regulated because it is part of an overall unlawful course of conduct: "*words can lose their protection when used to engage in prohibited conduct* (and when the state punishes the person because of what he *did*)." Rubenfeld, *supra* note 275, at 828.

282. *See* ELY, *supra* note 252.

advertently—to exhibit the deficiencies in that approach. Curiously, though, while staking much of his case on the claim that "balancing" is the only alternative to a neutrality-oriented "purposivism," Rubenfeld overlooks what for most of modern First Amendment history was viewed as the leading competitor to balancing—that is, a categorical approach.[283] That approach seems congruent with the believing-based rationale. Indeed, it even receives a backhanded recommendation from an insight that Rubenfeld offers but fails to integrate into his overall position.

3. Reviving the Categorical Approach?

> At one point, Rubenfeld suggests that his view of freedom of speech is intended to honor a simple principle. The principle takes shape from the basic intuition that individuals have the "right to their opinion," that they cannot be punished for having or for expressing a particular opinion, regardless of the topic, regardless of how foolish or trivial their opinion may be, and regardless even of how unpleasant or dangerous state actors might think it. This is the idea, which seems to be part of the bedrock of American free speech law . . . .[284]

This intriguing observation fits awkwardly into the overall scheme of Rubenfeld's essay. Thus, Rubenfeld offers no justification for this "basic intuition," nor does he explain how his position serves to "honor" the "principle" associated with it. In fact, under Rubenfeld's "purposivism," speech that expresses an opinion enjoys no First Amendment protection at all—not even the protection currently available to "low value" speech or to speech affected by "time, place, and manner" regulations—so long as government does not act for the purpose of regulating the content of that speech.[285] Conversely, much of the speech to which Rubenfeld offers "absolute" protection against any sort of content-based regulation—commercially generated pornography, for example, or commercial speech—seems at best distantly related to the "right to have and express an opinion."[286]

283. It is possible that Rubenfeld fails to discuss the categorical approach because he views it as equivalent to the "absolutist" approach that he favors. To be sure, "absolute" and "categorical" are in some contexts treated almost as synonymous terms. For a similar description depicting conventional free jurisprudence as an opposition between "absolutist" and "balancing" approaches, see SUNSTEIN, *supra* note 26, at 5. However, there is a vast difference between Rubenfeld's position, which amounts to a somewhat idiosyncratic version of the dominant modern "content neutrality" approach, and the traditional categorical approach, which operated by drawing lines between "speech" and "conduct" and (perhaps) between protected and unprotected categories of speech. The traditional approach did not focus on either "purpose" or "neutrality," and it could but did not need to hold itself out as "absolutist" (as conventional free speech doctrine reflects). The fact that Justice Black was both the leading proponent on the Court of the categorical approach and also a leading opponent of doctrine focusing on legislative "purpose" highlights the difference between the traditional category approach and Rubenfeld's position.

284. Rubenfeld, *supra* note 275, at 818.

285. *Id.* at 769, 800–01.

286. *Id.* at 823–25.

Nonetheless, Rubenfeld's basic intuition about the right to "an opinion" gestures in the direction of the believing-based rationale developed here, and his observation suggests the value of considering the problem of doctrine from that perspective. How should this "bedrock" idea be implemented in doctrine?

a. The Believing Person and the Categorical Approach

The fundamental claim of the believing-based rationale is that if our political community aspires to be a "republic of *persons*," then it must be open to allowing citizens to participate in the community *as persons*—which is to say *as believers*. We should pause to consider what this claim entails and, as importantly, what it does not entail, concerning legal protection for manifestations of belief.

Expression and religion are valuable, in this view, not for their own sakes and also not as means to some other extrinsic good, such as "truth."[287] They are valuable, rather, because and insofar as they are manifestations of belief (which is an essential component of personhood). Consequently, the believing-base rationale does not imply that everything that might for some purpose be classified as "expression" or "religion" must be legally protected for its own sake. Nor does the claim that government should accept persons as believers, and should allow or encourage them to manifest their beliefs, entail that government has any obligation to maintain a system that enables individuals to manifest their beliefs in any way they choose, or in the way that they predict would be most persuasive (or most shocking, or most likely to gain attention). Finally, the claim that persons should be welcomed in the political community as believers also does not entail that government itself is obligated to be agnostic or "neutral" in matters of belief; in a complicated way it may even imply the opposite.

What the believing-based rationale *does* seem to entail is that individuals should have the opportunity—a generous and sufficient opportunity—to manifest their beliefs, and that their status as citizens should not be jeopardized or downgraded if they accept that opportunity. Borrowing a phrase from current doctrine, we might say that the believing person rationale suggests that citizens must be afforded "ample channels" for the manifestation of belief.[288]

287. The point is not to deny that expression and religion might *also* be valued in these ways—that is, as intrinsic or instrumental goods. But that is not the respect in which they are valued by the believing-based rationale proposed here.

288. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In this respect, the believing-based rationale lends support to George Wright's provocative contention that

> if a regulation does not impair a speaker's ability to pursue his or her own free speech values, because it leaves open some sufficient channel other than the one being regulated, then the speaker cannot cogently claim a violation of free speech rights. This is so even if the government acted with a malicious or repressive intent, failed to substantially further any legitimate state interest, or failed to tailor its regulations so that there would be the least amount of impingement. . . . Simi-

Cautiously applied, the familiar "town meeting" analogy can be suggestive here, though not quite in the way that Meiklejohn intended.[289] Suppose it is understood that at a town meeting all citizens are welcome (and are welcome *as persons*, which is to say *as believing persons*) and hence are entitled to manifest their views. As Meiklejohn cogently explained, it hardly follows that a citizen has a right to speak for as long as he wishes, to interrupt someone else's speech, or to express himself in any manner he might choose.[290] Speaking for its own sake is not sacred or presumptively inviolable; it might be regulated in any number of ways and for any number of reasons. On the other hand, regulations must indeed ensure that everyone actually has an opportunity to express his or her views. Regulations that frustrate this purpose—by silencing particular people, or by limiting some people to a thirty-second "sound bite," or by requiring that people speak quietly or passively and without emotion—would violate the understanding that all citizens are entitled to "have their say." There can be no set formula for determining what regulations would be unduly restrictive; that assessment would have to be made with reference to the context and the overall goal of ensuring that all citizens have an opportunity—not just as a formality but as a reality—to manifest their views.

If the objective of the believing-based rationale is to ensure that everyone shall have "ample channels" for the manifestation of belief, then a categorical approach to the First Amendment seems attractive. By establishing a broad domain in which the manifestation of belief is legally protected, the categorical approach recognizes and respects citizens as believing persons. In addition, this understanding suggests that some of the familiar objections to categorical approaches may be less devastating than they sometimes have seemed.

b. The Speech/Conduct Distinction

As noted, perhaps the major objection to the traditional effort to distinguish between speech and conduct is that the distinction is arbitrary and unworkable: all expression involves conduct, and any kind of conduct may be expressive.[291] From the standpoint of the believing-based

> larly, even if the speaker strongly prefers . . . to use his or her original means of speaking without the government regulation, the presence of a fully adequate alternative channel renders the speaker's free speech claim baseless.

WRIGHT, *supra* note 105, at 220–21. Wright acknowledges that measuring the adequacy of channels of expression may present a difficult challenge, and he helpfully discusses how that question might be addressed. *Id*. at 223–29.

289. My use of the analogy here is not offered in behalf of a "democracy" rationale, nor would it support Meiklejohn's famous assertion that it is important "not that everyone shall speak but that everything worth saying shall be said." MEIKLEJOHN, *supra* note 71, at 26.

290. *Id.* at 25.

291. *See supra* notes 253–54 and accompanying text.

rationale, however, this objection seems to be true—but also largely beside the point.

From this perspective, once again, expression is not the primary value, either for its own sake or as a means to some other extrinsic good such as "truth." The underlying value, rather, is believing, and expression is valued as a manifestation of belief. But although it is important in this view that individuals have ample channels for manifesting their beliefs, it is not essential that every instance or form of manifestation of belief receive special respect and legal protection. The legal category of protected expression ought to be capacious, but there is no reason why it should be exactly coextensive with the set of activities that can be described, for one purpose or another, as expressive. So if the critic objects that "people sometimes express themselves by . . . camping in the town square,[292] or by urinating on City Hall, etc.," the response is "No doubt they do. So what?"

We might compare the problem and response here to that of the "public/private" distinction in constitutional law. The distinction pervades a good deal of constitutional discourse (including First Amendment jurisprudence), and it arguably serves valuable purposes—such as allowing for various forms of discrimination in some spheres (religious discrimination in the choice of a spouse, for example) while forbidding it in other spheres (such as public employment). Post argues that the public/private distinction is crucial to free speech law.[293] A familiar criticism objects, however, that the public/private distinction is to some extent conventional and even arbitrary, not somehow given in nature. The distinction between public and private is not some sort of natural fact, that is, like the difference between iron and copper: there are both public and private aspects to all human affairs.[294]

But if the distinction serves valuable purposes, this criticism is less than devastating. Proponents can readily admit that the legal distinction is in part arbitrary or conventional, that it cannot simply be "read off" of nature, and that it may be drawn differently in different contexts and for different purposes. The distinction is not entirely arbitrary; some human affairs *are* more private than others.[295] But even if it were purely arbi-

292. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

293. POST, *supra* note 24, at 189–90.

294. For a succinct and sympathetic rehearsal of this kind of criticism, see Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). For a satirical response, see David L. Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465 (1984).

295. *Cf.* WRIGHT, *supra* note 105, at 190–92. Wright makes an interesting comparison:

> The distinction, in the abstract, between the public and the private may in fact be prone to unravel. Adjectives are not employed, however, simply in the abstract. The terms public or private, in this sense, have referents. There is no inherent dynamic of staged decline in the concept of, for example, a public telephone. An individual can walk into a drugstore today, inquire after a public phone, and provoke no greater demand for clarification today, or tomorrow, than fifty years ago. If the concept of public telephone is not pellucid and sharp-edged, it is a least serviceable and can be widely employed in consistent fashion.

Id. at 191.

trary (as the particular sounds used in a given language to convey particular meanings are arguably arbitrary), the crucial point is that, artificial or not, the distinction may serve a valuable purpose.[296]

In the same way, the speech/conduct distinction is not given in nature: it does not report a natural fact. The distinction is in part a legal construction, albeit one that roughly tracks ordinary usage and commonsense understandings. Typically, the category of "expression" has been understood to encompass at least conventional speaking, writing, and publishing—activities that can easily be extended to modern technologies such as the Internet—and also certain less conventional forms of "symbolic" communications when these would be commonly understood to be expressive in character and purpose.[297] Thus understood, "speech" covers a vast domain of human activity, giving individuals a multitude of ways to manifest their beliefs. The fact that the category is in part conventional or artificial is hardly damning. Nor should the fact that the category does not include everything that might be done with expressive intent or effect be paralyzing: once again, protecting everything that might be classified as expression is not the point.

c. Categories of Unprotected Speech?

Proponents of a categorical approach to speech have typically parted ways over the question whether particular categories of speech should be deemed outside the scope of the First Amendment. Should everything that is classified as "speech" or "expression" receive the same level of legal protection, or should particular subcategories—such as obscenity or commercial advertising—be excluded?

Recognizing that "expression" is in significant part a conventional or artificial category in any event, not a sort of natural fact, has implications for this debate; the recognition underscores that what is at stake is not so much an unscrupulous departure from what the Constitution commands—the "speech is speech" and "no law means no law" position[298]—as the construction of a serviceable and sensible legal category.

296. POST, *supra* note 24, at 280–82. In a similar vein, Ruth Gavison acknowledges that "the public/private distinction can be invoked in many contexts, for many purposes, and in many different senses." Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 5 (1992). After carefully exploring various uses and objections, she concludes that "the all-out fight against the vocabulary of public and private is unjustified, because the terminology is uniquely suited, precisely because of its richness and ambiguities, to make and clarify many of feminism's most fundamental claims." *Id*. at 44; *see also* Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1080–82 (2000) (making a similar point).

297. *See* Texas v. Johnson, 491 U.S. 397 (1989). For a description of the law and issues on this point, see ERIC BARENDT, FREEDOM OF SPEECH 37–48 (1985).

298. This stance is typically associated with Justice Black. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 144 (2000). Harry Kalven summarized Black's position: "Freedom of speech is indivisible. . . . The choice for freedom of speech is a choice made once and for

Still, it is debatable whether First Amendment objectives are better served by treating some activities that would conventionally and for many purposes be considered speech as outside the scope of legal protection, or instead by presumptively including everything that is conventionally considered speech within the zone of protection subject to the pressures that will inevitably arise as some expression is seen as pernicious or unworthy of protection.[299] The believing-based rationale prescribes no definite answer to that question: the conclusion surely turns on considerations such as process and slippery slope concerns that go beyond what a theoretical rationale for respecting expression can sensibly address.

However, the rationale does suggest an explanation, and perhaps a sort of prima facie validation, for the judgments that underlie the traditional view that different categories of speech are differently situated relative to central First Amendment concerns. From this perspective, once again, the central objective is to respect the ability of persons to manifest the believing that is essential to their personhood. But as noted in the previous part, not everything that might be classified as "belief" is equally essential to personhood. Some beliefs are peripheral or incidental—they "mean nothing to us," we might say—while other, more ultimate beliefs command our attachment or devotion, and may even come to be constitutive of who we are. The belief-respecting purpose of the jurisprudences we associate with the First Amendment is most obviously and powerfully implicated by these deeper or more central beliefs. Consequently, insofar as it seems plausible to view certain categories of expression as typical avenues for the manifestation of this kind of belief, these kinds of speech are plausibly placed at the core of the First Amendment. Conversely, if other categories of expression typically are not involved in the manifestation of such beliefs, their claim to First Amendment solicitude is more attenuated.

This observation helps explain why commercial advertising was for years regarded as alien to free speech concerns, and why it continues to receive a lesser level of legal protection than some other kinds of speech.[300] To be sure, commercial advertising implicates an array of "interests" of various sorts (just as a variety of "nonspeech" activities do). But commercial advertising typically is not a vehicle for the manifestation of the kinds of beliefs that are central to personhood. Once again, whether other rationales or practical concerns—such as the difficulty of

all by the Founding Fathers and is not subject to reassessment . . . ." Harry Kalven Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967).

299. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 476–79 (1985).

300. Cass Sunstein observes that "for most of the nation's history, no serious person thought that commercial speech deserved constitutional protection." SUNSTEIN, *supra* note 26, at 3. For a discussion of the history by which commercial speech came to receive constitutional protection—albeit lesser protection than is afforded to, for example, political speech—see FARBER, *supra* note 20, at 149–65.

distinguishing between commercial and other kinds of speech[301]—warrant legal protection even for this category of expression is a question that the believing-based rationale cannot answer. But the rationale does support the judgment that, in principle, commercial advertising is distinguishable from many other kinds of expression.

Similarly, the believing-based rationale may provide support for the familiar view that a category of expression labeled "obscenity" (or "pornography"[302]) should be viewed as foreign to central First Amendment concerns. This view will seem more or less plausible depending on the image one holds regarding production of obscenity. One image might feature an avant garde novelist or photographer who manifests his beliefs and attitudes about sex, women, society, or the cosmos by producing erotic materials: this image suggests that obscenity is, presumptively at least, within the scope of the First Amendment. A different image, however, depicts obscenity or pornography as primarily a large-scale, profit-making business or industry[303]—one that, like any business, caters to a particular demand. By this view, the fact that obscenity or pornography can be classified as a form of expression raises no special problem. It is believing that the First Amendment protects, not expression for its own sake, and the "industry" characterization of obscenity or pornography suggests that this sort of expression is not typically a means of manifesting central beliefs.

Notice that the argument for excepting the category of obscenity or pornography from First Amendment protection does not turn on the familiar claim that this expression is not a "rational" form of discourse.[304] A version of the "truth" rationale coupled with a "rationalist" epistemology may suggest that, at least in principle, only "rational" communication is worthy of protection.[305] By contrast, the believing-based ration-

301. For a discussion of the problem, see Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1228–32 (1984).

302. Though "obscenity" and "pornography" are often distinguished, *see, e.g.*, Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985), for the limited purposes of present discussion they can be treated together.

303. *See, e.g.*, COLLINS & SKOVER, *supra* note 107, at 151, 159–60. Collins and Skover conclude that "[p]ornography is but another commodity in a capitalist culture that exploits sexual fantasies to feed consumerist desires." *Id*. at 182. Chief Justice Warren adopted a similar characterization in the seminal case of *Roth v. United States*, 354 U.S. 476, 495–96 (1957) (Warren, C.J., concurring), in explaining why restrictions on the sale of obscene materials did not violate the First Amendment.

304. *See, e.g.*, John Finnis, *"Reason" and "Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967). For a criticism of this position, see Stephen G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988).

305. For example, David Strauss construes the Free Speech Clause to give strong protection to "persuasion," but he explains that not all speech qualifies under "the persuasion principle." "'Persuasion' denotes a process of appealing, in some sense, to *reason*. Speech persuades when it induces action through a process that *a rational person would value*." Strauss, *supra* note 58, at 335 (emphasis added); *cf.* David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 LEGAL THEORY 119 (2001) (arguing that "deliberation" is the central First Amendment value and that speech that does not promote deliberation—i.e., "hate speech"—may not deserve legal protection).

ale emphasizes *believing*—not truth, much less rationality—as a central First Amendment value. As discussed, moreover, believing has a subjective, affective dimension; it is hardly limited to cognitive or "rational" assent to dry, propositional claims. Hence, the fact that a form of expression might not satisfy some standard of rational discourse furnishes no reason at all to exclude it from the zone of constitutional protection. Conversely, insofar as expression (rational or not) is distant from the core concern with manifested belief, that expression's claim to protection will be diluted.

This observation also provides an explanation for why another category of expression—that is, "art" or "art speech"—has a strong claim to First Amendment protection. Theorists sometimes ponder the justification for including, say, paintings or music within the scope of protection.[306] After all, these forms of expression are not in ordinary usage "speech," and they depart from a model of "rational" discourse in a "marketplace of ideas." Even literature—poems, novels, plays—may seem mildly problematic: once again, literature arguably departs from the unadorned rationality of, say, science or philosophy. And from the standpoint of a "democracy" rationale, most literature is somewhat removed from core "political speech."[307] Thus, Marci Hamilton remarks that "neither the Court nor legal scholars have felt compelled to provide a particularly well-suited theoretical justification for art's first amendment treatment."[308]

Nonetheless, theorists usually are convinced that art should be protected. The believing-based rationale explains why. Whether or not it is rational or explicitly political, music, painting, and poetry is typically as self-consciously a manifestation of central beliefs and attitudes (in all of their subjective richness) as almost any kind of expression can be. Indeed, from this perspective, art would seem to be even more central to the First Amendment's purpose than political speech. As Cass Sunstein observes, "art, literature, and science—even music and dance—are central to what is most important to human lives, sometimes far more central than politics."[309]

What about expression involving religion? Scholars and jurists have sometimes suggested that religious speech—or at least some kinds of religious speech, such as proselytizing or worship—should be regarded as outside the scope of free speech jurisprudence, at least for some pur-

306. *See, e.g.*, Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 76 (1996).

307. *See supra* note 77 and accompanying text.

308. Hamilton, *supra* note 306, at 76. Hamilton's own justification reflects a version of the "democracy" or "checking function" rationale: art, she argues, helps people experience alternative or alien world views, and in this way serves to subvert status quo tyranny.

309. SUNSTEIN, *supra* note 26, at 149. Risking excessive repetition, I should add that nothing in my argument implies that the believing-based rationale must be *exclusive*. Despite their difficulties, democracy-based justifications surely have some force—perhaps considerable force—and from that standpoint political expression *is* central.

poses.[310] However, it is difficult to imagine a form of expression that is more closely related not only to belief, but to ultimate or constitutive belief.[311] Indeed, by one influential view, manifestation of a person's "ultimate concern" is the very essence and definition of religion.[312] So if religious expression is distinguishable from other expression, that is because religious expression is bound up with the First Amendment's central purpose in a distinctively vital way—one that might explain why a distinctive jurisprudence has developed around religion.

d. The Exercise of Religion

The point warrants elaboration. Earlier I said that the believing-based rationale argues for protection for the manifestation of belief, but not for whatever form of manifestation a believer might prefer or might view as most effective.[313] The observation implies that beliefs can usually be manifested in more than one way, even though one form of expression may be more persuasive or efficacious than others. Different words can convey essentially the same message, which often can also be expressed in more "symbolic" media as well.

This point holds for a good deal of religious expression: indeed, the history of religion might well be viewed as one in which a few central ideas or beliefs are manifested in imagery, in song, in worship, in creeds, in narratives or myths or parables, and in libraries of learned theological discourse. However, religion differs from most other forms of belief in that, typically, some of its specific manifestations are rigorously prescribed by the believer's creed itself, so that believing becomes practically inseparable from these specific manifestations. Thus, religious belief may be bound up in a specific form of worship, performed according to a preordained schedule and with a set pattern of prayers, chants, recitations, songs, or other rituals. Similarly, beyond general ethical admonitions ("Honor your parents," "Love your neighbor") that may be carried out in a whole variety of ways, religions often generate specific religious duties (pilgrimages, almsgiving or tithing, fasts, the wearing of particular clothing) and specific prohibitions (regarding, for instance, forbidden foods). In its worship patterns and its specific duties and prohibitions, a religion's beliefs are inextricably mingled with particular manifestations of the belief: an ostensible follower who mouths the creed but declines

310. *See, e.g.*, Good News Club v. Milford Cent. School, 533 U.S. 98, 103 (2001) (Stevens, J., dissenting) (arguing for less protective standard for "religious speech that amounts to worship, or its equivalent"); *cf.* Widmar v. Vincent, 454 U.S. 263, 286 (1981) (White, J., dissenting) ("This case involves religious worship only; the fact that that worship is accomplished through speech does not add anything . . . .").

311. *Cf.* Rubenfeld, *supra* note 275, at 810 n.96 ("Religious activity is clearly expressive activity, and religious groups are expressive associations par excellence.").

312. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 176 (1965); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1065 (1978).

313. *See supra* notes 287–312 and accompanying text.

to participate in worship or comply with the specific duties and prohibitions will hardly be said to be a "believer" in the most meaningful sense.

Consequently, genuine respect for this sort of believing entails respect for—and perhaps, presumptively, legal protection for—the prescribed manifestations of belief. This conclusion suggests the appropriateness of a special jurisprudence for religious exercise, not because religion is alien to the concerns addressed by "freedom of expression," but because religion implicates those concerns in a distinctively powerful way. Thus, the believing-based rationale suggests that recent Supreme Court decisions are correct insofar as they treat religious expression as deserving of full free speech protection.[314]

Once again, however, the believing-based rationale does not by itself prescribe any definite answer to the vexed question of constitutionally mandatory "free exercise exemptions." Modern jurists and scholars have debated that issue on a variety of levels—textual, historical, and theoretical—but in judicial practice the important division grows less out of substantive theoretical differences than out of differences regarding institutional and "process" concerns. Current doctrine, expressed in Justice Scalia's majority opinion in *Employment Division v. Smith*, rejects the idea of judicially mandated free exercise exemptions primarily on the grounds that the creation and administration of such exemptions, which almost inevitably involves courts in assessing the value of particular religious practices and then "balancing" this value against secular interests, exceeds the authority and competence of courts.[315] However, the *Smith* doctrine explicitly recognizes the appropriateness of such exemptions when adopted by other, authorized branches of government.[316] To be sure, scholars (and Justice Stevens) sometimes make the stronger argument that free exercise exemptions are wrong in principle because they violate "neutrality" or "equality."[317] But the Court in *Smith* rejected that position by expressly inviting legislatures to create free exercise exemptions.[318]

Of course, critics disagree, sometimes caustically, with *Smith*'s understanding of the judicial role.[319] For present purposes, the important point is that the believing-based rationale, while it supports respect for the manifestation of religious belief, prescribes no definite answer to this more institutional question.

314. *Good News Club*, 533 U.S. at 103; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

315. Employment Div. v. Smith, 494 U.S. 872, 886–89 (1990).

316. *Id*. at 890.

317. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring).

318. *Smith*, 494 U.S. at 890.

319. Responding to the *Smith* Court's statement that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice," 494 U.S. at 889 n.5, James Gordon comments sarcastically, "Well, it does sound like pretty grim work, compared to, for example, working in a coal mine," and he adds that "the essence of judging is having to judge, and courts have done it in this area for years." Gordon, *supra* note 212, at 103 & n.94.

C. Nonestablishment: The Republic of Persons and the Public Engagement of Belief

The discussion thus far has addressed what we know as free speech and free exercise jurisprudence, but it has said nothing directly about that body of law associated with the Establishment Clause. Unlike free speech and free exercise jurisprudence, establishment jurisprudence is not easily conceived in terms of the protection of an individual or human right; it seems to be a general structural constraint on government more akin to federalism.[320] Though such limitations may serve to protect rights,[321] they do so in more indirect fashion.

However, establishment jurisprudence is tied in a vital, if complicated, way to the constitutional aspiration to create and maintain a republic of believing persons. If believing is essential to personhood, as I have argued, and if the political community established by "We the People" is to be a community of persons, then that community must solicit the allegiance of citizens by appealing not just to their material interests but also to their beliefs. Indeed, if it is to be a community of persons in a strong sense—a "more perfect union"—then it must in some way engage their central beliefs.

And in fact the American political community has long undertaken to speak to the deepest beliefs of its citizens. The effort to appeal to belief is reflected in a vast array of symbols (such as flags and monuments),[322] songs, ceremonies, and declarations (such as the national motto and the Pledge of Allegiance). Consider the various expressions and practices associated with so-called civil religion, many of which go back to the founding period but have become a conspicuous embarrassment under modern First Amendment jurisprudence: overtly religious Thanksgiving proclamations, a whole variety of religious incidents or allusions reflected in official ceremonies ("God save the United States and this Honorable Court!," " . . . so help me God") and on the national currency ("In God We Trust"), the appointment of legislative chaplains and the practice of legislative prayer.[323] Such expressions and practices plainly reflect that the political community is a community of believing

320. For an extended argument to this effect, see Carl Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Implications*, 18 J.L. & POL. (forthcoming).

321. The Court has argued that structural provisions such as federalism are ultimately calculated to protect the rights and interests of individuals. *See, e.g.*, New York v. United States, 505 U.S. 144, 181 (1992).

322. Sanford Levinson points out that "public art," including flags and monuments, is "chosen self-consciously by public institutions to symbolize the public order and to inculcate in its viewers appropriate attitudes toward that order." LEVINSON, *supra* note 266, at 38.

323. The pervasiveness of this practice, from the origins of the Constitution through the present, is described in *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983).

persons—a "nation with the soul of a church," as Chesterton famously put it.[324]

However, the challenge of enlisting loyalty by appealing to beliefs has been especially daunting in this country because of the fact of pluralism. Historically, political regimes had addressed the challenge by creating or associating themselves with a particular religion that was shared by (or imposed upon) most of the citizens. But among other obstacles, a luxurious pluralism has made that course impossible here. Governmental affiliation with any particular religious sect might generate support from some citizens—but at the cost of alienating many more citizens: the nonestablishment commitment reflects this difficulty. So a different, more complicated strategy has been required.

1. The "Anti-Orthodoxy Principle"

One recently popular strategy, sometimes described in terms of an "anti-orthodoxy principle" and closely linked to the "neutrality" approach discussed above, tries to ensure that government will maintain an agnostic or noncommital stance in matters in which a citizen's deep or central beliefs are likely to be implicated. William Marshall points out that according to familiar First Amendment jurisprudence, "[t]he state . . . must be agnostic with respect to transcendent truth claims. It is disempowered from declaring or identifying its own concept of truth."[325] Many scholars today appear to regard this proposition as something approaching a self-evident truth.[326]

Current establishment doctrine tries to employ something like this strategy in the area of religion: government is forbidden to say or do anything that would "send a message" either endorsing or disapproving of religion.[327] In this vein, Andrew Koppleman argues that in the midst of raging controversies about the meaning of religious freedom, it is nonetheless "axiomatic" that the "Establishment Clause forbids the state from declaring religious truth."[328] Realizing that "religion" is too narrow a category for this purpose, liberal theorists like Rawls and Macedo ex-

324. G. K. CHESTERTON, *What I Saw in America*, *in* 21 G. K. CHESTERTON, COLLECTED WORKS 35, 45 (1990) (1922).

325. Marshall, *supra* note 12, at 7 (footnotes omitted). *But cf.* JOHN COURTNEY MURRAY, S. J., WE HOLD THESE TRUTHS, at IX (1960) ("But the American Proposition rests on the . . . conviction that there are truths; that they can be known; that they must be held; for, if they are not held, assented to, consented to, worked into the texture of institutions, there can be no hope of founding a true City, in which men may dwell in dignity, peace, unity, justice, well-being, freedom.").

326. *See, e.g.*, Alexander, *supra* note 105, at 71; FISS, *supra* note 80, at 37; Marshall, *supra* note 12, at 19–20; Rubenfeld, *supra* note 275, at 818–22. The classic, oft-quoted statement is Justice Jackson's: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). For my own criticism of *Barnette*'s dictum, see Smith, *supra* note 274.

327. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

328. Koppleman, *supra* note 181, at 34.

tend the policy of governmental agnosticism (subject, of necessity, to significant qualifications and "provisos") to *all* comprehensive doctrines or views.[329]

But however appealing, and however broad its base of support, this "anti-orthodoxy" strategy is in fact as removed from political reality as is the similarly fashionable neutrality position in the free speech and free exercise domains. As noted earlier, government in fact is not—and could not be—neutral toward religious or other belief systems.[330] But even if a position of governmental neutrality were possible, the anti-orthodoxy strategy remains subject to both a logical and a practical difficulty. The logical difficulty is that once it is adopted as the constitutional position, "anti-orthodoxy" itself becomes a kind of orthodoxy—and, indeed, a judicially enforced orthodoxy which many citizens find alienating, just as they would find a more conventional orthodoxy alienating. The practical difficulty is that even if a position of governmental agnosticism in matters of strong belief could avoid alienating citizens, it also contains nothing to engage the allegiance of believing citizens. Believers do not develop attachments to a creedal vacuum.[331]

Consequently, the anti-orthodoxy strategy may seek to maintain citizens' allegiance on grounds unrelated to belief—by appealing, perhaps, to their economic interests. Thus, instead of a nation with "the soul of a church," we might advertise ourselves as the quintessential "commercial republic." In this vein, defending the Supreme Court's rejection of free exercise exemptions in *Smith*, George Will argued that the Framers "wished to tame and domesticate religious passions of the sort that convulsed Europe. They aimed to do so . . . by establishing a commercial republic—capitalism. They aimed to submerge people's turbulent energies in self-interested pursuit of material comforts."[332] Or we might conceive of our community as one that protects "freedoms" based on a policy of value agnosticism, and hence without commitments or assumptions about what values freedom should serve.

These visions raise complicated questions that theorists have discussed at length,[333] but for present purposes the important point is that, viable or not, a republic so conceived would not appeal in a meaningful

329. For a lucid discussion, see Stephen Macedo, *In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, *in* NATURAL LAW AND PUBLIC REASON 11, 18–24 (Robert P. George & Christopher Wolfe eds., 2000). The practical issue of the discussion is that as fair-minded citizens "we should avoid the appeal to special *metaphysical*, *philosophical*, or *religious* doctrines." *Id.* at 22 (emphasis added).

330. *See* SMITH, FOREORDAINED FAILURE, *supra* note 4, at 63–97.

331. These difficulties are elaborated at greater length in Smith, *supra* note 274.

332. George F. Will, *Conduct, Coercion, Belief*, WASH. POST, Apr. 22, 1980, at B7, *quoted in* Stanley Hauerwas & Michael Baxter, C.S.C., *The Kingship of Christ: Why Freedom of "Belief" Is Not Enough*, 42 DEPAUL L. REV. 107, 108 (1992).

333. For example, John Garvey's book *What Are Freedoms For?* is an extended critique of the latter aspiration. *See* GARVEY, *supra* note 54; *see also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

sense to citizens as believing persons. In that respect, though these constitutional visions may seek to *make space* for persons, they relinquish the aspiration to establish a republic *of* persons in the fullest sense.

So it is not surprising that scholars or Justices are able to maintain a commitment to the anti-orthodoxy strategy (even in the area of religion) only by shutting their eyes to the reality of American life and history. This practice of rampant denial is perhaps most conspicuous with respect to the recent constitutional development which holds that the First Amendment forbids government to do or say anything that sends a message either endorsing or disapproving of religion.[334] Implemented in a consistent and nonhypocritical way (as in fact the doctrine has not been—and could not be), the no-endorsement doctrine would in fact wipe out cherished landmarks of our constitutional heritage, including Jefferson's Virginia Bill for Religious Freedom ("Almighty God hath created the mind free . . . ."), the Declaration of Independence ("Nature and Nature's God"), Lincoln's Second Inaugural Address, the national motto ("In God We Trust"), and the Pledge of Allegiance ("one nation under God").[335]

2. The Constitution's Convoluted Strategy

So is there any alternative to the "anti-orthodoxy" strategy in a pluralistic nation? Reflection on our history suggests that in fact we have dealt with the challenges of community and pluralism in a much more complicated and sophisticated (or, a critic might say, less coherent) way. Instead of adopting a professed public agnosticism, the American constitutional experience has negotiated the messy problems of pluralism through a strategy composed of three principal tactics. The first two are commonly noted, while the third is less often observed.

One tactic, famously suggested by Madison in Federalist 10, can be described under the heading of "federalism." By dividing government—not just into two levels (national, state), but into a variety of levels and forms including cities, counties, and assorted other political units—it has been possible to embrace differing beliefs in different localities and to differing degrees, in ways best calculated to enlist the support of the relevant constituencies while preventing the domination of any single group or orthodoxy.[336] A school district in Alabama may resonate with one set of beliefs, a city council in Vermont with a different set. Indeed, there is good reason to believe that the original purpose of the First

334. For a helpful overview of this development, see Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 694–706 (2002).

335. I have discussed this and other problems with the no-endorsement test at length in Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987). For a recent criticism of the test, see Jesse Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L & POL. (forthcoming).

336. THE FEDERALIST No. 10, at 82–84 (James Madison) (Clinton Rossitered ed., 1961).

Amendment was precisely to leave the subjects listed in it, religion and expression, to the states, where a variety of different commitments were already in place or might evolve to suit different local constituencies[337] (though of course this particular aspect of federalism has long since been abandoned).

A second tactic is reflected in a policy of "nonsectarianism." This tactic was evident from the outset, as Jefferson and Madison resisted an effort to import more specifically Christian content into the Virginia Bill for Religious Freedom while retaining the more generic language referring to "Almighty God."[338] A similar understanding was reflected in Dwight Eisenhower's often (but unjustly) derided observation that "[o]ur government makes no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[339] A dim appreciation for this strategy probably accounts for modern courts' unwillingness, even while purporting to apply a no endorsement test, to invalidate a variety of official but generic religious expressions, such as the Ohio motto, "With God All Things Are Possible."[340] The official explanation for these decisions, typically, is that these expressions have over time been drained of their religious significance.[341] But this explanation seems not only disingenuous but also, as dissenters invariably point out, offensive to the religion concerned.[342] A better explanation, sometimes tacitly acknowledged, is that these expressions, though undeniably religious, are also generally nonsectarian in nature.

"Nonsectarian," to be sure, is a slippery notion. It is not equivalent to full neutrality—inevitably, even a theologically bland expression such as "In God We Trust" is incompatible with and offensive to the beliefs of different citizens—but simply tries to be as generic and inclusive as circumstances permit. In practice, the nonsectarian policy has often reflected a sort of aggressive ingenuousness in which proponents of a sort of watered-down national religion have insisted—sincerely, perhaps, but over the protest of religious minorities—that their position is in fact innocuous, inclusive, and inoffensive to persons of all religious views or

337. For an extended argument to this affect regarding the religion clauses, see SMITH, FOREORDAINED FAILURE, *supra* note 4, at 17–54; Steven D. Smith, *The Religion Clauses in Constitutional Scholarship*, 74 NOTRE DAME L. REV. 1033 (1999). For a similar argument also emphasizing the religion clauses but applicable to the First Amendment as a whole, see AKHIL REED AMAR, THE BILL OF RIGHTS 32–44 (1998).

338. ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 92–93 (1997). *See generally* SIDNEY MEAD, THE NATION WITH THE SOUL OF A CHURCH 11–28, 48–77 (1975); Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. (forthcoming).

339. MEAD, *supra* note 338, at 25.

340. ACLU v. Capitol Square Review & Advisory Bd., 243 F.3d 289 (6th Cir. 2001).

341. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

342. *See, e.g.*, the dissenting opinion by Judge Boyce in the Ohio motto case. *Capitol Square Review & Advisory Bd.,* 243 F.3d at 312. See also the dissenting opinion by Justice Blackmun in *Lynch v. Donnelly*, 465 U.S. 668, 726 (1984).

none.[343] A more responsible and honest view would concede that nonsectarianism is a matter of degree, varying from time to time and place to place: a policy that would seem relatively nonsectarian in one time or place (a generically Christian policy, perhaps) will not seem so in another. Despite these variations, nonsectarianism reflects a strategy widely employed in an effort to engage the beliefs of citizens (though not as fully as some might wish) in as inclusive a manner as the shifting contexts and scenes of public life allow.

A third pervasive though less recognized tactic in addressing the challenge of pluralism exploits what might be described as the "hierarchy of official pronouncement." Among the broad range of actions and statements that convey a governmental position or belief, in other words, there is an intricate, largely informal scale along which some pronouncements are regarded as *more* solemn and authoritative than others. Part of this hierarchy is formally recognized in legislative procedures. Thus, a nonbinding resolution adopted pursuant to official procedures surely expresses a judgment or belief of the legislature, but it does not have the "legal" status of—and thus is less imposing than—a statute containing legal sanctions. A constitutional amendment would be even more authoritative, of course.

Beneath these acknowledged "legal" forms of pronouncement lies a host of more informal measures that also serve, though in still less imposing ways, to convey governmental commitments on matters of belief: executive declarations and designations (of things like "National Bible Week," for example), public monuments, displays and exhibits on public property, statements by officials during official proceedings or in press conferences, or "off the record." Through this bewildering array of techniques, governments have been able express commitments at one level while remaining noncommittal at other levels, in this way seeking to enlist the support of believing citizens while reducing the alienation felt by those who dissent from the official positions.

Suppose we are asked, for example, whether our government is committed to "theism." Such a commitment, of course, might enlist the allegiance of some citizens while alienating other citizens (and a contrary policy—of atheism, or of public agnosticism, for example—would do the same, in differing degrees). But what is the answer? Is the government committed to theism?

As things stand, the question is hard to answer; or rather, the answer seems to be both "yes" and "no." It is hard to say in the first place what "the government" even is. Is it the city council? The state legislature? Congress? The national government as a whole? Perhaps the Constitution itself? And what would it mean for "the government" to be "committed" to a position like theism?

343. *See* Feldman, *supra* note 338.

What we can say is that there are many official expressions that seem to endorse or express theistic commitments—the national motto, for example, or the common practice of legislative prayer. In many other ways, however, government appears to be noncommittal. And the Constitution itself studiously avoids religious expressions; it is, as some scholars observe, a "godless Constitution."[344] Indeed, the largely structural and procedural Constitution is remarkably free of overt philosophical or ideological expressions of belief of any kind: its meager and terse substantive pronouncements allude to ideas of the most generic sort (justice, tranquility, union).[345]

To a theorist seeking to discern what the exact official orthodoxy might be, this messy array presents a daunting spectacle: but that is just the point. In this sense, the American constitutional strategy presents a stark contrast to, say, the seventeenth-century British effort to codify precisely the national creed through Parliamentary approval of the Westminster Confession.[346] But the messiness resulting from the combination of federalism, nonsectarianism, and a hierarchy of official pronouncements seems nicely tailored to a vast, diverse community composed of persons who are believers, but marvelously disparate believers. The more complex strategy provides for both engagement and plausible deniability: it has permitted governments to enlist the allegiance of citizens *as believers*—but in ways that allow dissenters to conclude, plausibly, that in a deeper sense the political community, or the nation, is not constituted by the beliefs to which they object.

Notice that although this complicated strategy has been facilitated by the Constitution—by the "godless Constitution" that declares no creed but instead establishes a complex system of federalism and separated powers and legal hierarchies—it has not depended primarily on implementation through the mechanisms of judicially developed and enforced constitutional law. On the contrary, constitutional law seems more likely to subvert the multitactic scheme by flattening the hierarchies of law and government and pronouncement, and by subjecting governance in all its forms and levels to a set of uniform "principles"—such as the no endorsement test.[347]

This is a point that constitutional theorists—and, increasingly, Justices—routinely miss. Yearning for a more theoretically edifying position, constitutional theorists are wont to infer from the fact of a "godless Constitution" that government at all levels and in all of its operations is required to be "godless," or "secular"[348]—subject to an "anti-orthodoxy

344. *See generally* KRAMNICK & MOORE, *supra* note 338.

345. The point is developed in STEVEN D. SMITH, THE CONSTITUTION & THE PRIDE OF REASON 31–46 (1998).

346. *See* OWEN CHADWICK, THE REFORMATION 234–37 (1964).

347. The point is discussed at greater length in SMITH, GETTING OVER EQUALITY, *supra* note 23, at 62–82.

348. *See, e.g.*, KRAMNICK & MOORE, *supra* note 338, at 165–77; Sullivan, *supra* note 36, at 197–99.

principle" as out-of-touch with the concrete realities of this world as the most fiercely ascetic hermit ever managed to be. Ironically, the theorists and Justices thereby mistake and negate the important contribution that an overtly noncommital Constitution can make to the maintenance of a community of *persons*—of *believing* persons—in a pluralistic nation.

V. CONCLUSION

As human beings we have interests and preferences, we make choices, and we assume the role of citizens. But none of these features expresses what it is that makes us, distinctively and essentially, "persons" as cogently as does our capacity for *believing*—and for orienting our lives around our deepest believings. The jurisprudences that have grown up around the First Amendment are intimately related to our character as "persons," and hence as "believing persons"; and those jurisprudences will be more secure and intelligible when the conception of "the believing person" is resuscitated and self-consciously embraced.

In this way, wiser reflection about what it means to be a person—reflection less burdened by the philosophies of the moment—may help to reorient our First Amendment discourse. And wiser reflection about our First Amendment commitments—reflection, again, less weighed down with the philosophies of the moment—may help to reorient our understanding of what it means to be a person.