

# **“YOU HAVE BEEN IN AFGHANISTAN”: A DISCOURSE ON THE VAN ALSTYNE METHOD**

GARRETT EPPS†

## INTRODUCTION

It is a signal honor to be invited to pay tribute to a professional mentor as significant in one's career as Professor William Van Alstyne has been in mine. Yet one must be careful to neither over-nor underestimate the honor paid; I and the other authors in this Symposium are called into action largely in the kind of role played in professional basketball by the New York Nationals, whose sole function it is to underscore the greatness of the Harlem Globetrotters by playing the game as well as they can and then losing. There is nonetheless still honor of a sort involved in being used as the metric by which the greatness of the Globetrotters is measured: if the Globetrotters might be considered to have the skill of  $Nx$  (the New York Nationals), it is nonetheless also necessarily true that  $N$  is some positive real number, thus locating the Nationals on the same X-axis as the Globetrotters. Bill Van Alstyne is the Meadowlark Lemon<sup>1</sup> of American constitutional law, and for any of us to be on the same axis with him is quite enough of an honor for one career, even though we cannot spin the ball as nimbly as he can.

In my own case, the honor is particularly appreciated because Bill Van Alstyne's influence on my career began even before my legal education, and indeed strongly influenced my decision to study law and my choice of Duke as the place where I would study it. When I think back on my years as his student, I am reminded of the finest

---

Copyright © 2005 by Garrett Epps.

† Orlando John and Marian H. Hollis Professor of Law, University of Oregon. Duke University School of Law, J.D., 1991, LL.M., 1994. I would like to thank Professor Christopher Schroeder and the Duke Public Law Program for the invitation to participate in this outstanding Symposium, and Professor William Van Alstyne for his example, his instruction, and his encouragement over the years of our friendship. Emmet Soper provided research assistance.

1. Lemon was the most famous Globetrotter, known for his dazzling ball-handling skills.

account of graduate professional training ever written in the English language, Sir Arthur Conan Doyle's *A Study in Scarlet, Part I, Being a Reprint from the Reminiscences of John H. Watson, M.D., Late of the Army Medical Department*.<sup>2</sup> When Dr. Watson first meets Holmes, the young detective greets him by saying, "You have been in Afghanistan, I perceive."<sup>3</sup> Holmes's deduction, and the method by which it is reached, form the foundation for Watson's lifelong fascination with Holmes and his methods. Note that the acquaintanceship begins, not with remarks by Holmes about himself, but with an observation by Holmes about Watson. Education, when properly carried on, functions not to convey to us information that exists outside ourselves but to show to us understandings and capabilities that are already dormant within us. Certainly Bill Van Alstyne did, and does, this for me. Like Kingsfield in John Jay Osborne's *The Paper Chase*,<sup>4</sup> Bill Van Alstyne trains my mind; I come to him with a skull full of mush<sup>5</sup> and leave thinking, if not really like a lawyer, then at least a bit more like Bill.

My own first encounter with Bill—what we might call the "Afghanistan moment" of our relationship—occurred while I was still a newspaper reporter. I was covering a conference on church-state issues convened by a statewide group of clergy and lay people in North Carolina. The year was 1985, and the sponsors of the conference had become alarmed by the rancorous tone of religious and political debate in the wake of the twin reelections of Ronald Reagan and Jesse Helms. Conferees were worrying at perennial questions about American public life: What is the place of religion in our political discourse? To what extent are American institutions a product of a specific "Judeo-Christian" religious tradition? Does the Constitution permit government to accommodate or even encourage religion as a means of promoting republican values and social stability?

One of the speakers was a senior member of the faculty at a fine law school that is not Duke. Though it is not his real name, for the purposes of this paper I shall call him Professor "Moriarty."

---

2. SIR ARTHUR CONAN DOYLE, *A Study in Scarlet*, in 1 SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES 1, 1 (reissue ed., Bantam Classics 2003) [hereinafter SHERLOCK HOLMES].

3. 1 *id.* at 7.

4. JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1971).

5. *Id.* at 17-21.

“Moriarty” had proposed in his paper that the proper role of government was in effect to smooth the ground and prepare the way so that religious belief and observance may flourish among the people, inspiring them to participate properly in American civic life. In particular, he ridiculed as excessively scrupulous a court’s insistence that the municipal police of Bernalillo County, New Mexico, cease displaying on their vehicles the county seal, a Latin cross above the motto “Con Esta Vencemos.”<sup>6</sup> One of the speakers was William Van Alstyne. Luckily I need not rely on my own meager verbal skills to evoke the striking figure he cut; I rely instead on Watson for his description of the young Sherlock Holmes (Doyle does not mention in this passage the constant pipe smoking that is another characteristic Holmes and Van Alstyne share):

His very person and appearance were such as to strike the attention of the most casual observer. In height he was rather over six feet, and so excessively lean that he seemed to be considerably taller. His eyes were sharp and piercing, . . . and his thin, hawk-like nose gave his whole expression an air of alertness and decision. His chin, too, had the prominence and squareness which mark the man of determination. His hands were invariably blotted with ink . . . .<sup>7</sup>

With some trepidation, I went over, notebook in hand, to ask this formidable figure what he planned to say. Bill gave me a very clear and direct answer. “Professor ‘Moriarty’ has delivered a thoroughly shoddy paper,” he said. “I intend to demolish it.”<sup>8</sup>

As a newcomer to sanguinary academic battles, I was transfixed by the ensuing onslaught. Bill zeroed in closely on the issue of the county seal, and drew upon his knowledge of the history of Christianity and its iconography to demonstrate that the joining of the Latin cross with the message of conquest violated the deepest beliefs not only of non-Christians but even of a large number of Christians as well. In retrospect, it reminds me of the great battle between Holmes

---

6. “With this we conquer.” Compare the revelation supposedly supplied to the Emperor Constantine, who saw a cross in the sky and heard the words “in hoc signo vinces”—“in this sign you will conquer.” Constantine then proclaimed Christianity as the official religion of the Roman Empire. On the Bernalillo case, see *A.C.L.U. Wants Cross Removed From New Mexico County’s Seal* N. Y. TIMES, Aug. 31, 1980, at A18; see also *Friedman v. Bd. of County Comm’rs*, 781 F.2d 777, 780–81 (10th Cir. 1985) (en banc) (reversing the District Court’s judgment that the County seal did not send a message of religious endorsement and exclusion).

7. 1 SHERLOCK HOLMES, *supra* note 2, at 11.

8. “[Moriarty] is the Napoleon of crime, Watson.” 2 SIR ARTHUR CONAN DOYLE, *The Final Problem*, in SHERLOCK HOLMES, *supra* note 2, at 736, 740.

and Moriarty at the Reichenbach Fall,<sup>9</sup> with the sole difference being that when it was over, one body, not two, fell into the raging torrent to be dashed against the rocks.

Thus I was fully forewarned of the potential consequences when I first assayed to cross swords with Bill on a point of constitutional law. Early in my law school career I became one of the legions of students who haunted Bill's office between classes.<sup>10</sup> My presence arose partly out of curiosity and partly out of the fact that Bill's office was, in those innocent days, a last holdout of the losing army in the great smoking wars of the 1980s and 1990s. (Among Holmes's first words to Watson were, "You don't mind the smell of strong tobacco, I hope?")<sup>11</sup> As a tobacco abuser myself, I formed the habit of dropping by during my first year of law school ostensibly to discuss the law with Bill while we enjoyed a mutual taste of the forbidden leaf. On one such occasion I unwisely ventured an opinion that the federal government might, without violating the First Amendment, pass a statute forbidding newspapers and broadcasters from revealing the results of exit polls of voters conducted anywhere on election day until the polls had closed all over the country.

At once Bill decided that the game was afoot. His argument (almost certainly correct) was that the First Amendment surely forbade even the temporary suppression of truthful reporting about such a core function of our political system, particularly when the reason why it was being suppressed was a fear that listeners would hear and act upon it. I, in proper New York National fashion, stubbornly insisted that free voting is centrally important to the health of our system of government, and that its protection arguably constituted precisely the sort of "compelling interest" that could and should be protected by a narrowly tailored, temporary prohibition—a kind of "time, place, and manner" restriction. I might say that we went at it for an hour or so hammer and tongs, but I am reluctant to claim for myself the dignity of the tongs. Bill hammered at me for sixty minutes; suddenly he realized not that I was right (I probably wasn't and he certainly didn't think that I was) but simply that, lowly first-year law student though I might be, I wasn't going to snap no

---

9. See 2 *id.* at 751–55 (detailing the battle in which Holmes and Moriarty apparently perish).

10. "It is the unofficial force—the Baker Street irregulars." 1 SIR ARTHUR CONAN DOYLE, *The Sign of Four*, in SHERLOCK HOLMES, *supra* note 2, at 121, 184.

11. 1 SHERLOCK HOLMES, *supra* note 2, at 9.

matter how many strokes of the hammer befell me. He suddenly fell silent, puffing on his briar pipe, and looked at me with a touch of admiration and surprise. “I say, Garrett,” he said at last, “good show!”

Our professional friendship has been particularly profitable to me because it has consistently required me to cope—either explicitly, in discussions with Bill, or implicitly, in my own internal dialogue—with the objections that Bill raises or that he would raise to my own work. As someone whose analytical style is quite different from his, I have had to study the Van Alstyne method and learn to apply it myself, if for no other reason than to protect myself from the kind of demolition that befell the hapless Professor “Moriarty.”

In Part I of this Essay, I set out what I conceive to be the Van Alstyne method and compare it in particular to the foundational methodological document of modern philosophy, *Discourse on the Method* by René Descartes.<sup>12</sup> In Part II, I then attempt to apply the method to an unsettled doctrinal area about which Bill and I frequently speak and somewhat less frequently disagree, the proper scope of the Free Exercise Clause of the First Amendment. Using Bill’s own ambition of “squaring” a government enactment with a constitutional provision, I explore the caselaw from *Reynolds v. United States*<sup>13</sup> to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>14</sup> asking always whether a given proposed rule “interpret[s] this Constitution”<sup>15</sup> along the Cartesian/Van Alstynian axes of, first, consistency and, second, lack of asserted extratextual interpretive principle. In my conclusion, I suggest that the Van Alstyne method, conscientiously applied, produces the somewhat surprising conclusion that the Free Exercise jurisprudence of the Warren Court more fully fulfills the method’s aim of fidelity to text than does the more convoluted caselaw of the Rehnquist Court.

---

12. RENÉ DESCARTES, DISCOURSE ON THE METHOD (George Heffernan ed., 1994) (1637).

13. 98 U.S. 145 (1878).

14. 508 U.S. 520 (1993).

15. WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 3 (1984).

I. "YOU KNOW MY METHODS"<sup>16</sup>: VAN ALSTYNE AND DESCARTES

To Bill, the word "lawyerlike" is the highest form of praise; by this term, I think he means a kind of legal analysis that does not begin with an intuitive perception of where the analyst wants the argument to go, but that instead proceeds by assembling the relevant materials, breaking the question down into its constituent parts, and finally drawing the appropriate legal inferences from their relationships. Only when one discerns the direction and shape assumed by these elements can one then make a conclusion as to the correct result—if, in fact, there is a correct result. Intuition—and, for that matter, political or policy inclination—play almost no role in this process.

Bill has a B.A. in philosophy from the University of Southern California, so it is almost certainly not a coincidence that the method I have outlined bears a distinct resemblance to that set out by René Descartes in *Discourse on the Method*,<sup>17</sup> a work that is the foundation of modern philosophy. The core of the "doubting method" can be found in Descartes' four maxims of analysis.

The first maxim is "never to accept anything as true that I did not evidently know to be such; that is to say, carefully to avoid precipitation and prejudice."<sup>18</sup> (Holmes seemed to echo this precept when he said, "It is a capital mistake to theorize before you have all the evidence. It biases the judgment.")<sup>19</sup> The second of Descartes' principles is "to divide each of the difficulties that I would examine into as many parts as would be possible and as would be required in order better to resolve them."<sup>20</sup> The third is "to conduct my thoughts in an orderly manner, by beginning with those objects the most simple and the most easy to know, in order to ascend little by little, as by degrees, to the knowledge of the most composite ones."<sup>21</sup> (As Holmes writes, "Before turning to those moral and mental aspects of the matter which present the greatest difficulties, let the inquirer begin by mastering more elementary problems.")<sup>22</sup> Descartes' fourth rule is "everywhere to make enumerations so complete and reviews so

---

16. 1 SIR ARTHUR CONAN DOYLE, *The Stock-Broker's Clerk*, in SHERLOCK HOLMES, *supra* note 2, at 565, 567.

17. DESCARTES, *supra* note 12.

18. *Id.* at 35.

19. 1 SHERLOCK HOLMES, *supra* note 2, at 23.

20. DESCARTES, *supra* note 12, at 35.

21. *Id.*

22. 1 SHERLOCK HOLMES, *supra* note 2, at 16.

general that I were assured of omitting nothing.”<sup>23</sup> (Or, as Holmes often said to Watson, “When you have eliminated the impossible, whatever remains, *however improbable*, must be the truth.”<sup>24</sup>)

As applied to the interpretation and application of legal tests, the method then would suggest that a lawyer should begin with the problem rather than the desired solution; should break the problem down into its constituent factual predicates and legal principles at the greatest possible level of specificity; should resolve each step of the analysis as conclusively as possible before considering whither it leads; and should not reject any potential interpretation simply on the grounds that it is counterintuitive, politically unappealing, unfashionable, or previously unconsidered by commentators and courts. This method is applied in Bill’s classic essay, “A Critical Guide to *Marbury v. Madison*.”<sup>25</sup> In that essay, Bill does not attempt to channel the Framers and explain what they must have been thinking; instead, like Descartes or Holmes, he turns carefully and in exhaustive detail to what the Framers *said* in the Constitution and projects from it a wide variety of meanings that could be given to the idea of judicial review. It is a “doubting method” in that it gives no deference to authority, whether that of Chief Justice Marshall or of learned commentators, but directs all attention toward the interplay of text and the necessary qualities of common law courts. As a student, I derived from it the comfort of knowing first that even brighter and more experienced minds than I found *Marbury* far from perspicuously clear on first reading, and second that the institution of judicial review in the United States today did not spring full grown from the brow of Chief Justice Marshall but is instead a lawyer’s construct derived from the practical realities of a common law judicial system.

Useful as I found “Critical Guide” during law school, I found another essay even more useful as I began my descent from eager law student to jaded law professor. In 1984, Bill published a revealing essay as the introduction to his influential book, *Interpretations of the First Amendment*. The essay is called “Interpreting *This* Constitution: On the Unhelpful Contribution of Special Theories of Judicial Review.”<sup>26</sup>

---

23. DESCARTES, *supra* note 12, at 35.

24. 1 SHERLOCK HOLMES, *supra* note 10, at 160.

25. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

26. VAN ALSTYNE, *supra* note 15, at 3–20.

The essay attacks certain theories offered by legal scholars as to the proper role for courts to take in assessing constitutional challenges to legislation. As in the fabulous confrontation with Professor “Moriarty” (or as in Holmes’s bold confrontation with Professor Moriarty), Bill does not shrink from combat merely because of the number or stature of his foes. He attacks a league of extraordinary gentlemen that includes James Bradley Thayer, Herbert Wechsler, Gerald Gunther, John Hart Ely, Jesse Choper, Charles Black, Owen Fiss, Ronald Dworkin, Frank Michelman, and Laurence Tribe.<sup>27</sup> Bill characterizes these worthies’ theories as “special” because they do not rely upon textual application of the Constitution’s provisions to concrete cases but, in effect, inject into the process a notion of the proper role of the courts in constitutional judicial review and then counsel greater or lesser deference to legislative bodies depending upon the judges’ assessment of those bodies’ democratic character or moral worth.

Bill offers up his own method for critique later in the essay. The Van Alstyne method has two parts. It begins with a quote from Justice Owen Roberts:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.<sup>28</sup>

It is easy, as Bill notes, to dismiss this dictum as a reductive apothegm written by an “unremarkable” justice.<sup>29</sup> Yet Bill still draws from it the worthy suggestion “that the judicial task of constitutional review should be performed with the same *undissembling* interest in accuracy as one would bring to his or her own workbench”<sup>30</sup>—that the language of *squaring* constitution and statute provides a useful metaphor of the judge as *builder* of a proper constitutional edifice in which all angles are true and all corners square. The importance of such measurement is that a judge is not to draw constitutional lines with any presupposition as to the extent of the judiciary’s role in the

---

27. *Id.* at 7 & nn.21–26.

28. *Id.* at 12 (quoting *United States v. Butler*, 297 U.S. 6, 62 (1936)).

29. *Id.* In addition, the “unremarkable” Justice wrote his credo while reaching a decision that many commentators, including this one, consider to be profoundly wrong.

30. *Id.* (emphasis added).

constitutional system. The judge, in other words, is neither to *defer* to arguably incorrect interpretations of the Constitution merely because they have the imprimatur of the more “democratically” elected branches nor to *view skeptically* interpretations of the Constitution offered by those branches merely because they are “political” rather than “legal” or because they do not accord with the Court’s own views as to the meaning of terms such as “justice” and “liberty.” In addition, “[i]t is not the Court’s business to move [the line] or to misrepresent its location from any presupposition of its own that a different constitutional line might be better.”<sup>31</sup> A builder does not use a square to produce a desired result; the correctness of the builder’s measurements can be objectively determined, even if specialized expertise may be needed to interpret them.

Because of the importance of the judge’s role in constitutional judicial review, Bill suggests, the builder should follow the ancient rule of “measure twice, cut once.” In other words, “[b]ecause it is the Constitution being expounded, one should be especially conscientious about its determination—should have an exceptional willingness to listen, to consider, and to be very careful.”<sup>32</sup> Again, it would be possible to regard this as simply a jurisprudential bromide—what school of judging, after all, suggests *not* listening? But in the context of Bill’s criticism of “special” theories of judicial review, it in fact seems to represent a reaffirmation of the judge’s role as one derived from the common law, in which the contours of a case are descried, not from a preexisting inclination of the judge to reach a certain result—whether representation-reinforcing or economically efficient—but from the judge’s sworn obligation to allow the law as it is, the facts as they are found, and the arguments that the litigants bring before the court jointly to determine the result. This is a judicial canon of behavior that recent Courts have not always observed.

The “T-squaring” method does not presuppose that the holder of the square will always be able to derive an answer. “[T]he line’ representing the constitutional clause must at least be reasonably discernible.”<sup>33</sup> For this reason, “[d]etermining *where* the line represented by a constitutional clause lies is in fact not the same as the mechanical task of seeing *whether* one line ‘squares’ with

---

31. *Id.*

32. *Id.* at 13 (footnote omitted).

33. *Id.*

another.”<sup>34</sup> The judge must first decide where the line is, which, Van Alstyne concedes, is an interpretive, not a mechanical, task.<sup>35</sup> And because of the ambiguity of much of the language of the Constitution, “many of the problems of constitutional adjudication are not imagined, . . . they are not contrived, and . . . they do not proceed solely from judges who are mere ideologues.”<sup>36</sup>

What, then, is the judicial role when the line is unclear? Lawyerlike, Van Alstyne falls back on the concept of burden of proof to provide a rule for resolving such questions. “[I]t is the litigant who brings the claim asserting that there is some ‘line’ (i.e., some article or combination of articles) in the Constitution with which an act does not square” who must bear the burden of establishing the location of the line; “If the location of that line cannot be established, necessarily the claim must fail.”<sup>37</sup> If the litigant cannot provide a fix on the line, then the duty of the conscientious judge is to reject the claim—regardless of its sympathetic nature or its congruence with current theories of democracy, economic efficiency, or morality.

The burden to show where the constitutional line lies is not with the Court. It is with the party who claims that the act of Congress does not square with that line. The duty of the court is to entertain the claim, to be attentive to it, to require no more of this litigant than would be required of any other, in any other case, to show that “the line lies *here*,” so then to see whether the act does not square. Residual uncertainty thus does not impair performance of the judicial function and nothing obliges the court to improvise the line to accommodate the litigant or merely to fill out the Constitution in some abstractly more satisfying way. Indeed, nothing entitles the court to do any of these things. The judicial duty is not less fitly performed because the party raising the challenge fails.<sup>38</sup>

The implications of this allocation of the burden are significant, for they amount to a presumption that an act of Congress is valid. “[W]hen an act of Congress otherwise applies to define a party’s rights, it is to be deemed controlling in the Supreme Court unless the litigant is able to show that, as applied, the act fails to square with

---

34. *Id.*

35. *Id.* at 13–14.

36. *Id.* at 15.

37. *Id.*

38. *Id.*

some clause (or combination of clauses) in the Constitution.”<sup>39</sup> Failing such a demonstration, the act governs as the “supreme law of the land”<sup>40</sup>—even if it seems wrongheaded, draconian, unwise, or even inconsistent with a constitutional provision that is “intractable for litigant use.”<sup>41</sup> It is thus not the duty of the courts to enforce an entire “vision” of the Constitution that would explain and give effect to all its provisions in conformity with an interpretation gleaned either from history or from contemporary thought. “Intractable” clauses of the Constitution, though binding on all parties, will simply not lend themselves to enforcement by the judiciary.

Bill elucidates the idea of burdens of proof more fully later in the essay. He contends that some constitutional claims will put the burden on the government to demonstrate the appropriate line and its relationship to the Constitution. “Such an instance would arise when the challenge is not on the basis that the applicable act of Congress is forbidden but rather on the basis that it was not authorized.”<sup>42</sup> This type of claim differs from a claim that the government is taking an action that the text forbids precisely in the assignment of burdens; if a measure

is alleged not to square because there is no obvious enumerated power or combination of powers sufficient to sustain the act in question, the burden appropriately becomes that of the party relying upon the act to show that, to the contrary, there is in fact ample power. On the other hand, if the objection is that the act fails not for want of original power to enact it but rather because other constitutional provisions disallow it, the burden of succeeding on that objection is equally clear; it is on the party who so asserts.<sup>43</sup>

A scrupulous observance of these allocations of burdens would mean that a court

is thus *not* bound at all costs to invent some meaning for every word and clause in the Constitution. Rather, it is to measure the adequacy of that meaning or that interpretation tendered by some party to the

---

39. *Id.* at 16.

40. U.S. CONST. art. VI, § 2.

41. Van Alstyne, *supra* note 25, at 15.

42. *Id.* at 17.

43. *Id.*

litigation insofar as that tendered meaning or interpretation is relied upon to show how an act of Congress does or does not 'square.'<sup>44</sup>

Fully considered, then, the Van Alstyne method is far from reductive. It readily admits the open-ended nature of many of the Constitution's provisions, it provides an ample role for the coordinate branches of the government (and for the States) in interpreting and acting upon the Constitution, and it assigns to judges a far more modest role than that of the "Platonic guardians" against whom Learned Hand warned.<sup>45</sup> For it is one thing to say—as certain judicial theorists on all sides of the ideological divide are wont to—that it is the business of the Court to strike down legislation that *the Court believes* to violate the Constitution; it is another thing—related, but distinct and significantly narrower—to say that it is the business of the Court to strike down legislation *when and only when a party to litigation can demonstrate that it either violates some provision of the document or is simply not authorized by it anywhere*. This role, if truly adopted as an operating philosophy by judges, would be in keeping with Alexander Hamilton's apothegm that the judiciary, as set up under the new Constitution of 1787, "ha[th] neither force nor will but merely judgment."<sup>46</sup> Indeed, Bill's objections to the "special" theories of judicial review can thus be seen to be objections to the courts' transgressing their proper roles—not in terms of other branches, or of the States, but of the litigants who should properly shape the docket and doctrine of a common law court.

Thus, then, the Van Alstyne method—Cartesian in its approach, sophisticated in its view of the difficulties of the judicial role, and modest about the proper place of the judiciary. Note, however, that this modesty is not one imposed upon the Court by a political or moral theory external to itself; it is in fact a kind of internal, or procedural, modesty, imposed by the nature of courts (in this sense, it is very like the "internal morality" that Professor Lon Fuller wrote must inform the law because of its very nature as law<sup>47</sup>).

What ought we to make of this theory? To begin with, one is tempted to respond to it as Gandhi reportedly did to the question,

---

44. *Id.* at 18.

45. LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958).

46. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

47. See LON L. FULLER, *THE MORALITY OF LAW* 4 (1964) (arguing that such an internal morality makes law possible by "clarifying the directions of human effort essential to maintain any system of law").

“What do you think of Western civilization?” “I think it would be a very good idea.”<sup>48</sup> Demonstrably, neither the Rehnquist Court nor its immediate predecessors have adhered to this litigant-centered view of the Court’s role.<sup>49</sup> In fact, I am not sure of any historic period in which the Court has so restrained itself. In the next Part, I examine the Court’s shifting interpretations of the Free Exercise Clause to see whether they qualify as applications of the T-square or as “special” theories of judicial review. In particular, I make use of one of Bill’s favorite devices, the Venn diagram, to probe whether a given case makes use of a rule that consistently applies the Clause without non-Cartesian presuppositions,<sup>50</sup> and assess each possible rule for its internal consistency and usefulness to courts. Or, as Holmes would put it, “Come, Watson, come! . . . The game is afoot.”<sup>51</sup>

## II. INTERPRETING *THIS* FREE EXERCISE CLAUSE: A GRAPHIC REVIEW

The Constitution provides that Congress “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>52</sup> It is futile to pretend that this disjunctive rule is all one smooth whole. It imposes two disabilities upon Congress (and, through the Fourteenth Amendment, upon the States): first, government may not “establish” a favored religion or religions; second, government may not obstruct the “free exercise” of any religion at all, regardless of its view of it. That these are logically and practically distinct can be seen by imagining in turn the Constitution with only one of the two clauses. To begin with, the First Amendment might perfectly coherently prohibit *establishment* of religion without requiring any particular solicitude for the “free exercise” of religious believers. This is the regime of *secularism*, in which the state regards itself as supreme within its own sphere and simply makes no concessions to religious beliefs and practices that may obstruct its aim. France today operates under a constitutional provision

---

48. For a discussion of this “quote,” see, for example, THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrews et al. eds., 1996), available at <http://www.bartleby.com/66/77/24377.html>.

49. See *infra* Part II.

50. See *supra* notes 17–24 and accompanying text.

51. 1 SIR ARTHUR CONAN DOYLE, *The Adventure of the Abbey Grange*, in SHERLOCK HOLMES, *supra* note 2, at 1009, 1009.

52. U.S. CONST. amend. I. (emphasis added).

proclaiming it “an indivisible, *secular*, democratic and social Republic” that is bound to “respect all *beliefs*.”<sup>53</sup> Because religious conduct receives no textual protection, the French government can—as the American probably could not—forbid female Muslim schoolchildren to wear Islamic headscarves on the grounds that the prohibition would further French values of equality and secularism.<sup>54</sup> Even some American States, regrettably, enshrine secularism in their own State constitutions—including my own State, Oregon, whose courts readily uphold the validity of laws that suppress religious behavior altogether and in fact neither require any heightened showing of necessity by the State in such cases nor permit the challenger even to offer evidence of the impact of the State law on his or her religious rights.<sup>55</sup> In such a regime, in other words, the duty of courts “to listen, to consider, and to be very careful”<sup>56</sup> in regard to free exercise claims is nil.

By contrast, now imagine a system that incorporated a “free exercise of religion” guarantee but provided no guarantee against “establishment.” Again, this is a familiar system; it is called a regime of *toleration*. The United Kingdom functions even today under such a system; so, in a different way, does the Federal Republic of Germany. A certain religion (or religions) receives state imprimatur and funding, and sometimes privileged access to the state educational system; beyond this official endorsement and funding, the state makes no effort to coerce other believers or nonbelievers to adhere to the favored religion. Dissenters are permitted to believe, profess, and practice their disfavored faith without any material penalty, subject at most to formal regulation in such areas as registration and organization.<sup>57</sup>

---

53. CONST. art. I (Fr.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, pt. 2, at 1 (Gisbert H. Flanz ed., 2003) (emphasis added).

54. See *UN Rights Official Objects to French Ban on Muslim Headscarves*, AGENCE FRANCE-PRESSE, Mar. 22, 2004 (reporting on the uproar surrounding French passage of such a ban).

55. See *Cooper v. Eugene Sch.* Dist. No. 4J, 723 P.2d 298, 313–14 (Or. 1986) (allowing a Sikh teacher to be summarily dismissed by her public school for wearing clothing required by her religion); *State v. Soto*, 537 P.2d 142, 144 (Or. Ct. App. 1975) (affirming a trial court’s refusal even to hear defendant’s evidence of the religious nature of his peyote possession).

56. VAN ALSTYNE, *supra* note 15, at 13 (footnote omitted).

57. Alas, it must be noted that a significant number of Americans believe that the American States are required by the Constitution only to observe some relatively tepid approximation of toleration. Former Chief Justice Roy Moore of Alabama and his conservative supporters report themselves cheerfully willing to allow non-Christians and infidels to persist

For complex and debatable historical reasons, the Framers of the American First Amendment chose to incorporate both the “antiestablishment” and the “free exercise” principles in our Constitution. Neither secularism nor toleration is the American way; in fact, this system was radically new at the time<sup>58</sup> and remains today sufficiently unusual that it does not have a ready name. For lack of a better term, many Americans call it “separation of church and state,” but that term does not appear in the Constitution. It is in fact a theological term coined by Roger Williams, a seventeenth-century Christian who sought to protect religious bodies against state manipulation.<sup>59</sup> The term entered the American political lexicon when President Thomas Jefferson adopted it as a crowd-pleasing way of reassuring Baptists that their vision of the state was embodied in the constitution.<sup>60</sup>

There is no reliable shorthand for the American dual system of religious guarantees. Instead, we must apply the Van Alstyne method to the text itself. “Establishment of religion” has a relatively clear core meaning—it means government endorsement and support of a favored religion or religions, possibly, though not necessarily, coupled with use of state power to coerce adherence to its tenets. “Free

---

and even perish in their erroneous beliefs, as long as the State of Alabama can publicly point out the “correct” view upon which they believe the United States was founded:

In Moore’s eyes, it is the special virtue of the Jewish and Christian conception of God that it allows us to make a twofold claim: to recognize in public the beliefs on which our rights are founded, and to refuse to mandate for others that they must hold the same beliefs. He is free to exercise his duty as chief justice in calling attention to the moral foundation of our rights, without by the same deed trying to force Jewish or Christian belief upon Muslims, Buddhists, atheists, agnostics, or anyone else.

As Justice Moore sees it, the principle of religious liberty enunciated in our great founding documents does exactly no more and no less. It calls attention to the moral foundation of our rights in our inalienable duty to our Creator, and in the same formulation declares the fundamental liberty of all consciences to choose the form and manner of fulfilling that duty.

Michael Novak, *That Ten Commandments Case*, NAT’L REV. ONLINE, Dec. 16, 2002, at <http://www.nationalreview.com/script/printpage.asp?ref=/novak/novak121602.asp> (on file with the *Duke Law Journal*).

58. See generally WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1986).

59. See ROGER WILLIAMS, *MR. COTTON’S LETTER LATELY PRINTED, EXAMINED AND ANSWERED* (1644), reprinted in 3 *THE COMPLETE WRITINGS OF ROGER WILLIAMS* 392 (Russell & Russell, Inc. 1963) (“When they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself . . . and made His garden a wilderness . . .”).

60. See DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 17–24 (2002) (describing Jefferson’s use of the phrase in his letter to the Danbury Baptist Association and its political repercussions).

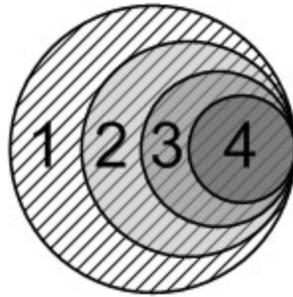
exercise” is less perspicuous in its meaning, even today, after more than two centuries of application of the principle. “Free” must surely mean uncoerced and, to a significant extent, unregulated—but what of “exercise?” Here the phrase becomes, lexicographically at least, almost perfectly ambiguous. There is a core meaning that can be derived from the term in most natural-language uses; that meaning is something close to “using,” “conducting,” “carrying out,” or “making active”—implying that the term “free exercise” covers some quantum of conduct or behavior. There is also, however, a specific theological meaning, dating back to the seventeenth century, which is given by the *Oxford English Dictionary* as “[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion).”<sup>61</sup> To give this meaning to the term would suggest that it covers significantly less conduct than if the previous meaning is given. And so the meaning of “the free exercise” of religion is problematic as a matter of definition. It could cover a wide range of conduct when engaged in for religious motives; or it could mean simply the freedom to conduct “rites and ceremonies.”

However, the Van Alstyne method does not permit discouragement when a precise line is hard to draw at the outset. To conclude that the phrase is *ambiguous* is not the same as concluding that it is *meaningless*. That is, taking the two definitions above as poles between which the proper constitutional definition is to be found, we should note that some meanings are already excluded. To begin with, “free exercise” does *not* mean nothing—because neither the broadest possible definition (all religiously inspired conduct) nor the narrowest possible definition (some but not all ritual conduct) is nothing, and the space between them is both finite and real. To illustrate this and other interpretations of the Clause, I employ a further refinement of the method—the Venn diagrams that Bill himself employs to useful effect in Chapter 1 of *Interpretations*, entitled “A Graphic Representation of the Speech Clause.”<sup>62</sup> Below, then, is what the text and the ambiguity have produced so far.

---

61. 5 OXFORD ENGLISH DICTIONARY 529 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

62. VAN ALSTYNE, *supra* note 15, at 21–49.



1=All possible conduct. 2=All conduct that could possibly be protected by a generously read Free Exercise Clause. 3=All conduct that is ritual or liturgical in nature. 4=Some subset of ritual or liturgical conduct that is covered by the narrowest admissible reading of the word “exercise” in its religious meaning.

Figure 1. The irreducible meaning of this Free Exercise Clause must lie somewhere between the borders of 2 and the borders of 4, inclusive. Note that no matter where drawn, this border includes some conduct.

The Clause as used in *this* Constitution, then, covers *something*. Note also that the two poles (on the one hand, all conduct and on the other, only ritual conduct) exclude at least one definition. Because both liturgical and nonliturgical conduct are *conduct*, it cannot be the case that the Clause protects only *non-conduct*—e.g., only *beliefs* about religion, or *speech* about religion. *Some* religiously inspired conduct *is* protected; whether or not we can draw the line properly *within* the category of conduct, we can deduce with confidence that to draw it *outside* the category of conduct is incorrect (for this, see Figure 2, illustrating a theory which proposes that “the free exercise” does not cover any conduct).

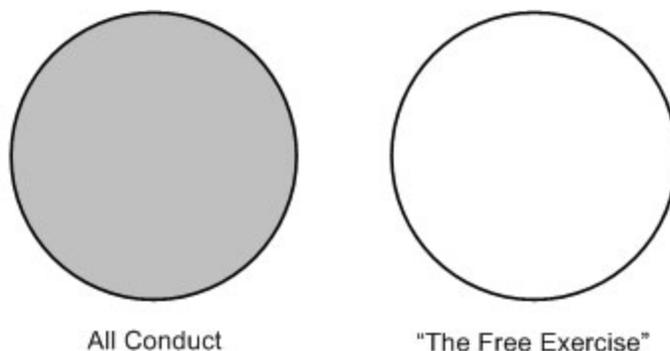


Figure 2—The First Clearly Incorrect View of “the Free Exercise” of Religion.

Having begun, properly, with the text, I now shift into an examination of the Supreme Court’s interpretations of the Clause.

Intriguingly enough, given that the answer in Figure 2 is demonstrably incorrect, it is this precise view of the Clause that was adopted by the United States Supreme Court in the first major Free Exercise case, *Reynolds v. United States*.<sup>63</sup> *Reynolds* was a challenge to a prosecution for bigamy of a high official of the Church of Jesus Christ of Latter-Day Saints. At the time of the case, Church law (believed to have been ordained of God through direct revelation to the martyred prophet Joseph Smith) enjoined the practice of plural marriage upon male members of the Church, with the injunction falling with particular force upon Church leaders like George Reynolds.<sup>64</sup> The federal statute under which Reynolds was prosecuted—the so-called Morrill Act—was specifically and openly designed to outlaw Mormon polygamy, even when practiced in the Utah Territory, a thriving settlement established by the Mormons precisely to escape the persecution that their marriage customs had inspired elsewhere in the United States.<sup>65</sup> The Act was intended by its

---

63. 98 U.S. 145 (1879).

64. See *id.* at 161 (“[T]he [Mormon] church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God . . . refusing to practice polygamy . . . when circumstances would admit, would be punished, and . . . the penalty for such failure and refusal would be damnation in the life to come.”).

65. See Morrill Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (repealed 1910) (criminalizing the practice of polygamy). For the history of the Morrill Act, see LEONARD J. ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE* 172 (2d ed. 1992). For a less friendly view of the Church of Jesus Christ of Latter-Day Saints, see generally 1 SHERLOCK HOLMES, *supra* note 2, at 1.

sponsor to carry into effect the pledge of the 1860 Republican platform that the party, once elected, would eradicate the “twin relics of barbarism—Polygamy, and Slavery.”<sup>66</sup> Faced with imprisonment for obeying the unconditional command of both his faith and his church, Reynolds asked the Supreme Court to find his conduct protected by “the free exercise” of religion. The Court could have done so; or it could have found that *this* conduct—plural marriage among consenting adults—did not fall within the conduct protected by the Clause, and then explained why not. Instead, the Court did neither; it simply rewrote the Clause to match Figure 2. Under the First Amendment, the Court said, “Congress was deprived of all legislative power over *mere opinion*, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>67</sup> The Court read “exercise” not to include “exercise,” and it did so by using an essential tool of a “special” theory of judicial review. Instead of parsing the language of *this* First Amendment, it turned to Jefferson’s letter to the Danbury Baptists and concluded that, whatever *this* Amendment said, Jefferson’s statement that “the legislative powers of the government reach actions only, and not opinions,” was the actual meaning of the Free Exercise Clause.<sup>68</sup> Polygamy was proscribable first because it was not “mere belief” or “opinion” and second because it was “in violation of social duties or subversive of good order.”<sup>69</sup> The Court reached the latter conclusion because “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”<sup>70</sup> Thus did the first “special” theory of the Free Exercise Clause either render the Clause a nullity or limit its reach to protection of conduct that was not “odious”—and that was thus unlikely ever to face proscription in the first place. “The Free Exercise” thus came to mean, at best, “the freedom to engage in conduct approved by the majority” (see Figure 3) and at worst “the

---

66. REPUBLICAN PLATFORM OF 1856, *reprinted in* NATIONAL PARTY PLATFORMS, 1840–1972, at 27 (Donald Bruce Johnson & Kirk H. Porter eds., 5th ed. 1973); *see also* ARRINGTON & BITTON, *supra* note 65, at 172.

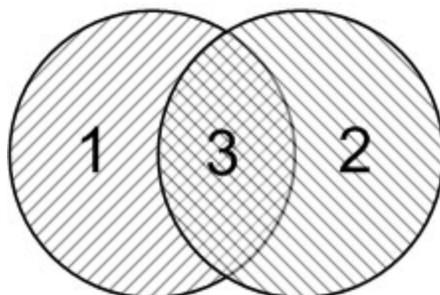
67. *Reynolds*, 98 U.S. at 164 (emphasis added).

68. *Id.*

69. *Id.* at 164, 166. But see *Davis v. Beason*, 133 U.S. 333, 346–47 (1890), in which the Court approved a State law that deprived State citizens of their civil rights for “espousing” a belief in plural marriage or “adhering to” an organization that “espous[ed] such a belief.”

70. *Reynolds*, 98 U.S. at 164.

freedom to believe whatever one wants as long as one makes *no* attempt to practice it”—and so, to a remarkable extent, it remains to this day for many thinkers, both lawyers and nonlawyers.



1=Conduct not odious to a majority. 2=Religiously inspired conduct by minorities. 3=Conduct by religious minorities to which a majority has no serious objection.

Figure 3—The “optimistic” version of the *Reynolds* vision of the Clause. Because majorities seldom ban conduct to which they have no objection, the Clause in effect protects no conduct.

*Reynolds* represents, in Van Alstyne’s terms, a classic “special” theory of judicial review. That is because the *Reynolds* Court, like the more recent theorists Van Alstyne chided in his essay,<sup>71</sup> rewrote the Free Exercise Clause because, by its own account, it found the Clause written for it by the Framers unsatisfactory. Consider the Court’s explanation for its interpretation of the Clause. If the Free Exercise Clause provided even presumptive protection for polygamists, the Court argued, society would collapse.

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages

---

71. See VAN ALSTYNE, *supra* note 15, at 7 & nn.21–26, and text accompanying note 27.

shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.<sup>72</sup>

In other words, the Clause is to be read, contrary to its text, as protecting only “mere opinion,” because to read it as written would cause anarchy and the collapse of government. In addition, the Court does not attend to the “line” proposed by the litigants in this particular case, but rather imagines the most extreme assertions of religious rites that could be advanced and refutes them instead of the case actually in front of it. The Framers of the First Amendment simply did not understand the nature of what they were doing, and it was the duty of the Supreme Court to correct their work by substituting for “the free exercise” of religion “the mere opinion about.” In Van Alstyne terms, this interpretation is bankrupt; what is remarkable is that today, nearly 130 years after it was first promulgated, this first “special theory” of the Free Exercise Clause is still considered persuasive—sufficiently so that the Rehnquist Court cited it as the founding document of Free Exercise jurisprudence.<sup>73</sup>

The *Reynolds* scheme, however, did have the advantage of clarity: the Free Exercise Clause in effect protects *no* religiously inspired conduct. If we reject the *Reynolds* rule, then, we must continue the attempts at line drawing. By hypothesis, the Free Exercise Clause protects some conduct. But how much? The secular imagination at once leaps to human sacrifice and other hideous atavisms that the religious are thought secretly to be hankering to indulge in. And while we may not necessarily share the popular conception of the religious generally as semideranged refugees from the cast of *Deliverance*,<sup>74</sup> we should take note that religious justification has been claimed within recent memory for child abuse, child neglect, child murder, mass suicide, and attempted germ warfare against nonbelievers.<sup>75</sup> For this reason, no one is likely to propose the anti-*Reynolds* rule (see Figure 4), though Judge Michael McConnell

---

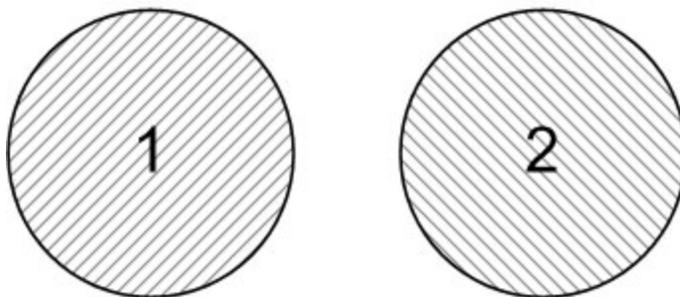
72. *Reynolds*, 98 U.S. at 166–67.

73. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (citing *Reynolds*).

74. *DELIVERANCE* (Elmer Productions & Warner Bros. 1972) (depicting rural Southerners as murderous, subverbal psychopaths).

75. See, e.g., GARRETT EPPS, *TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL* 66–89 (2001) (depicting the crimes of the Rajneesh cult).

of the Tenth Circuit, before ascending the bench, proposed something very close.<sup>76</sup>



1=Conduct the state may legitimately prohibit. 2=Religiously inspired conduct. Because there is no overlap, the state may not prohibit any religiously inspired conduct.

Figure 4—The anti-Reynolds scheme of “the Free Exercise” of religion.

The most durable proposal after *Reynolds* was originated by Justice William J. Brennan in *Sherbert v. Verner*.<sup>77</sup> The *Sherbert* rule states that government may “burden” free exercise only when the regulation is narrowly tailored, or necessary, to further a compelling governmental interest.<sup>78</sup> This rule has received more than its fair share of criticism after the fact,<sup>79</sup> but, like many of Justice Brennan’s creations, it has significant virtues of judicial craft, and actually squares reasonably well with the Van Alstyne method.

The first important contrast between the Brennan method and the *Reynolds* scheme is its litigant-centered perspective. The *Reynolds* Court rather unselfconsciously adopted the viewpoint of the religious majority. Because most of the public considered George Reynolds’ conduct “odious,” it could be banned. Justice Brennan,

---

76. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1148 (1990) (proposing the rule that “[a] government interest is sufficient [to overcome a Free Exercise claim] if it is so important that it is not conceivable that the government would waive it even if the religious needs of the majority so require d”).

77. 374 U.S. 398 (1963).

78. *Id.* at 406.

79. See, e.g., William P. Marshall, *Solving the Free Exercise Dilemma*, 67 MINN. L. REV. 545, 548-57 (1983) (discussing the difficulties with the Supreme Court’s post-*Sherbert* approach to free exercise).

however, begins by asking what impact the challenged restriction has on the *religious challenger*. “[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid” regardless of the nature of the burden—“direct” or “indirect.”<sup>80</sup> Note that the effect of this passage is to take the religious majority’s subjective state off the table. Whether motivated by antireligious design, sectarian discrimination, or simple indifference, the majority must satisfy the Clause if its legislation “impedes the observance” of any religion or religions. “Observance” can plainly mean either ritual behavior or nonritual behavior; the Clause, in the Brennan scheme, makes no necessary distinction between them. Nor does the Brennan test depend on any distinction between outright prohibition and government conduct that raises the cost of the behavior. In *Sherbert*, South Carolina had denied Mrs. Sherbert unemployment benefits for refusing Saturday work. As a Seventh-Day Adventist, Mrs. Sherbert could obviously argue that the observance of the Sabbath was extremely central to her faith. But the Brennan formulation required no such claim. The requisite showing was simply that the law forced her “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>81</sup> Requiring such a choice, the Court said, places “the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”<sup>82</sup>

After identifying the burden, the *Sherbert* opinion then unveils a test that is taken from cases regarding the Speech Clause. This choice has been subject to subsequent criticism,<sup>83</sup> but in fact is neither arbitrary nor excessive. Both Clauses inhabit the same First Amendment and use almost identical wording—prohibiting “abridg[ment]” of “the freedom of speech” and “prohibit[ion]” of “the free exercise” of religion.<sup>84</sup> The burden of proof would seem to fall on those who seek to interpret them differently, rather than on those defending the interpretive choice in *Sherbert*.

---

80. *Sherbert*, 374 U.S. at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

81. *Id.*

82. *Id.*

83. See *Employment Div. v. Smith*, 494 U.S. 872, 883–89 (1990), for Justice Scalia’s criticism of the *Sherbert* balancing test.

84. U.S. CONST. amend. I.

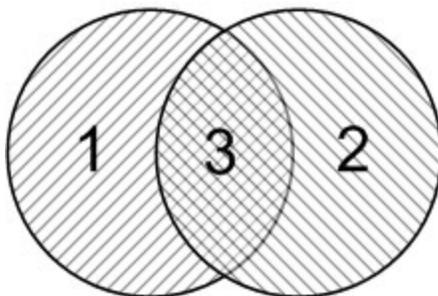
Having established the test as “strict scrutiny,” the *Sherbert* opinion then asked what “compelling interests” the State was seeking to advance by its rejection of Mrs. Sherbert’s claims. As noted above, it is at this point that the persistent anxieties of the religious majority tend to become involved in the analysis. Permit one Sabbatarian to claim exemption from Saturday work, the analysis often suggests, and soon droves of layabouts will be joining the Adventist faith to avoid work, the idle and vicious of the Southeast will be moving to South Carolina, fraudulent antipopes will be establishing new churches that ban work on any day of the week, and temple prostitution and human sacrifices will be slouching toward the Low Country to trouble the God-fearing people thereof. In a sense, the calm tone of the *Sherbert* opinion in the face of imaginary heresies may be its most profound achievement. As the opinion notes, the state could suggest only one concrete adverse consequence of an exemption: “a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work.”<sup>85</sup> A dismal (though limited) picture; but, employing the device of the burden of proof, the opinion pointed out that those who painted it had no proof that was drawn from life. “[T]here is no proof whatever to warrant such fears of malingering or deceit.”<sup>86</sup>

---

85. *Sherbert*, 374 U.S. at 407.

86. *Id.*

This, then, is the graphic representation of the Free Exercise Clause as drawn by the *Sherbert* Court:



1=Religiously inspired conduct. 2=Conduct the government has a “compelling interest” in regulating. 3=Religiously inspired conduct that may be prohibited. 1-3=“The Free Exercise of Religion.”

Figure 5—The Brennan version of the Free Exercise Clause, or the *Sherbert* Test. Thus the Clause protects some but not all religiously inspired conduct, and requires the government to explain why a proposed burden is necessary.

The rule is not quite as simple as the *Reynolds* rule; a court applying it must still determine whether a given class of acts falls within 1, then whether it also falls within 3. But this is a two-step calculation, relatively transparent (by which I mean that an honest explanation of how it is being applied can be understood readily by most readers, whether they agree with the calculations made or not). The Court managed to apply the *Sherbert* test successfully in a number of cases.<sup>87</sup> Not only does the rule provide protection for some but not all religious conduct, it furthers the goals of consistency by applying the same test to Free Exercise questions that is applied to Free Speech matters and to many Equal Protection claims as well. It additionally gives litigants a common vocabulary in which to discuss

---

87. See, e.g., *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 139–41 (1987) (reversing a state’s denial of unemployment benefits to a worker discharged for her refusal to work on her Sabbath, based on religious beliefs she adopted after commencing her employment); *Thomas v. Review Bd.*, 450 U.S. 707, 716–19 (1981) (reversing a state’s denial of unemployment benefits to a worker discharged for his refusal, based on his religious beliefs, to work on an armaments production line); *Wisconsin v. Yoder*, 406 U.S. 205, 215–19 (1972) (preventing application of a state compulsory education law that conflicted with Amish religious objections to higher education).

the question, and requires of the Court a relatively clear explanation of why a decision is being made. It is of course not utterly predictable, but that is not a requirement of an interpretive theory; as Bill wrote, "many of the problems of constitutional adjudication are not imagined, . . . they are not contrived, and . . . they do not proceed solely from judges who are mere ideologues."<sup>88</sup>

Nonetheless, by 1990 the Court had evidently grown weary of *Sherbert*, and it manufactured the opportunity to overturn it in *Employment Division v. Smith*.<sup>89</sup> *Smith* offers a tempting target for critique in Van Alstyne terms. To begin with, the *Smith* majority did not display an "exceptional willingness to listen, to consider, and to be very careful."<sup>90</sup> In fact, the majority remanded the case to pose a question that none of the litigants had asked and then gave that question an answer that none of the parties had discussed.<sup>91</sup> It reintroduced the perspective of the religious majority as the most important issue, and further reaffirmed the *Reynolds* rule that conduct of any kind is presumptively *unprotected* by the Free Exercise Clause.<sup>92</sup> Its one refinement on *Reynolds* was a concession that restrictions on religious conduct that were enacted either *because the conduct was religious* or *with the intent of discriminating against a religious group* were subject to the "compelling interest test."<sup>93</sup> In addition, inadvertently oppressive *unemployment compensation* regulations were also subject to the test.<sup>94</sup> But other cases where the majority enacted "neutral and generally applicable" rules that, through indifference or ignorance, had the effect of prohibiting religious conduct were to be judged, at most, by the permissive "rational basis" test.<sup>95</sup> Under the new test, a test that claimed to simplify Free Exercise jurisprudence, the topology began to become somewhat complicated:

---

88. VAN ALSTYNE, *supra* note 15, at 15.

89. 494 U.S. 872 (1990).

90. VAN ALSTYNE, *supra* note 15, at 13 (footnote omitted).

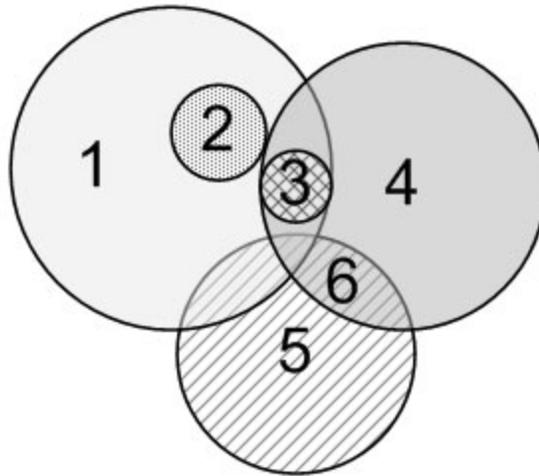
91. EPPS, *supra* note 75, at 216-21.

92. *Smith*, 494 U.S. at 877-82.

93. *See id.* at 882 ("There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.").

94. *Id.* at 882-84.

95. *Id.* at 877-82.



1=Religiously inspired conduct. 2=Prohibitions on religiously inspired conduct enacted because the conduct is religious. 3=Inadvertently oppressive rules relating to unemployment compensation. 4=Prohibitions on conduct enacted in ignorance or indifference of the religious inspiration of the conduct for some believers. 5=Conduct that is protected by some other more favored provision of the Bill of Rights. 6=Area of 5 that is also part of 4.

“The Free Exercise” of religion=2+3+6

Figure 6—The *Smith* Version of the Free Exercise Clause.

This complexity, I would suggest, is one signal of what is arguably wrong with the test. In effect, the *Smith* Court attempted to regraft the *Reynolds* rule onto a First Amendment doctrine that had been extensively developed in the previous century. This led the opinion’s author, Justice Antonin Scalia, to engage in the crassest sort of doctrinal redefinition. The *Smith* opinion relies on *Reynolds* as its precedent (bear in mind, of course, that the law that George Reynolds had been accused of violating was passed *in order* to suppress the Latter-Day Saints, thus arguably meaning that *Reynolds*, as the *Smith* Court read it, was not a *Reynolds* case). The opinion rewrites the United States Reports to create a hitherto undiscovered category of cases involving something called “hybrid rights”—combinations of free exercise with other rights such as the First

Amendment right of speech<sup>96</sup> or the Due Process right to control the education and upbringing of children.<sup>97</sup> Finally, it relies most heavily for precedent on a case that is not only widely reviled but has been overruled.<sup>98</sup>

In fact, the opinion's use of precedent is so disingenuous and tendentious that it calls to mind the picture one prominent scholar recently ridiculed as the current picture of "the great judge":

the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.<sup>99</sup>

The remarkable vividness and cynicism of this picture perhaps stems from self-loathing, as the high-stepping judge of *Smith* is himself the censorious critic of precedential manipulation, Antonin Scalia. Perhaps we should view his reductive view of common law judging as a cry for help—*Stop me before I distinguish more*. In any event, whether other "great judges" actually manipulate precedent so callously or not, Scalia as author of *Smith* did. But only for the greater good. To allow the Free Exercise Clause to approach its textual meaning would subject the nation to a full spectral parade of horrors that must necessarily ensue if a State were to be forced to allow peyotists to consume their sacrament under ritual conditions: "[I]f 'compelling interest' really means what it says . . . , many laws will not meet the test. Any society adopting such a system would be courting anarchy . . ." <sup>100</sup> To allow religious claimants to argue for exemption would make it impossible to enforce laws

ranging from compulsory military service to the payment of taxes, to health and safety regulation[s] such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child

---

96. See *id.* at 882 (citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) as a "hybrid" case).

97. See *id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) as a "hybrid" case).

98. See *id.* at 879-80 (citing *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), overruled by *West Virginia Board of Education v. Barnette*, 319 U.S. 642 (1943)).

99. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 9 (1997).

100. *Smith*, 494 U.S. at 888.

labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.<sup>101</sup>

If the prospect of total collapse of ordered liberty were not daunting enough, the opinion further notes that application of the “compelling interest” test would mean that “federal judges will regularly balance against the importance of general laws the significance of religious practice,”<sup>102</sup> a possibility so self-evidently horrible that the opinion need not explain why it is any worse than any other exercise in judicial balancing. And perhaps the most important reason why the Free Exercise Clause must be defined out of existence is that use of the “compelling interest” test in this disfavored context “would subvert its rigor in the other fields where it is applied.”<sup>103</sup> Since, as noted above, one of those “other fields” is another almost identically worded clause of the First Amendment, the necessity of such subversion is not entirely clear. But at any rate, the *Smith* majority reinstated the *Reynolds* rule with additions required by subsequent doctrine. It is, in effect, as if a scientist subsequent to Galileo and Copernicus had proclaimed “*eppur non si muove*”<sup>104</sup> and reinstated the Ptolemaic system, suitably complicated to accommodate the thousands of observations of planetary movements made since the change from an earth-centered to a sun-centered planetary system. “*Entitia non multiplicanda*,” supposedly warned the blessed William of Ockham.<sup>105</sup> It is worth discussing here the usefulness of Ockham’s Razor to both descriptive and prescriptive jurisprudence. The rule begins life as a technique for explaining natural phenomena, and its validity should be clear: if only a small number of causal factors completely explains a phenomenon, then including other factors in

---

101. *Id.* at 888–89 (citations omitted).

102. *Id.* at 889 n.5.

103. *Id.* at 888.

104. Loosely translated, this Italian phrase means “And yet, it does *not* move.” As the reader will note, this is a variation on one of the most famous phrases in Western history, only slightly less famous than “In the beginning was the Word.” The original, “*eppur si muove*,” (“and yet it moves”) was supposedly delivered by Galileo Galilei after he had been induced by the threat of torture to sign a minute retracting the claim in his published works that the Earth moves around the Sun, rather than vice versa. WILLIAM R. SHEA & MARIANO ARTIGAS, GALILEO IN ROME 195 (2003).

105. “Entities are not to be multiplied (without reason).” Ockham’s surviving texts do not use this formulation, but his writings do endorse the principle. See, e.g., STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., Fall 2002 ed.), at <http://plato.stanford.edu/archives/fall2002/entries/ockham/#4.1> (last visited Aug. 25, 2004).

the explanation requires us to posit natural causes that actually have no effect—or, in other words, ghost causes, disembodied specters.<sup>106</sup>

Why is an overly complex rule to be eschewed in law? Well, first, as descriptive jurisprudence it is more prone to inaccuracy and incoherence than is a less complex one; second, as prescriptive jurisprudence, it is more open to evasion and manipulation—which, I suggest, is exactly what has happened to the so-called “*Smith* rule.” Science historian Thomas Kuhn has noted that this kind of baroque excess is a mark of a “normal science” that is overdue for a “paradigm shift.”<sup>107</sup>

The very complexity of the *Smith* rule thus suggests that it cannot be right. In fact, from the discussion above, it seems clear that the *Smith* Court has simply developed another “special” form of judicial review. It might be summed up as follows—“Do not give full effect to all Constitutional provisions, as doing that may water down the ones you care about; resist any attempt to draw lines involving these inferior provisions.” This is simply a special case of the practice of judicially changing embarrassing or “archaic” provisions, and thus by definition does not fit the Van Alstyne method.

In this connection, it is intriguing to note that Justice O’Connor, in her concurrence, claims credit for sticking to *Sherbert* while managing to insert a new provision that significantly complicates that rule. O’Connor notes that “we have respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.”<sup>108</sup> So far, so orthodox. But Justice O’Connor writes not to praise free exercise for peyotists but to bury it. Under her version of the *Sherbert* rule, the peyotists would lose without any of the painstaking factual examination the *Sherbert* Court seemed to prescribe of the asserted State interests. Instead, she writes, peyote may be criminalized even in the ritual context because “uniform

---

106. *Id.*

107. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 66–76 (3d ed. 1996) (“So long as the tools a paradigm supplies continue to prove capable of solving the problems it defines, science moves fastest and penetrates most deeply through confident employment of these tools. . . . The significance of crises is the indication they provide that an occasion for retooling has arrived.”)

108. *Smith*, 494 U.S. at 894 (O’Connor, J., concurring in the judgment).

application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote."<sup>109</sup>

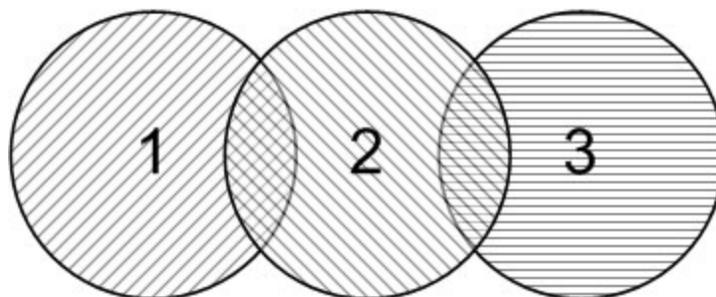
It is tempting to say that at this point Justice O'Connor's concurrence has labored mightily and given birth to a mouse—tempting, but unfair. A mouse may be small, but it is at least a living creature, capable of having some effect in the real world. Justice O'Connor's rule seems quite negligible by comparison; it seems to forbid “prohibit[ion] of the free exercise [of religion]” *except where the majority does not want anybody doing some particular thing that a religious minority must do*. If a prohibition is across the board, then that ends the inquiry. This conclusion must be true because at the time of the *Smith* case Oregon, of states with a significant Native population, was the only one that refused to make any accommodation for religious use of peyote. The track records of the other states allowing religious exemptions were readily available for examination; a court or a Justice possessing “an exceptional willingness to listen, to consider, and to be very careful,”<sup>110</sup> should have been willing either to look at the evidence suggesting that peyote exemptions do not cripple drug-enforcement efforts or at worst to remand the case for fact-finding on that issue. Instead, Justice O'Connor simply adopts the implied finding in Oregon's statute and substitutes a State's *unwillingness* to accommodate for the required *near impossibility* of accommodation.

The O'Connor version of “the free exercise” of religion might look something like the next figure:

---

109. *Id.* at 905 (O'Connor, J., concurring in the judgment).

110. VAN ALSTYNE, *supra* note 15, at 13 (footnote omitted).



1=Conduct the government wishes to prohibit for a “compelling” reason. 2=Religiously inspired conduct. 3=Conduct the government wishes to prohibit for reasons which are noncompelling in and of themselves but are augmented by a desire not to make any exceptions.

“The Free Exercise” of religion=2-(1 and 3)

Figure 7—The O’Connor version of the “Free Exercise” Clause.

Considered as a “special” theory of judicial review, the O’Connor version thus might stand for something like “give full effect to the Clause except in cases where the state would prefer not to.” Despite the praise given the rhetorical flourishes in Justice O’Connor’s opinion, there is reason to think that its adoption by a majority of the Court would not be a step forward in interpreting *this* Free Exercise Clause.

The majority has, however, encountered serious problems in applying the *Smith* rule—problems that should not be surprising if we view the *Smith* opinion as, in effect, an attempt to turn back the clock to the day of *Reynolds*.<sup>111</sup> The more wheels within wheels a theory requires, the more likely it is that sooner or later one of the wheels will come off. The Court found itself facing precisely that prospect when it attempted to apply *Smith* to another case.

---

111. If we do so view it, the Court’s subsequent dismissal of Congress’s statutory attempt to turn back the clock to the days of *Sherbert*, which crippled the enforcement clause of the Fourteenth Amendment, takes on an even more poignant air of illegitimacy. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the federal Religious Freedom Restoration Act as exceeding Congress’s power under Section 5 of the Fourteenth Amendment).

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>112</sup> concerned a city that had outlawed “ritual slaughter” of animals in order to prevent a congregation of Santerists from opening a house of worship on property they had bought within the city limits.<sup>113</sup> Justice Scalia had cited the lower court opinion in this case as an example of a “neutral, generally applicable” law that might be threatened if the *Sherbert* rule was applied.<sup>114</sup> But in fact the ordinances were textually aimed at religious practice—it was the closest thing to his hypothetical statute “prohibit[ing] bowing down before a golden calf”<sup>115</sup> that reality is likely to produce. Beyond their lack of textual neutrality, they had been passed in an atmosphere of bigotry and included exemptions designed to protect every other group that killed animals except the Santerists.<sup>116</sup> The Court thus was able to identify no fewer than four ways the law failed scrutiny—it was textually discriminatory, it was motivated by religious animus, the behavior it covered made it not neutral, and the behavior it exempted made it not generally applicable.<sup>117</sup> Any one of these would have been enough to place it in a separate category where *Sherbert* did apply. This opinion changed the *Smith* paradigm, adding new spheres to its model of the heavens:

---

112. 508 U.S. 520 (1993).

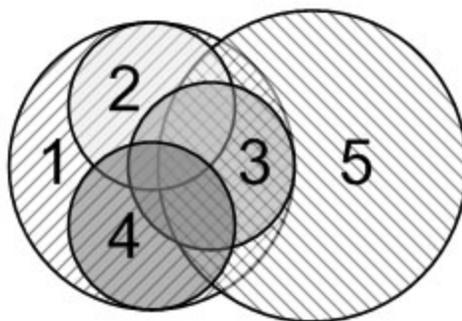
113. *Id.* at 525–29.

114. *Smith*, 494 U.S. at 889 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467 (S.D. Fla. 1989)).

115. *Id.* at 878.

116. *Church of the Lukumi Babalu Aye*, 508 U.S. at 526–29.

117. *Id.* at 535–38.



1=Religiously inspired conduct. 2=Religiously inspired conduct that is prohibited by a norm that includes exemptions amounting to a religious gerrymander. 3=Religiously inspired conduct prohibited by a legal norm whose underlying values suggest it is inspired by religious animus. 4=Prohibitions on religiously inspired conduct that were enacted amid circumstances suggesting religious animus. 5=Conduct, whether religious or not, that is prohibited in furtherance of a “compelling interest.”

“The Free Exercise” of religion is all that part of 1 that is also covered by 2, 3, or 4 or any combination thereof and is not included within 5.

Figure 8—The *Lukumi Babalu Aye* version of “the Free Exercise.”

The attempt to refine the Free Exercise Clause has thus complicated it almost to the point of incoherence.

#### CONCLUSION

We shall not cease from exploration  
 And the end of all our exploring  
 Will be to arrive where we started  
 And know the place for the first time.

“Little Gidding”  
 T.S. Eliot, *Four Quartets*

So, our tour of the Free Exercise Clause has shown us what I consider to be a classic example of paradigm collapse—a scheme that becomes unworkably complicated as its proponents attempt to adapt it to new factual situations. The *Lukumi Babalu Aye* formulation is almost cabbalistic in its complexity and is unlikely to prove workable over the long run. Of the many schemes laid out here, only two seem

workable—the negation of the Clause by the *Reynolds* Court and the “compelling interest” test proposed by Justice Brennan. The *Reynolds* rule, while workable, is not an interpretation of *this* Constitution, but a judicial manipulation of the line because of an anxiety or objection about its implications. This conclusion, anticlimactically, leaves us with the Brennan formulation as the sole candidate for a rule that applies *this* Constitution.

That the Brennan test seems to fulfill the requirements of the Van Alstyne method, of course, does not imply that it is the only test that could possibly do so. The fascinating aspect of our analysis is that the Van Alstyne method is not necessarily stultified or even embarrassed as a jurisprudential practice by the fact that it has been applied and has produced a preference for a “liberal” result. Nor is there any guarantee that similar applications of the method will produce “liberal” results elsewhere; to consider only one example, imagine the result if the method were used to tease out the practical meaning of the Second Amendment.<sup>118</sup> A method that rigorously applies criteria of logic, consistency, fidelity to text, and elegance seems quite likely to elicit some results that will displease every constitutional camp. As a progressive, I favor certain policy results; as a constitutional scholar, I am aware that the Constitution dictates certain arrangements and absolutely forbids others. Further, I am aware that the set of required and permissible arrangements under the Constitution *cannot possibly* square completely with my desired set of policy outcomes. This painful knowledge is the basis of maturity as a constitutional interpreter; and yet the human mind seems infinitely capable of producing reasons, or rationalizations, why this simply cannot be true—that surely, if America is good, and I am good, then the things I want for America must be the same thing its constitutive document requires.

It is of course this wishful thinking that the Van Alstyne method is directed against. Though we do not believe in the Evil Deceiver of Descartes’ theory—a demon who seeks to convince us that the

---

118. See, e.g., William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1241–55 (1994) (reaching the conclusion that “until the Supreme Court manages to express the central premise of the Second Amendment more fully and far more appropriately than it has done thus far, the constructive role of the NRA . . . ought itself not lightly to be dismissed”).

outside world exists even though it does not<sup>119</sup>—we must believe, and believe strongly, in the evil deceiver inside each of us, that strives to convince us that the realm of law and the realm of desire are one and the same. For it is precisely in the painful disjuncture between law and desire—between *what I think should be* and *what I must concede is*—that maturity both as a lawyer and as an advocate of change begins. Without a firm commitment to searching for the boundary between law and desire, our work as scholars will be of little use, as we will never know whether and to what extent we are simply using the Constitution as a mirror to reflect back to us, suitably enhanced, our own faces. I hesitate to claim that I embody such maturity; but to the extent that I do, I must give much of the credit to the lessons I learned from Bill Van Alstyne. Perhaps, indeed, Bill himself will decide that my analysis of his method is “thoroughly shoddy.” If so, I expect no less than demolition, even though it be my own scholarly cadaver that is flung over the Reichenbach Fall.<sup>120</sup> My task, then as always, will be “to listen, to consider, and to be very careful.”<sup>121</sup>

---

119. For a discussion of the “evil” or “malicious deceiver,” see RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 18 (John Cottingham trans. & ed., Cambridge Univ. Press rev. ed. 1996) (1641).

120. See *supra* notes 8–9 and accompanying text.

121. VAN ALSTYNE, *supra* note 15, at 13 (footnote omitted).