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David Little

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THOMAS JEFFERSON'S RELIGIOUS VIEWS AND THEIR INFLUENCE ON THE SUPREME COURT'S INTERPRETATION OF THE FIRST AMENDMENT

*David Little**

In *The Americans: The Colonial Experience*, Daniel Boorstin suggests that one of the characteristics of the "American frame of mind" is the "belief that the reasons men give for their actions are much less important than the actions themselves,"¹ and he associates this belief with the Founding Fathers. This essay will summarize the pervasiveness and significance of this belief with regard to Thomas Jefferson's views of religion and of the relation of religion to the civil order.² It will also explore, in a very preliminary manner, the influence of this belief—with its implicit disparagement of all reasons for action, including religious reasons—on the Supreme Court's interpretation of the first amendment. Toward this end, the opinions of the Court in two late 19th-century decisions, *Reynolds v. United States*³ and *Davis v. Beason*⁴ will be analyzed. *Reynolds* is the Court's earliest discussion of the "free exercise" clause of the first amendment, and it is there that Jefferson's famous phrase regarding "the wall of separation between Church and State"⁵ made its first appearance in judicial literature. *Davis* draws heavily on the conclusions reached in *Reynolds*.

In both these decisions, the Court found the Mormon practice of polygamy to be a crime, regardless of the religious beliefs which supported the practice; and in justifying its opinion, the Court relied on Jefferson's writings. It is this author's contention that however beneficial Jefferson's influence was in some respects, his views also had a befuddling effect on the reasoning of the

* Professor of Religious Studies, University of Virginia. B.A., 1955, College of Wooster; B.D., 1958, Union Theological Seminary; Th.D., 1963, Harvard University.

1. D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 151 (1958).

2. For a more detailed treatment of this subject, see D. Little, *The Origins of Perplexity: Civil Religion and Moral Belief in the Thought of Thomas Jefferson*, in R. RICHEY & D. JONES, *AMERICAN CIVIL RELIGION* 185-210 (1974).

3. 98 U.S. 145 (1878).

4. 133 U.S. 333 (1890).

5. This phrase first appeared in a letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), reprinted in A. KOCH & W. PEDEN, *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 332-33 (1944).

Court, particularly at the point of disparaging reasons and beliefs in relation to action. A more detailed discussion of the connection between Jefferson's religious views and the *Reynolds* and *Davis* decisions will follow in the second part of this article.

I. JEFFERSON'S VIEWS OF RELIGION

In examining Jefferson's views of religion and of the relation of religion to the civil order, we need to apply to his views the same kind of persistent scrutiny he often applied to the views of his opponents. We shall be more interested in what Jefferson *did* believe, than in what he rejected, despite the fact that he himself was sometimes more attentive to the latter than he was to the former.

Since we shall implicitly raise some objections to Jefferson's point of view, let us take account of two cautionary comments. First, in some ways it is more fashionable lately to debunk Jefferson than to defend him. Fawn Brodie's book, *Thomas Jefferson: An Intimate History*,⁶ sets the pace. There is something unseemly about relishing the discovery of flaws, or of alleged flaws, in the character and thought of national heroes. This is a temptation to be resisted, especially in the case of a man of Jefferson's deserved eminence. On the other hand, the greater the man, the more honest scrutiny he can endure.

Second, although this article will question the frame of mind within which Jefferson understood the relation of religion to the civil order, including his famous doctrine of the separation of church and state, there is no doubt that Americans have enjoyed important benefits as a result of Jefferson's successful campaign to disestablish religion at the national level. Even some of Jefferson's severest critics concede that his "record on religious liberty was really quite exceptional"⁷—vigorously defended and consistently put into practice against profound resistance. What has had great benefits, however, has also had some costs.

Let us now begin to identify the frame of mind in which Jefferson developed his views of religion, which in turn led to his doctrines of religious liberty and the separation of church and state. What did Jefferson mean by the famous words from his letter of 1802 to the Danbury Baptists?

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or worship, that *the legislative powers of government reach actions*

6. F. BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* (1974).

7. L. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 21 (1963).

only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, *convinced he has no natural right in opposition to his social duties.*⁸

Further, what did Jefferson mean by the words from the Preamble to the Act for Establishing Religious Freedom (1786), that "our civil rights have no dependence on our religious opinions?"⁹

When Jefferson drew a bold line between "opinions" and "actions," as he did in the first passage, or between "opinions" and "civil rights," as he did in the second, he had more in mind than meets the eye. He made those distinctions because he considered the opinions or beliefs of people to be basically irrelevant and unimportant in respect to their actions. In conducting one's life, in acting properly, and in doing the right thing, there is a sure, clear guide at hand that does not involve much thinking or deliberating, or much worrying about different opinions and beliefs—that is, the sure, clear guide of common sense. Jefferson was emphatic and explicit: this simple guide is a sense, and one that has little need of what he calls "the uncertain combinations of the head."¹⁰ "This sense of right and wrong . . . is as much a part of [human] nature as the sense of hearing, seeing, feeling, . . . as much a part of man as his leg or arm . . ."¹¹ And, he concludes, this sense is "so much a part of our constitution that no error of reasoning . . . might lead us astray from its observation in practice."¹²

Jefferson believed this capability must be cultivated and tutored by means of education. Moreover, government and the force of law is required to intervene when a citizen's common sense fails him, that is, when he violates his easily perceivable social duties. Generally, however, Jefferson was opti-

8. Letter to a Committee of the Danbury Baptist Association, *supra* note 5 (emphasis added).

9. Preamble to the Act for Establishing Religious Freedom (1786), *reprinted in* A. KOCH & W. PEDEN, *supra* note 5, at 312. For a copy of Jefferson's original text before deletions were made by various deliberative bodies that considered the document, see J. BOYD, *THE PAPERS OF THOMAS JEFFERSON* 545-47 (1950).

10. A. KOCH & W. PEDEN, *supra* note 5, at 404.

11. *Id.* at 430-31. Jefferson belonged to the "sentimentalist" or "sensationalist" branch of 18th-century moral intuitionism, a position that was distinctly and self-consciously opposed to the rationalist branch of intuitionism. It is a serious mistake to label Jefferson a "rationalist." See D. Little, *supra* note 2, at 206-07 nn.20 & 21.

12. A. KOCH & W. PEDEN, *supra* note 5, at 636.

mistic about the reliability and availability of common sense, if human beings attempt to use it.¹³

Above all, Jefferson regarded himself as a scientist—a scientist in all things, including human action. From Jefferson's point of view, to be a scientist meant that truth in every aspect of life should and could be determined by the scientific method—or, as he called it, the "experimental method"—which employs seeing, hearing, feeling, and the other senses in ascertaining truth. In settling issues, scientists focus on the observable data, so Jefferson believed. They do not sit around theorizing and arguing about abstractions.¹⁴

When Jefferson applied his method to things like political disputes between Tories and Whigs, he produced the most remarkable results. He wrote, after the fashion of a scientist recording his observations about an experiment: "The sickly, weakly, timid man, fears the people, and is a Tory by nature. The healthy, strong and bold, cherishes them, and is formed a Whig by nature."¹⁵ We need hardly remind ourselves that Jefferson was formed a Whig by nature! When it is possible to discern so easily who is right and wrong, there is no need to take seriously theoretical disputes and arguments. In fact, Jefferson agreed with Benjamin Franklin: "Disputes are apt to sour one's temper, and disturb one's quiet. . . . [T]he [m]ultitude are more effectively set right by [e]xperience, than kept from going wrong by [r]easoning with them."¹⁶

In other words, Jefferson had a very simple, not to say naive, view of the world. If only people were free to apply the scientific method to all areas of experience, they would readily come to agree on what is right and wrong or what is true and false. They would not need to worry over theoretical disputes. People, after all, possess common sense, and they possess it universally.

This fundamental, pragmatic outlook affected Jefferson's thoughts about education. He sought to provide an education that would be "useful and practicable for us."¹⁷ In place of many of the "theoretical" subjects traditionally taught in Europe, Jefferson strongly recommended the study of agriculture in American colleges and universities.

It is the first in utility, and ought to be first in respect. The same

13. See D. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 165-66 (1948).

14. For a discussion of Jefferson's views about the "experimental method," see *id.* at ch. 3.3.

15. XV *THE WRITINGS OF THOMAS JEFFERSON* 492 (A. Lipscomb ed. 1903).

16. D. BOORSTIN, *supra* note 1, at 153.

17. X *THE WRITINGS OF THOMAS JEFFERSON* 244 (A.E. Bergh ed. 1907).

artificial means which have been used to produce a competition in learning, may be equally successful in restoring agriculture to its primary dignity in the eyes of men. It is a science of the very first order. . . . [It is] the crown of all other sciences¹⁸

This pragmatic attitude was as true in religion as it was in everything else. All doctrinal controversy among different groups within Christianity was, when all was said and done, so much hot air. "When once we quit the basis of sensation," Jefferson remarked, "all else is in the wind."¹⁹ Religious disputes, like all arguments about theories and beliefs, simply distract people from the sure, simple guide of common sense: they amount, he once wrote, to "the charlatantry of the mind."²⁰

Jefferson was sure in his belief that there was a God. But his God was not the God of the preachers and theologians. He was the God who was easily discovered, as we would expect, by sense experience, by observing the natural order and harmony of the universe.²¹ He was "nature's God" of the Declaration of Independence, and, as such, was not complicated or mysterious, nor were his commandments so. They were simple and straightforward, for they were the same ready directives we discover by consulting our common sense. In fact, only if a religion conforms to the simple morality of common sense is it acceptable. Again, one does not need much preaching, argument, or discussion over doctrine to know that.

Among the religious traditions, including Judaism, with which Jefferson was acquainted, Christianity was by far the most appealing to him; but this was so only after Jefferson had abstracted the true, simple message of Jesus "from the rubbish in which it is buried, easily distinguishable by its lustre from the dross of His biographers, and as separable from that as the diamond from the dunghill."²² This meant, for example, sifting through the New Testament so as to feature "the most sublime morality which has ever fallen from the lips of man" by excising all "inferior" theological and theoretical materials.²³ Jefferson was absolutely sure that he was able to avoid all the difficult problems of exegesis and interpretation of Christian Scriptures, as of all Sacred Scriptures, because he had the sure guide of common sense at his disposal. Accordingly, the only thing worth knowing in religion is the common core of practical moral guidance that is the same the world over. And it follows from this that dogmas, which vary from religion to religion, are,

18. D. BOORSTIN, *supra* note 13, at 217.

19. A. KOCH & W. PEDEN, *supra* note 5, at 701.

20. D. BOORSTIN, *supra* note 13, at 134, *citing* II THE WRITINGS OF THOMAS JEFFERSON 229 (A.E. Bergh ed. 1907).

21. A. KOCH & W. PEDEN, *supra* note 5, at 706-07.

22. *Id.* at 694.

23. *Id.*

as he said, "totally unconnected with morality."²⁴ The dogmas are thoroughly dispensable; they will blow away in the wind. The moral teaching alone will be left.

We ought not leave the impression that Jefferson made no reference whatsoever to the importance of "reason and free enquiry" or, as he also put it, "reason and experiment" in matters of religion. He did occasionally make such references, as, for instance, in the *Notes on Virginia*.²⁵ But it is in the very same writing that he supported his reference to "open discussion" in religion by belittling the relevance of religious differences in civil affairs.

The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket [n]or breaks my leg. . . . [I]f a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the State to be troubled with it.²⁶

Jefferson also stressed free debate among different religious points of view in the Preamble to the Act for Establishing Religious Freedom, where he asserted that such discussions lie beyond the regulation and restraint of governmental power.²⁷ But again, this is because the standards for imposing and restricting governmental power "have no dependence on our religious opinions,"²⁸ but are derived from a surer, less adventitious source. The government may interfere in religious matters only "when [religious] principles break out into overt acts against peace and good order," and themselves thus cause a breach in the "wall of separation" that ought to exist between opinion and action, and that must accordingly be protected by the government.²⁹ In the opening sentences of the Preamble,³⁰ Jefferson submits what appear to be his own religious opinions in support of his view of the proper limitations on governmental power:

Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion³¹

24. XII THE WRITINGS OF THOMAS JEFFERSON 315-16 (A.E. Bergh ed. 1907).

25. Jefferson, *Notes on Virginia*, in A. KOCH & W. PEDEN, *supra* note 5, at 187.

26. *Id.* at 275-77.

27. See J. BOYD, *supra* note 9, at 545.

28. *Id.* at 546.

29. *Id.*

30. A. KOCH & W. PEDEN, *supra* note 5, at 313.

31. *Id.* at 311.

In other words, Jefferson's expressed view of civil rights was dependent, up to a point at least,³² on *his* religious opinions! If one did not share Jefferson's opinions, as many in history have not, one might well come to different conclusions about the character and range of civil rights. What explains the apparent contradiction on Jefferson's part is, I suggest, his belief that his own religious interpretations were not in a class with the ordinary beliefs and opinions of others, because his views were authenticated not by idle metaphysical and theological speculation, but by the method of common sense.³³

Finally, in his letter to the Danbury Baptists, Jefferson reaffirmed the same sharp distinction between opinion and action, not only in the interests of untrammelled religious discussion, but to make an additional point as well. When he said he was "convinced that [man] has no natural right in opposition to his social duties,"³⁴ he meant that those actions which fit man to live harmoniously in the civil order (and which are, of course, directly intuitable by common sense), may not under any circumstances be overridden by other

32. In several portions of the original text of the Preamble, Jefferson elaborated on his personal conviction that the mind is "*altogether insusceptible of restraint*," J. BOYD, *supra* note 9, at 545; that "*the opinions of men are not the object of civil government, nor under its jurisdiction*," *id.* at 546; and that God has chosen to extend our religion "*by its influence on reason alone*," *id.* at 545. These statements, which were subsequently deleted, simply reinforce the fact that Jefferson introduced his own religious convictions in support of the freedom of religion. The second deletion restates the version of the "wall of separation" doctrine found in the letter to the Danbury Baptists.

The author notes his indebtedness to his colleague, David Levin, for calling attention to these deleted passages (though Levin believes that they give evidence of a more extensive liberality of spirit in Jefferson than the author allows). As Boorstin sees the matter:

The Jeffersonians could view the dispute of metaphysicians and theologians with detached amusement or indifference, because it is easy to tolerate anarchy in a realm where one has never really entered and which one is glad to see discredited

. . . [T]he experimental method which the Jeffersonians had to profess in order to get their practical scientific job done, carried with it . . . an unconsidered dogmatism in matters of behavior and morals.

D. BOORSTIN, *supra* note 13, at 111.

Since the standard for right action, assumed by Jefferson to be so clear and indisputable, was also for him the standard for evaluating religious truth—for separating "the diamond from the dunghill"—the selfsame "unconsidered dogmatism" similarly characterized Jefferson's particular brand of religious belief.

33. Jefferson also appealed to "natural right" as the basis for the independence of political activity from religious conviction. Presumably, that appeal might be independent of any religious warrant. A. KOCH & W. PEDEN, *supra* note 5, at 312. Yet Jefferson nowhere distinguished what might well be two very different sorts of appeal. He did not do this because of his conviction that the same common sense underlies and reveals both natural rights and "the plan of the Holy Author of our religion." *Id.* at 313.

34. Letter to a Committee of the Danbury Baptist Association, *supra* note 5.

duties or beliefs. In that sense there can be no conflict between natural right and social duties. Social duties, then, become the standard for appraising and tolerating beliefs and opinions. In other words, to the extent beliefs and opinions do not run afoul of the commonly perceivable social duties, they are harmless and not to be hindered.

It might occur to some observers that Jefferson's view of what constituted proper social duties (and therefore natural rights) rested on *his own* beliefs and opinions, just as his view of what constituted "our civil rights" rested, in part, on his beliefs and opinions regarding "the plan of the Holy Author of our religion."³⁵ Ironically, that difficulty did not occur to Jefferson because, according to his theory, actions are so easily determined apart from beliefs and opinions.

What is most remarkable about Jefferson's world is its simplicity, its tidiness, and its lack of both perplexity and irreducible mystery. In his world, nature, God, morality, and the civil order all blend together neatly and obviously. There are no conflicts, no tensions, or anything else that would drive people with any sense of emotion to reflect, deliberate, question, or reconsider. The following characterization of Jefferson by Leonard Levy seems to capture the person who lay behind this frame of mind: "Regret and remorse are conspicuously absent from Jefferson's writings, as is reflective reconsideration of a problem. Something in his makeup, more than likely a stupendous ego, inhibited second thoughts. . . . Restatement, not reevaluation, marked his thinking. . . ."³⁶

Now we can begin to understand why Jefferson dismissed and discounted as irrelevant distractions all beliefs, opinions, doctrines, and theories that did not pass the test of the sure, simple standard of common sense. And it is because all such beliefs were finally irrelevant and unimportant to Jefferson that he believed they should be set apart and fenced off from the world of action, the world of civil responsibility, by a "wall of separation." It was *not*, as we are so often told, that Jefferson honored and respected differences of opinion so much that he erected his famous wall. On the contrary, it was because he honored and respected them so little.

II. JEFFERSON'S RELIGIOUS VIEWS AND THE SUPREME COURT

The two Supreme Court decisions to be discussed, *Reynolds v. United States*³⁷ and *Davis v. Beason*,³⁸ illustrate some of the costs of Jefferson's view-

35. A. KOCH & W. PEDEN, *supra* note 5, at 311.

36. L. LEVY, *supra* note 7, at 172.

37. 98 U.S. 145 (1879).

38. 133 U.S. 333 (1890).

point towards religion and its relation to civil action. As mentioned earlier, both of these cases held the Mormon practice of polygamy to be a crime.

Several questions were decided in *Reynolds*, but only two are significant for our purposes: "Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?"; and "Did the court err in that part of the charge which directed the attention of the jury to the consequences of polygamy?"³⁹ Mr. Chief Justice Waite delivered the unanimous opinion of the Court, answering both questions in the negative.

With respect to the first question, the Court found no reason why George Reynolds, a practicing Mormon who had married a second wife, should be acquitted of the crime of bigamy.⁴⁰ Reynolds had proven that he was an active member of the Mormon church and that it was an accepted Mormon belief that male members of the church had the duty, if possible, to practice polygamy. The refusal to do so, they believed, would result in eternal damnation.

According to Chief Justice Waite's opinion, "the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."⁴¹ In response, the Chief Justice invoked, for the first time, Jefferson's phrase from the letter to the Danbury Baptists concerning the "wall of separation", and quoted the relevant portions of the letter at length.⁴² He also quoted several passages from the Preamble to the Act for Establishing Religious Freedom:

Coming as this does from an acknowledged leader of the advocates of the measure [the first amendment], it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. 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.⁴³

The concluding sentence constituted a key principle in Waite's reasoning. He immediately proceeded to establish that so far as the western tradition was concerned, polygamy was a "violation of social duties" and was "subversive of good order." "Polygamy has always been odious among the northern and western nations of Europe. . . . At common law, the second marriage was

39. 98 U.S. at 153.

40. Congress, in 1862, made bigamy a crime in the U.S. Territories. Act of July 1, 1862, ch. 126, § 1, 12 Stat. 501 (1862) (repealed 1882).

41. 98 U.S. at 162.

42. *Id.* at 164.

43. *Id.*

always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offence against society."⁴⁴ Moreover, he contended that plural marriage patterns would eventually produce a "patriarchal principle," which, "when applied to large communities, fetters the people in stationary despotism,"⁴⁵ and undermines monogamy, as well as the established principles of American government. In so doing, polygamy subverts good order.

Given that the law of the land defines "social duties" and "good order," and further given that United States law deems plural marriages to be in violation of these concepts, Waite concluded that a religious belief in favor of practicing polygamy could not be allowed to excuse or exempt a person from obeying the law.

To permit this would be to make professed doctrines of religious beliefs 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

The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only

But when the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made.⁴⁶

With respect to the second question, Chief Justice Waite concluded that the trial court judge's charge to the jury regarding the deleterious consequences of polygamy was not prejudicial.⁴⁷ According to Waite, the Court saw

no just cause for complaint in this case. Congress in 1862 (12 Stat. 501), saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to

44. *Id.*

45. *Id.* at 166.

46. *Id.* at 167.

47. *Id.* at 168. The charge had read:

I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion [the practice of polygamy]. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land.

Id.

flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform.⁴⁸

One thing is clear about Waite's reasoning in this decision. Despite his endorsement of Jefferson's division between belief and action, as well as of Jefferson's view of the role of government regarding that division, Waite himself did not respect the division. The Court's decision turned out to reach opinions and not actions only. In the first place, the sort of belief Reynolds held was precisely a belief about action, a belief that is not truly "held" unless it involves action. In believing intensely as a Mormon that he had a duty to practice polygamy, Reynolds' belief was that polygamy ought to be performed. Therefore, to prohibit Reynolds from acting on his belief was necessarily to stand in judgment not only on the action, but also on the correctness of the belief.

In the second place, the Court necessarily substituted its own beliefs about action for Reynolds' beliefs. The issue was not the restriction of actions rather than beliefs. It was the restriction of one set of beliefs about action, namely Reynolds', in favor of another set, namely the Court's. How else are we to understand the implicit argument running throughout Waite's opinion and inferred from Jefferson's letter to the Danbury Baptists? The argument proceeds more or less as follows:

1. According to Jefferson, one has no natural right in opposition to his social duties. This means that one's social duties are always right, and violations of social duties always wrong.⁴⁹
2. The social duties appropriate for American citizens are self-evident from American history as well as America's Western European heritage, according to which polygamy is a violation of social duty.⁵⁰
3. Since polygamy is a violation of social duty, and since no one has a natural right in opposition to his social duties, the performance of polygamy is always wrong.

The conclusion of this syllogism clearly follows from the major and minor premises; but, as stated, those premises raise some questions. The major premise needs clarification and defense, though one of the reasons that such is not provided is because of Jefferson's commitment to common sense. When one can perceive things directly and simply, what need is there for

48. *Id.*

49. *See* text accompanying note 8 *supra*.

50. *See* text accompanying note 44 *supra*.

rational clarification and justification? That is what theoreticians do, and we know what Jefferson thought of them. However, Jefferson's commitments and convictions, which lie behind Waite's opinion, cannot hide the fact that his assumptions, and therefore Waite's, comprise a set of beliefs about right and wrong action that are not, at least to this author, "self-evident."

This is also true of the minor premise. It may not be entirely fair to tax Jefferson with Waite's appeal to the history of law as the way to determine social duties, though part of the problem with Jefferson's position is precisely the indeterminacy of his method for knowing what counts as a social duty and what does not. In fact, Waite's way of determining social duties does not seem altogether illegitimate, given the vagueness of Jefferson's "method." In any case, we are faced with a set of beliefs about action which dictates that what a large number of people has considered odious *is* odious. To say the least, that belief also needs clarification and defense, for it is the very belief which Reynolds challenged.

Waite's arguments with respect to "good order" similarly place one set of beliefs about action against another. If it is true, as Waite alleged, that polygamy would eventually undermine monogamy and the principles of democratic government, then there is reason for the government to interfere with Mormon beliefs about polygamy in the interests of beliefs about monogamy and democracy. Some such interference is undoubtedly unavoidable, but then it is once more clear that the legislative powers of government do in fact reach opinions and not actions only.

We can draw the same conclusion from Waite's response to the question regarding the alleged error in the trial court's statement to the jury noting the consequences of polygamy. The charge to the jury, which Waite found acceptable, is permeated with value-laden beliefs about action.⁵¹ To label the practice of polygamy a "delusion," and to speak unconditionally of "pure-minded women" and "innocent children" as "victims" and "sufferers" of "the evil consequences" of polygamy presupposes a rather vivid set of beliefs about right and wrong action. Needless to say, if one were a Mormon and supported polygamy on religious grounds, he would find the application of those terms anything but self-evident. On the other hand, Waite's acquiescence suggests he did not find the utilization of those terms inappropriate.

In the closing pages of the opinion, Waite made a comment that differed in tone and direction from the foregoing arguments. This comment portrayed the conflict of religious belief and social duty as it relates to the needs of maintaining a government and a legal system, rather than viewing it simply as an issue of right and wrong beliefs. Waite rejected the idea that an appeal to religious belief can excuse criminal behavior on the grounds that anarchy

51. See note 47 *supra*.

would then replace the rule of law, and "government could exist only in name."⁵² Even under the terms of this more functional and pragmatic argument, however, the legislative powers of government would still reach opinion as well as actions. Since the maintenance of any government would necessitate agreement on some beliefs about action, state interference would be required in the event that certain contrary beliefs appeared.

Reynolds exhibits some of the oversimplifications and confusions regarding Jefferson's distinction between belief and action. These defects become clearer and more blatant in *Davis v. Beason*,⁵³ a case that refers extensively to *Reynolds*.

Samuel Davis, a Mormon, wished to vote in an election in his home territory of Idaho. Toward this end he took an oath, according to an Idaho law,⁵⁴ which, among other things, contained the following provision:

[N]o person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order . . . which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy . . . is permitted to vote at any election, or to hold any position . . . within this Territory.⁵⁵

Davis was then convicted of conspiracy to obstruct the administration of the laws of the territory by seeking to register as a voter while knowingly belonging to the Mormon church. On appeal before the Supreme Court, Davis relied on several contentions, but Mr. Justice Field, delivering the unanimous opinion of the Court, reviewed only the legality of the law that withheld the right to vote from those who "teach, advise, counsel or encourage" polygamy and who would not promise to desist from such activity.

On this point, Field stated, "there can be no serious discussion or difference of opinion."⁵⁶ He noted:

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and debase man. Few crimes are more

52. 98 U.S. at 167.

53. 133 U.S. 333 (1890).

54. IDAHO REV. STAT. § 501 (1887).

55. *Id.*, quoted in 133 U.S. at 333.

56. 133 U.S. at 341.

pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. *To call their advocacy a tenet of religion is to offend the common sense of mankind.*⁵⁷

The last sentence is of special interest to us in light of Jefferson's views of religion and common sense. Field elaborated on the point there made:

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.⁵⁸

Whether or not Jefferson may be blamed for the precise formulation of this point, Field's assertions parallel very closely Jefferson's basic position. For Jefferson, it will be recalled, the sure, clear guide of common sense established a standard by which to distinguish the worthy from the unworthy in religion. What was worthy in religion was of course that which conformed to the social duties dictated by common sense. To Jefferson, as well as to Field, common sense could only yield as the preferred religious point of view—or, in Jefferson's words, "the plan of the Holy Author of our religion"⁵⁹—a highly liberalized but still recognizable version of Christianity. Equipped with this sure common sense standard, there is no particular difficulty, no perplexity, about knowing which acts are, as Field stated, "inimical to the peace, good order, and morals of society."⁶⁰ Therefore, there is no particular difficulty identifying which "tenets of religion" are valid and which are not.

As indicated above, the judgment Field made on matters of morality and religion is more self-assured, more absolute, and more unqualified, than Waite's opinion in *Reynolds*. This may partly be due to certain character traits peculiar to Field.⁶¹ However, we still cannot help but note the striking

57. *Id.* at 341-42 (emphasis added).

58. *Id.* at 342.

59. A. KOCH & W. PEDEN, *supra* note 5, at 311.

60. 133 U.S. at 342.

61. Mr. Justice Field's judicial and personal convictions may have been interwoven. A profoundly moral tone pervaded many of his judicial utterances; legal issues were stated in ethical terms; 'right' rather than precedent tended to be the guiding consideration. And conjoined to this preoccupation with normative questions was a remarkable sense of certainty concerning the answers. Field did not believe something to be right—he knew it to be; and the self-righteousness thereby generated was a dominant feature of his juridical personality.

McCloskey, *Conservatism and Constitutionalism: Stephen J. Field*, in *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910* at 88 (1951).

similarities between the approaches of Jefferson and Field. At the very least, it is fair to conclude that Jefferson's views of religion, belief, and action provide a congenial background for Field's absolutism.

The oversimplifications and unexamined assumptions regarding beliefs about action that were uncovered in our investigation of *Reynolds* leap out at us in *Davis*. There is not the slightest hesitation in the latter opinion to disparage as unworthy basic Mormon beliefs about polygamy, or to employ the force of law in interfering with the implementation of those beliefs. Moreover, the normative assumptions of Field and the Court he represented are as manifest as they are undefended. The reference to "the common sense of mankind" reflects the Jeffersonian belief in a universal common sense that readily reveals right and wrong action to those who are in their "right" senses. But that *is* a belief, and, so far as this author is concerned, one whose status is anything but self-evident. The same holds true for Field's convictions that polygamy tends to "degrade woman and debase man," and that "[f]ew crimes are more pernicious to the best interests of society."⁶² Those contentions are true only given the truth of certain more basic beliefs about what is and what is not valuable for human beings. Considered from *Davis*' point of view, the fulfillment of a command of God certainly would not be regarded as degrading to women or debasing to men.

In criticizing *Reynolds* and *Davis*, this article suggests neither that the Court was wrong to consider matters of value-belief and commitment, nor that it was mistaken in not respecting scrupulously enough Jefferson's wall of separation between belief and action. Nor is there contained herein a suggestion that the Court made the wrong value judgments regarding polygamy and the alleged threat it represented to the social fabric. Nor, finally, is there an implication that because interference with some beliefs is inevitable, that the Court should interfere, with slight discretion, in all matters of belief and opinion. What is suggested is that the Court, like all agencies of civil order, cannot avoid at times involvement in the sphere of belief, and, as in the Mormon cases, of passing judgment by implication on the correctness of beliefs.

While the Court did not explicitly take a religious position in the decision against the Mormons, it did nevertheless assume a stance that bore directly on the religious beliefs of Mormons, and that position made the "free exercise" of some of those beliefs impossible. The regulation and direction of the civil order itself depends on adopting a set of beliefs and values about the world that necessarily has implications for religious beliefs. To ignore

62. 133 U.S. at 341.

that fact is to obscure one's vision by hiding behind a misplaced wall of separation.

III. CONCLUSION

A review of these two early cases demonstrates what should have been obvious but for the confusions created by a Jeffersonian approach to these questions. The sharp distinction between belief and action is mistaken. All of us engage in the actions we consider to be significant on the basis of beliefs we hold about those actions. If beliefs differ, actions may also differ. A person can succeed in tearing beliefs and actions apart, and delude himself that he is judging the one and not the other, only if he has first accepted a theory like Jefferson's which minimizes the importance and relevance of the reasons behind our actions.

The matter of interpreting the free exercise clause of the first amendment is a difficult and complicated affair. It involves a delicate balancing and compromising of divergent beliefs, interests, and duties. It is difficult to find any simple formula for settling such conflicts. Therefore, those charged with the responsibility of making the necessary determinations ought to be fully aware of how involved and complex the process is, both legally and intellectually. It is submitted that the Supreme Court's earliest interpretations of the first amendment indicate that the direction provided by Jefferson in this respect often obscures, rather than clarifies, this process.