Yamauchi Lecture
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Introduction

Good evening, thanks for coming. There are so many interesting facets of this case to talk about. But what I want to focus on is what it illustrates about the current state of First Amendment law:

"Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof." These are the first words of the First Amendment to the U.S. Constitution and (along with the bar on religious tests for office) they encompass the protections for religious freedom guaranteed by the Constitution. The construction of this guarantee, in two separate clauses that each addresses a different aspect of the right at issue, has made constitutional protection of religious freedom a particularly complex and contentious issue. Headlines abound that illustrate both the **popularity** of appeals to religious freedom and the **difficulty** of trying to parse the meaning enshrined in its enigmatic syntax.

For example, the Cody Brown family, of "Sister Wives" fame, claims that Utah's anti-polygamy law violates their religious freedom.

Meanwhile, the right to religious freedom informs the seven states, joined by several Roman Catholic agencies, that are challenging the Affordable Care Act requirement that employees at church-affiliated institutions receive health coverage for contraceptives and other birth control services.

By the end of the 20th century popular understandings of the meaning of the constitutional guarantees pertaining to religion have largely departed from the Supreme Court's jurisprudence, leading to often unexpected and unpopular rulings on issues from school prayer to peyote. This in turn has made the Religion Clauses a particularly contentious area of First Amendment rights.

A less sexy example of the challenge courts face interpreting and applying the Religion Clauses is the pending bankruptcy proceeding *In re Monroe L. Beachy*. The case concerns the distribution of the remaining assets of the so-called "Amish Bernie Madoff." Mr. Beachy is a member of the Amish community of Spring

Creek, Ohio. He ran a financial services firm that, despite commitments to only invest client funds in low risk government-backed securities, had become insolvent around 2000 due to riskier investments. Most of his clients were also members of Old Order Anabaptist religious communities whose commitment to a life guided by principles and values that separate them from the materialism and competitiveness of the outside world has branded them the "Plain People." Rather than admit to his clients that he had suffered losses in high risk investments, in 2000 Beachy initiated a Madoff-style Ponzi scheme to cover up the losses while continuing with ill-advised high risk investments that mushroomed losses until an investigation by the Securities and Exchange Commission prompted him to file for Chapter 7 bankruptcy protection in 2010.

There are a number of features of the bankruptcy system that are designed to maximize the value of proceeds available for distribution to creditors and to facilitate orderly administration of the process. However, despite these benefits and despite the fact that Mr. Beachy violated the trust and traditional values characteristic of their communities, most of those who were defrauded by Mr. Beachy sought to have the bankruptcy case dismissed. The vast majority of Mr. Beachy's creditor's (94% of them, representing 97% of the money at stake) indicated that they preferred to have the matter resolved by an alternate plan, one that would be overseen by leaders from their own community.

This case illustrates many of the tensions inherent in our nation's founding conundrum:

What kind of religious freedom is fundamental to democracy? Does religious freedom mean the right to not have the government force you to do things that conflict with deeply held religious convictions? And if so, does that mean that when it comes to the government's power to regulate society sometimes religious communities are permitted to do things according to a different set of rules? Does religious freedom mean that the government cannot help religious organizations to push their values on citizens who are not members of their religious community? Mr. Beachy's creditors raised the first of these questions when they asked for the bankruptcy proceedings to be dismissed on grounds that participation in the bankruptcy court system conflicts with their religious principles and values. But as we'll see both are relevant to the case.

Who are the Old Order Anabaptists?

To better understand the nature of the motion to dismiss and its support from those who stood to gain the most from the bankruptcy proceedings, it will be useful to have some background on these Old Order Anabaptist communities, sometimes referred to in media reports and court filings as simply the "Plain People."

Old Order Anabaptists trace their roots back to the very start of the Protestant Reformation in the early 1500s. The early Anabaptists agreed with Luther and Zwingli's rejection of the Medieval Roman Catholic system. Yet many believed that the reformers had not gone far enough, had simply substituted the idea of justification by grace alone for the Catholic penitential system. They wanted a *lived* Christianity, that is to live as true Christians who would follow Christ and reject the perversions of the "world." Thus they embraced the idea that one must choose to be a Christian and follow the teachings of Christ. This meant that they also rejected the idea of Christianity as a birthright and therefore rejected the validity of infant baptism. For the Anabaptists, the early apostolic and post-apostolic "Martyrs' Church" were the models to follow, not the bloated bureaucracy of Rome or those of the Protestants, who had only gone halfway in their efforts to reform the Church. In the words of the A&M Creditors who supported the Motion to Dismiss :

> The Anabaptists believed Swiss reformer Ulrich Zwingli, German reformer Martin Luther, and other contemporary reformers compromised regarding radical obedience to Scripture and did not completely restore their church practices to the New Testament pattern of Jesus Christ and the Apostles. The Anabaptists also insisted that the church was to be a voluntary brotherhood of adult believers.

For these more radical reformers, one of crucial moments that marked the decline of the church and its corruption was the moment when the Catholic Church became the religion of Rome. They rejected any power of the civil authorities to regulate or enforce religious uniformity. For example, these dissenters rejected every aspect of the medieval parish system, which assigned each home to a designated church and by law required every baby born to be baptized into the church by the designated parish priest.

They wanted nothing to do with these other *so-called* churches. They did not want to attend the local tax-supported church and listen to the sermons of the appointed parish priest or Lutheran minister. Rather, they met in private homes to discuss among themselves the meaning of the Gospel. They did not believe that infant baptism could have any effect. Rather, they believed that a commitment to live one's life according to Christ's teachings is a choice that could only be made with understanding of what that commitment would entail and therefore baptism into the church was a rite that could be entered into only by adults.

This outward protest against the authority of the official state-supported churches in the act of adult baptism is the source of the name that covers these communities of religious dissenters: Anabaptists or "re-baptizers". Indeed, because Anabaptists rejected the idea of "Christendom," that is, that church and state should work together for the promotion and preservation of religion and good social order, the local authorities throughout the Netherlands and Central Europe saw the Anabaptists as a dire threat to the stability, peace and good order of their realms. Imprisonment, exile, or execution were the order of the day. The Anabaptists had thus become a Martyrs Church by the mid-sixteenth century.

Because they rejected any form of ecclesiastical hierarchy, each Anabaptist community had (and continues to have) a great deal of local autonomy. However, in 1527 the various Swiss and German Anabaptist community leaders met to articulate the core principles that they shared. They produced the Schleitheim Confession, seven articles of belief and practice that emphasize their separation from and rejection of the world. For example, under the heading "Separation from Evil" the Confession reads :

> **Separation from Evil**
> The community of Christians shall have no association with those who remain in disobedience and a spirit of rebellion against God. There can be no fellowship with the wicked in the world; there can be no participation in works, church services, meetings and civil affairs of those who live in contradiction to the commands of God (Catholics and Protestants). All evil must be resisted including their weapons of force such as the sword and armor.

Linked with this total separation from and resistance against the wicked world is a commitment to nonviolence, as exemplified in the principle of the Confession that is articulated under the heading "The Sword":

> **The Sword**
> Violence must not be used in any circumstance. The way of nonviolence is patterned after the example of Christ who never exhibited violence in the face of persecution or as a punishment for sin. A Christian should not pass judgment in worldly disputes. It is not appropriate for a Christian to serve as a magistrate; a magistrate acts according to the rules of the world, not according to the rules of heaven; their weapons are worldly, but the weapons of a Christian are spiritual.

As can be seen from this rejection of the use of the sword, for Old Order Anabaptists government is by definition coercive and so they avoid any unnecessary entanglement or involvement with the institutions of the government.

Their rejection of formal church hierarchies and any form of organized authority structure meant that, as their teachings spread and their communities grew , a diversity of beliefs and practices emerged over time within each gathering of believers. While we call them Old Order Anabaptists today, these groups trace their lineage to at least three main branches of Anabaptism, including the early Swiss Brethren, the communitarian Hutterites, and the Dutch and Swiss followers of Menno Simmons. One Old Order group in particular traces itself back to a Swiss Mennonite reform movement from the late 17th century—the Amish. The Amish emerged when a local minister, Jakob Amman, contended that the Mennonites were too lax with the enforcement of discipline, especially for wayward members of the church community.

All of these groups emphasized separation from the wicked world and the brotherhood of believers. They also all faced persecution throughout sixteenth, seventeenth, and eighteenth centuries. However, when William Penn acquired a charter from the British crown in 1681 to establish a colony in which British Quakers would be free from persecution, a new world opened up to these Anabaptist dissenters. The first Amish families moved to Pennsylvania in the beginning of the eighteenth century. Today Old Order Amish, Mennonites, Brethren, and Hutterites live throughout North America in as many as 49 states.

As each of these Anabaptist communities established itself in North America and grew, each community developed its own set of specific rules governing its community. There is therefore a great deal of diversity across Old Order Anabaptist communities. Some, like the Hutterites, practice community of goods, that is, they share all of their economic resources in common according to the model of Acts 2 and 4. Others, like the Amish, reject any technological advance that they believe is a threat to the unity of their separated community of the faithful.

Nevertheless, there are certain defining commitments, core principles and values that distinguish Old Order Anabaptists from other religious communities, even as the specific rules governing their particular communities vary. For much of their history, even in America, these core principles have made them detestable to the wider public. Their stance on nonviolence made them unpopular during wartime, and many members of these pacifist communities suffered discrimination and persecution. In addition to refusing to fight in war, the Old Orders refuse to pledge allegiance to anyone or any object except almighty God. They swear no oaths. They pay most taxes, but do not participate in the social security or Medicare systems because they believe in taking care of their own, putting their trust only in God, and avoiding any reliance on or unnecessary involvement with the machinery that governs the wicked world.

Throughout their history they have defined themselves and their community largely with reference to who they are *not*, **us**: They are not "English," they are not modern, they are not materialistic, they are not individualistic, they do not value the things of this world. This self-separation from American society provoked a great deal of resentment, hostility, and suspicion that they were not real Americans.

After all, what it means above all else to be an American is to value individual freedom—but for these communities, freedom means something utterly different. They value freedom from sin. This kind of freedom means precisely the opposite of the kind of freedom that most Americans value, which is the freedom to define and pursue our own individual wants and needs. For the Old Order Anabaptists freedom requires the subordination of one's individual desires to serving God and serving the good of the community as a whole.

For them, individualism, the idea of being reliant solely on one's own willpower, and shouldering the responsibilities of one's individual choices, is an affront to God.

Here, I'm reminded of the aftermath of the Nickel Mines tragedy in 2006. A stranger entered into a one-room Amish schoolhouse and gunned down ten little girls. The gunman had lived nearby and many Amish neighbors reached out to his family and attended his funeral, including parents of the murdered girls. It is perhaps impossible for us to understand how or why they would do such a thing. The responses offered in interviews about how they could forgive the man who had done this to them illustrate the subordination of the self that is characteristic of these communities. One of the parents remarked:

> **Mother of Victim (Amish Woman 3)**: To me, when I think of forgiving, it doesn't mean that you have forgotten what he's done. But it means that you have released unto God the one who has offended you. And you have given up your right to seek revenge. I place the situation in God's hands and just accept that this is the way it was. And I choose not to hold it against Charles because it really doesn't help me anything anyway.

As another parent put it:

> **Father of Victim (Amish Man 6):** … I came home from the burial thinking, I was so thankful to God that I don't need to make a judgment on his soul. And there was just a wash of peace. For me it was like unloading baggage. It was just like, "Wow. I don't need to deal with this. This is God's territory."

This subordination of the self, to God and to the community is both emblematic of what it means to be Amish and is also self-consciously a rejection of the individualism characteristic of American society at large. So there's this intentional quality of "otherness," separation and withdrawal from the world that the Old Order Anabaptist communities have cultivated since the early 1500s.

Related to the subordination of the self to God is the Old Order emphasis on community. Membership in the church means a total lifelong commitment to placing God above all other interests, which includes placing eternal salvation above worldly success. But although church members knowingly and willingly, as adults, choose this path, they understand that as individuals they are weak. Only in community can God's will be kept front and center. Only through the church can an attitude of humility and love be maintained.

While this anti-individualist, anti-materialist attitude provoked hostility and even outright persecution of the Amish for most of their history, in the late 20th century something shifted. The Amish, with their one-room schoolhouses and horses and buggies have recently come to be seen as symbolic of a lost simpler age, as evidenced by the more than 11 million tourists who visit Lancaster County, Pennsylvania each year.

Part of this shift has to do with transformations in the ways that Americans have come to think about religious freedom, transformations that came to be wrought in jurisprudence interpreting and applying the religion clauses by the unrelenting efforts religious dissenters, including the Amish and the Jehovah's Witnesses. These groups repeatedly saw themselves at odds with laws enacted by legislative majorities who were often openly hostile to or at the very least indifferent to the ways these laws conflicted with religious duty. Refusals to pledge allegiance to the flag and refusals to comply with compulsory school attendance laws changed the constitutional landscape. Under the Free Exercise Clause of the First Amendment these groups were provided constitutionally mandated exemptions from laws that had forced adherents to engage in activity that was repugnant to their religious scruples.

The court's development of this understanding of the meaning and scope of the First Amendment paralleled developments in popular sentiment. The sectarian hostility that had divided Catholics from Protestants into the early twentieth century had been replaced by a broad public theology that united Protestant, Catholic, and Jew by the 1950s. Freedom of religion became linked with freedom of speech as perhaps THE core civil liberties that characterize American life, as exemplified in FDR's Four Freedoms Speech.

First Amendment jurisprudence in the areas of religion and speech proliferated in the 20th century. The patron saint of free speech jurisprudence was Justice Oliver Wendell Holmes. In his view the expression of political opinions (including anarchist and anti-militarist views) ought to be left free from government regulation because the best test of the validity of ideas is in their power of persuasion, their ability to get themselves accepted from among all of the other competing views for how society ought to be governed. In

his famous dissenting opinion in a case in which a Quaker woman was denied citizenship for refusing to affirm that she would take up arms to defend the country Holmes wrote :

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

This view came to dominate later developments in Free Speech law as Holmes's position came to be embraced by the majority. However the Supreme Court has not extended this same line of reasoning to its Religion Clause cases. Nonetheless, the court did broaden its understanding of the scope of constitutional protection for religious exercise during this same period of constitutional development, beginning with an exemption from state licensing requirements for Jehovah's Witnesses proselytizers, then granting an exemption from mandatory flag salutes for Jehovah's Witness school children, extending unemployment benefits for a Seventh-Day Adventist who was fired for being unavailable to work on Saturday, and in 1972 allowing an exemption from anti-truancy laws for the Amish.

These developments produced a curious effect. It made those whose religious practices had cast them as un-American emblematic of the kind of freedom that America offers its citizens. So, Old Order Anabaptists who have remained true to their principles and values for centuries have seen their place in American society transformed: from that of reviled anti-modern religious fanatics to a tourist attraction, a living exhibit of a simpler, premodern life retained through a deep and sincere devotion to religious values.

Other transformations in American society have also affected the Amish in less positive ways. Rising land prices have made it especially difficult to retain a primarily agricultural way of life, and this has led to inevitable engagement with the outside world beyond the tourist traps. For example, in northern Indiana about 50% of the Amish community sought work in RV factories or other related manufacturing fields because young Amish men can no longer rely on agriculture as a means to support themselves and their families.

Background on Beachy's Business:

It was in the middle of this most recent transformative period that Monroe L. Beachy began to offer financial services to local businesses, his friends and neighbors.

Although he had little more than an 8th grade education, Beachy began processing payrolls for local businesses, offered loans on a handshake, maintained the books for the Amish Helping Fund and eventually obtained a license to offer investment services. News reports indicate that "if anyone asked" he told his clients that he only invested in safe, government backed securities, which suggests that few of his clients felt they knew enough about the financial markets to ask many questions about their investments. According to the New York Times:

> Word spread about his safe, steady returns. Parents encouraged their children to practice thrift by opening A & M accounts, too. By spring 2010, he was mailing his simple one-page, seven-line statements to almost 2,700 investors, largely Amish and Mennonite, in more than two dozen states from Alaska to Arkansas.

In court testimony, Beachy indicates that he relied on advice from outsiders that led him to expand his investment portfolio into higher risk markets. His accounts were already insolvent in 1998 at the time of the burst of the dotcom bubble, due to losses from internet-related investments. Again relying on advice from outside advisers, Beachy failed to cut his losses. He also failed to disclose them to investors and continued to take in new investments, using the new cash to pay returns to existing clients, à la Bernie Madoff, who patterned his behavior after the eponymous schemer Charles Ponzi. This continued for more than 10 years. The first hint that his clients had of any trouble was the day that Beachy filed bankruptcy in 2010, which he did after consulting an attorney about a subpoena he received from the Securities and Exchange Commission, which was investigating his business records.

The Bankruptcy Proceedings

Chapter 7 of the bankruptcy code provides for the orderly and fair liquidation of assets when you owe creditors more money than you have. The system is set up to determine exactly how much money is owed

and to whom, exactly what assets exist and are available for liquidation and distribution, and to determine the priority of payments. There are a lot of benefits of the system. For example, if in the weeks before filing for bankruptcy Beachy had transferred large sums of money to relatives or into dummy accounts, the bankruptcy court would be able to get that money back. However, despite these benefits over 94% of his creditors (representing almost 97% of the funds) sought dismissal of the bankruptcy case.

The motion to dismiss and supporting court filings describe the Plain Communities' opposition to being involved in litigation of any kind and further explains that they sought dismissal conditioned on the court approving an alternative plan for paying creditors. According to documents filed with the court:

> The Amish view regarding litigation is based on the New Testament principle of Christian love recorded in I Corinthians 6:1-7. The Christian is called to reconcile men to God, and therefore needs to be at peace with all men, especially fellow believers. Christians should suffer wrong rather than take vengeful or punitive measures against another. The Amish inherently believe lawsuits constitute an offense that is condemned by Scripture. Amish Church members do not resort to litigation in civil courts; rather, they settle their differences among themselves within the church, calling upon their elders' wisdom.
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> Furthermore, Amish do not defend themselves in court, even when sued unjustly. "Now therefore there is utterly a fault among you because you go to law with one another. Why do ye not rather take wrong? Why do ye not rather suffer yourselves to be defrauded?" (I Cor. 6:7)
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> Amish do not swear an oath under any circumstances since it is forbidden in Scripture, "But above all things, my brethren, swear not." (James 5:12; Matt. 5:33, 34).

So, just participating in any way in the bankruptcy proceedings would violate the religious principles of more than 90% of the creditors. If they refuse to file in court under oath an accounting of how much they invested, their money will be irrevocably lost. Perhaps they ought to rather "suffer themselves to be defrauded" but without social security or Medicare the few thousand dollars that one 76 year old widow invested with Beachy represents the sum total of her safety net. So, rather than choosing between the secular law courts and suffering to be defrauded they sought to have the court approve an alternative plan. This plan sought to balance the tension between "suffering themselves to be defrauded" and the reality of having to provide for themselves as a community set apart from the world.

One of the main features of the plan is it would be handled out of court, within the community, under the leadership of community leaders and guidance of outside legal and accounting professionals. In addition to avoiding having to go through the secular court system, advocates of the alternate plan argue that removing the case from the bankruptcy court would leave more money for distribution to investors. The system for prioritizing payments in bankruptcy puts payments for bankruptcy court fees, attorneys fees and other administrative costs at the top of the list. They are paid as their services are rendered, off the top, before anyone who is already owed money. This makes sense. No one would participate in the system or advise individuals or businesses in the bankruptcy process if they had to go to the back of the line. So, bankruptcy lawyers are paid 100% of their fees (subject to approval and oversight by the bankruptcy trustee) as those fees are incurred. While defrauded investors have to accept a pro rata share of what remains. But under the proposed alternative plan further attorneys fees and court costs would have been eliminated and any fees for advisors and other administrative costs would have been paid for out of a separate fund, one that had been raised by the church. Advocates of the alternative plan argued that this would mean that likely more assets would be available for distribution to creditors than through the bankruptcy process. In addition, the Plain Community has raised "Additional Benevolent Funds," donations intended to be distributed on the basis of need to those creditors whose financial circumstances were in the direst of straits as a result of the malfeasance of Mr. Beachy.

The objections to the motion to dismiss the case, which were filed by the U.S. Trustee and the bankruptcy trustee, focus on the minority of creditors who are not members of the Old Order communities. The trustees express doubt that those who are not Amish would consent to the alternative plan. The trustees also disagree that the alternate plan is in the best interests of the creditors of the estate.

The bankruptcy court's opinion demonstrates attention to the complexities and sensitivities at issue, noting the difficulty of treating thousands of individuals from communities spread across the nation as members of a cohesive, monolithic church. But the court nonetheless declined to find that the parties'

collective right to the free exercise of their religion compelled him to dismiss the case and allow the Amish to resolve the matter by their own lights. To the contrary, he ruled that diverting the proceedings to the alternate forum would risk violating the First Amendment by forcing non-Amish creditors to accept the determination of proceeds from a forum overseen by religious leaders.

Mr. Beachy and his Amish creditors declined to pursue an appeal and accepted the court's decision, retaining the matter for resolution in the bankruptcy court according to well-established principles and procedures. Perhaps they viewed recourse to a protracted and contentious appeals process to be a deeper violation of their religious scruples than the requisite filing of forms mandated by the bankruptcy process. But if they had elected to appeal the ruling, it seems to me that they would have had grounds to do so based on the religious freedom interests implicated in the case.

Religious Freedom Law

The bankruptcy court's ruling follows applicable precedent and it is therefore not obvious that an appeal would in fact have been successful. Nonetheless, I think the issues of the case illustrate much of what is lacking in the courts' current understanding of the meaning and value of the protections for religious freedom set forth in the First Amendment. Judge Kendig's opinion is correct to note that since the Supreme Court decision in *Employment Division v. Smith* in 1990, the Free Exercise clause of the First Amendment does not require that religious communities be exempt from otherwise applicable laws and regulations by virtue of their conscientious convictions. The general dissatisfaction with the *Smith* decision led Congress to enact The Religious Freedom Restoration Act (RFRA), which presently stands on precarious constitutional footing. Under RFRA, which sought to reinstate the court's previous line of Free Exercise doctrine, if a federal law, regulatory system or other government program substantially burdens religious exercise the government must show that there was a compelling reason to do so and that it had sought to minimize the impact on religious interests. Supporters of the alternative plan claimed just that, that participating in the bankruptcy

proceedings would unjustifiably require members of a religious community to participate in a system that they deem anathema and would substantially burden their right to live outside of and apart from the secular world. However, the bankruptcy court did not apply the standards of RFRA to authorize the alternative plan in large part because it saw delegating resolution of the matter to the alternate forum as a violation of the First Amendment's No Establishment Clause: "Congress shall make no law respecting an establishment of religion." Judge Kendig's opinion expresses concern that to dismiss the bankruptcy case and allow the Amish community to settle the matter outside of court would effectively mean that the bankruptcy court would be impermissibly advancing the Amish religion and vesting significant governmental authority in a religious body.

It may be difficult to see how allowing the Amish community to settle claims, 97% of which are held by those who accept the superior moral status of the alternative forum, could be understood as threatening to establish the Amish religion as the national church. However, this ruling aptly demonstrates the confusing tangle of precedent that currently exists on the issue of discerning the nature and scope of the protection for religious freedom.

Throughout the 20th century two separate lines of adjudication developed, one for providing religious exemptions under the Free Exercise Clause and one guarding against excessive government entanglement with religious institutions or prohibited government endorsement or financial support for religious institutions under the No Establishment Clause. A third line of cases emerged discussing the "play within the joints between the two clauses," when a government agency acts in such a way so as to accommodate the religious interests of a citizen or group but such accommodation itself does not rise to the level of government endorsement or support of the religion.

In the 1990 *Smith* decision, the court reversed the Free Exercise line of cases, holding that no accommodation is constitutionally required if the law did not target the religious practice and so, Judge Kendig was largely left with the Establishment Clause precedents, although at the present time these precedents have

been so criticized by some current members of the court that it is uncertain whether they continue to be binding authority.

Shortcomings of Contemporary First Amendment Jurisprudence

What's most interesting to me about this case and the complexity of the lines of precedent leading to it is the fact that one of the shortcomings of current protection for religious freedom is the court's lack of clarity articulating not just what the law is, but why religious freedom is necessary to contemporary democratic society. Free speech may not always be popular, but it is supported by a widely accepted set of principles. As a nation we are steeped in a tradition of valuing free speech as a defining feature of our way of life. This is because freedom of speech is essential to democratic self-government. If the sovereign authority to rule resides in the people, then the people need to be free to form judgments about the kind of society we want to build. The government cannot use its coercive power to dictate what are and are not valid political opinions. This is essentially the view that undergirds the Supreme Court's rationale for radical protection of free speech, free press, and free assembly. This rationale holds that the constitution represented a radical experiment in governance, that the government cannot dictate how people ought to think because the people determine how they ought to be governed. The only policies enforceable by law are those that have been validated through a full and free process of political discussion and debate and so all points of view must be allowed to participate to ensure that the political process is in fact full and free. Freedom of expression is therefore what makes democracy a democracy.

However, the court has not articulated a similarly coherent and consistent set of principles justifying constitutional protection for religious freedom. But if democratic governance derives its authority from the intellectual freedom of its citizens then that zone of freedom needs to have certain features. If democracy ultimately depends on the ability of citizens to form judgments by their own lights, then at a minimum democracy entails freedom from institutionalized coercion of opinion or belief. The government cannot

attempt to force you to accept as valid a particular view of what is right or good. But that alone is insufficient, part of what is necessary in order to be able to form independent judgments is access to all necessary information that individuals may consider and/or reject in forming their opinions. This means that in addition to freedom from institutional coercion of thought and belief, democracy depends on freedom of press (access to information).

But human beings come to understand ourselves and our world around us not only in solitary reverie, but intersubjectively, through our attempts at reaching mutual understanding in discussion with others. And so the capacity to form one's own judgments also entails the freedom to express one's views and compare or contrast them in conversation with others, freedom of speech. Yet another dimension of the freedom to reach one's own considered judgments entails that such judgments are not mere abstract rational analyses but form a cohesive part of a life lived with integrity. This means that citizens are not just free to form their own opinions but also that those judgments and conscientious convictions are meaningful because they inform, structure, and enrich one's decisions about how one ought to live. The freedom to believe in the validity of a principle is hollow if the government prevents you from living a principled life.

In my view, the First Amendment taken as a whole safeguards this sphere of intellectual liberty, which includes freedom from having the government dictate and enforce by law what does and does not constitute a true set of beliefs about the world (the prohibition against establishing a state church) and the freedom to live one's life in a manner that is consistent with the core values and principles that a citizen conscientiously holds (free exercise of religion). Combined with freedoms of speech, press, assembly and the right to petition the government these form the intellectual freedom that constitutes democratic self-governance.

To say that religious freedom has value to democratic politics, that it has a distinctively political importance, means that religious freedom has value beyond its value to individual members of minority faiths, who benefit from not being compelled to conform to the religious beliefs and practices of the ruling majority. To say that religious freedom has political value is to say that it benefits society as a whole. I argue that the

political value of religious freedom is that it is constitutive of that set of intellectual liberties that is fundamental to democratic self-governance.

In addition to the political importance of religious freedom, the American experiment in religious liberty also suggests a social importance, that society as a whole has benefitted from a system that has afforded radical protection for religious freedom, including dissenting religious minorities. In this regard, it seems to me that one consequence of religious freedom has been diffusing hostilities. A cultural commitment to civil liberties emerged during the 20th century as the court came to recognize and safeguard a sphere of intellectual liberty. Parallel with this culture of civil liberties has been a growth in mutual toleration and even mutual influence and surprising synergies amongst groups that had long been mutually antagonistic.

Religious freedom can also aid processes of nonviolent social change. Expressions of religious dissent, protests against the prevailing norms of the social order, have been enormously powerful catalysts of social transformation. Unorthodox religious beliefs are potentially subversive and politically revolutionary. Any challenge that calls into question the propriety of the conventional norms that order society potentially undermines the prevailing power structure. In fact, efforts to secure toleration for dissenting religious groups emerged alongside efforts to avoid punishment for expressing dissenting political opinions, because ultimately what was at stake for both Quakers and two-penny pamphleteers was freedom of conscience. Throughout American history religious principles, religious language, and religious organizations have been powerful engines in both progressive and conservative social reform movements from abolition, temperance and civil rights to attempts to block the ratification of the Equal Rights Amendment and limiti abortion rights.

Freedom of religious expression is important because it forms a part of the sphere of intellectual liberty that is the wellspring for democratic decision-making. Proposed norms for our common life percolate up from out of the process of political discourse and are distilled into laws that govern our interactions. But because the government cannot *coercively* enforce one view of what is right or good, in order for a particular policy proposal to govern society that proposal needs to attain its legitimacy through the *unforced* force of the

better argument, *i.e.*, proponents need to be able to persuade even those who do not accept their extra-rational appeals to authority. They need to explain why the proposed policy is right by articulating arguments for it in reasons that are generally accessible to all. Political policies cannot be grounded in claims to authority that need to be accepted on faith. In other words, if you want your view to be determinative of the social order then you need to be prepared to argue for it on the basis of reasons that all citizens could be expected to accept. Thus the freedom to express one's views and live one's life according to conscientiously held convictions is inseparable from freedom from institutionalized coercion of opinion or belief.

Applied to the Beachy Case

So, what does any of this have to do with Mr. Beachy's bankruptcy case? The Amish are religious dissenters. And religious dissent ought to be constitutionally protected because it is a valuable good for society as a whole. Although the rights of religious dissenters are related to other expressive rights like freedom of speech and press, simply guaranteeing those rights leaves out certain important dimensions of the sphere of intellectual liberty that is fundamental to democracy. For many deeply religious individuals, such as the Old Order Anabaptists, religion shapes and gives meaning to every aspect of their existence, and as such is not an incidental accessory that can be set aside from time to time. Their lives are ineliminably religious. And so everything that they do and refuse to do, not just everything that they say, communicates their principles and values. The commitment of members of the Plain Communities to live their entire lives in accord with biblical values, to resolve all disputes in light of the cardinal values of love and forgiveness, without resorting to litigation or secular authorities, and to consider the spiritual welfare of the community as a whole is a challenge to the conventional norms that govern our society.

But, you may argue, the Amish do not vote. They have no interest in changing the conventional norms: They just want to be left alone. But that activity of living in accordance with a separate set of values nonetheless communicates something socially and politically relevant about what is right and what is good.

Letting the Amish be Amish communicates to civil society as a whole that the prevailing norms are not the only way of governing a community; the conventional wisdom about what constitutes a good life does not exhaust the possibilities for human life. This is one of the reasons for the popularity of Amish country as a tourist destination, people are fascinated by the prospect of their existing an alternative to the hectic hub-bub of our technology driven lives.

But the fact that the courts have not adequately explained what is politically and socially valuable about religious freedom means that Judge Kendig's opinion failed to recognize the full nature of the claims that were being asserted in the motion to dismiss. For example, in denying the motion, Judge Kendig found that the motion failed to demonstrate that the creditors' interests would be better served under the alternative plan. The bankruptcy system is presumed to be able to maximize proceeds because that is what the system is empowered to do. And so Judge Kendig did not think the motion to dismiss offered sufficient evidence to prove that more proceeds would have been available for distribution under the alternative plan. However, this decision is based on a narrowly financial and individualistic definition of the creditors' interests, one calculated strictly in terms of the amount of money available to each individual creditor. The court may very well be right that there was insufficient evidence to prove definitively that there would in fact have been more money available to distribution to creditors under the Amish alternative. Only the bankruptcy court could claw back fraudulent conveyances and maximize the amount of proceeds available for distribution. But supporters of the motion to dismiss seem to be operating under a much broader notion of their interest, a notion centered on the collective interests of their community and way of life. The only sufficient way to express this dissent from the prevailing norms of materialism and individualism is to live by other values.

But this brings us to the question of whether dismissing the case would violate the No Establishment Clause. Can the bankruptcy court constitutionally endorse Amish values? No one, least of whom the Plain Community themselves, want to use the machinery of the government to coercively enforce their values on outsiders. But the motion to dismiss was predicated on the condition that unanimous consent to the

alternative plan could have been obtained. The court and trustees doubted that unanimous consent was possible and the *New York Times* reported that some non-Amish felt pressure not to voice their objections. But if allowed to go forward, the onus would have been on the proponents of the alternative plan to obtain the consent of all of the creditors and the bankruptcy court could have imposed a secret ballot system to ensure uncoerced consent.

The Amish have a different set of values to apply to the case. True these principles are traditionally articulated in the distinctive language of their religious community and are grounded on the authority of their particular understanding of scripture, which most outsiders will not accept. But suppose for the sake of argument that the Amish creditors had been able to successfully offer compelling reasons for the superior equity of the alternative plan, and suppose those arguments had persuaded everyone. In that instance, dismissing the case would not have been the government unconstitutionally coercing citizens to accept a particular community's view of what is right and good. Rather, the government would have been permitting that community to make its case and could have conditioned dismissal on the persuasiveness of Amish principles and values, on the power of their *unforced force* on the basis of reasons. To be sure, there is no guarantee that the Amish would have been able to articulate reasons that are not dependent upon appeals to scripture for how a community benefits from resolving disputes outside of the courts and by providing for the care and welfare of those who are less fortunate. But the First Amendment's guarantee that citizens be free to choose what they think is right from among a free marketplace of ideas means that rather than forcing citizens to choose between living a principled life and suffering to be defrauded the bankruptcy court ought to have given the Amish a chance to demonstrate what is right and good about their alternative. Only then could the Founders' lively experiment in religious freedom been put to the test.

Concluding Remarks

The stability of the social order depends in no small measure on the ability of those who understand religious freedom to mean: that the government cannot push the values of one religious worldview on citizens who are not members of that religious community, to live harmoniously alongside those who understand religious freedom to mean: that the government cannot force you to do things that conflict with principles whose authority lies beyond that of the secular authorities.

The enigmatic syntax of the First Amendment makes clear that both are right. The challenge lies not so much in understanding and interpreting these words, but in drawing upon their wisdom to knit together a cohesive social fabric that is bound by liberty for all.