1-1-1987

Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America

Frederick Mark Gedicks
BYU Law, gedicksf@law.byu.edu

Roger Hendrix

ESSAY

DEMOCRACY, AUTONOMY, AND VALUES: SOME THOUGHTS ON RELIGION AND LAW IN MODERN AMERICA

FREDERICK MARK GEDICKS*
ROGER HENDRIX**

Contemporary America is increasingly confused about whether religion should play a role in public life. This decade has seen a resurgence of political activity among religious people and organizations, particularly on the political right.[1] Yet this rediscovered political activism on the part of religion has called forth apocalyptic and vitriolic attacks by those who see public religion on both the left and the right as a threat to conventional politics and constitutional liberties.[2] Similarly, the

* Assistant Professor of Law, Mercer University School of Law. B.A. 1977, Brigham Young University; J.D. 1980, University of Southern California.

** Consultant, The Information Group, Los Angeles, California. B.A. 1968, California State University, Long Beach; M.A. 1971, Brigham Young University; Ed.D. 1976, University of Southern California.

The authors wish to thank Ted Blumoff, James Cutsinger, Hal Lewis, Tom Macaffee, Bill Marshall, Jefferson Powell, Ivan Rutledge, Jack Sammons, John Singleton and the participants in the Mercer Law Faculty Colloquium for their helpful criticism of earlier drafts of this Essay. Professor Gedicks wishes to acknowledge financial support made available by Dean Karl D. Warden, and the invaluable help of Richard Campbell, his research assistant, and Katherine Durant, who is doing student research on a related topic. Because some of these people rather strenuously disagree with our conclusions, we emphasize that any errors are our own.

1. *See, e.g.*, R. VIGUERIE, THE NEW RIGHT: WE'RE READY TO LEAD 123-37 (rev. ed. 1981).

2. *See, e.g.*, F. CONWAY & J. SIEGELMAN, HOLY TERROR: THE FUNDAMENTALIST WAR ON AMERICA'S FREEDOMS IN RELIGION, POLITICS AND OUR PRIVATE LIVES (1982); G. EVANS & C. SINGER, THE CHURCH AND THE SWORD: HOW THE CHURCHES AND PEACE MOVEMENT ARE STORMING AMERICA—AND WHAT YOU CAN DO ABOUT IT (rev. 2d ed. 1983).

Supreme Court's recent decisions approving legislative prayer[3] and government sponsorship of the Christmas holiday[4] have been widely and vehemently criticized,[5] although the watered-down religion in both of those cases is hardly a threat to the vaunted American wall between church and state; where it counts, the wall is as sturdy as ever.

Some of our most influential public institutions reflect little evidence of the profoundly religious character of American culture. The Supreme Court long ago expelled religion from the public schools.[6] Most school textbooks ignore religion,[7] thereby implicitly denying its relevance to any aspect of contemporary society. The texts also generally ignore the critical roles played by religious organizations and individuals in the formation of the American nation and the historical development of its culture and politics.[8] If public education were the only measure of the religious devotion of the nation, one would have to conclude not only that God and his followers are dead, but that they never existed.

Popular culture also ignores religion despite the fact that America

3. Marsh v. Chambers, 463 U.S. 783 (1983).

4. Lynch v. Donnelly, 465 U.S. 668 (1984).

5. *See, e.g.*, Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 13-14 (1984); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

6. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948).

7. P. VITZ, RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY 21-22, 70 (1985). Vitz also found, however, that textbook references to religion rose in direct proportion to chronological, cultural, and geographical distance from contemporary American life. *See id.* at 23-25, 33-36. Vitz's study has drawn a great deal of comment in the popular press, much of which has been critical. *See, e.g.*, Chandler, *Conservative Christians Join Forces to Get Religion Back into Nation's Classrooms*, L.A. Times, Aug. 9, 1986, pt. 2, at 4, col. 1; Werner, *Education, Religion Lack in Texts Cited*, N.Y. Times, June 3, 1986, § C, at 1, col. 1. Nevertheless, a substantial number of academics apparently agree with Vitz's conclusions. *See generally*, Smith v. Board of School Comm'rs, 655 F. Supp. 939, 983-89 (S.D. Ala. 1987) (evaluating extent to which textbooks omit reference to significance of theistic religion in American history).

8. Vitz found that textbooks generally ignored the Protestant Reformation, the founding and development of Mormonism, Christian Science, Seventh Day Adventism, and other distinctly American religions, the influence of conservative Protestantism in American history, and the positive contributions of Catholicism and Judaism to American social reform. P. VITZ, *supra* note 7, at 32, 42, 65. Vitz also found numerous examples of historical revisionism. *See, e.g., id.* at 24-25 (textbooks describing American pilgrims as "people who make long trips" without reference to their religious character); *id.* at 44 (textbooks discussing Joan of Arc without any reference to God, revelation, Catholicism, or sainthood). Vitz also discusses cultural censorship. *See, e.g., id.* at 41-42 (textbooks devoting substantial discussion to Mohammed and the rise of Islam while giving little or no treatment to Jesus and Christianity).

and Americans remain pervasively religious.[9] Empirical studies demonstrate that Americans remain intensely committed to traditional religious institutions and practices,[10] yet one looks in vain for a television family that attends services, even if only on Christmas or Easter (or Rosh Hashanah or Yom Kippur). Such depictions of religious devotion passed from the cultural scene long ago. Contemporary religious television characters are usually either comedic caricatures or corrupted hypocrites. Even when the media portray the life of a real person, they often deemphasize or altogether ignore the individual's religious beliefs. For example, a recent television movie portrayed a woman's release from a state mental institution after twenty years of confinement.[11] In actual life, the woman is a deeply religious person whose faith in God sustained her throughout the ordeal.[12] On television, though, the religious dimension to her life was not depicted in any way.[13] Similarly, the news media rarely acknowledge the existence and significance of the religious beliefs

9. This is admitted in current scholarship with varying degrees of enthusiasm, although the fact itself is rarely denied. *Compare* M. BALL, LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY 125 (1985) *and* Karst, *Paths to Belonging: The Constitution and Cultural Identity,* 64 N.C.L. REV. 303, 360 & n.364 (1986) *with* R. BELLAH, THE BROKEN CONVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 123-27 (1975) *and* Berger, *Religion in Post-Protestant America,* COMMENTARY, May 1986, at 41, 44. Indeed, some insist upon its recognition. *See, e.g.,* R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 21, 52, 95, 96 *passim* (1984). For exhaustive studies documenting the pervasive religious belief and activity of contemporary Americans, see T. CAPLOW, H. BAHR, B. CHADWICK, D. HOOVER, L. MARTIN, J. TAMNEY & M. WILLIAMSON, ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN'S RELIGION (1983); THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE '80S: THE IMPACT OF BELIEF (1981) [hereinafter THE CONNECTICUT MUTUAL REPORT].

10. G. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1985, at 120-21, 162, 291 (1986) (91% of Americans state a religious preference, 71% claim membership in a church or synagogue, 61% believe that religion can solve all or most of today's problems, 56% believe that religion is very important in their lives, and 42% attended a church or synagogue during a typical week); THE CONNECTICUT MUTUAL REPORT, *supra* note 9, at 41 (74% of Americans consider themselves religious, 57% frequently engage in prayer, 49% have made a "personal commitment to Christ," and 44% attend church "frequently"); Wattenberg, *Do Americans Believe in Anything Anymore?,* ESQUIRE, Nov. 1984, at 78, 80 (95% of Americans consider themselves religious and 58% attend a church or synagogue at least once a month). These figures have been stable since the 1970s. *See* G. GALLUP, *supra,* at 121, 292. However, they are somewhat lower than response levels measured in the 1950s. *See id.* at vii, ix, 121.

11. *Nobody's Child* (CBS television broadcast, Apr. 5, 1986) (dramatizing the life of Marie Balter).

12. *TV Preview: Spice, Vice and Justice,* Wall St. J., Apr. 3, 1986, at 24, col. 1 (brief review).

13. *Id.*; *see also supra* note 9. Television's ignorance of religion often is justified as a policy adopted to avoid offending viewers. Nevertheless, television programs regularly portray (and often glorify) gratuitous sex and violence, fraud and dishonesty, drug and alcohol abuse, vulgar and unflattering references to religion and religious deities, and other behavior that is violative of, or offensive to, the ethics and morals of numerous religious traditions. Thus, this justification is consistent with the content of general television programming only to the extent that it avoids offending nonreligious viewers with exposure to religion.

held by the political figures on which they report, even though American politicians seem to be as broadly and deeply influenced by religion as other Americans.[14]

It was not always so in America. Although the secular Enlightenment exerted a strong influence during the early years of the republic, religious organizations and individuals retained a distinct social power and relevance. As post-Enlightenment America matured through the nineteenth and twentieth centuries into a modern liberal society, however, religion lost its primacy as a means of gaining knowledge.[15] Modern America gets most of its answers from science, tending to discard those world-views that are not observable, verifiable by the "scientific method," or otherwise subject to rational discourse. The Enlightenment was so successful in intellectually debunking religious myths that even theologians now flatly state that the New Testament view of the world can no longer be taken seriously.[16] There seems to be little use for the knowledge that God and religion might impart.

Another consequence of the Enlightenment was full recognition of the individual, in particular the sanctity of personal conscience and the inviolability of individual autonomy. Medieval humanity was subservient to the commands of religious and other social institutions which imposed rigid roles on each member of society. Thus, the medieval person's primary duty was to fulfill the role assigned by church and social superiors. Under post-Enlightenment liberalism, people became free to create themselves, to develop their own individuality in whatever manner seemed best for them, rather than in conformance with some ill-fitting

14. *See, e.g.*, P. BENSON & D. WILLIAMS, RELIGION ON CAPITAL HILL: MYTHS AND REALITIES (1986) (empirical study on religiosity of members of Congress). Benson and Williams found that contrary to popular belief, members of Congress are religious, and by some measurements more religious, than the American public. *Id.* at 74-84. They speculate that the failure of the news media to include religion in congressional reporting is due to a variety of factors, including the reluctance of some members of Congress to discuss their religous sentiments publicly, and the relative lack of academic interest in religion among American social scientists. *Id.* at 5, 72. However, Benson and Williams also note that the overwhelming majority of reporters for the most respected and prominent of the national media are areligious. They suggest that these reporters either are not interested in the religious aspects of congressional news or are unable to recognize religious influences when they are present. *Id.* at 72-73. Thus, consciously or unconsciously, these reporters filter religion from congressional news and contribute to the "impression that religion is not an important part of life for members of Congress." *Id.* at 72-73 (citing Lichter & Rothman, *Media and Business Elites*, PUBLIC OPINION, Oct./Nov. 1981 at 43).

15. *See* A. LINDSAY, RELIGION, SCIENCE, AND SOCIETY IN THE MODERN WORLD 30 (1943); R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 179, 209 (1985).

16. *See, e.g.*, Bultmann, *New Testament and Mythology* in KERYGMA AND MYTH: A THEOLOGICAL DEBATE 1, 3, 4 (R. Fuller trans. rev. ed. 1961); *see also* P. DAVIS, GOD AND THE NEW PHYSICS 2 (1983) ("the biblical perspective of the world seems largely irrelevant").

exogenous social construct.[17] Many of the Supreme Court's opinions have been read as upholding a similar ideal of personal freedom and choice, not only in matters of religious belief and worship but in other aspects of American life as well.[18]

It seems, however, that in speeding down the highways of modernity we have left behind a number of vital ideas, not the least of which is the value of religion both to society and to individuals. The tendency to ridicule or ignore beliefs and feelings that are not scientifically or otherwise rationally explainable seems to be an attribute of modern liberal societies.[19] Because the development of religious faith is not a rational process, its persistence in the modern world simply cannot be accounted for by reason and logic as other than an aberrational anachronism.[20]

The communal nature of religion likewise does not mesh with modern liberalism. Religious faith generally acquires a richer significance when referenced to the faith of others.[21] Indeed, the faith of a group of others is often the stimulus for development of faith by a nonbeliever. Post-Enlightenment liberalism, however, sees the genesis of all things as being in the mind of the individual. Individual rights obsessively pervade modern constitutional law,[22] with groups retaining analytical significance only because they presumably represent an aggregation of individual

17. *See* R. SMITH, *supra* note 15, at 3, 14, 199, 201; *see also* A. LINDSAY, *supra* note 15, at 7.

18. *See, e.g.*, Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 91-94; *see also* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

19. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1074-75 (1980); *see also* R. NIEBUHR, CHRISTIAN REALISM AND POLITICAL PROBLEMS 2 (1953).

20. R. NEUHAUS, *supra* note 9, at 162; P. TILLICH, THEOLOGY OF CULTURE 6 (1959). In many ways, it is unfair to define religion negatively, that is, in terms of what it is not. *See infra* text accompanying notes 120-21. By our use of "non-rational" or "unrational" in this Essay, we do not wish to suggest that the tools of reason cannot usefully be applied to the truth claims of religion. However, claims of religious truth generally are unempirical and cannot be demonstrated to others under existing conventions of scientific research. *See infra* notes 118-19 and accompanying text. *But see infra* note 54. Though this also is true of many non-religious truth claims, those claims usually can be grounded in observations drawn from more or less ordinary human experience which can be empirically tested. The claims about reality made by the traditional Western religions, however, usually presuppose a divine source of transcendant power and judgment, *see infra* notes 61-65 and accompanying text, and thus seem particularly out of step with modern scientific conceptions of the world. By "non-rational" or "unrational," then, we mean to emphasize the unempirical and objectively undemonstrable character of religious experience, and thus its incongruence with the contemporary world. *See generally* R. NEUHAUS, *supra* note 9, at 135; R. NIEBUHR, *supra* note 19, at 4-5.

21. *See* Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 10, 29 (1983).

22. MacNeil, *Bureaucracy, Liberalism and Community—American Style*, 79 NW. U.L. REV. 900, 946 (1985); *e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (opinion of Powell, J.) (equal protection); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 907 (1963) (freedom of expression); Karst, *supra* note 9, at 357 (freedom of religion). *See generally* Symposium, *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984).

thought, expression, and action.[23] Such theorists analyze social, political, and legal problems as if the formation and maintenance of society stemmed solely from the self-contained activity of individuals. We have been slow to recognize that groups are not mere aggregations of individual activity, but ongoing and independent entities that themselves influence how people think, express, and act.[24] The dynamic is not simply that individuals form groups, as liberal theory presupposes; groups also form individuals.[25]

If religious freedom is principally a function of subjective individuality, and more particularly private individual conscience, then it follows that religious rhetoric and morality do not belong in public policy debates.[26] An emphasis on individual rights thus transforms religion and religious institutions from sources of social value and change into "the private affair of the individual seeking to be unburdened of his loneliness, a cult of personal peace of mind,"[27] which the secure and enlightened believe has nothing to say of public significance. Not surprisingly, the Supreme Court's decisions, with few exceptions, can be read as displaying hostility towards institutional religion.[28] Numerous justices, as well

23. R. SMITH, *supra* note 15, at 46-49; MacNeil, *supra* note 22, at 913; *see also* Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 383.

24. Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1473 (1984); *see* E. ERIKSON, CHILDHOOD AND SOCIETY 36 (2d ed. 1963).

25. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1002, 1052 (1983); Note, *supra* note 24, at 1471.

26. Thus, Richard Neuhaus, who was an aide to Dr. Martin Luther King during the civil rights era, relates how the television cameras always turned off when Dr. King talked of the underlying religious justifications for racial equality. R. NEUHAUS, *supra* note 9, at 98.

27. H. BERMAN, THE INTERACTION OF LAW AND RELIGION 25 (1974); *compare with* Cover, *supra* note 21, at 33 ("People associate not only to transform themselves, but to change the social world in which they live.") *and* Frug, *supra* note 19, at 1068 " '[P]ublic freedom' [is] the ability to participate actively in the basic societal decisions that affect one's life. This conception of freedom . . . differs markedly from the currently popular idea of freedom as merely 'an inner realm into which men might escape at will from the pressures of the world . . . .' ") (quoting H. ARENDT, ON REVOLUTION 114-15, 119-20 (1962)).

28. *See generally* Smith, *supra* note 18; Bradley, *Dogmatomachy—A "Privitization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275 (1986); Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739 (1986). *See also* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 843-44 (1984) (noting anti-Catholic bias of the 1950s Court). Michael Smith argues that the Burger Court moderated this hostility, but concedes that the Court retains a residual suspicion of collective religious action. *See* Smith, *supra* note 18, at 113-16.

As this Essay was going to press, the Supreme Court decided Corporation of the Presiding Bishop v. Amos, 55 U.S.L.W. 5005 (June 24, 1987), in a way that can only be described as an unqualified victory for religious institutions. In a separate opinion however, Justice Brennan indicated his continued uneasiness over the antisocial potential of collective religious action. *Id.* at 5009 (Brennan, J. concurring in the result).

as some majority opinions, have expressed the view that religion is a matter of personal privacy and belief, apparently without any collective, public role in American life.[29]

Thus, the liberal affinity for science, rationality, and individualism has spawned negative perceptions of religious institutions and the value and legitimacy of the religious experience. Ironically, intellectual development and elaboration of the concepts of individuality and autonomy that are at the heart of liberalism probably owe as much to the traditions of Western religion as they do to the Greek philosophers often credited with originating the concepts.[30] Nevertheless, the inability (or the refusal) of liberalism to account for the religious experience has generated a cultural presumption that religion should be excluded from modern American public life. Despite the fact that Americans remain strongly committed to religion,[31] American culture barely reflects any meaningful religious content, and the propriety of allowing religion to influence the political process has come under attack.[32]

Culture is the elaboration and definition of the symbols which represent our lives, defining and expressing what we believe life means.[33] When the symbols and language of religion disappear from public life—from school, television, politics—then apparently those in a position to influence public institutions, media, and policy no longer believe that religion is a necessary, legitimate, or even relevant vehicle for expressing the realities of American life.[34]

---

29. *See, e.g.*, Wallace v. Jaffree, 372 U.S. 38, 51-52 (1985); Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (Douglas, J., concurring); Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (opinion of Harlan, J.); Braunfeld v. Brown, 366 U.S. 599, 610 (1961) (Brennan, J., concurring and dissenting); Everson v. Board of Educ., 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting).

30. A. LINDSAY, *supra* note 15, at 7-11; Fitch, *Can There Be Morality Without Religion?*, in RELIGION, MORALITY AND LAW 1, 6, 7 (A. Harding ed. 1956); *see also* H. KUNG, ON BEING A CHRISTIAN 30-31 (E. Quinn trans. 1976).

31. *See supra* notes 9-10 and accompanying text.

32. *See, e.g.*, Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 884-88 (1984); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1475-77 (1981); Note, *The Establishment Clause and Religious Influences on Legislation*, 75 NW. U. L. REV. 944, 967-75 (1980). Although the Court has recognized a generalized right of religious individuals and organizations to attempt to persuade others of the correctness of their views (*see Walz*, 397 U.S. at 670) it has refrained from extending to religious individnals an unqualified right to engage in political action despite being motivated by religious belief. *See* Harris v. McRae, 448 U.S. 297, 319 (1980); McDaniel v. Paty, 435 U.S. 618, 628-29 (1978) (plurality opinion). *See generally* Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1379 (1981).

33. *See* Karst, *supra* note 9, at 307.

34. For an interesting example, see Karst, *supra* note 9, which, after observing that 80% of Americans identify themselves as Christians, *id.* at 360 n.364, and that "American nationhood rests

Indeed, many of the Court's opinions that have been received as favorable to institutional religion (and thereby subjected to withering criticism) do not really protect "religion" at all; they protect speech and expression, as in *Widmar,*[35] or political piety, as in *Marsh,*[36] or holiday spectacles, as in *Lynch*.[37] "Religion" to the Court is not what we would call "serious religion"—a set of compelling and transcendent normative standards to which the believer has no choice but to conform, a shared communion with spiritual and divine reality—but rather a personal taste or preference without intersubjective relevance. Thus, the Court can state that the crisis of conscience faced by a Sabbatarian who must choose between his God and a job which requires work on his Sabbath is analytically indistinct from the agnostic who also is required to work on Saturday but would really rather be watching football or doing yardwork.[38] Similarly, sincerely held religious practices receive no constitutional protection if they are perceived by the Court as undermining mere "public policy."[39] Even the most celebrated free exercise case, *Wisconsin v. Yoder,*[40] clearly had as much to do with the Court's assessment of the secular utility of the vocational education given to Amish teenagers as it did with the corrosive influence of compulsory schooling on Amish religious culture.[41]

To the extent that religion is excluded from public life, its ability to influence individuals and society is severely circumscribed. Nevertheless, religion has important (and perhaps unique) effects on individuals which manifest themselves in society in complex but ultimately desirable ways.

---

on a base that is not just contractual but is also cultural," *id.* at 362, nevertheless decribes the cultural themes of modern America with barely any mention of religion. *Id.* at 361-76.

35. Widmar v. Vincent, 454 U.S. 263 (1981).

36. Marsh v. Chambers, 463 U.S. 783 (1983).

37. Lynch v. Donnelly, 465 U.S. 668 (1984).

38. *See* Bradley, *supra* note 28, at 298, 318 (criticizing Thornton v. Calder, Inc., 472 U.S. 703, 709-10 & n.9 (1985)); *see also* Garvey, *Freedom and Equality in Religion Clauses*, 1981 SUP. CT. REV. 193.

39. Bob Jones Univ. v. United States, 461 U.S. 574 (1983). *Bob Jones* has been widely criticized for this aspect of the decision. *See, e.g.,* Bradley, *supra* note 28, at 320-25; Cover, *supra* note 21, at 66-67; Freed & Polsky, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 10-15.

40. 406 U.S. 205 (1972).

41. *Compare id.* at 216-19 *with id.* at 221-22, 224-25. The Amish, though idiosyncratic, were characterized by the Court as hardworking and industrious in the best traditions of the American Protestant ethic. *See id.* at 224, 225-26. One can wonder, therefore, whether *Yoder* is really about protection of *minority* religious belief and conduct. Would the result have been the same had the plaintiffs been members of a more contemplative and mystic Eastern sect? *See* Moon v. United States, 718 F.2d 1210 (2d Cir. 1984), *cert. denied,* 466 U.S. 971 (1984).

By the same token, concepts of community and the interaction of individuals with each other in group contexts, particularly religious ones, have crucial effects on the development of individuality. Together, these observations suggest that American society must accept religious individuals and organizations as equal participants in public life in order to remain faithful to its liberal premises. This means reintegrating serious religious thought and belief into our culture, particularly our political culture, as legitimate predicates for public action.

I.

One of the unique characteristics of human personality is a refined and sophisticated capacity to envision better worlds, ideal places that do not exist in the physical world.[42] That such idealizations do not occupy time and space does not, however, make them less real than objects in the physical world. In terms of their effect on us, abstract conceptions are at least as real as physical objects because they are the means by which we interpret and judge the physical world.[43]

For many, it is religion that creates the reality against which the events of physical existence are interpreted. The important aspect of religion in this mode is the transcendent nature of religious worlds: The idea that the choices one makes in journeying through life have implications and consequences before birth and after death meets a deep psychological need to know that events, actions, choices, and thoughts are not merely arbitrary and temporal, but are somehow linked to a more enduring (and, therefore, more "real") truth and reality.[44]

Consider, for example, the pre-industrial lifestyle of the Older Order Amish. The Amish are motivated in large part by their abiding belief in a God that will punish them harshly if they do not persevere in their anachronistic lifestyle, and that will richly reward them if they do. The

42. *See* Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477, 1530, 1535 (1984).

43. *See* Frug, *supra* note 19, at 1079:

> [P]eople perceive the world by selecting out those things which seem important to them and [then] tailor[ing] their actions to those selected perceptions. . . . The combined process of accommodation of ideas to experience and assimilation of experience to ideas means that, to some extent, the world is made to conform to our ideas and, to some extent, our ideas are made to conform to the world.

See also M. BALL, *supra* note 9, at 8; E. CORWIN, AMERICAN CONSTITUTIONAL HISTORY 10 (A. Mason & G. Garvey eds. 1964).

44. *See* R. NEUHAUS, *supra* note 9, at 234; *cf.* P. TILLICH, *supra* note 20, at 9 (religion "gives us the experience of the Holy, of something which is untouchable, awe-inspiring, an ultimate meaning, the sense of ultimate courage").

considerable physical and psychological hardships caused by the incongruence of Amish life with that of contemporary society are thus of little moment in light of the eternal consequences of the inevitable day of judgment. To the Amish, "heaven" and "hell" are certainly as real as, and perhaps more real than, anything in the physical world.[45]

The religious link between the mundane here and now of physical existence and the possibility of a transcendent, enduring reality beyond, instills in many religious people the desire and duty to improve their own lot and that of their fellows by suggesting the moral possibilities of a better way of living, and by cultivating respect for law, including a greater willingness to restrict one's own choices and actions to benefit others. Thus, religious consciousness is an important positive influence on the substance of societal values.[46]

A.

Modern religion at its best promises humanity not only a better life hereafter, but a better way of living here and now. It is this latter promise that most directly affects society.[47] The promise of an existence hereafter that is somehow linked to the here and now is a compelling one, forcing one to consider the implications of choices and actions in temporal existence. Often, as with the Amish, this is because religious eschatology conditions acceptance into heaven and avoidance of hell upon a life lived in conformance with particular religious values. Even in the absence of such conditions, however, the acceptance of a transcendent religious reality predating birth and enduring beyond death often will influence the believer to alter her behavior to accord with the accepted reality.

Of course, there are wholly secular ideals of human existence which positively influence human behavior. For example, an important value in American society is respect for the person and property of others. One

45. *See* P. TILLICH, *supra* note 20, at 141; Cover, *supra* note 21, at 26-27.

46. Throughout this Essay, we treat religion and religious belief as primarily functional, sociological matters. This is not because we necessarily reject the claims about reality that are made by religion, but rather because the objective validity of these claims is largely irrelevant to a discussion about the interaction of law and religion in a liberal society. The important question for law is not whether God "really" exists, but whether those subject to law believe that He or She exists, and thus whether law must somehow adjust for the impact that this belief has on society. *See infra* text accompanying notes 145-69.

47. *Cf.* R. BELLAH, *supra* note 9, at 162 ("culture is the key to revolution; religion is the key to culture"); *accord* J. ORTEGA Y GASSET, *Concord and Liberty*, in CONCORD AND LIBERTY 9, 37 (H. Weyl trans. 1963) [hereinafter J. Ortega].

can deeply believe in the rightness of adhering to this ideal because experience teaches that it is the best way to maintain a stable society in which individuals can pursue and achieve personal happiness and fulfillment.[48] Indeed, one may see the "person and property of others" as representing spouse or children or the objects of other meaningful or fulfilling relationships, with one's feelings for them compelling the conclusion that the right way to live must include respect and love for others. Pursuit of happiness and recognition of love suggest an ideal society as real and as transcendent as one based on the biblical command to love one's neighbor. The pervasive American belief in God, however, and the continued commitment of the majority of Americans to religion[49] suggest that many Americans measure and judge their own behavior and that of others against the reality created by their religious beliefs. Thus, religious world views, as much as secular ones, can contribute both to social stability and to social progression to the extent that religious teachings positively influence the behavior of believers.

Undeniably, religion has spawned tremendous violence and conflict throughout history.[50] Religious traditions have always exhibited extraordinary creativity in fashioning justifications for persecution and violent confrontation that apparently are at odds with the progressive implications of their fundamental beliefs. For instance, early American Christians justified the enslavement and persecution of blacks through gymnastic interpretation of Old Testament texts,[51] concluding that blacks are descendants of the evil Cain, who was cursed by God for murdering the righteous Abel.[52] By so describing blacks, they avoided the hopeless task of reconciling their personal conduct with the Golden Rule: Because blacks were thought less than human, it was not required

48. This would be a quintessentially liberal justification. *See generally* R. SMITH, *supra* note 15, at 19, 21.

49. *See supra* notes 9-10 and accompanying text.

50. It is generally accepted that one of the primary goals of early liberals was avoidance of the religious strife that had characterized the post-Reformation era. *See, e.g.*, R. SMITH, *supra* note 15, at 3, 19 *passim*.

51. *E.g., Genesis* 4:1-15, 9:18-27 (King James).

52. *See generally* W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 (1968). Some Mormon theologians relied on this theory well into the 20th century to justify a refusal to grant priesthood privileges to blacks. *See generally* Bush, *Mormonism's Negro Doctrine: An Historical Overview*, 8 DIALOGUE: A JOURNAL OF MORMON THOUGHT 11 (1973). For an interesting description of 19th century Protestant justifications of slavery which their proponents considered fully consistent with New Testament teachings, see Maddex, *A Paradox of Christian Amelioration: Proslavery Ideology and Church Ministries to Slaves*, in THE SOUTHERN ENIGMA: ESSAYS ON RACE, CLASS AND FOLK CULTURE 105 (1983).

to accord them equal respect as humans. Similarly justified religious violence continues to the present day in the Arab-Israeli conflict in the Middle East, the clash of Protestants and Catholics in Northern Ireland, the acts of militant Islamic extremists in Iran and elsewhere, and the fighting among Sikhs and Hindus in India. The specter of such religious division and violence in America is invoked periodically by the Supreme Court under the rubric of "divisiveness" to justify excluding religion from American public life in all but its weakest and most diffuse forms.[53]

Nevertheless, an emphasis on the dark side of religion distorts its true character, for religion is a positive social influence as often as it is a negative one. The abolitionist movements of the 19th century were centered in the northern Protestant churches, and the civil rights movements of the last generation drew much strength and support from congregations of Protestants, Catholics, and Jews. In 20th century America we have seen nothing that approaches the violence of the post-Reformation wars or the terrorism endemic to any of the current religiously based conflicts. Religiously motivated violence in modern America, such as the Black Muslim separatist movements which gained currency in the 1960s (and still linger in such demagogues as Louis Farrakhan) and more recent instances of bombing and arson directed at abortion clinics, has never involved more than a minute segment of the religious population and has always been religiously idiosyncratic. Indeed, the clinic bombers can quite accurately be characterized as having operated at the very fringe of religious traditions whose orthodoxy offers no sanction for such violent acts and rhetoric; certainly neither Catholicism nor fundamentalist Protestantism suggests divine reward for those who murder pro-choice people and destroy their property. A theology of violence does not flow naturally from the religious elements of the pro-life movement. Similarly, black separatism was motivated more by desires to reverse the dehumanizing effects of centuries of slavery and segregation than by the teachings of Islam,[54] although the Islamic teaching of "holy war" undeniably contributed to the movement's militancy and occasional violence, as it undoubtedly contributes today to Palestinian terrorism.[55]

53. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971); Engel v. Vitale, 370 U.S. 421, 429 (1962); Everson v. Board of Educ., 330 U.S. 1, 9-11 (1947); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 694-700 (1970) (opinion of Harlan, J.); Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting); *infra* note 81 and accompanying text.

54. *See, e.g.*, MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1964).

55. For descriptions of Islamic "holy war" or *jihad*, see I. GOLDZIHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 100-03 (A. Hamori & R. Hamori eds. 1981); M. KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 164-67 (1984).

The violence and social divisiveness of the modern world should not be laid on the doorstep of religion. The overwhelming majority of Protestants, Catholics, Moslems, and Hindus neither participate in nor approve of violence and terrorism. To place the blame on these religious movements, therefore, for what is happening in Northern Ireland, the Middle East, and India is simplistic and unfair.[56] Catholicism is no more required to defend IRA terrorism than socialism is required to defend Mussolini. Those who insist that religion is a wholly negative social force in the modern world are trapped by a myopic post-Enlightenment mind-set which fails to appreciate that collective human action of any kind often will be intolerant and violent.

The most profoundly horrible atrocities of the 20th century have been committed by unambiguously secular regimes—Nazi Germany, Stalinist Russia, Maoist China, Khmer Rouge Cambodia.[57] Thus, some have argued that state suppression of transcendent moral visions, such as those espoused by the Western religions, subjects humanity to the unmitigated intolerance and violence of rationality.[58] Even if true, this hardly proves that science is an unredeemable evil which society must therefore banish from the realm. Likewise, one who catalogues the sins of religion must also take account of its virtues.

In a curious way, the religious conflicts that exist in the contemporary world, together with those that have clearly manifested themselves in history, suggest the tremendous, and perhaps unique, hold that religion has on our lives. While transcendent ideals can be imagined by the nonreligious as well as the religious,[59] nonreligious visions can lack the

---

56. For example, it has been suggested that much of the current violence blamed on religion in underdeveloped countries like India and Iran may be more accurately attributed to the relatively violent nature of pre-industrial societies. *See* R. NEUHAUS, *supra* note 9, at 163; Berger, *supra* note 9, at 45.

57. R. NEUHAUS, *supra* note 9, at 8-9.

58. *See, e.g.*, A. LINDSAY, *supra* note 15, at 21:

> [Leviathan] only works because, besides [Hobbes'] selfish, restless, unbelieving entrepreneurs, there is another class of men who do not fear violent death, who can respond to claims of loyalty and devotion, and can therefore make an army which can give Leviathan the necessary power.
>
> . . . .
>
> Is not Leviathan a parable of the impact of modern science on an unregenerate society? . . . Do we not read Hobbes with different eyes when we have seen Hitler and learnt how modern scientific development and modern technology can produce in reality Hobbes' Leviathan?

See also id. at 39. Paul Tillich has similarly observed with respect to the Soviet Union: "[It] uses the most refined methods of the technical control of nature and society in order to maintain and increase its power. It uses terror in a way which never would have been possible without the triumph of technical reason in Western culture." P. TILLICH, *supra* note 20, at 185; *see also id.* at 43-44.

59. *See supra* text accompanying notes 48-49.

psychological significance that accompanies the religious vision. Religion calls forth from believers a degree of commitment and sacrifice that often is not matched by adherents to secular ideologies.[60] Indeed, the concept of divine judgment that pervades most Western religions suggests the possibility that religious visions of transcendent reality may in fact be more compelling than secular ones in their influence on human behavior.[61] Whereas the believer must account to God (if not here, then certainly hereafter), the ultimate sanction to the secularist is the judgment of her peers, which often never comes and in any event is hardly omnipotent in a liberal democracy.[62] One who believes that God will ultimately judge the manner in which one has loved her neighbor may find it more important to love the neighbor here and now than the person who believes that death merely returns us all to the existential void.[63] Because divine judgment is external to the believer and beyond human control, she cannot temper the reality of the judgment by reconstituting it in a manner more consistent with human thoughts, feelings, and desires; she can only repent.[64] The decision to accept or reject the commands of the religious reality, therefore, has enormous psychological significance. The stakes are high because a decision that is "wrong" when

60. *See* Fitch, *supra* note 30, at 22: "No significant system of values can be maintained in this world unless individuals are willing at times to sacrifice themselves for a greater good. If that greater good is simply humanity as we know humanity, then the wise egotist will certainly deny himself the honor of martyrdom." *See also supra* note 58.

61. *Cf.* Cover, *supra* note 21, at 11-14 (values established by "paideic" or norm-*creating* communities such as the church exert a stronger force on behavior than values reflected in "imperial" or norm-*maintaining* institutions such as the liberal state); *see also* P. TILLICH, *supra* note 20, at 41.

In one very important sense, then, the widely held presumption that the religious experience is not rational because it is not observable or empirically verifiable, *see supra* note 19, is incorrect or, at least, incomplete. Though one cannot directly observe or test the experience, one can certainly measure the consequences of the experience in the lives of its adherents—what the experience has caused them to do, how it has ordered or reordered the various aspects of their temporal lives. When a religious experience does indeed result in dramatic social changes and effects, one must consider, as at least one possible causal factor, the reality of the experience. This style of inquiry and analysis is not unlike much scientific research, such as work with subatomic particles. Notwithstanding that one cannot directly observe such particles, the reality of their existence is assumed to be proved when experiments involving these particles yield the same results that are predicted by mathematical and other models which are constructed on the assumption that the particles exist. *See generally* E. DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE: A STUDY IN RELIGIOUS SOCIOLOGY 417 (J. Swain ed. 1947).

62. R. NEUHAUS, *supra* note 9, at 76; *see also* R. NIEBUHR, *supra* note 19, at 183-84.

63. *See* V. FRANKL, MAN'S SEARCH FOR MEANING 174 (I. Lasch trans. 1959) ("The majority . . . consider themselves accountable before God; they . . . interpret their own lives [not] merely in terms of a task assigned to them but also in terms of the taskmaster who has assigned it.").

64. *See id.* at 156, 164; R. NEUHAUS, *supra* note 9, at 250; *see also* P. TILLICH, *supra* note 20, at 59.

judged against the individual's religious premises will bring permanent and unavoidable consequences which the individual cannot control.[65]

In short, this suggests an ethic of duty and self-sacrifice that currently is somewhat out of favor. Rights-dominated legal rhetoric, with its focus on individual claims, does not channel our thinking in ways that promote recognition of an obligation to think of and defer to others.[66] Mark Tushnet, for example, suggests a social transformation by which potential religion clause litigants (including the government) would give more deference to the beliefs and actions of those with whom they disagree, even to the point of foregoing a legal challenge or defense to which they are entitled. This would open the possibility of resolving church-state disputes by the voluntary exercise of governmental or individual discretion rather than the coercive imposition of constitutional law.[67] This suggestion, though powerful if taken seriously, can only sound quaint to a legal bar and academy obsessed with the enforcement of constitutional rights.

For most people, respect for others is not the way of least resistance,[68] particularly when one knows that the law is on her side. A transcendent religious reality, on the other hand, can continually remind one

---

65. *See* J. ORTEGA, *supra* note 47, at 18-19:

> A belief must be distinguished from an accepted idea, a scientific truth, for instance. Ideas are open to discussion; they convince by virtue of reason; whereas a belief can neither be challenged nor, strictly speaking, defended. While we hold a belief, it constitutes the very reality in which we live and move and have our being.
>
> . . . .
>
> . . . [Reality is] that which must be reckoned with, whether we like it or not.

See also Cover, *supra* note 21, at 45.

66. *Compare* Hutchinson & Monahan, *supra* note 42, at 1486-87, 1496 *with id.* at 1498 n.2, 1520.

67. Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 736-38 (1986) (discussing Sutherland, *Establishment According to* Engle, 76 HARV. L. REV. 25 (1962)). Tushnet suggests, for example, that the conflict at issue in Engle v. Vitale, 370 U.S. 421 (1962), could have been resolved without the Court's intervention, by the state school board's refusal to require recitation of an offensive prayer that was so religiously diffuse as to be nearly meaningless anyway, or by the offended plaintiff's recognition that challenging the prayer would itself give great offense, thereby fractioning local society and subverting its ability to promote the common good. *Id.*

The potentially greater effectiveness of forbearance over coercion in the regulation of human affairs also has been noted by theologians. *See, e.g.*, R. NIEBUHR, *supra* note 19, at 17, 30, 90-91, 109-10, 135.

68. *See* V. FRANKL, *supra* note 63, at 157, 158:

> Values . . . do not drive a man; they do not *push* him, but rather *pull* him. . . .
>
> . . . .
>
> . . . Man is never driven to moral behavior; in each instance he decided to behave morally. Man does not do so in order to satisfy a moral drive and to have a good conscience; he does so for the sake of a cause to which he commits himself, or for a person whom he loves, or for the sake of his God.

(emphasis in original); *see also* E. ERICKSON, *supra* note 24, at 138.

of the obligation, the duty—the account of which must be given to God—to conform to the normative standards that her religion teaches and to defer to others, irrespective of the distribution of legal rights.[69] Religion is one source of a vision of "life as it should be" which is sufficiently compelling to challenge "life as it is." Belief in a transcendent reality which insists upon conformance to certain values and behavioral standards imparts urgency and significance to the choice to adhere to these values and standards, a choice which otherwise is dangerously close to a mere calculation of self-interest.[70]

B.

The commitment of liberalism to self-interest and individual autonomy has always presented difficult problems for liberal political theory: To what extent should individual choices be restricted by law in order to create a stable system that will protect such choices? And once the restrictions are agreed upon, how (if at all) should they be enforced?[71] Some early European liberals were somewhat cynically committed to institutional religion because they saw the church as supportive of the liberal state and thus able and willing to reinforce obedience to law through religious teachings.[72] The establishment clause of the first amendment largely spared America from the unfortunate consequences that resulted from the European melding of church and state, although even in America institutional religion was seen as one of the purveyors of republican virtue well into the 20th century.[73]

---

69. *Cf.* P. TILLICH, *supra* note 20, at 182 ("[T]he Holy is not only that which is; the Holy is also that which ought to be, that which demands justice above all."). In this sense, the root of the English "religion" is closer to the meaning of the Latin *religiosus*, "warily and scrupulously conscientious," rather than the more commonly cited *religare*, "to bind together." *Compare* J. ORTEGA, *supra* note 47, at 22 *with* R. NEUHAUS, *supra* note 9, at 60. *See also* M. BALL, *supra* note 9, at 135.

70. *Cf.* R. SMITH, *supra* note 15, at 180 ("[T]he support given by religion to virtuous standards of behavior was indispensable for the preservation of political liberty. . . . [R]eligion [gives] people a 'taste for the infinite,' which [is] essential to combat [selfishness,] the greatest peril of free and materialistic modern societies." (paraphrasing de Toqueville); *see also* H. BERMAN, *supra* note 27, at 24, 140; R. NEUHAUS, *supra* note 9, at 153; R. NIEBUHR, *supra* note 19, at 106.

71. This is a focus of the Critical Legal Studies movement. R. SMITH, *supra* note 15, at 8; Hutchinson & Monahan, *supra* note 42, at 1483-84. However, the dilemma has long been recognized. *See, e.g.*, E. CORWIN, *supra* note 43, at 44-45, 96; A. LINDSAY, *supra* note 15, at 16.

72. *See* R. SMITH, *supra* note 15, at 57; *see also* P. TILLICH, *supra* note 20, at 6; Tushnet, *supra* note 67, at 732-33.

73. *See, e.g.*, E. CORWIN, *supra* note 43, at 213. It may be that the celebrated religious pluralism of modern America owes less to the establishment clause, which until the 1940s was a virtual dead letter in constitutional law, than it does to certain sociological factors such as the frontier orientation and class mobility of American society, which generally enabled religious dissidents to move elsewhere at little cost (*see generally* A. LINDSAY, *supra* note 15, at 51) and the practical

Although the threat of punishment provides some disincentive to disobedience of law, the very need for coercive measures to enforce law in liberal societies makes it clear that the interests of such societies often conflict with individual choice. Because even a relatively small number of dissenters can render law enforcement ineffective, an overwhelming majority of persons must be willing voluntarily to restrict their personal choices and actions to those not prohibited by law if law is to have significant force and effect. Individuals will do so, however, only in the face of a "moral power they respect."[74] "[W]hat deters crime is the tradition of being law abiding, and this in turn depends upon a deeply or passionately held conviction that law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life."[75]

The liberal state has no competence to determine ends; it can only determine means to the ends which are determined elsewhere, usually by the people themselves. Thus, any public policy problem which purports to be "solved" by a purely technical solution which is not related to some transcendent moral vision acceded to by a majority of the people becomes "unhinged."[76] It is a means without a legitimating end. Society will ignore any instrumentalism that is not related to a moral reality that the people accept as legitimate.

Contrast, for example, the general American attitude toward tax evasion with that toward armed robbery. Prohibitions against the latter are not merely prudent rules for a civilized society, but also reflect a belief in the wrongfulness of depriving others of possessions by physical violence. Though violent crime remains a serious problem in America, the vast majority of Americans eschew criminal violence because of their belief in its wrongfulness as well as their knowledge of its illegality. Tax law is a different matter entirely. We view the Internal Revenue Code, particularly in its detail, as a purely positivistic construct of the state, resting on no religious or other moral foundation. The substantive commands of the Code are thus morally arbitrary, having no link to principles that will survive the present day. Not surprisingly, noncompliance

orientation of American theology to social ethical problems, which generally has prevented the identification of theology with partisan political programs (*see generally* P. TILLICH, *supra* note 20, at 165-67). In America, at least, religion has not served to anesthetize the masses.

74. Hutchinson & Monahan, *supra* note 42, at 1528 n.241; *accord* Harding, *Can There Be Law Without Morality?*, in RELIGION, MORALITY AND LAW, *supra* note 30, at 28, 45-46.

75. H. BERMAN, *supra* note 27, at 29; *see also* R. NIEBUHR, *supra* note 19, at 22-23 ("Laws are obeyed because the community accepts them as corresponding, on the whole, to its conception of justice.").

76. R. BELLAH, *supra* note 9, at 152.

with the tax laws, especially by otherwise law abiding citizens, has increased to virtually crisis proportions.

The respect that law requires can come in important measure from transcendent religious ideals that citizens see reflected in the implicit morality of their laws. In politics, those in and out of power prefer to describe the motivations for their various agenda in moral rather than political terms.[77] While the aggression and arbitrariness of "we have the votes and this is the way we want it" may force the desired objective, it does not win hearts and minds. The tendency to describe power struggles in terms of moral principles is a recognition of the greater rhetorical claim that moral discourse can lay to individual conscience. Moral passion, and especially religious passion, is usually more persuasive than power.

As politicians often have borrowed the moral rhetoric of religion for their own purposes, so religion often has thrust itself into the political arena.[78] Sometimes this is merely because religious organizations, as much as secular interest groups, see politics as a means of protecting or advancing their power and influence.[79] Often, however, religious groups become politically involved because they perceive in the political issues of the day a moral and religious dimension that allows the religious person—as both citizen of the republic and believer in a transcendent reality—to speak with particular force and persuasion. Slavery and freedom, public good and private gain, states' rights and federal civil rights, abortion and choice—these are only several of numerous examples of the elevation by religious forces of a public policy debate to a moral discussion of ultimate questions of right and wrong.[80]

In the United States, religious participation in politics and other public policy debates frequently is condemned because it polarizes the political community on issues that do not lend themselves to the essential

77. For fascinating variations of the rhetoric of morality versus the rhetoric of political self-interest, see SENATE COMM. ON THE JUDICIARY, REPORT ON NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES, 99th Cong., 2d Sess. 99-100 (1986) (remarks of Sen. Metzenbaum, R-Ohio); *id.* at 107-13 (remarks of Sen. Leahy, D-Vt.); *id.* at 114 (remarks of Sen. Simon, D-Ill.).

78. For example, churches and other religious organizations are heavily engaged in movements relating to arms control, abortion restrictions, suppression of pornography, American policy in Central America, disinvestment and anti-apartheid in South Africa, economic justice and welfare rights, gun control, parental control of public education, immigration policy, and so-called morals legislation such as anti-prostitution and anti-sodomy laws.

79. *See* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

80. *See* R. BELLAH, *supra* note 9, at 46; Berger, *supra* note 9, at 43; *see also supra* note 77 and accompanying text.

legislative processes of fact-finding and compromise.[81] The religious experience and its accompanying morality, it is argued, are matters of personal piety and unyielding conviction; bringing one's religious beliefs into the public arena as predicates for government action is, therefore, highly inappropriate, a public imposition of private and personal beliefs.[82]

If moral principles are indeed wholly subjective, and for that reason out of place in politics, then the political process is only a referee mechanism for the accommodation of conflicting secular interests.[83] Laws generated by the mechanism represent only the relative political power of the affected interest groups, rather than any transcendent moral vision.

When law is viewed as the morally arbitrary outcome of the exercise of political power, it becomes vastly more difficult to persuade those subject to such law that it deserves their respect and obedience. The question whether to obey law is transformed, from a matter of keeping faith with a moral vision that the citizen shares (at least partially), to a calculation of personal prudence. The critical issue becomes not whether law projects a reality that the citizen can acknowledge as legitimate and worthy of respect, but instead whether obedience to law will serve personal interests.[84] The persuasive claims that can be made with moral argument disappear in favor of selfishness.

In the United States, of course, all morality is not excluded from the political arena—only religious morality. It is not clear what there is about religious morality that renders it unacceptably subjective and private that is not also true of secular morality.[85] It may be that, because the source of ultimate authority for most modern secular moral theory

81. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 416 (1985) (Powell, J., concurring); Larson v. Valente, 456 U.S. 228, 252-53 (1982) (quoting *Walz*, 397 U.S. at 695 (opinion of Harlan, J.)); Engel v. Vitale, 370 U.S. 421, 442-43 (1962) (Douglas J., concurring). This argument has been used of late by the political left to attack the political activism of the resurgent religious right. Ironically, 20 years ago the same argument was used by the political right to criticize the religious left for its participation in the civil rights, anti-war, and anti-poverty movements. *See* R. NEUHAUS, *supra* note 9, at 10.

82. *See, e.g.*, D. LYONS, ETHICS AND THE RULE OF LAW 190-91 (1984); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963); Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 538-40 (1980).

83. Posner, *The* De Funis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27-29; *see* Berger, *supra* note 9, at 44.

84. *See* H. BERMAN, *supra* note 27, at 27; P. TILLICH, *supra* note 20, at 136-37; Fitch, *supra* note 30, at 20; J. MARITAIN, *The Approach of the Practical Intellect to God*, in CHALLENGES AND RENEWALS: SELECTED READINGS 170-73 & n.11 (J. Evans & L. Ward eds. 1966).

85. Kent Greenawalt argues that there is no difference and, therefore, that whenever rational analysis and rational secular morality cannot resolve difficult issues of public policy, religious convictions as much as nonrational secular premises can and should inform public debate about such issues. Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985); *see also*

usually is some elaboration of the principle of self-interest,[86] secular morality appears consistent with liberal theories of government in a way that religious morality, with its reliance on the external judgment of the divine, does not. At any rate, American law does not suffer the full effects of a final divorce between law and morality because only religious modes of moral argument are prohibited. The effects arguably are further mitigated by the fact that much religious morality is consistent with secular morality, so that the exclusion is in many cases only formal.

Nevertheless, the singular banishment of religious morality from political discourse does create serious problems. If religious morality can influence law only when disguised as secular morality, then the implicit message sent by law is that the former is less legitimate than the latter, less worthy of consideration by those who conduct the nation's business.[87] Moreover, when the business of politics is limited to an agenda that scrupulously excludes religion, religiously motivated political action is left constitutionally unprotected.[88] Accordingly, whenever religion has anything distinctive to contribute to public policy debates, it runs the risk of being condemned as well as ignored.[89] As we argue in Part III,

---

R. NEUHAUS, *supra* note 9, at 125-26. (politics is an "inescapably moral enterprise" and thus we should not divest ourselves of moral referents such as religious purposes).

86. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 136-42 (1971).

87. *Cf.* Tushnet, *supra* note 67:

> The secular purpose requirement [of establishment clause jurisprudence] thus means that if enough people take religion seriously, they cannot enact their program, but if they favor the same program for other reasons, they can enact it. It seems fair to say this rule does not accept the view that religion should play an important part in public life.

Id. at 725 (discussing Wallace v. Jaffree, 472 U.S. 38 (1985)); *see also* Esbeck, *supra* note 23, at 382-83; Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 700-01 (1968).

88. *Cf.* Frug, *supra* note 19, at 1143: "Marx argued against the division of both the individual and society into political and economic spheres on the ground that the division prevented human emancipation by fracturing the human personality and reducing political activity to the protection of economic interests." It is, therefore, more than a little troubling that several recent Supreme Court decisions that have vindicated religious free exercise in the face of an establishment clause challenge have involved situations in which the Court believed that the challenged religious activity also could be characterized as a subset of protected secular activity. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984); Widmar v. Vincent, 454 U.S. 263 (1981). *See generally* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Tushnet, *supra* note 67, at 713-23, *supra* notes 35-41 and accompanying text.

89. *See, e.g.*, McRae v. Califano, 491 F. Supp. 630, 690-723 (E.D.N.Y. 1979), *rev'd sub. nom.* Harris v. McRae, 448 U.S. 297 (1980). For a more recent example, consider the lawsuit filed by the Abortion Rights Mobilization, Inc. (ARM), challenging the tax-exempt status of the two most politically active Catholic groups in the United States, the National Conference of Catholic Bishops and the United States Catholic Conference. Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982). ARM is arguing that these groups' attacks on abortion constitute support of anti-abortion political candidates in violation of federal tax law. The district court has repeatedly denied motions to dismiss and to stay discovery. Abortion Rights Mobilization, Inc. v. Regan,

this political treatment of religion, far from constituting some supposed "benevolent neutrality,"[90] must inevitably make people less religious.[91]

The banishment of religion from politics exposes a central defect of liberalism as it has developed in modern society, namely, "its subversion of the essential unity of moral and political life."[92] In liberal thought, the individual is compartmentalized into a public and a private self, with religious belief confined to the private.[93] For the religious person, however, the "public" and the "private" are not so neatly separated:

> If religion is the state of being grasped by an ultimate concern, this state cannot be restricted to a special realm. The unconditional character of this concern implies that it refers to every moment of our life, to every space and every realm. . . . Essentially the religious and the secular are not separated realms. Rather they are within each other.[94]

When religious morality is excluded from politics, the religious individual is alienated from public life. One cannot use as a basis for public action her religious individuality—those very thoughts, feelings, and beliefs that carry the greatest personal meaning and thus are most likely to move her to public action.[95] Unless one succeeds in disguising her religious morality with the arguments of secularism, the political arena is closed to her. The knowledge that the political system rejects an individual's personal religious experiences as being wholly subjective and irrelevant makes her feel separated, illegitimate, and inferior.

The stability of any liberal democracy depends on a perception of the people that their law treats everyone more or less equally and does not affirmatively dictate different results based upon the status of those that it governs. Liberal states that do not respect this reality are either

---

552 F. Supp. 364 (S.D.N.Y. 1982); 603 F. Supp. 970 (S.D.N.Y. 1985). In addition, the Catholic groups recently were found in civil contempt of court for failing to comply with a court order to produce documents. Abortion Rights Mobilization, Inc., v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986). *See generally* Campbell, *Church and Political Issues: How Far is Too Far?*, N.Y. Times, May 12, 1986, at 8, col. 2; Hyer, *Catholics Backed on Tax Exemption; Religious Groups Defend Bishops Against Challenge in U.S. Court*, Wash. Post, May 28, 1986, at A14, col. 1.

90. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

91. *See infra* text accompanying notes 113-44.

92. Hutchinson & Monahan, *supra* note 42, at 1493; *see also id.* at 1530; Esbeck, *supra* note 23 at 380, 381; *cf.* Frug, *supra* note 19, at 1074-75 (liberalism sees the world in dualistic terms).

93. *See* H. BERMAN, *supra* note 27, at 16; Note, *supra* note 24, at 1471; *e.g.*, Note, *supra* note 24, at 1476 ("religion is by its nature a personal matter"); *supra* note 29 and accompanying text.

94. P. TILLICH, *supra* note 20, at 41; *see also* R. NEUHAUS, *supra* note 9, at 180 ("What people believe to be true and what people believe to be morally right are closely related. [T]he mutual dependence of fact and value is assumed.").

95. *See* H. BERMAN, *supra* note 27, at 16; R. NEUHAUS, *supra* note 9, at 125; P. TILLICH, *supra* note 20, at 41-42, 59; Greenawalt, *supra* note 85, at 379-80, 382, 398, 404.

forced into authoritarianism or are overthrown.[96] If the religious people who constitute the majority of Americans come to believe, as many already do, that the law making process does not respect their religious beliefs (at least to the extent that it respects secular beliefs), then they themselves will respect neither the process nor the laws that it generates.

II.

Liberalism usually conceives of communities and associations as aggregations of individuals entitled to no special protection by the legal system beyond the indirect benefits derived from protection of their component members.[97] Increasingly, however, it has been recognized that communities and groups give rise to many attributes of individualism, rather than vice versa. "[G]roups and society are necessary conditions for the emergence of all that is morally valuable in individuality."[98] This suggests that the law should recognize and protect groups directly, independent of the legal protection that groups may receive as aggregations of individual interests. In particular, religious groups help the emergence and retention of personality and individuality both by providing reference points for their members against which those members can compare and contrast their own moral assumptions and beliefs, and by supplying creative reinforcement and nurturing in the development of individual personality.

The critical relation of freedom of expression to self-realization and individual autonomy is a recurring theme of first amendment jurisprudence.[99] Expression of any sort, much less religious expression, does not take place in a social vacuum; there must be a relevant culture of individuals—a community—to which the expression is directed or referenced in

96. *Cf.* R. NEUHAUS, *supra* note 9, at 133 ("[P]ower that is exercised in contradiction to culture is very fragile. It depends overwhelmingly, sometimes exclusively, on coercion."); P. TILLICH, *supra* note 20, at 138 ("External imposition is not sufficient for creation of a moral system. It must be internalized. Only a system which is internalized is safe."); Karst, *supra* note 9, at 369 ("[A] society can[not] maintain its 'unifying ideology' . . . uuless the society's system of beliefs is largely validated in most people's minds by their own experience."). A dramatic contemporary illustration is the declaration by Ferdinand Marcos of martial law in the Phillipines. Although he temporarily consolidated and extended his personal power in what had been a liberal democracy, he was forced to flee the country only a generation later in the face of overwhelming public support for his political adversaries.

97. *See* Garet, *supra* note 25, at 1013-14; Macneil, *supra* note 72, at 942, 946; *supra* text accompanying notes 21-29.

98. Garet, *supra* note 25, at 1044; *see id.* at 1050-51; Macneil, *supra* note 22, at 934, 937, 945.

99. *See, e.g.*, Emerson, *supra* note 22, at 878-80.

order for it to have significant meaning for the expressor-individual.[100] In expressing adherence or opposition to a set of values, an individual "takes a stand," and begins to define and work out what she believes as an autonomous human being. Such beliefs, when sincerely adopted, have significant effect on an individual's life choices and actions: they truly make her into a different personality than she otherwise would be. Unlike animals, which generally function in response to survival instincts, humans have the ability to make value judgments and alter their personal behavior to conform to such judgments, even in the face of social opposition or persecution.[101]

Because individuality is in many respects a social phenomenon—that is, an individual's definition and sense of self depends significantly on the character of recognition granted by others[102]—a religious community committed to the autonomy, responsibility, and dignity of its members will enhance the unique personality development of each by providing a vehicle for hearing, discussing, and ultimately accepting or rejecting transcendent ideals. The idea of personality and individualism "implies a complementary rather than an antagonistic notion of community" with respect to its effect on autonomy.[103] To younger or newer members of a religious community, the communal religious values are external and undiscovered, and must be taught and demonstrated by more mature members. As members mature in the community, however, they either gradually internalize each religious value until it becomes part of their individual personality—"this is what I am"—or they reject it—"this is what I am not."[104]

Groups are sources of loyalty and solidarity, as well as moral referents. The support and reinforcement of some relevant group of persons is critical to individual development. Ideally, each person should experience an environment that understands, supports, and permits individual growth, that makes one feel loved, secure, and accepted.[105] Otherwise, individuals are condemned to an impoverished and unfulfilled isolation.[106] There clearly are, of course, individuals who succeed in resisting

100. *See* Garet, *supra* note 25, at 1023 ("[W]hen we think about speech we imagine . . . a community of shared understanding, sustained communication, collective representations, and collective self-expression and self-understanding."); *see also* Note, *supra* note 24, at 1473.

101. *See generally* E. ERIKSON, *supra* note 24, at 80, 97.

102. Karst, *supra* note 9, at 307-09.

103. Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 239 n.179 (1984).

104. *E.g.*, R. NEUHAUS, *supra* note 9, at 55-56; *see also* Note, *supra* note 24, at 1473.

105. E. ERIKSON, *supra* note 24, at 84-85.

106. Hutchinson & Monahan, *supra* note 42, at 1492.

coercive environments to become the persons they choose to be. Most of us, however, are made of lesser stuff.[107] We need a community, a group of others, to nurture us in our personality growth, to reinforce the decisions that we make, to comfort us when things go poorly, to convey to each of us the essential message that we are valued and that the world—at least, the group—would miss our presence. Knowledge of this acceptance helps us to assess ourselves positively, to conclude that life is worth living even when we feel worthless, because others consider us worthy. It is lack of the nourishing and sustaining community that too often leads to apathy, depression, and even suicide.[108]

For many Americans, it is religion that fulfills this acceptance function. It is, to be sure, not a value-neutral support; religious communities reject those who do not accept their basic values. Clearly, rejection of persons who have grown up in the community and have defined themselves with reference to its values and traditions also can lead to personality destruction.[109] For those who accept the religious group's core precepts of belief and behavior, however, the fellowship of believers creatively influences their individual development. The shared religious beliefs and experiences of the group give rich, added meaning to individual beliefs and experiences.[110]

Religious communities apparently continue to be important sources of moral values and self-definition for most Americans.[111] Accordingly, hostility toward or ignorance of religious communities risks diminishing or altogether eliminating a critical context by which individuals choose their values and define the meaning of their existence.[112] Curbing the public activity of religious groups in America would thus erode and even threaten the very individual autonomy whose preservation ought to be one of the highest priorities of the liberal state.

---

107. *Cf.* J. WHITE, WHEN WORDS LOSE THEIR MEANING 4 (1984) ("One cannot maintain forever one's language and judgment and feelings against the pressures of a world that works in different ways, for one is in some measure the product of that world.").

108. "[S]omeone looks down on each of us in difficult hours— a friend, a wife, somebody alive or dead, or a God—and he would not expect us to disappoint him. He would hope to find us suffering proudly—not miserably—knowing how to die." V. FRANKL, *supra* note 63, at 132.

109. *See generally* E. ERIKSON, *supra* note 24, at 36, 94.

110. P. TILLICH, *supra* note 20, at 124-25 (describing how existential philosophy and modern psychoanalysis can be applied to conceive of the church as a source of love and support rather than of condemnation).

111. *See supra* notes 9-10 and accompanying text.

112. Note, *supra* note 24, at 1474; *see* Cover, *supra* note 21, at 31. *See generally* Hutchinson & Monahan, *supra* note 42, at 1533, 1536.

III.

Not so long ago, the church was an important, indeed the dominant, means of gaining knowledge. Medieval humanity was not limited to reason in discovering truth, nor to its feelings; it also obtained knowledge by crediting an external source linked to the transcendent reality of religious beliefs ("God," to Western humanity). It is familiar history that the church too zealously guarded its dominant claim to authority in imparting knowledge, and in defense of that claim suppressed many truths. Nevertheless, the religious experience—the reception of knowledge from God—has been a powerful positive force in history. Abraham, Moses, and other ancient prophets believed that God spoke to them. Whether he did or not, they believed that he did, acted on that belief, and Judaism was born, freed, and preserved. Peter, Paul, and others claimed to hear God speak to them through Jesus, and Christianity came into being. Joan of Arc heard voices which won battles for France. Joseph Smith's vision spawned Mormonism and culminated in the colonization of the Rocky Mountains. Other examples abound.

The bias of modern liberalism, of course, is that God, if he exists at all, does not talk to us and never did. Figures in history who purported to be acting on knowledge received from an external, divine source are, therefore, thought to have been aberrational, pathologically affected by some disorder which caused them to act in such a decidedly unrational way.[113] Their often substantial followings are explained as resulting solely from charisma and demagoguery, rather than from the truth and value of the doctrine they preach. The possibility that their religious experiences are in some sense "real" is not seriously considered.[114] Modern humanity, it is believed, has outgrown all of this.[115]

In a pluralistic society, no point of view has a compelling claim to dominance or even tenure. Ideas come and go, depending on how they fare in the marketplace of ideas. If people choose not to take religion

113. *See, e.g.*, J. JAYNES, THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND (1976). *But see* R. NEUHAUS, *supra* note 9, at 16 ("[W]e should be suspicious of explanations for other people's beliefs and behavior when those explanations imply that they would believe and behave as we do, if only they were as mature and enlightened as we are.").

114. *But cf.* text accompanying note 59.

115. *Cf.* R. NIEBUHR, *supra* note 19, at 106:

> The Liberal part of our culture thought that the Christian idea of the sinfulness of all men was outmoded. In its place it put the idea of a harmless egotism, rendered innocuous either by a prudent self-interest or by a balance of all social forces which would transmute the selfishness of all into a higher social harmony.

See also R. BELLAH, *supra* note 9, at 72; R. SMITH, *supra* note 15, at 169; P. TILLICH, *supra* note 20, at 4.

seriously, then it hardly can be imposed on them. It simply becomes another of the losers in the pluralistic competition. If religion is disappearing as a public influence, however, it may not be because of unfettered choices in a truly free marketplace, for individual Americans remain insistently (if privately) religious.[116] The disappearance is strongly reinforced by law.

Legal reasoning has long been thought of as a rational and logical process—though well-informed by experience—by which the limits on social co-existence are discovered or created.[117] As such, it cannot adequately account for the subjectivity and unrationality of the religious experience. The essence of religion is personal experience that may be relevant to others, but can be meaningfully communicated to them only with great difficulty unless they share the religious beliefs that make the experience meaningful.[118] Communication of the religious experience thus depends heavily on art, metaphor, and mystical language and ritual. The process by which one develops belief in a transcendent reality—acquires faith—is not, cannot be, a rational process, for the validity of the objects of one's faith cannot be observed or tested, nor can it be logically proven.[119]

Law, on the other hand, is permeated by the pretense of objective and empirical inquiry.[120] The essence of a lawsuit is the marshalling of "evidence" by each side about the "facts"—who did what to whom when, where, and how. When the law must deal with religion, it must use a language and a process steeped in objectivity, rationality, and empiricism to describe and evaluate experiences which are subjective, unrational, and unobservable. A religious language of faith, belief, and divine judgment seems out of place in the legal system. Indeed, the description of religion in terms of objectivity, rationality, and observability invokes the unwarranted supposition that these are the proper, even the exclusive, evaluative criteria. To the religious person, it is more accurate and

116. *See supra* notes 9-10 and accompanying text.

117. *See, e.g.*, Harding, *supra* note 74, at 43-43; J. ORTEGA, *supra* note 47, at 29.

118. *Cf.* M. BALL, *supra* note 9, at 58 ("genuine communication among people who do not share the same culture is especially difficult"); J. ORTEGA, *supra* note 47, at 18 ("[D]o we not all in writing and talking find out in the end that none but we understand ourselves?"); *see also* E. ERIKSON, *supra* note 24, at 97.

119. *See* R. NIEBUHR, *supra* note 19, at 202-03.

120. *See* M. BALL, *supra* note 9, at 16: "Langdell . . . believed that law was a science all of whose materials could be found in books. Like scientists, some lawyers and judges believe themselves to be detached, neutral observers doing what God or nature or necessity demands." *See also id.* at 24.

far more meaningful to describe religion as "spiritual" rather than "subjective" or "irrational." It is inevitable, then, that law will systematically devalue the religious experience. Legal language and process currently are incapable of capturing and conveying the essential meaning and significance of religion.[121]

Consider, for example, *Wilson v. Block*,[122] in which the Hopi and Navajo Tribes contested a federal administrative decision to permit the expansion and further development of a ski resort on federally owned, non-tribal land in the San Francisco Peaks of northern Arizona. The Peaks are the dominant geological formation visible from the Hopi and Navajo Indian reservations and occupy a central role in the religious traditions of the two tribes.[123] The tribes made two free exercise arguments: first, that the contemplated expansion would deny them the access needed to the Peaks for performance of religious ceremonies and collection of ceremonial objects; and second, that the contemplated development would be a sacrilegious desecration of a central symbol of the Navajo and Hopi faiths.[124]

The court responded almost eagerly to the first argument, which is not surprising; utilitarian balancing is what courts do most, and what they think they do best. After observing that only 777 of the 75,000 acres of the Peaks would be developed, and determining that the tribes would retain access to those 777 acres even after the expansion, the court had little difficulty finding that the expansion was socially efficient.

---

121. *Cf.* Marshall, *Introduction: Religion and the Law Symposium*, 18 CONN. L. REV. 697, 700 (1986):

> [O]ne is left with the disquieting thought that the problems posed by the religion clauses raise . . . a substantial challenge to the ability of any set of rational principles to deal with an inherently irrational concern like religion. The unavoidable heresy may be that in the application of law to religion, the core of religion—its irrationality—is exorcised.

See also R. NIEBUHR, *supra* note 19, at 184-85 ("the Christian answer [to the human predicament] . . . involves a definition of God which stands beyond the limits of rationality").

122. 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1983).

123. The Navajos believe that the Peaks are one of four sacred mountains that are home to specific Navajo deities, and that the Peaks themselves constitute a living deity. They also believe that special healing powers inhere in the Peaks which would be impaired by the contemplated development. The Hopis believe that the "Kachinas"—special emissaries of the Hopi Creator that guard and sustain Hopi villages—reside at the Peaks for part of each year, and that the expansion would constitute a direct insult to the Kachinas and to the Creator. *Id.* at 738. For a summary of North American native religious beliefs and recent land development cases, see Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447 (1985).

124. *Wilson*, 708 F.2d at 740. The bulk of the opinion is devoted to various statutory issues. *See id.* at 745-60.

Thus, it found expansion preferable to the prohibition on further development sought by the tribes.[125]

The court apparently did not feel as much at home with the second argument, for it did not address it. The court did note testimony that the contemplated development would have little direct impact on the tribes' religious *practices,*[126] which was really only a restatement of its response to the first argument about access. It also observed that the current ski development "has been in existence for nearly fifty years and it appears that [the tribes'] religious practice and beliefs have managed to co-exist with the diverse developments that have occurred there,"[127] which was a thinly veiled attack on the tribes' religious sincerity. The court's myopic concentration on measurable, observable activity ignored the essential element of the tribes' argument: that a governmentally approved sacrilege on one of their most important religious symbols officially devalues their religious traditions before all Americans and, more important, before the tribes themselves. The inevitable result, as the Hopi tribal chairman testified, will be the destruction of tribal religious culture:

> It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred home of the Kachinas. The basis of our existence as a society will become a mere fairytale to our people. If our people no longer possess this long held belief and way of life, which will inevitably occur with the continued presence of the ski resort . . . a direct and negative impact upon our religious practices [will result]. The destruction of these practices will also destroy our present way of life and culture.[128]

It is clear that the court ignored the tribes' claim of threatened cultural extinction, because taking this claim seriously would have required a balancing of the social utility of the contemplated expansion against that of maintaining tribal religious culture. The court expressly disclaimed the need to engage in that analysis.[129] Even had the court balanced those interests, however, it is far from clear that the interests of the tribes would have prevailed. The so-called "compelling state interest"—

125. *Id.* at 744-45.

126. *Id.* at 744.

127. *Id.* at 745 (summarizing district court's findings).

128. *Id.* at 740 n.2 (testimony of Abbot Sekaquaptewa); *see also* E. ERICKSON, *supra* note 24, at 120-24 (case study of native American cultural alienation).

129. *Wilson*, 708 F.2d at 745.

theoretically a governmental interest the vindication of which is fundamental to the continued existence and legitimacy of the political system and which, therefore, justifies infringement of a fundamental liberty like freedom of religion[130]—has substantially eroded in recent years.[131] Given its obvious preference for utilitarian balancing, the *Wilson* court might well have found that the threat of cultural extinction which expansion posed for the tribes was outweighed by "compelling" interests such as providing safe and adequate recreational facilities for urban citizens, and assuring full and equal access by all citizens to federal lands.[132]

Our argument, however, is not that the court necessarily should have decided in favor of the tribes; to the contrary, societal interests sometimes may be judged more important than even the most sincere

---

130. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 21 (1978) ("no man or class of men ought on account of religion to be . . . subjected to any penalties or disabilities, unless . . . the existence of the State be manifestly endangered") (quoting James Madison); Note, *supra* note 24, at 1479.

131. It is doubtful that the government's interest in ensuring the fiscal integrity of the social security system or in granting women access to full membership in the Jaycees is really of the same order and magnitude as its interest in responding to a perceived threat of hostile invasion. *Compare* United States v. Lee, 455 U.S. 252 (1982) *and* Roberts v. United States Jaycees, 468 U.S. 609 (1984) *with* Korematsu v. United States, 323 U.S. 214 (1944). *See also Yoder*, 406 U.S. 205 (state's interest in educating its children in public schools beyond the eighth grade is not compelling); Braunfeld v. Brown, 366 U.S. 599, 613-14 (1961) (Brennan, J., concurring and dissenting) (discussing Sunday Closing Laws):

> What, then, is the compelling state interest which impels the [state] to impede . . . freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of . . . freedom? It is not the desire to stamp out a practice deeply abhorred by society . . . [N]or is it the State's traditional protection of children. . . . It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

132. This suggests the "marginalist" principle: To the extent that religious belief or expression is unique, it is protected only when providing protection has no socially significant consequences. Tushnet, *supra* note 67, at 723; *see also* A. LINDSAY, *supra* note 15, at 14 (the modern liberal state tolerates religion "if it confines itself to a pietism that has no impact on society"). Thus, native American religion claims that only trivially impact the purpose or enforcement of generally applicable law are usually upheld. *See, e.g.*, Frank v. State, 604 P.2d 1068 (Alaska 1969) (reversing on free exercise grounds conviction of native American who killed a single moose out of season for use in tribal funeral celebration); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (reversing on free exercise grounds convictions of native Americans for use of peyote in religious rituals). When such claims have a negative economic impact, however, as they always do in land development cases, the claims are usually denied. *See, e.g., Wilson*, 708 F.2d at 735; Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Crow v. Gullett, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983). *But see, e.g.*, Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985).

religious claims.[133] Surely, though, a religious group's claim that particular governmental action will lead to its extinction is one that should be taken seriously in a society that purports to value religious pluralism. The criticism is not that religious interests are improperly weighted in the constitutional balance—an assertion with which reasonable minds can differ—but that the biases toward empiricism, science, and rationality that are embedded in legal culture prevent religious interests from being weighted at all, unless they resemble familiar secular interests.[134] If interest-balancing retains any analytic legitimacy in the post-realist world,[135] it presumably does not do so by dropping one side of the analytic equation.

What *Wilson* dramatically illustrates is that current legal language and process are not well suited to deal with religious claims that do not accord with a modern secular vision of reality. Law lacks the language that would permit serious conversation about the social implications of legal vindication of such unmodern visions of reality. Religious beliefs that are unempirical, unscientific, and otherwise unrational, like those of the Navajos and Hopis in *Wilson*, lose by default because the judiciary, unwilling or unable to take them seriously (perhaps fearing ridicule if it does), simply ignores them.

Certain peculiarities of American constitutional law exacerbate these shortcomings of legal langnage. Establishment clause decisions of the Supreme Court have resulted in the prohibition of religion and religious belief as justification for government action.[136] Though the decisions have not divested government of all vestiges of religion, they have changed the language of the constitutional law of religion: Because at least certain kinds of religious motivations are constitutionally illegitimate, government actions that appear to have a religious origin or character argnably must be recast in secular terms to avoid constitutional invalidation. In other words, the religious convictions of even a majority of Americans apparently can directly influence the creation of law only if

133. *See, e.g.*, Hardin v. State, 188 Tenn. 17, 216 S.W.2d 708 (1949) (rejecting claim that general prohibition on possession and transportation of poisonous snakes violated free exercise rights of religious snake handlers).

134. *See supra* text accompanying notes 35-41, 85-87.

135. We acknowledge the post-realist critique currently advanced by Critical Legal Studies that interest-balancing and other realist policy analyses do not yield the determinate and objective resolutions of the legal disputes they purport to generate. We reject, however, any further claim that the particulars of how such tests are stated and applied are immaterial to the resolution of legal disputes. *See infra* text accompanying note 171.

136. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980); Epperson v. Arkansas, 393 U.S. 97 (1968).

those convictions can be articulated in wholly nonreligious terms, thereby cutting off from the law religion and the most meaningful aspect of the religious experience—its link to the transcendent.

How we talk about ourselves eventually changes us.[137] As religious language disappears from law,[138] politics,[139] and American public life in general,[140] we will stop making the linguistic and conceptual distinctions called for by such language. When we no longer permit public description of ourselves, socially or individually, in religious terms, it will not be long before we become incapable of describing ourselves in such terms, even privately, at which point we will no longer be religious.[141]

That we may collectively choose to become nonreligious is a potential consequence of life in a pluralistic society; it is possible, as we have noted, to conceive of the "better life" without reference to transcendent religious beliefs.[142] Given the pervasive religiosity of the American people and the large and continuing contributions of religion both to society and to individuality, however, it is not clear why American law should insist on wholly secular origins, conceptions, and justifications for law, particularly when America professes to be a liberal society. Indeed, this secularization has ominous implications for the liberal conceptions of state and individual.

---

137. *See* J. WHITE, *supra* note 107, at 4; Karst, *supra* note 9, at 372. It has been suggested, for example, that application of the language and concepts of the physical sciences to the study of individuals and society gave birth to the value free determinism characteristic of much of modern and post-modern thought. *See* A. LINDSAY, *supra* note 15, at 24-25, 43-45; R. NIEBUHR, *supra* note 19, at 3, 80-81.

138. *See, e.g.*, Greenawalt, *supra* note 85, at 356 ("Many law professors, like other intellectuals, display a . . . disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience. [These people] regard religious convictions as foolish superstitution."). Even among legal educators who are religious, there often is a reluctance to conceive of their religious convictions as relevant to the subjects that they teach. *See* Lee, *The Role of the Religious Law School*, 30 VILL. L. REV. 1175, 1185 (1985).

139. *See, e.g.*, H. BERMAN, *supra* note 27, at 29-30 (discussing religious freedom in the Soviet Union); *see also* Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986) (arguing that all vestiges of traditional religion in American government should be replaced with secular manifestations of American "civil religion" such as Lincoln's Second Inaugural Address).

140. *See supra* text accompanying notes 3-13, 27-41.

141. *Cf.* P. TILLICH, *supra* note 20, at 7 ("Religion, if banished to the realm of mere feeling, . . . also has lost its seriousness, its truth and its ultimate meaning. In the atmosphere of mere subjectivity of feeling without a definite object of emotion, without an ultimate content, religion dies."); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 149 (1976) ("If enough individuals cease to identify themselves in terms of their membership in a particular group . . . then the very identity and separate existence of the group . . . will come to an end.").

142. *See supra* text accompanying note 48.

At the center of liberal political theory is the goal of creating a state which will maximize individual choice and autonomy. Thus, one of the strongest policies underlying the constitutional protection of speech and expression from state interference is the fear that suppression of information will lead to "wrong"—that is, irrational or less rational—judgments by autonomous individuals.[143] Once one concedes that reality is not totally captured by empiricism and logic,[144] however, then it becomes clear that exclusion of religious speech and other religious activity from public life poses the same risk—that persons will make decisions different from those that they would have made in the presence of the less truncated conceptions of reality that unfettered religious expression can provide.

Whether secular or religious, each of us must decide for ourselves what the quality and character of temporal life should be. Such an obvious and profound judgment cannot and should not be made in the absence of the religious voice.

IV.

> Surely no historian, no cultural anthropologist would think of discussing the civilizations of the Near and the Far East without noting the impact of their religions upon their morals. What is peculiar is that some persons think they can discuss the ethics of the West without reference to the Judeo-Christian framework.[145]

The idea that reason and experiment can uncover the firm foundation on which rest the truths of an objective universe is an illusion, in law

---

143. Emerson, *supra* note 22, at 881.

144. *See, e.g.*, R. NEUHAUS, *supra* note 9, at 135-36 ("[M]ost of the things that we believe really matter—love, community, honor, purpose in life—are not subject to scientific measure and control."); P. TILLICH, *supra* note 20, at 54 ("[N]ot everything in reality can be grasped by the language which is most adequate for mathematical sciences."); J. WHITE, *supra* note 107, at 22:

> The region that can be ruled by the methods of logic and science, and by the parts of the mind that function in these ways, is, after all, rather small . . . for good or ill, much the larger part of human life must proceed without the certainties these two forms of reasoning provide.

The insistence on circumscribing all explanations of human existence within the modalities of science has spawned non-theological explanations for that existence which purport to be non-theistic and scientific. *See, e.g.*, J. BARROW & F. TIPLER, THE ANTHROPIC COSMOLOGICAL PRINCIPLE (1984). These, in turn, have been criticized by some scientists as ignoring the limits of science and the power of non-scientific concepts like religion:

> [T]he reason the universe seems tailor-made for our existence is that it *was* tailor-made. . . . Faced with questions that do not neatly fit into the framework of science, they are loath to resort to religious explanation; yet their curiosity will not let them leave matters unaddressed. Hence, the anthropic principle. It is the closest that some atheists can get to God.

Pagels, *A Cozy Cosmology*, THE SCIENCES, Mar./Apr. 1985, at 38 (emphasis in original); *see also* H. KUNG, *supra* note 30, at 43.

145. Fitch, *supra* note 30, at 4; *accord* E. CORWIN, *supra* note 43, at 213.

as in other endeavors. Indeed, such an approach obscures truth as often as it reveals it, by creating a dogma that values conformity over truth and thereby inhibits imagination and creativity.[146] The premise of modern liberalism, with its focus on the individual, is that neither the state nor anyone else may dictate objective truth. Truth in a liberal society is discovered subjectively by individuals, who are then free to order their own lives (but no one else's) in accordance with their own discovered values.

To characterize truth and values as subjective, however, is incomplete. Just as we cannot scientifically demonstrate an external objective truth "out there," waiting to be discovered, neither are we ourselves detached and truly autonomous individuals, dispassionately sorting through moralities and values in search of those we would call our own.[147] What we are depends in part on the values to which we have been exposed: To some extent, we choose our values, but to some extent, our values choose us.[148]

Thus, the first amendment intuition of the sociological value of an open society—that society is better served by more exposure to diverse information, ideas, and expression than by less—is clearly the correct one for a liberal society whose members must determine morality for themselves. The values that percolate through society will affect both individuals and their choices; the more diverse are those values, the more diverse will be the influences on and the choices available to individuals. A diversity of moral influences and value choices enhances each person's capacity for self-reflection, self-direction, and self-development.

Although moral values are assumed to be personal and subjective by the liberal state, they nevertheless have an objective dimension; the dichotomy between subject and object, if valid at all, is not absolute.[149]

146. *See generally* M. BALL, *supra* note 9, at 8-22; E. ERIKSON, *supra* note 24, at 24, 37. Consider, for example, the concept of "neutrality" that pervades religion clause jurisprudence. It is questionable enough whether one can maintain neutrality with respect to the beliefs and activities of various religious sects; to articulate the boundaries of a neutral ground between a secular philosophy which demands that public life be swept clean of religious influences, and a religious morality which asserts its relevance to public policy issues, may well be conceptually impossible. The Supreme Court's spectacular incoherence in articulating the constitutional law of religion may stem from its persistence in attempting to define a neutral position with respect to ideas that are mutually exclusive, and thus do not permit articulation of a middle ground. For an example of the Court's attempt to define a neutral position see Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

147. *See* E. ERIKSON, *supra* note 24, at 23.

148. *See supra* note 41 and accompanying text; *see also* E. ERIKSON, *supra* note 24, at 34; R. NEUHAUS, *supra* note 9, at 11.

149. For example, see R. HARE, FREEDOM AND REASON 47-48 (1963), which describes "the moral question" as, "[t]o what action can I commit myself in this situation, realizing that, in committing myself to it, I am also (because the judgment is a universalizable one) prescribing to anyone

The compelling nature of individually discovered truth, when mixed with the human need for association with others, causes like-minded people—however they become that way—to come together (or to stay together) to create (or to perpetuate) moral traditions. The state itself might be described as arising and continuing from analogous forces. At the most fundamental political level, then, one could expect to find these traditions reflected in the laws that such people enact to govern themselves.

In America, most of the people, free to make their own choices about the nature of reality, choose to see it through the language and imagery of religion.[150] Until forty years ago, that language and imagery was unself-consciously reflected in our laws and legal traditions.[151] In an America that is democratic as well as liberal, the issue today should not be whether public policy must be "religious" or "secular" or "neutral," but rather whether the religious values held by the majority of Americans will be respected, that is permitted, as much as secular values to enter the dialogue that influences the value choices of all Americans. This requires that religion be permitted a legitimate role in American public life.

Unfortunately, despite numerous protestations of neutrality, the Supreme Court views public manifestations of serious religious thought and belief as socially threatening. The rationales advanced by the Court in its parochial school aid cases, for example, bespeak an unmistakable distaste for the entire enterprise of private religious education.[152] Moreover, the Court often strikes down governmental action under the establishment clause on the basis of empirical judgments of coercion of religious belief which are unsupported by evidence of any sort.[153] Indeed, the Court itself has stated that no evidentiary showing of coercion is necessary to a finding of unconstitutionality under the clause, that the prophylactic nature of the establishment clause justifies invalidation of governmental action because of the bare possibility (as perceived by the

in a like situation to do the same?" *Accord* Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal Change*, 9 J. LEGAL STUD. 335, 348-49 (1980); *see also supra* notes 92-95 and accompanying text. *But cf.* S. KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 182 (W. Lawrie ed. 1941) (defining truth as an objective uncertainty held fast in the most passionate personal experience).

150. *See supra* notes 9-10 and accompanying text.

151. *See generally* H. BERMAN, *supra* note 27, at 16; R. NEUHAUS, *supra* note 9, at 111.

152. Bradley, *supra* note 28, at 293-309 *passim* (criticizing Aguilar v. Felton, 473 U.S. 402 (1985); Lemon v. Kurtzman, 403 U.S. 602 (1971); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); McCollum v. Board of Educ., 333 U.S. 203 (1948)).

153. *See, e.g., Aguilar*, 473 U.S. at 423-26 (O'Connor, J., dissenting); *Lemon*, 403 U.S. at 616-17 (1971); *Abington*, 374 U.S. at 312, 316 (Stewart, J. dissenting); *McCollum*, 333 U.S. at 227, 231 (separate opinion of Frankfurter, J.).

Court) of religious coercion.[154] These "judicial intuitions" take the Court beyond the judicial notice of "social facts" that has been controversial enough in other areas of constitutional law.[155] Apparently religion is so dangerous that it requires crushing even the acorn from which an establishment oak might grow.

The Court's paranoia about the influence of religion is most nakedly revealed in its suppositions about the social sophistication of school children. In its establishment clause decisions, the Court frequently adverts to the immaturity of school children and to their corresponding inability properly to distinguish the roles of church and state, and thus to withstand the implicit coercion of religious belief or disbelief that may be present in a church-state relationship. The observation often is made without supporting evidence that children are in fact confused or intimidated by either church or state,[156] thus revealing that the Court considers children presumptively incapable of understanding church-state relationships. Accordingly, the Court acts to protect children from even the slightest hint of religious coercion that may emanate from such a relationship by banning virtually all connections between religion and public schools, on the one hand, and government and private religious schools, on the other.[157]

Such solicitude for the simple and immature psyche is not always present in other constitutional contexts. Mature decisions about whether to terminate a pregnancy or to engage in sexual activity, for example, clearly require intellectual, moral, and social sophistication at least equal to that necessary to discern and withstand state promotions of religion. Nevertheless, statutes grounded in the (quite reasonable) assumption that children are presumptively incapable of making the complex judgments implicit in the decision to undergo an abortion or to use contraceptives

154. *See, e.g., Lemon*, 403 U.S. at 612-14; *Abington*, 374 U.S. at 225. Engel v. Vitale, 370 U.S. 421, 430-31 (1962).

155. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252 (1977); Miranda v. Arizona, 384 U.S. 436 (1966).

156. *See, e.g.*, Felton v. Secretary, 739 F.2d 48 (2d Cir. 1984), *aff'd sub. nom.*, Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Bell, 546 F. Supp. 1071 (W.D. Mich. 1982), *aff'd*, 718 F.2d 1389 (6th Cir. 1983), *aff'd*, 473 U.S. 373 (1985); DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I.), *aff'd sub. nom., Lemon*, 403 U.S. 602; Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd*, 403 U.S. 602 (1970).

157. Those connections that remain are "indirect," the result of benefits funnelled directly to parents and children without use of the public or private school as a transmitting medium. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983); Committee for Public Educ. v. Regan, 444 U.S. 646, 659-61 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968); Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947). *But see* Zorach v. Clauson, 343 U.S. 306 (1952).

have been uniformly struck down as unconstitutional impositions on the child's right to privacy.[158] It is difficult to understand why there should be a conclusive presumption of immaturity in church-state contexts, but not in other contexts, unless one starts with the premise that exposure of children to public religious influences is a social negative and, therefore, to be minimized by keeping religious belief and activity scrupulously private.

This judicial concern about the exposure of children to religious influences is shared by the lower courts. Consider, for example, *Bender v. Williamsport Area School District*[159] which involved an establishment clause challenge to a voluntary student prayer group which was permitted to meet in a public high school's cafeteria during an "activity period." The activity period was a thirty-minute time slot, scheduled twice a week and immediately following a short homeroom period, during which student clubs were permitted to hold meetings. Students who were not members of a club were allowed to study in the library, visit the school's computer center or career-college placement office, or remain in their homerooms until the beginning of the next class period. Each student's choice of what to do during the activity period was completely voluntary, subject only to the restriction that she remain on campus and be accounted for on the school's attendance rolls.[160] *Bender* is thus markedly different from other school prayer decisions in which students who did not wish to participate in prayer were required to leave a classroom or otherwise restrict their conduct in deference to the prayer;[161] here it was the prayer participants themselves who were required to take affirmative action to create the prayer opportunity.

Nevertheless, the court held that permitting the prayer group to meet violated the establishment clause,[162] principally because of

158. *See* Bellotti v. Baird, 443 U.S. 622 (1979) (affirming lower court ruling overturning state statute requiring parental or judicial consent for non-emergency abortions by minors); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (declaring unconstitutional state prohibition of sale of contraceptives to minors); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding that the state may not require parental consent for abortions during first 12 weeks of pregnancy). *But see* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (upholding parental consent statute which included alternative procedure for minor's obtaining consent); H.L. v. Matheson, 450 U.S. 398 (1981) (upholding parental notification statute constitutional as applied to unemancipated minor making no claim or showing of maturity).

159. 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986) (lack of standing to bring appeal).

160. *Id.* at 543-44 & nn.8-9.

161. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 411 (1961).

162. *Bender*, 741 F.2d at 557.

"the more obvious presence which a religious group would unavoidably have within a high school [as opposed to a college] setting," and the inevitability of "involuntary contact between non-participating students and [such] religious groups."[163] In this court's view, the mere awareness that some students might be praying somewhere on campus—rather than playing chess, planning a ski trip or reading a (presumably nonreligious) book—creates a coercive psychological pressure on other students to participate in prayer, a pressure that the court advises us is heightened by the possibility of "involuntary contact" with those who pray. The impressionablity of school children notwithstanding, there was simply no basis for finding that mere knowledge of the existence of the prayer group put students under even the remotest pressure to participate in prayer rather than in any of the numerous other activities which were available during the activity period. One can make sense of the *Bender* opinion only if one assumes that the exposure of children to public religious influences is so dangerous that one may even sacrifice the associational and expression rights of religious children to cabin the danger.[164]

In a liberal democracy, respect for divergent views does not require that one concede the field to those views whenever they conflict with one's own. Such respect does require, however, that those views not be barred from the discussion simply because of their origin,[165] especially when their adherents constitute a majority of the people. In that event, it

163. *Id.* at 552. The court also found that presence of an adult monitor at the prayer meetings, which school rules required, might be interpreted by non-participating students as an endorsement of the meetings by school authorities even though the monitor took no part in the activities of the meetings. *Id.* at 552-53. In addition, the court found that there was a risk of excessive entanglement in the manner in which the school's publicity rules were applied to the prayer group. *Id.* at 555-57.

164. The court held that avoidance of the purported establishment clause violation constituted a compelling state interest which justified infringement of the first amendment rights of students who wished to participate in the prayer group. *Bender*'s resolution of this constitutional conflict is not an aberration. *See, e.g.*, Nartowicz v. Clayton City School Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1983), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Mary v. Evansville-Vanderburg School Corp., 615 F. Supp. 761 (S.D. Ind. 1985), *aff'd*, 786 F.2d 1105 (7th Cir. 1986); Trietly v. Board of Educ., 65 A.D. 2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978); Johnson v. Huntington Bch. Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977); *see also* Wood, *Religion and the Public School*, 1986 B.Y.U. L. REV. 349, 366. For an argument that voluntary public school prayer groups are constitutional, see Loewy, *School Prayer Neutrality and the Open Forum: Why We Don't Need a Constitutional Amendment*, 61 N.C.L. REV. 141 (1982).

165. *See* M. BALL, *supra* note 9, at 42, 45.

begins to look as if they are excluded, not for any reason of substance, but because they indeed might prevail.[166]

We should point out that we are not arguing for the formulation of public policy on the basis of private truths. Religious as much as secular individuals must translate their personal beliefs into a language that is accessible to all.[167] This is a consequence of political reality as well as an obligation of the virtuous republican legislator.[168] So long as they are put forth in terms and on premises that permit a debate about their general wisdom and usefulness,[169] religiously based arguments that are relevant to resolution of a public policy issue should not be disqualified from participating in the discussion solely because of their religious origin or character.

In terms of current constitutional doctrine, what we argue suggests more careful attention to the legislative or administrative motivation that should serve to invalidate governmental action under the establishment clause. Laws should not be declared unconstitutional because they have religious origins, or because their proponents are motivated by their personal religious beliefs, or even because their public effects coincide with private religious beliefs, all of which have been advanced at one time or another as proper bases for striking down laws under the establishment clause. The illicit establishment clause motivation should be much narrower: the intention disproportionately to help or to hinder the beliefs or

166. *See* R. NEUHAUS, *supra* note 9, at 47; *see also* Greenawalt, *supra* note 85, at 404 ("many intellectuals who think that religious convictions are foolish superstitions want to minimize their legitimate position in social life without confronting them head on").

167. R. NEUHAUS, *supra* note 9, at 36, 125. Those who insist that the government act solely because, for example, "the Bible commands it," at best exhibit a hostile indifference to those who interpret the Bible differently or who do not accept it as an authoritative source at all; at worst, such persons evidence an intent to persecute dissenters. *See* Wood, *supra* note 164 at 354-56. However, those who cry "establishment" at every public acknowledgement of religion commit the same sin. *See, e.g.*, Calvary Bible Presbyterian Church v. Board of Regents, 72 Wash. 2d 912, 436 P.189 (affirming dismissal of lawsuit seeking discontinuance of state college course on the Bible as literature), *cert. denied*, 379 U.S. 923 (1964). *See supra* text accompanying notes 165-66.

168. *Compare* Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677, 712-15 (1985) *with* Greenawalt, *supra* note 85, at 387-93.

169. It is probably sufficient, for example, to explain *why* the Bible commands particular action (obviously, responses such as "the Bible is God's word" merely restate the question) or *why* such action is independently desirable—*e.g.*, because the experience of religious societies has shown that the action makes for a society which is more peaceful and stable, or is demanded by conceptions of justice or fairness, etc. This allows all participants in the law making process to address the relative social merits of the action without regard to their personal view of the purported religious justification. *See* Bernardin, *The Role of the Religious Leader in the Development of Public Policy*, 34 DE PAUL L. REV. 1, 3-10 (1984).

practices of a particular religious sect or of religion generally, or to implement sectarian control of government or government control of religion. This formulation of the illicit establishment clause motivation protects establishment clause values while leaving broad possibilities for the public participation and influence of religion in the formation of public policy.[170]

In the short run, changes in the hermeneutic formulae of establishment clause jurisprudence are not likely to yield any different constitutional results than those created by the Court's decisions thus far. A judiciary that views religion as a private matter of conscience whose truth claims have been rendered subjective and irrelevant by the advances of modern science is not likely to render decisions which create or expand a public role for religion, regardless of the linguistic formulation invoked to decide specific cases. Even so, the "tests" of the religion clauses are not immaterial. They constitute the conceptual vehicle for legal conversation about the clauses and the larger issue of a public role for religion. As such, any religion clause test limits, channels, and opens that conversation in diverse ways which eventually make certain resolutions of church-state conflicts seem more plausible and persuasive, and others less so.[171] In the long run, the tests do matter in the resolution of specific cases because they alter the cultural landscape that is the genuine source of legal decisions. A judiciary that is compelled even formally to confront religion qua religion—that is, not as the negation of reason, or a purely subjective preference, but as a spiritual and transcendent vision as compelling to its adherents as the empirical proofs of modern science—must eventually come to acknowledge the functional reality of religion in the lives of most Americans and, therefore, its social relevance.

The legal and other cultural institutions of America must shed their paranoia about the dangers of religious participation in the political process, and in public life generally. Though vigilance in the preservation of religious freedom is obviously an appropriate and essential concern of the Supreme Court, it is nevertheless clear at this point in our history that analogies to the widespread religious strife of post-Reformation Europe

170. *See* Gedicks, *supra* note 168, at 712-15.

171. *Cf.* Hutchinson, *Indiana Dworkin and Law's Empire* [Book Review], 96 YALE L.J. 637, 664 n.153 (1987) ("Although it is not important in the sense of causing anything to happen, [constitutional] adjudication represents a significant rhetorical mode of social ordering and control. . . . [I]t helps to structure the world in particular ways and to justify the existing conditions of social organizaiton.").

or post-Tudor England are no longer valid, if they ever were.[172] Certainly the preservation of that freedom does not require that public institutions, including the public schools, pretend that religious beliefs and their individual and institutional adherents are not there.[173] One can acknowledge the existence of religious individuals and organizations, and teach about the contemporary significance of their beliefs and activities, without coercing or otherwise influencing conformity to those beliefs and activities. Likewise, one can acknowledge that rationality and science have not provided complete and satisfying explanations for how people live and act in a modern world. When unrational, unscientific, and unempirical religious visions of the world are so negatively affected by governmental actions that partakers of those visions ask for recognition or relief, the law should seriously consider these requests by accepting religion on its own terms, as a compelling source of normative authority in the lives of its adherents, and not as another mundane variant of subjective preference indistinguishable from how one likes her eggs cooked for breakfast.[174]

In one of the most famous dissenting opinions in constitutional law, Justice Holmes excoriated the Court for having constitutionalized a social and economic theory to which most Americans of that era did not subscribe.[175] Much as those who influence American political and cultural institutions may want to insist that ours is a secular state with a scientific and modern polity free of anachronistic superstition, Americans remain avowedly religious, with all of the unrational and unempirical—and spiritual and transcendent—conceptions of reality which that term implies. Insistence upon exclusively secular constructions of reality today is as undemocratic as social darwinism was in 1906.

The history of the West makes clear that when religion is present in the public arena, it makes valuable contributions. Since the state became a discernible entity independent of the church, religion has contributed both to the vitality and progress of the secular state and the liberation and autonomy of individuals.[176] Virtually all of the conceptual pillars of liberal democracy—impartial adjudication, judicial review, liability for

172. *Cf.* Bradley, *supra* note 28, at 308 ("[N]o one wants the U.S. to become another Iran. But the real question is whether there is *any* warrant to suggesting that it might.") (emphais in original).

173. *See supra* text accompanying notes 7-13.

174. *See* R. NEUHAUS, *supra* note 9, at 50.

175. Lochner v. New York, 198 U.S. 45, 75-76 (1906) (Holmes, J., dissenting).

176. H. BERMAN, *supra* note 27, at 24, 140; B. TIERNY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650, at 13, 25 (1982).

negligence, the presumption of innocence, habeas corpus, equal protection of the laws, good faith—have an origin or justification in the Judeo-Christian tradition as reflected in the Bible.[177] Indeed, the very concept of equal respect for persons—perhaps the dominant theme of modern American constitutionalism[178]—grew out of ancient Israel's projection of its captivity in Egypt onto the revealed rules of social coexistence in the promised land.[179]

The most recent injections of religion into politics, controversial as they are, have nevertheless energized many religious Americans with the knowledge that their religious individuality is not a hopelessly subjective intrusion into public life. The life and growth of American law in particular and of American society in general have been enriched by the contributions of religious traditions.[180] To cut off this vast pool of values and experience from American public life is undemocratic and illiberal, as well as a denial of history.

177. H. BERMAN, *supra* note 27, at 71, 94-95, 103-04.

178. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 180-83, 272-78 (1977) (discussing J. RAWLS, *supra* note 86, and the concept of equality); *see also* Garet, *supra* note 25, at 1024-25.

179. Ozick, *The Moral Necessity of Metaphor*, HARPER'S, May 1986, at 62, 67. *Compare* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 82-87, 100-01, 170 (1980) (discussing the concept of "virtual representation") *with Leviticus* 19:34 (King James) ("But the stranger that dwelleth with you shall be unto you as born among you, and thou shall love him as thyself, for ye were strangers in the land of Egypt . . . .") *and id.* at 24:22 ("Ye shall have one manner of law, as well as the stranger, as for one of your own country . . . .") *and* R. NIEBUHR, *supra* note 19, at 96, 101.

180. *Cf.* H. BERMAN, *supra* note 27, at 75 ("we must recognize that the great passions which have created our heritage also create a presumption in favor of preserving it").