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ESSAYS

PUBLIC LIFE AND HOSTILITY TO RELIGION

*Frederick Mark Gedicks**

MANY who value the contributions of religion to American life have contended that American politics and public life are hostile to religion. This, for example, is the premise of Richard Neuhaus's widely read book, *The Naked Public Square*.¹ Others have made similar observations and arguments, especially about the legal academy.² The United States Supreme Court's Religion Clause opinions are widely perceived to be hostile to religion,³ and anecdotes

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¹ Richard J. Neuhaus, *The Naked Public Square: Religion and Democracy in America* (2d ed. 1986).

² See, e.g., Frederick M. Gedicks & Roger Hendrix, *Choosing the Dream: The Future of Religion in American Public Life* (Contributions to the Study of Religion No. 32, 1991); Gerard V. Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 St. Louis U. L.J. 275 (1986); Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 Duke L.J. 977; David M. Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. Dayton L. Rev. 345 (1988); Peter L. Berger, *Religion in Post-Protestant America*, Commentary, May 1986, at 41.

For observations about the legal academy, see, e.g., Kent Greenawalt, *Religious Convictions and Political Choice* 5-6 (1988); Michael J. Perry, *Morality, Politics, and Law* 10, 211 n.10 (1988); Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. Legal Educ. 509 (1987); Rex E. Lee, *The Role of the Religious Law School*, 30 Vill. L. Rev. 1175 (1985); Steven D. Smith, *Book Review*, 8 Const. Commentary 227, 228-29 (1991).

³ See Herbert McClosky & Alida Brill, *Dimensions of Tolerance* 133-35 (1983) (suggesting that most Americans agree with the principle of separation of church and state but disagree with the Supreme Court's application of this principle in particular cases); see also Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 739 (1987) ("The judiciary's church-

about the antireligious hostility of public life are common.⁴ Moreover, studies suggest that some of the principal actors in American public life systematically marginalize religious viewpoints relative to secular ones.⁵ Regardless of the evidence, many religious people clearly feel excluded and alienated from public life.⁶

Despite this strongly felt perception by some, others are baffled by the suggestion that American public life discriminates against religion.⁷ Some adduce as contrary evidence that religion is deeply (if

state principles do not resonate with popular sentiments. They seem counterintuitive to the average citizen and the Court knows it.").

Douglas Laycock has suggested that the Court's Religion Clause jurisprudence might best be explained by the Court's adoption of a privatization thesis, which holds that religion must be excluded from public life. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1007-10 (1990). For a comprehensive examination of this thesis and an argument that it no longer influences the Court's decisions, see Richard Myers, *The Supreme Court and the Privatization of Religion*, 41 Cath. U. L. Rev. (forthcoming 1992).

⁴ "Public life," as distinguished from "private life" by liberal political theory, is the main focus of Part I of this Essay. For examples of the antireligious hostility of public life, see, e.g., Neuhaus, *supra* note 1, at 97-98 (describing how the news media ignored the religious dimension of the political activism of Dr. Martin Luther King, Jr.); John Dart, *The Religion Beat*, in *The Religion Beat: The Reporting of Religion in the Media* 19, 20-21 (The Rockefeller Found. Conference Report 1981) (observing that the religion editor of the typical urban newspaper is a nonbeliever); Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DePaul L. Rev. 1019, 1035 (1990) (noting the marginalization of religion in public media and intellectual life); Mark Edmundson, *A Will to Cultural Power: Deconstructing the de Man Scandal*, *Harper's Mag.*, July 1988, at 67, 69-70 (observing that professors of English at elite universities generally believe literature has replaced religion as the principal source of moral values).

⁵ See, e.g., Peter L. Benson & Dorothy L. Williams, *Religion on Capitol Hill* (1982) (arguing that national media in the United States do not report on the religious beliefs of Congress despite the fact that members of Congress are as religious as the general population); Ellis Sandoz, *A Government of Laws: Political Theory, Religion, and the American Founding* (1990) (arguing that scholars of the American founding era generally have ignored religious influences); Paul C. Vitz, *Religion and Traditional Values in Public School Textbooks: An Empirical Study*, in *Equity in Values Education: Do the Values Education Aspects of Public School Curricula Deal Fairly With Diverse Belief Systems?*, Final Report § 1, pt. 2 (July 1985) (arguing that American public school textbooks ignore the influence of Christianity and Judaism in history).

⁶ See Gedicks & Hendrix, *supra* note 2, at 29-32, 82-83.

⁷ See, e.g., Mark Tushnet, *Religion in Politics*, 89 Colum. L. Rev. 1131 (1989) (reviewing Kent Greenawalt, *Religious Convictions and Political Choice* (1988)).

I confess to some puzzlement at this claim about the culture of the contemporary United States, which seems to me far less hostile to religion, even in the abstract heights inhabited by intellectuals, than Greenawalt suggests. . . . To the admittedly modest extent that the Supreme Court accurately reflects general cultural trends, [its Religion

controversially) involved in contemporary American politics.⁸ Others flatly deny that any hostility to religion, outside of a few isolated instances, exists in American public life.⁹ Still others suggest that the perception of hostility comes from mere misunderstanding.¹⁰ And if religion seems uniquely disabled in public life by the Supreme Court's construction of the Establishment Clause, that seems to many a fair trade-off for the unique benefits conferred upon religion by the Free Exercise Clause.¹¹

Clause doctrine] does not seem to me to show that suspicion of religious motivations for legislation pervades our culture.

Id. at 1134-35.

⁸ See, e.g., Theodore Y. Blumoff, *Disdain for the Lessons of History: Comments on Love and Power*, 20 *Cap. U. L. Rev.* 159 (1991).

There is a striking tendency among those who call for a more central locus for religion in American political life to lead with their chins. It is as if they had missed the last three decades: the Moral Majority, the Reverends Billy Graham, Martin Luther King, Jesse Jackson, Pat Robertson, Jerry Falwell, Theodore Hesburgh and others—all have taken their turns in the political limelight, advising Presidents, broadening the accepted range of public responses to emotionally charged, moral/religious issues, pulling the entire political spectrum far to the right during the 1980s, and even defining party platforms and politics. Religion is today and always has been thoroughly admixed in American politics, and this despite the long prevailing liberal ethos.

Id. at 186-87 (footnote omitted); see also Tushnet, *supra* note 7, at 1135 n.17 (noting the religious motivations that often lie behind opposition to abortion).

⁹ See, e.g., William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 *Case W. Res. L. Rev.* 357, 407-11 (1989-90); Oliver S. Thomas, *Comments on Papers by Milner Ball and Frederick Gedicks*, 4 *Notre Dame J.L. Ethics & Pub. Pol'y* 451, 453 (1990).

¹⁰ See, e.g., David A.J. Richards, *Toleration and the Constitution* 141 (1986) ("[The] different concerns of the religion clause do not . . . place them in the kind of hostility that many commentators imagine when they call for exclusive emphasis on either anti-establishment or free exercise."); Marshall, *supra* note 9, at 407 ("[T]he inability to capture the essence of religion in a logical medium is not hostility to religion . . ."); *id.* at 409 ("An approach which treats religious beliefs as equal to non-religious beliefs cannot be characterized as hostile to religion; there is no antagonism in equal treatment."); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 *Notre Dame J.L. Ethics & Pub. Pol'y* 591, 636 (1990) ("[A]n argument against a right to religion-based exemptions is not an argument against religion.").

¹¹ See Tushnet, *supra* note 7, at 1134-35; West, *supra* note 10, at 616-17. Whatever might have been made of this argument during the erosion of free exercise rights in the 1980s—see, e.g., *Lyng v. Northwest Indian Cemetery Protection Ass'n*, 485 U.S. 439 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Bowen v. Roy*, 476 U.S. 693 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *United States v. Lee*, 455 U.S. 252 (1982)—little seems to remain of it after *Employment Div., Dep't Human Resources v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause does not mandate religious exemptions from generally applicable laws even when such

These conflicting empirical claims cannot be resolved without agreement on the nature of the problem presented by religion in public life. I want to demonstrate in a more precise way how American public life is hostile to religion. Like so much else, the hostility of public life to religion can be traced to one of the conceptual foundations of liberal political theory: the distinction between public and private life. I will start with a sketch of this distinction in American liberal thought¹² and follow it with a discussion of how the distinction enables liberals to marginalize religion in public life.¹³ Next, I will show how this marginalization surfaced in two recent Supreme Court opinions.¹⁴ I will close with some observations about the significance of recognizing that American public life is hostile to religion.¹⁵

I.

The impulse to divide society into mutually exclusive public and private spheres derives from the Lockean tradition of natural rights. In that tradition, citizens are thought to have inalienable rights against government that are held independently of the state.¹⁶ Under a Lockean political regime, the reach of permissible government action (public life) depends on the boundaries of the inviolable sphere of individual rights (private life).¹⁷

Conceptually, the presence or absence of individual free will marks the boundary between the public and private spheres.¹⁸ The division of society into public and private spheres thus mirrors the fundamental division in Western thought between subject and object.¹⁹ In pri-

laws severely burden religious practice and are not justified by a compelling state interest. See *infra* Part III.B for a discussion of *Smith*.

¹² See *infra* Part I.

¹³ See *infra* Part II.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part IV.

¹⁶ See John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in *Treatise of Civil Government and a Letter Concerning Toleration* 3, 89-94 (Charles L. Sherman ed., Irvington Publishers, Inc. 1965).

¹⁷ See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *The Politics of Law* 13, 17 (David Kairys ed., rev. ed. 1990).

¹⁸ See Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151, 1196-97 (1985). The importance of individual free will to the boundary between public and private life has been implicit (and, at times, explicit) in natural law theory since the middle ages. See J.G. Merquior, *Liberalism: Old and New* 18-23 (1991).

¹⁹ See Peller, *supra* note 18, at 1199, 1215, 1265.

vate life, subjectivity and passion hold sway. Individuals are free to do whatever they please for any reason (or for no reason) as long as they do not harm anyone else.²⁰ Value choices need not be defended by publicly accessible reasons because private behavior is assumed to be the result of desire, which is beyond rational or empirical analysis.²¹

Public life, on the other hand, is the realm of objectivity and reason. In this realm, government and individuals must serve the collective "public interest" rather than the idiosyncratic tastes and preferences of any individual.²² Value choices must be rationally defended in public life, for unlike private actions, public actions cannot be justified by mere appeal to an individual's tastes or preferences. Indeed, once positivism eclipsed natural rights in American jurisprudence, public life constrained the pursuit of these tastes and preferences, constituting the objective limitation of the social world imposed upon the subjective freedom of the individual.²³ As a consequence, actions in public life must be justified empirically or rationally, by reference to the observable and explainable phenomena of the exterior world.²⁴

The border between public and private life is neither peaceful nor stable. For liberal political theory, private life poses the threat of subversion of the institutions and actors of public life to some set of idio-

²⁰ See Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *Buff. L. Rev.* 237, 237, 243 (1987); Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 *Harv. L. Rev.* 1468, 1471 (1984).

²¹ See Mark Kelman, *A Guide to Critical Legal Studies* 61-62, 127 (1987); Roberto M. Unger, *Knowledge and Politics* 42-43 (1975).

²² See Freeman & Mensch, *supra* note 20, at 237, 243.

²³ See Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *Yale L.J.* 1006, 1015 (1987) ("[M]ost modern constitutional law can be reduced to a series of rules prohibiting government interference with nongovernmental power centers.").

²⁴ See, e.g., Edward A. Purcell, Jr., *The Crisis of Democratic Theory* 242 (1973) (McCarthyism represented to American intellectuals "moralism, ideology, religious fundamentalism, intellectual oversimplification, and irrationalism. Established social institutions, as the other half of the contrast, inevitably appeared good. They represented practical compromise, pragmatism, 'market decisions,' intellectual complexity, and structural rationality."); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 278 (1988) ("[I]nstrumental rationality is what is taken to distinguish the public sphere, which includes both the politics and the market and which is governed by instrumental rationality, from the private sphere, which need not be so governed.").

syncratic values.²⁵ The unrestrained indulgence of individual preferences in private life threatens political and social stability if permitted in public. At the same time, whenever public life encroaches upon private life, it threatens the pursuit of individual values.²⁶

Accordingly, the purpose of the liberal state is to preserve the objectivity of public life from the subjectivity of private life, while nonetheless ensuring that there remains sufficient private space for the pursuit of subjective values.²⁷ The state achieves this balance by remaining ideologically neutral—that is, staying aloof from the pursuit of values in private life and acting only on the basis of objective facts.²⁸ The rationality and deliberation of public life thus wall in and control the passion and desire of private life, enabling society to establish its rules on the basis of ordered reason rather than violence or caprice.²⁹

If individual values are the function of desire, which itself cannot be measured or explained, then no single set of values can be objectively shown to be superior to any other set, and government must remain neutral with respect to any individual's values.³⁰ When liberal government acts based on a particular conception of the good, it deprives individuals of the freedom to choose their own values.³¹ Only by staying out of such conflicts can government retain its role as neutral arbi-

²⁵ See Seidman, *supra* note 23, at 1007; see also Purcell, *supra* note 24, at 244 (describing Reinhold Niebuhr's view that men and women are constantly tempted to proclaim their personal beliefs to be universally applicable); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DePaul L. Rev. 1047, 1048-49 (1990) (arguing that confirmation hearings on Catholic nominees to the Supreme Court evidence "a fear that the 'private' realm of religion . . . will illegitimately invade the public space of judicial decisionmaking").

²⁶ See Seidman, *supra* note 23, at 1007-08.

²⁷ *Id.* at 1026.

²⁸ See Kelman, *supra* note 21, at 66; Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. Rev. 999, 1060-61 (1988).

²⁹ See Karl Marx, *On the Jewish Question*, in 3 Karl Marx & Frederick Engels, *Collected Works* 146, 163 (New York ed. Int'l Publishers 1975) (1843) ("Security is the highest social concept of civil society, the concept of *police*, expressing the fact that the whole of society exists only in order to guarantee to each of its members the preservation of his person, his rights, and his property.").

³⁰ See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 11 (1980) ("While everybody has an opinion about the good life, none can be known to be superior to any other.").

³¹ Unger, *supra* note 21, at 89 ("If the law applier cannot justify his decisions, because they appear to rest on his own individual and subjective values, liberty will suffer. Those to whom

ter of social conflict.³² Thus, the least controversial kinds of government actions in a liberal democracy are based on objective facts, and the most problematic actions on subjective values.³³

In American jurisprudence, however, public life has not always enjoyed such a privileged status. In the nineteenth and early twentieth centuries, the privilege was reversed: the pursuit of personal values was thought to be the source of public life, rather than vice versa.³⁴ Beginning in the twentieth century, the existence of natural or prepolitical rights assumed by liberty-of-contract jurisprudence was vigorously challenged by the legal realists.³⁵ Although some realists rejected the very idea of a stable and coherent division of society into public and private spheres,³⁶ others accepted the distinction and sought only to reverse the priority of private life over public life.³⁷ These "constructive" or "assimilated" realists eventually prevailed, arguing that rights held by individuals in private life were not derived from nature but rather were the effects of the exercise of social power in public life.³⁸ The contemporary assumption is that public life exists

the law is applied will have surrendered their freedom to the judge, the person authorized to apply the rules.").

³² *Id.* at 73 ("The state is viewed either as above the antagonism of private values or as the framework within which those interests are represented and reconciled. Only such an institution can hope to frame laws that do more than embody a factional interest."); Peller, *supra* note 18, at 1261 ("In the liberal vision, law is legitimate only insofar as it is impersonal and impartial, existing outside the play of social differentiation.").

³³ For example, I have suggested elsewhere that the liberal preference for objectivity is the source of the Supreme Court's reluctance to ban nonobscene pornography, notwithstanding its intuition that such speech is of little individual or social value. See Frederick M. Gedicks, *The Religious, the Secular, and the Antithetical*, 20 *Cap. U. L. Rev.* 113, 130 & n.64 (1991). This preference is also the source of the belief-action distinction in free exercise doctrine. See Note, *supra* note 20, at 1471.

³⁴ See Peller, *supra* note 18, at 1207-08; see also Purcell, *supra* note 24, at 36-38 (describing instinct psychology). See generally Merquior, *supra* note 18, at 2-3 (describing nineteenth-century liberal view that the powers of the state are limited by individual freedom); Marx, *supra* note 29, at 164-68 (criticizing nineteenth-century liberalism's reduction of the state to the protector of individual rights).

³⁵ See Purcell, *supra* note 24, at 74-76, 79-80.

³⁶ See Mensch, *supra* note 17, at 21.

³⁷ Peller, *supra* note 18, at 1192-93; e.g., Purcell, *supra* note 24, at 91-92.

³⁸ Purcell, *supra* note 24, at 76, 248; Mensch, *supra* note 17, at 21-24; Peller, *supra* note 18, at 1255.

prior to private life. The objective and material are thus privileged over the subjective and ideal.³⁹

Prior to the realists, the fear was that the objectivity of public life would co-opt individual liberty by invading private life.⁴⁰ In the post-realist world, the concern is that a particularist set of values will capture public life and exclude competing conceptions of the good. Accordingly, one of the key tasks of contemporary liberal politics is to police the boundary between public and private life by distinguishing value from fact and desire from reason. Beliefs or values that reside in private life are suspect as a basis for government action unless they can be relocated in public life as facts or reasons.⁴¹ Only when confirmed by widely shared human experience, scientific investigation, or reasoning from premises that can be verified by experience or investigation does a belief qualify as knowledge upon which government legitimately can act.⁴²

II.

Religion has long been placed in American private life.⁴³ Religious belief in the Western tradition centers on a transcendent force or belief—that is, a force or belief beyond the material, phenomenal world. As such, religious belief is not subject to verification or falsification according to the objectivist conventions of public life.⁴⁴ Secu-

³⁹ Peller, *supra* note 18, at 1250-51, 1286. But see Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 Ga. L. Rev. 923, 1126 (1991) (arguing that American culture understands social reality to be a function of private choice).

⁴⁰ Peller, *supra* note 18, at 1263.

⁴¹ Cf. Greenawalt, *supra* note 2, at 24 ("In liberal theory, rationality may be contrasted with reliance on personal intuition, feeling, commitment, tradition, and authority as bases for judgment.").

⁴² See *id.* at 56-59; Peller, *supra* note 18, at 1266.

⁴³ See Freeman & Mensch, *supra* note 20, at 241; Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349, 1356 (1982); Note, *supra* note 20, at 1471; see also Mensch & Freeman, *supra* note 39, at 990 ("[The Reformation's] insistence that salvation comes only from faith had the unintended but perhaps inevitable effect of relegating theology to the realm of private, subjective desire.").

⁴⁴ Gedicks & Hendrix, *supra* note 2, at 64-71. This is not to say, however, as defenders of secularized public life sometimes do, that reason and empiricism play no role in the development and maintenance of religious faith. Compare Carter, *supra* note 2, at 986, 991-92 (observing that liberals often see reason and belief as mutually exclusive); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. Pitt. L. Rev. 75 *passim* (1990) (asserting that religious belief is not based on logic or reason) with Greenawalt, *supra* note 4, at 1021, 1029, 1032

larism constitutes the test of residency in American public life, and religion by its nature cannot pass the test.

Keeping religion and religious belief confined to private life enables the liberal state to marginalize religion without eliminating it.⁴⁵ "Religion, rather than being abolished, becomes a private whim, an expression of purely subjective, individualized values."⁴⁶ As one of the purest contemporary expressions of subjective, impossible-to-confirm values, religious belief need not (and, indeed, cannot) be considered by those who act in public life.⁴⁷ Liberal government thus treats religious belief neutrally—as a subjective value preference restricted to private life, rather than as objective knowledge proper to public life.⁴⁸ This position can be genuinely neutral, however, only if the boundary between the private world of subjective preference and the public world of objective fact is natural, fixed, and inevitable.

Judges during the liberty-of-contract era did believe that the boundary between public and private life was stable and discoverable by objective means.⁴⁹ The natural-law premises of that age suggested that human activities were inherently public or private. It followed that all aspects of human life could be identified as properly belonging to one sphere or to the other by uncovering the essential nature embedded within any particular human activity.

Few would defend this position today. In the first place, the modern eclipse of natural law by positivism dealt a serious theoretical blow to the notion that the line between public and private life can be

(identifying and agreeing with traditions and scholars who argue that rationality is an important component of religious belief); Mensch & Freeman, *supra* note 39, at 1042-44 (describing the rational aspects of Biblical inerrancy); Myers, *supra* note 3 (arguing that secular and religious beliefs with respect to abortion are equally rational).

⁴⁵ See Marx, *supra* note 29, at 155 ("Man emancipates himself *politically* from religion by banishing it from the sphere of public law to that of private law.").

⁴⁶ Freeman & Mensch, *supra* note 20, at 241; see Carter, *supra* note 2, at 978, 995-96; Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & Religion (forthcoming 1992).

⁴⁷ Cf. Mensch & Freeman, *supra* note 39, at 1129 (noting that the secular account of freedom renders theological concerns irrelevant to public policy); Peller, *supra* note 18, at 1266 ("In [materialist] discourse, belief without verification is mere subjectivity or empty formalism, since the internal coherence of propositions may have no relation to the real world.").

⁴⁸ Ackerman, *supra* note 30, at 364 (stating that neutrality marks "the conceptual boundary on the secular authority of all those who pretend to be God's vice-regent on earth").

⁴⁹ Mensch, *supra* note 17, at 17, 20.

drawn objectively.⁵⁰ More fundamentally, recent developments in postmodern philosophy and literary criticism have fatally undermined the epistemological premises of the proposition that substantive meaning like "public" or "private" resides in the phenomenal world independent of an act of interpretation.

Prior to these developments, Western intellectual thought from the time of Descartes had been founded upon a radical distinction between mind and world. Under this theory, not only do things exist in the world independent of the human mind, but they are possessed of an essential character.⁵¹ Because these essential characteristics reside in the things themselves, the true nature of something is never a function of human perception; to the contrary, the truth of human perception is a function of the true nature of the thing.⁵² Thus, under the classical Western conception of truth and knowledge, a proposition is true only to the extent that it corresponds to the world "as-it-really-is," and one can know something only by understanding the essential characteristics of that world.⁵³

Philosophers and literary critics have largely abandoned the correspondence theory of truth in favor of theories that do not separate the observer and the observed.⁵⁴ But without the correspondence theory, or something like it, it is impossible to determine whether an activity

⁵⁰ See, e.g., Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. Pa. L. Rev. 1296 (1982).

The positivist cannot invoke the inherently private realm entailed by the very concept of natural rights. More fundamentally, since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every "private" action not prohibited by law.

Id. at 1301.

⁵¹ The classical doctrine of intelligible essences is described in Unger, *supra* note 21, at 31-32, 79-80. It is closely related to the metaphysics of presence, which holds that meaning is a function of some positive attribute that is affirmatively present in the thing or activity being interpreted. See, e.g., Peller, *supra* note 18, at 1259-74.

⁵² See Fritjof Capra, *The Tao of Physics* 57 (Bantam Books 1977) (1975).

⁵³ For descriptions of the correspondence theory of truth, see Garth L. Hallett, *Language and Truth* 5-16 (1988); Perry, *supra* note 2, at 40-42; Dorothy Grover, *Truth and Language-World Connections*, 87 J. Phil. 671, 671-72 (1990).

⁵⁴ See Terry Eagleton, *Literary Theory* 143-44 (1983); Hallett, *supra* note 53, at 17-30; Perry, *supra* note 2, at 41; Grover, *supra* note 53, at 672, 686-87. For an account of this abandonment, see Allen Thiher, *Words in Reflection: Modern Language Theory and Postmodern Fiction* (1984).

has been "properly" classified as public or private.⁵⁵ The public or private character of an activity depends not on the discovered attributes of a self-existent world but on the classifier's subjective perception of that world.

Thus, far from reflecting the world as-it-really-is, the division of society into public and private life is merely a socially contingent metaphor used to ascribe meaning to the world as-we-experience-it.⁵⁶ Any human activity arguably possesses both a public and a private dimension.⁵⁷ As Louis Seidman has observed, the boundary between public and private life is not drawn by nature but is instead "a human construct that must be fought for and quarrelled over."⁵⁸

Secularism, then, does not mark any natural or inevitable distinction between private and public life. The confinement of religion to private life reflects the exercise of contingent social power, not the disinterested discovery of essential meaning or self-existent reality.⁵⁹

III.

The privileging of secular knowledge in public life as objective and the marginalizing of religious belief in private life as subjective has been a foundational premise of American jurisprudence under the Religion Clause of the First Amendment.⁶⁰ Most of the Supreme

⁵⁵ See generally Unger, *supra* note 21, at 32 ("If there are no intelligible essences, there is no predetermined classification of the world.").

⁵⁶ See *id.* at 80 ("Because facts have no intrinsic identity, everything depends on the names we give them."); Peller, *supra* note 18, at 1178 (" 'Private' relations are 'private' to the extent that they are represented as not constituted or influenced by 'absent' public or social forces; 'individual will' is 'individual' to the extent that it is self-present and not dependent on the practices of others.").

⁵⁷ Freeman & Mensch, *supra* note 20, at 249-50.

⁵⁸ Seidman, *supra* note 23, at 1006.

⁵⁹ See Gedicks & Hendrix, *supra* note 2, at 123-27. For further discussion of this point, see Unger, *supra* note 21, at 80 ("He who has the power to decide what a thing will be called has the power to decide what it is."); Gary Peller, *Reason and the Mob*, *Tikkun*, July/Aug. 1987, at 28.

The construction of a realm of knowledge separate from superstition and the identification of a faculty of reason separate from passion was not, after all, simply some mind game played by philosophers and professional intellectuals. These categories have always served political roles in differentiating groups as worthy or unworthy and in justifying particular social hierarchies.

Id.

⁶⁰ The Religion Clause provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

Court's Religion Clause decisions reflect this elevation of the objective/secular over the subjective/religious. Two recent decisions—*Edwards v. Aguillard*,⁶¹ the creation science case decided under the Establishment Clause, and *Employment Division, Department of Human Resources v. Smith*,⁶² the Native American peyote case decided under the Free Exercise Clause—illustrate this phenomenon.⁶³

A.

In *Edwards*, the Supreme Court reviewed a Louisiana law that required public schools to teach creation science whenever evolution was taught. Louisiana officially maintained that the law protected academic freedom and provided for fairness and balance in teaching schoolchildren about the origin of human life. During the enactment process, however, the sponsor of the law and several other legislators had rather indiscreetly stated that they supported the law because creation science coincided with their religious beliefs, and evolution contradicted those beliefs.⁶⁴ Relying heavily on a prior decision, *Epperson v. Arkansas*,⁶⁵ the Court held the law invalid under the Establishment Clause for lack of a secular purpose.⁶⁶ It found that the legislative purposes officially articulated by the state were shams and that the real purpose of the law was to advance fundamentalist beliefs about divine creation by making the teaching of evolution more difficult.⁶⁷

⁶¹ 482 U.S. 578 (1987).

⁶² 494 U.S. 872 (1990).

⁶³ *Edwards* and *Smith* are particularly good examples of the hostility thesis, but other cases aptly demonstrate it. For example, many of the themes of *Edwards* are present in the first Establishment Clause decision of the modern era, *Everson v. Board of Educ.*, 330 U.S. 1 (1947). Similarly, virtually all of the Court's free exercise decisions during the 1980s display a statist preference for government regulatory interests over religious free exercise. See cases cited *supra* note 11.

⁶⁴ See *Edwards*, 482 U.S. at 586, 592.

⁶⁵ 393 U.S. 97 (1968) (holding that a law forbidding teaching of either evolution or creationism violates the Establishment Clause for lack of secular purpose).

⁶⁶ *Edwards*, 482 U.S. at 593-94.

⁶⁷ *Id.* at 586-87.

There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution. . . .

These same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution are present in this case. . . . The legislative history . . . reveals that the term "creation science," as

The text of *Edwards* suggested that evolution is a matter of objective fact, whereas creationism is a matter of subjective belief. The more general subtext was that science is rational and real, whereas religion is irrational and imaginary. Throughout the opinion, the majority described creationism as mere "belief," while it consistently presented evolution as indisputably real.⁶⁸

For example, the Court quoted with approval expert testimony to the effect that "[a]ny *scientific* concept that's based on *established fact* can be included in [the public school] curriculum."⁶⁹ Similarly, it criticized the law under review for having given "persuasive advantage to a particular religious doctrine that rejects the *factual* basis of evolution in its entirety."⁷⁰ The objectivity of evolution assumed by the Court gives that theory a decisive intellectual advantage over creationism, such that placing creationism alongside evolution as an equal or even a superior conception of human origin appears indefensible. Giving credence to creationism becomes like the medieval church's stubborn adherence to geocentricity despite Galileo's empirical confirmations of the Copernican system.

Accordingly, the Court dismissed without argument testimony about the empirical basis of creationism.⁷¹ It quoted with approval the determination in *Epperson* that a decision not to teach any theory

contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind.

. . . [T]he Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.

Id. at 590-92; see also id. at 589 ("[T]he Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism . . .'" (quoting *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985))).

For succinct overviews of the evolution versus creationism conflict in the context of public school curricula, see Carter, *supra* note 2, at 979-85; Mensch & Frecinan, *supra* note 39, at 1034-39.

⁶⁸ See *Edwards*, 482 U.S. at 585, 591-92.

⁶⁹ Id. at 587 (emphasis added) (quoting the president of the Louisiana Science Teachers Association).

⁷⁰ Id. at 592 (emphasis added).

⁷¹ Id. at 591-92. Justice Antonin Scalia summarized the evidence in the record supporting creationism in his dissent. See id. at 622-25 & n.4 (Scalia, J., dissenting). For an argument that creationism should be taught as science, see Wendell R. Bird, Note, Freedom of Religion and Science Instruction in Public Schools, 87 Yale L.J. 515 (1978).

of human origin was designed to " 'suppress' " evolution⁷² and characterized the Louisiana law as "advanc[ing] a religious doctrine by requiring . . . the *banishment* of the theory of evolution from public school classrooms."⁷³ By summarily rejecting the possibility that creationism might be empirically plausible, and by using terms like "suppress" and "banish," the Court signaled its view that creationism/religion censors evolution/knowledge in an oppressive, untruthful way—through despotic coercion rather than through scientific proof.

The equation of creationism with evolution as an explanation for human origin evoked the contemporary liberal nightmare of particularist values subverting public life.⁷⁴ The nightmare is powerful, of course, because it recalls vivid historical and cultural images in the post-Enlightenment West: religion as superstition that denies reality and suppresses truth, together with religion as fanaticism that causes its adherents to erupt in persecution, violence, and war against all with whom they disagree.⁷⁵ These general images from European history reinforce a specifically American image of religious fundamentalists as oppressive and reactionary, suppressing all knowledge that conflicts with their narrow and literal reading of the Bible.⁷⁶

Science depends upon the notion of falsifiability for objective proof. If a hypothesis cannot be empirically tested, it is of little use. Science discounts creationism because, in answer to every tough question presented by the data, creationists offer the nonfalsifiable answer, "God did it." But this dismissive attitude obscures the bias that science, and positivism generally, brings to deciding what counts as a "tough question." For scientists, a tough question is one that cannot

⁷² *Edwards*, 482 U.S. at 590 (emphasis added) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968)).

⁷³ *Id.* at 596 (emphasis added).

⁷⁴ See Purcell, *supra* note 24, at 238 (" 'As the religious wars of the sixteenth and seventeenth centuries and the ideological purges in contemporary totalitarian societies indicate, the effort to impose unity of belief in matters of religion and ultimate philosophy, far from unifying a society, can lead to extraordinary bloodshed and brutality.' " (quoting *The Power of the Democratic Idea* 17-18 (Sixth Report of the Rockefeller Bros. Fund Special Studies Project 1960))).

⁷⁵ See, e.g., William P. Marshall, *The Public Square and the Other Side of Religion* (forthcoming) (manuscript at 27, 28 & nn.75-76, on file with the Virginia Law Review Association).

⁷⁶ See, e.g., *Epperson*, 393 U.S. at 103 & n.11, 107 & n.15, 108 & n.16, 109 nn.17-18; Conkle, *supra* note 46.

be explained by reasoning from empirical premises within the framework of the Darwinian paradigm.⁷⁷

Take, for example, the much discussed "gaps" in the fossil record. Evolutionists generally assume that human life evolved by random mutation from less complex forms of life. Crucial episodes along the evolutionary path, however, seem absent from the geological record. This fossil gap is a puzzle to be solved, but only because the Darwinian paradigm itself demands some explanation consistent with its general hypothesis. For creationists, the gap poses no problem. Rather, the gap is evidence of the validity of a different paradigm, one that assumes a master plan implemented by a cosmic creator.⁷⁸ The whole thing is neatly circular: An explanation of the fossil gap that is more or less consistent with the evolutionary paradigm will further validate that paradigm, but it is the evolutionary paradigm itself that first defines the gap as a "problem" and then delimits the range of acceptable solutions.⁷⁹

This conflict between evolution and creationism illustrates Roberto Unger's antinomy of theory and fact.⁸⁰ The raw empirical data about the origin of human life—the so-called "facts"—have no meaning in and of themselves.⁸¹ Only by imposing some order on the data through use of the evolutionary paradigm do the data come to have meaning. The different meaning that might come from imposing the creationist paradigm is rejected because evolution explains the data "better." But if the data have no meaning independent of the paradigm imposed on them, how can one discern the greater explanatory power of one paradigm over another?⁸² "Better" simply means "pref-

⁷⁷ See generally Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970) (arguing that historically the questions that scientists investigate as well as the answers to those questions have been constituted by the biases of the investigators); Symposium, *Creationism vs. Evolution: Radical Perspectives on the Confrontation of Spirit and Science*, *Tikkun*, Nov./Dec. 1987, at 55 (making a similar argument in the specific context of evolution).

⁷⁸ See, e.g., Gerald L. Schroeder, *Genesis and the Big Bang* 133-41 (1990).

⁷⁹ See Kuhn, *supra* note 77, at 80.

⁸⁰ See Unger, *supra* note 21, at 31-36.

⁸¹ This is the consequence of modern rejection of the doctrine of intelligible essences. See *supra* note 51 and accompanying text.

⁸² See Ruth A. Putnam, *Creating Facts and Values*, 60 *Phil.* 187 (1985).

Every experimenter when he turns to construct a theory to fit his data discards some of the latter as erroneous; often he can identify a cause (or a likely cause) of the error, but there are times when data are rejected simply because they do not fit. . . . At which

erable" or "more congenial," as in "my paradigm is better than yours."

The allocation of creationism to the marginalized world of subjectivity, and evolution to the privileged world of objectivity, is merely the exercise of social power rather than a natural, value-neutral distinction. Evolution is epistemologically preferred because it does not appeal to an extraordinary cause like God. But the bias against such explanations is arbitrary:

The religious person, who is comfortable with the notion of God's activity and sees God's work all around him every day, finds nothing incongruous about miraculous events because they are simply another facet of God's action in the world. In contrast the scientist, who prefers to think of the world as operating according to natural laws, would regard a miracle as a 'misbehaviour', a pathological event which mars the elegance and beauty of nature. Miracles are something that most scientists would rather do without.⁸³

There is no objective justification for privileging evolution over creationism; the modernist claim to knowledge without bias is false.⁸⁴ Only manipulation of the boundary drawn between public knowledge and private belief enables the Court to declare evolution the only valid account of human origin.

point does this sort of thing turn into "the theory justifies the data", thereby undermining the very integrity of science? At what point do the facts which are to be the foundation of science turn into fictions?

Id. at 195.

⁸³ Paul Davies, *God and the New Physics* 197 (1983).

⁸⁴ See Alan Freeman & Betty Mensch, *Religion as Science/Science as Religion: Constitutional Law and the Fundamentalist Challenge*, *Tikkun*, Nov./Dec. 1987, at 64, 69 ("Scientific communities, not unlike their religious counterparts, are hermeneutic endeavors, communities of tradition organized with reference to authoritative texts. Religious creationists have their Bible; scientific evolutionists have for their text the rocks. Each community has its own interpretative criteria, procedures, and conventions, which are ultimately self-referencing."); Peter Gabel, *Creationism and the Spirit of Nature*, *Tikkun*, Nov./Dec. 1987, at 55, 62 ("[I]t would be an unqualified step in the right direction if we abandoned the illusion that analytical detachment provides us with a privileged form of knowledge . . ."). Of course, there is little doubt that, given the opportunity, creationists would attempt to privilege their account of human origin to the same extent that evolutionists have privileged theirs. See Frecinan & Mensch, *supra*, at 70.

B.

In *Smith*, two Native American drug counselors, who had been fired by the clinic where they worked for religious use of peyote, were denied state unemployment compensation. The state of Oregon maintained that because use of peyote was criminal conduct under the state penal code, use of the drug for any reason constituted misconduct for which unemployment benefits could be denied. The counselors, on the other hand, argued that the Free Exercise Clause precluded the state from denying them compensation because the act for which they were dismissed was an element of their religious worship.⁸⁵ Abandoning a generation of precedent,⁸⁶ the Supreme Court held in an opinion by Justice Antonin Scalia that the Free Exercise Clause does not require that government exempt religious believers from complying with a generally applicable law that unintentionally penalizes religious worship.⁸⁷ The Court suggested that such exemptions are not only unworkable but threatening to political order in a religiously plural society.⁸⁸

⁸⁵ See *Smith*, 494 U.S. at 874-76.

⁸⁶ The Court did not view its opinion as having departed from prior decisions, maintaining that it "ha[d] never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. It distinguished *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of the Ind. Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963) [hereinafter *Unemployment Compensation Cases*], on the absence of criminal conduct on the part of the religious objector in those cases, as well as the presence in those cases of a mechanism for particularized assessment of misconduct. *Smith*, 494 U.S. at 876-84. It distinguished *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and its antecedents on the coincidence of other constitutional rights with the free exercise claim asserted in those cases. *Smith*, 494 U.S. at 881. Commentators have found this (re)reading of the precedents laughable. See, e.g., James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 94-99 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 2-3; William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309 (1991); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 233-34 (1991).

⁸⁷ See *Smith*, 494 U.S. at 882. "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and we decline to do so now." *Id.*

⁸⁸ See, e.g., *id.* at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."); *id.* at 890 (describing the hardships of minority religions under generally applicable laws as an "unavoidable consequence of democratic government"); *id.* at 889-90 n.5 ("[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.").

As in *Edwards*, the specter of social chaos made a crucial early appearance in *Smith*. The Court began its analysis by quoting with approval language from a World War II decision that suggested that compliance with the law reflects a value higher than religious conscience.⁸⁹ The Court then quoted language from the 1879 case of *Reynolds v. United States*⁹⁰ to the effect that permitting religious exemptions would lead to anarchy⁹¹ and drew exactly that conclusion for the contemporary United States.⁹²

These dire warnings of the dangers of free exercise exemptions are curious because life under the exemption doctrine overruled by the Court was hardly chaotic. Surprisingly few exemption cases reached the Supreme Court, and religious objectors lost most of those cases.⁹³

⁸⁹ "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities"

Id. at 879 (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940), overruled by *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). Inexplicably, Justice Scalia did not note that *Gobitis* was overruled by the Court barely three years after it was decided. Although one might argue that the foregoing language is still persuasive because it was not necessary to the Court's holding in *Gobitis*, the fact that it was written to support a result that was promptly abandoned undercuts its authority.

⁹⁰ 98 U.S. 145 (1879).

⁹¹ "Can a man excuse his practices to the contrary [of generally applicable law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."

Smith, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166-67).

⁹² See *Smith*, 494 U.S. at 888.

Any society adopting [the] system [of granting exemptions except in case of a compelling governmental interest] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Id. (citing and quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)). Yet, it has never been shown that false claims of religious belief are a serious problem outside of tax enforcement. Even in the area of tax enforcement, the Internal Revenue Service does not seem to have been unduly hindered by free exercise considerations. See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *United States v. Sun Myung Moon*, 718 F.2d 1210 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984).

⁹³ Compare *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (holding that denial of unemployment compensation benefits by the state to individuals who refuse to work

A policy of exemptions could represent a threat to political order only if one assumes that exemptions would be sought by numerous nonbelievers on the basis of false claims of religious belief and that courts would be unable to distinguish false claims from sincere ones. Thus, the Court's fear of political chaos suggests that religion is a taste or preference that people will affect in order to take advantage of an exemption from general law.⁹⁴ The picture of religion that emerges is that of a cynical, disintegrating force bent on subverting the majesty of *The Law*.⁹⁵

"Law and order," however, is not a self-defining concept. Absolute order, or something close to it, might be maintained over short periods of time by eliminating civil liberties. Presumably the Court does not intend to gut the entire Bill of Rights. But in any event, what

on religious sabbath violated Free Exercise Clause); Unemployment Compensation Cases, *supra* note 86 (same); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish granted exemption from compulsory high school attendance law) with *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (denying television ministry exemption from general tax on sales of Bibles); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denying prison inmates exemption from policy that prevented them from attending religious worship services); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (denying orthodox Jewish military officer exemption from uniform regulation that prevented him from wearing a yarmulke); *Jensen v. Quaring*, 472 U.S. 478 (1985), *aff'g* *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984) (divided court denying exemption from driver's license photograph requirement to person who believed photographs were "graven images" in violation of the Ten Commandments); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying religious university exemption from regulation that denies tax exemption to racially discriminatory educational institutions); *United States v. Lee*, 455 U.S. 252 (1982) (denying Amish exemption from Social Security taxes); see also *Braunfeld v. Brown*, 366 U.S. 599 (1961) (denying orthodox Jewish merchant exemption from Sunday closing law).

⁹⁴ Cf. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. Rev. 299, 325-26 (suggesting that under the pre-*Smith* exemption doctrine, the Court denied an exemption whenever the benefit conferred by exemption might be attractive to large numbers of people).

⁹⁵ This image is the likely explanation for the Court's fixation with the criminal character of peyote use despite its irrelevance to the question of whether persons fired for such use should receive unemployment benefits under state law. The counselors in *Smith* were not seeking an exemption to escape prosecution but only to receive unemployment benefits. Moreover, the Oregon Supreme Court had determined that the purpose of the "misconduct" provision was not to reinforce the criminal law but merely to protect the financial integrity of the unemployment compensation fund. See *Smith*, 494 U.S. at 875. If the counselors were denied benefits to protect the fund, then the fact that their dismissal was for prohibited criminal conduct rather than nonprohibited but civilly actionable conduct is irrelevant, as the Oregon Supreme Court concluded. See *id.* The relevant consideration is whether the counselors' conduct was so widespread as to threaten depletion of the fund if benefits were paid to them and others similarly situated. See Gordon, *supra* note 86, at 94-96.

does "absolute order" mean? Absence of crime? Of political dissent? Of social diseases like alcoholism, drug addiction, or AIDS? The Court has chosen one stopping point on an artificial continuum and denied religious exemptions because they appear to threaten one particular conception of order.

There are, of course, conceptions of order that religious exemptions do not threaten. For example, one can easily conceive of a society in which the religious beliefs of its citizens are taken into account in assessing guilt or innocence under the criminal law.⁹⁶ One can even conceive of order as demanding the opposite of the Court's holding in *Smith*. Religious people could be excused from complying with generally applicable laws that contradict their religious beliefs, as they could be protected from civil and social penalties for such noncompliance. Formally, at least, this is the regime under which we lived from 1963 to 1990—without anarchy.

Without exemptions, some religious groups will likely be crushed by the weight of majoritarian law and culture. Such groups pose no threat to order. However, majoritarian dominance could radicalize some believers into destabilizing, antisocial activity, including violence.⁹⁷ Thus, the goal of preserving order by refusing to protect religiously conscientious acts from penalties imposed by generally applicable laws potentially undermines the very order that a no-exemption scheme purports to preserve. In the long run, one can conceive of religious exemptions as preserving order as easily as subverting it.⁹⁸

The Court's conception of order appears most arbitrary in its resurrection of the belief-action distinction that first appeared in *Reynolds*.⁹⁹ A plausible difference between beliefs and actions can be

⁹⁶ Cf. Jolin H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 Conn. L. Rev. 779, 798-801 (1986) (stating that obedience to religious conscience, like criminal insanity, places in question whether believers may be held responsible for violations of law committed while under its influence).

⁹⁷ Gedicks & Hendrix, *supra* note 2, at 82-91.

⁹⁸ Cf. John Locke, *A Letter Concerning Toleration*, in *Treatise of Civil Government and a Letter Concerning Toleration*, *supra* note 16, at 167, 213-21 (arguing that religious toleration promotes civil order). Although Locke's appeal for toleration can be used to argue the advisability of religious exemptions from general law, Locke himself opposed such exemptions. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1410, 1433 (1990).

⁹⁹ See *Reynolds*, 98 U.S. at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

maintained only if one limits belief to purely mental activity. But the Court did not draw the line here, nor could it have: a right that protects only belief is not a right. The Court stated that "government may not compel *affirmation* of religious belief [or] punish the *expression* of religious doctrines it believes to be false."¹⁰⁰ So even the Court concedes that the Free Exercise Clause protects "pure" religious speech, including the right not to speak. The act of speaking (or of not speaking, for that matter), however, is one that affects the world outside of the mind. Why was the Court willing to protect the act of speaking but not other acts, like the sacramental smoking of peyote in the Native American Church?

A well-developed (if somewhat unevenly applied) First Amendment doctrine extends significant protection to "hybrid speech," action that includes significant expressive or communicative dimension.¹⁰¹ Smoking peyote is a positive "expression" of Smith's religious beliefs, much like burning the flag expresses negative political views about the United States, or placing a crucifix in a jar of urine expresses a negative view of Christianity.¹⁰² A variety of arguments have been advanced in favor of outlawing flag desecration and terminating government sponsorship of controversial art, but no one has (yet) suggested that flagburning and sculpture are wholly unprotected under the First Amendment because they constitute action rather than belief.¹⁰³

¹⁰⁰ *Smith*, 494 U.S. at 877 (emphasis added) (citation omitted).

¹⁰¹ Compare *United States v. Eichman*, 110 S. Ct. 2404 (1990) (burning the American flag as a political protest is expression protected by the First Amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (same) [hereinafter *Flagburning Cases*]; *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (holding that high school students who wore black armbands as an antiwar protest were engaged in expression protected by the First Amendment) with *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (refusing to protect sleeping in certain national monuments as a constitutionally protected communication of the plight of the homeless); *United States v. O'Brien*, 391 U.S. 367 (1968) (refusing to recognize draft-card burning as protected expression protesting the Vietnam war). For a general discussion of these cases, see Laurence H. Tribe, *American Constitutional Law* 829-30 (2d ed. 1988).

¹⁰² But see Marshall, *supra* note 86, at 313 n.25 (arguing that the religious conduct at issue in *Smith* was not expressive).

¹⁰³ Dan Conkle suggested to me that in one sense this comparison is unfair. The laws struck down in the *Flagburning Cases*, *supra* note 101, were arguably content-specific, directed at flagburning as a means of expression. An analogous religion-specific law would likewise violate the Free Exercise Clause even under *Smith*. However, he suggested that in another sense, the comparison is fair. When prohibited by a content-neutral general law, such as a

Why, then, was the *Smith* Court's conception of order preferable? Indeed, why was it so clearly preferable that the Court felt confident in asserting it virtually without argument? The Court invoked the liberal standby of necessity—that the political order in the United States will disintegrate without the elimination of religious exemptions. For example, the Court maintained that it would be impossible to distinguish those who might deserve exemptions, such as the Amish in *Wisconsin v. Yoder*,¹⁰⁴ from those who do not. Thus, exemptions cannot be granted to anyone if order is to be preserved. Note that the Court did not suggest that the Amish and other religious objectors are not deserving but only that we cannot tell them apart from the fakers and charlatans who supposedly would rush to take advantage of religious exemptions.¹⁰⁵

Even granting the Court's premise that the deserving cannot be distinguished from the undeserving, which is not self-evident, it does not follow that we should penalize the deserving by indiscriminately denying exemptions to everyone. One could argue with equal plausibility that we should grant exemptions even to the undeserving. Constitutional law is full of overinclusive rules whose articulation and application protect undeserving as well as deserving people. Requiring proof of actual malice in libel cases protects *The National Enquirer* as well as *The New York Times*;¹⁰⁶ the various exclusionary rules that protect interests under the Fourth and Fifth Amendments¹⁰⁷ probably set free more guilty people than innocent ones; and freedom of speech protects pornography as well as political speech.¹⁰⁸

These kinds of overbroad constitutional rules presume that the values the rules protect are so important that it is worth the risk of protecting some undeserving people precisely to ensure that deserving

local ordinance that regulates outdoor fires, flagburning as expression is still balanced against the government's general regulatory interests. *Smith*, on the other hand, refuses to balance religious exercise against even insignificant regulatory interests.

¹⁰⁴ 406 U.S. 205 (1972).

¹⁰⁵ See *Smith*, 494 U.S. at 880, 888-90. *Smith* limits its rhetoric about anarchy to judicial exemptions and expressly approves legislative exemptions. However, to the extent that false claims are a problem, they remain so whether the exemptions are granted judicially or legislatively.

¹⁰⁶ See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁰⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁰⁸ See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

people are *never* denied protection.¹⁰⁹ There is a cost to this, to be sure, but it is not the breakdown of political order into violence and chaos. Indeed, the choice is not between order and chaos, but between different conceptions of order. The *Smith* Court preferred the interests of the regulatory state over those of the individual standing against that state.¹¹⁰ By falsely presenting statism as the only viable alternative to chaos, the Court avoided explaining why one should prefer its statist conception of order over a more libertarian alternative.

IV.

The hallmark of contemporary liberal political theory is neutrality between competing conceptions of the good.¹¹¹ This means that the liberal state cannot take a position regarding any claim that cannot be rationally or empirically demonstrated to be true.¹¹² Thus, those who claim that liberalism is hostile to religion simply have made a category mistake. The liberal argument is that because the claims of religion are not amenable to empirical or rational proof, they are fundamentally different from the claims of secular ideologies and disciplines that can be proven rationally or empirically and thus need not

¹⁰⁹ See Lawrence G. Sager, *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959 (1985); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

¹¹⁰ Frederick M. Gedicks, *Religious Conservatives Misjudged the Court*, *Christian Sci. Monitor*, July 18, 1991, at 19 (arguing that the conservative Reagan-Bush Court is statist rather than libertarian). The Court's preference for statism is, ironically, shared with some liberals. See, e.g., Richards, *supra* note 10, at 143 (noting that the pre-*Smith* exemption doctrine was motivated by a desire to avoid the "explosive" curtailment of state power); Gey, *supra* note 44, at 78 ("[I]f religion is defined broadly enough to encompass all behavior that is motivated by religion, most activities of the modern regulatory state are thrown into chaos.").

¹¹¹ See, e.g., Ackerman, *supra* note 30, at 10-12; Richards, *supra* note 10, at 63, 168. But see, e.g., Stanley Fish, *Liberalism Doesn't Exist*, 1987 Duke L.J. 997, 1000:

[Liberalism] is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that had held it for centuries.

The claim that value-neutrality is possible has been repeatedly criticized by Continental philosophers at least since Heidegger. See, e.g., Hans-Georg Gadamer, *Truth and Method* 282-85, 314, 346-49, 358-59 (Joel Weinsheimer & Donald G. Marshall rev. trans., 2d rev. ed. Crossroad Publishing Co. 1990) (1986).

¹¹² Marshall, *supra* note 9, at 408; see *supra* text accompanying notes 43-48.

be dealt with in the same way.¹¹³ Secular enterprises yield knowledge, which the liberal state is bound to accept; religion only yields unprovable beliefs about the good, as to which the liberal state must remain neutral.

Completely captured by the association of secularism with public life and the confinement of religion to private life, liberals fail to see how thin the distinction is between knowledge and belief. It never occurs to them that religious claims might be rational or that secular claims could be irrational.¹¹⁴ For example, liberal theorists repeatedly argue that political deliberations in a liberal democracy must be governed by critical rationality—that is, citizens in a liberal state should act only pursuant to empirically plausible reasons.¹¹⁵ As conceived by liberals, religion entails unchallengeable commitments born of faith and extra-rational appeals to transcendent authority.¹¹⁶ Accordingly, liberals generally disqualify religion from full and uncontroversial participation in politics because it lacks the participational prerequisites to liberal political dialogue.¹¹⁷

¹¹³ Gedicks, *supra* note 33, at 130 ("To say that the government must be neutral between competing conceptions of the good . . . is not to say that it must be neutral between competing conceptions of Reality.").

¹¹⁴ *Id.* at 133-37.

¹¹⁵ See, e.g., Ackerman, *supra* note 30, at 81 ("A liberal state exists, in short, only when *actual* power relations can be rationalized through Neutral dialogue."); Richards, *supra* note 10, at 84 ("Equal respect for persons engages . . . the demands on their common, mutually cooperative lives that could be justified to the self-determining rational and reasonable powers of all persons living in community."); Mark G. Yudof, *When Government Speaks* 32 (1983) ("The ideology of democratic government posits the existence of autonomous citizens who make informed and intelligent judgments about government policies . . ."); Gey, *supra* note 44, at 176 ("[S]ome form of rational, critical analysis is the centerpiece of any democratic project to achieve political and social change."); Lawrence B. Solum, *Faith and Justice*, 39 *DePaul L. Rev.* 1083, 1090 (1990) ("[J]ustice requires that public institutions make and justify decisions on the basis of public reasons."). Republican theorists generally agree. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1548-51 (1988) (describing deliberation as a central tenet of republican theory).

¹¹⁶ See, e.g., Gey, *supra* note 44, at 173-74; Marshall, *supra* note 75, at 22-28.

¹¹⁷ See, e.g., Greenawalt, *supra* note 2, at 216-17 ("The government of a liberal society knows no religious truth and a crucial premise about a liberal society is that citizens of extremely diverse religious views can build principles of political order and social justice that do not depend on particular religious beliefs."); Gey, *supra* note 44, at 176 ("[R]eligion is fundamentally incompatible with the critical rationality on which democracy depends."); Solum, *supra* note 115, at 1089-92 (conceding that the requirement that judicial decisions be justified by "public reasons" depends on a politically charged version of the public-private distinction that confines religion to private life). Professor Greenawalt would allow religious

It seems fair to ask *where* in the United States such rational deliberative politics are practiced. At the heart of every successful elective campaign these days lies the creation of photo opportunities and soundbites. Attractive visual images of the candidate and pithy, stylized quotations from campaign speeches are hardly the stuff of rational deliberation; on the contrary, they are designed to attract votes by appealing to the noncognitive, affective aspect of human consciousness.¹¹⁸ At best, it is unclear that politics as usually practiced in the United States is any more critical and rational than religion. The liberal belief that reason mediates political conflict is no less a matter of faith than religious belief in God.¹¹⁹

Liberals argue, of course, that rational deliberation is a political ideal that actual practice only approximates. The presence of uncritical or extra-rational appeals to the noncognitive hardly proves that the ideal is an inappropriate goal of politics, even though it may be a difficult one to achieve. But religion possesses substantial elements of criticism and rationality and has for centuries.¹²⁰ If politics as actually practiced falls well short of the ideal of critical rationality, and if religious belief is partially based on reason, on what basis is religion disfavored in political life?¹²¹

The hostility to religion that I have described here entails epistemological and political preferences for secularism that have no ideologically neutral justification. Liberalism privileges secular ways of knowing and marginalizes religious ones by manipulating the boundary between public and private life. Liberalism politically privileges secularism over religion by naming public life (the realm of secular-

discourse in political life only when the question is one in which all participants are relying to a significant extent on nonpublic justifications. Greenawalt, *supra* note 2, at 112-13, 144-45.

¹¹⁸ Cf. Tushnet, *supra* note 24, at 279 ("One method of structuring institutions involves the use of the noncognitive devices that constitute the art of rhetoric. In this way the republican tradition is only ambivalently committed to the importance of instrumental rationality."). One political commentator, however, has recently argued that the success of noncognitive political campaigning depends on the existence of an underlying cognitive rationality. See Thomas B. Edsall, *Willie Horton's Message*, N.Y. Rev. Books, Feb. 13, 1992, at 7, 7-11.

¹¹⁹ Carter, *supra* note 2, at 987; Fish, *supra* note 111, at 997.

¹²⁰ See *supra* note 44.

¹²¹ Cf. Carter, *supra* note 2, at 989-90 (arguing that liberals think creationism is properly excluded from the public school science curriculum because it is not based on critical rationality, yet "very little of the public school curriculum . . . could fit that description").

ism) rational and orderly and private life (the realm of religion) irrational and chaotic.¹²²

I have not attempted to deal here with any of the potential ideological justifications for either epistemological or political hostility to religion in American public life. Perhaps such hostility cannot be avoided, although I doubt this. But even if hostility *is* unavoidable, it is nonetheless hostility. Liberals who do not admit as much get a free rhetorical ride in advocating a secularized public life. It is much easier to argue, as they do, that liberalism is "neutral" in the conflict between secularism and religion, than it is to proclaim an epistemological or political privilege for secularism. Supporting either privilege solely on its own terms is a difficult task, no matter how strong the imperative. If hostility to religion in public life is indeed the price that must be paid for a free and democratic society, then that is how the argument should be framed. But if it is framed in this way, I do not believe it can succeed.

¹²² For example, William Marshall agrees that the secularism of public life cannot be defended on epistemological grounds. Marshall, *supra* note 75, at 6-9. He defends such secularism on political grounds, arguing that religion in public life "is potentially problematic," *id.* at 9, because religion possesses "an inherent volatility that secular ideologies do not." *Id.* at 29-30 n.77. In Marshall's view, the fact that "[t]he fervency of [religious] beliefs fueled by suppressed fear are easily turned into movements of intolerance, repression, hate, and persecution" justifies a "special caution" with respect to its involvement in public life. *Id.* at 29. Lawrence Solum has made a similar political defense of secularism, arguing that "religious and other differences make it impossible to reach public agreement about a comprehensive conception of the good." Solum, *supra* note 115, at 1087. Thus, in Solum's view, deliberations in public life must exclude explicitly religious arguments lest we reenact the religious violence of the Reformation wars. *Id.* at 1092, 1096-97.

Roger Hendrix and I have argued elsewhere that religion is not unusually destructive compared to modern secular ideologies. Gedicks & Hendrix, *supra* note 2, at 133-40. Although we agree with Professors Marshall and Solum that the involvement of religion in public life presents certain risks, *id.* at 174-77, 183-84, we dispute both their conclusion that these risks justify the exclusion of religion from public life, *id.* at 155-57, and their further conclusion that the risks are mitigated by such exclusion, *id.* at 71-72, 76-77, 81-91.