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"God is Dead and We Have Killed Him!":
Freedom of Religion in the Post-modern Age

Michael W. McConnell*

I. INTRODUCTION

In *The Gay Science*, Friedrich Nietzsche, the fountainhead of post-modernism, tells of a madman who on a bright morning lights a lantern and runs to the marketplace proclaiming "God is dead! God remains dead! And we have killed him! . . . There never was a greater event,—and on account of it, all who are born after us belong to a higher history than any history hitherto!"¹ The effect was powerful. For those capable of understanding, "some sun seem[ed] to have set, some old, profound confidence seem[ed] to have changed into doubt."² In *Thus Spake Zarathustra*, Nietzsche’s mythic hero carries the same message—"God is dead!"—throughout the earth, in a parody of the gospels,³ calling it his "gift" to mankind.⁴ But there is one exception. The book begins with an encounter between Zarathustra and a holy man living alone in the forest. Zarathustra asks the hermit what he does in the forest, and the hermit replies: "I make hymns and sing them; and in making hymns I laugh and weep and mumble: thus do I praise God. With singing, weeping, laughing, and mumbling do I

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2. Id. at 275.
3. Zarathustra, like Christ, leaves his home when he is thirty years old, goes into the mountains in solitude, and then begins to sojourn among the people preaching the truth about God.
praise the God who is my God." The hermit then asks Zarathustra what he had brought as a "gift." Zarathustra, surprisingly, does not take up this invitation to tell the hermit the terrible truth of the death of God. Instead he says, evasively, "What should I have to give thee! Let me rather hurry hence lest I take aught away from thee!" And Zarathustra leaves the old man to worship in peace.

This is the story of religious freedom in the post-modern world.

The first thing we notice about the story is the extraordinary gentleness with which Zarathustra treated the holy man. This is startlingly out of character for a philosopher who celebrates strength and derides mercy, who tells unflinchingly the hard truths and has no respect for those so weak that they must take refuge in comfortable lies and superstitions. Nowhere else in Zarathustra does the hero spare the sensibilities of his hearers. Nietzsche thus suggests that there is something different about the holy man. While for most men, word of the death of God is a "gift," for the saint it would "take away" something precious. And in like manner, the post-modern world is willing to leave the believer in peace. Religious belief, we realize, is precious to those who have it, and it would be pointless and mean to interfere with it.

But what we notice next about the story is that the hermit was quaint and wrong. He was behind the times. He simply had not gotten the word. When Zarathustra was alone, Nietzsche tells us that he marvelled to himself, "Could it be possible! This old saint in the forest hath not yet heard of it, that God is dead!" Zarathustra's forbearance was not based on any respect for the possible truth of the saint's beliefs. Zarathustra did not entertain that possibility. He could not. God is dead. You cannot argue with facts. His forbearance was an act of kindness, an indulgence—not the product of a mind open to the possibility that the other possesses a truth.

The third point we notice about the story is that it involves a hermit, living by himself in the forest. He did not preach or proclaim the word of God. He did not go into the village. He sang, laughed, wept, and—most revealingly—"mumbled," but these inarticulate sounds did not communicate. Zarathustra's

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5. Id.
6. Id.
7. Id. at 6.
toleration was toward one who neither participated in public life nor entered public discourse. No such forbearance was shown to anyone in the village. If the hermit left the forest and attempted to enter into public discussion and debate, he would be given the news of God's death like everyone else.

Can we recognize in Zarathustra the enlightened attitude toward religious faith in our age? Religious freedom is to be protected, strongly protected—so long as it is irrelevant to the life of the wider community. But allow religion to affect the law pertaining to, say, abortion; or allow religion to affect the way we educate our children in our communities' schools; even allow religion to affect the way we celebrate holidays in public, and there is trouble. When these quaint and discredited beliefs spill over into the life of the community, we have crossed the line. Religion, the Supreme Court has told us on more than one occasion, is "a private matter for the individual, the family, and the institutions of private choice."9 Religion in public is at best a breach of etiquette, at worst a violation of the law. Religion is privatized and marginalized. It has nothing to offer to the public sphere. We will not interfere with solitary hermits in the forest, but they must stay out of the public square.

Lest this characterization be viewed as a caricature, consider a brief recently filed by the respected Attorney General of the State of New York, Robert Abrams. The case involved the State's refusal to allow a religious group to use a public meeting room to show a religiously-oriented film about child rearing, even though these facilities were open by law to any "use[] pertaining to the welfare of the community."9 The group claimed this violated their freedom of speech, but the Attorney General defended the exclusion by arguing that

[unlike the community purposes for which authority is designated in the statute, religion is an "individual experience," that is "inviolately private." Religion "must be a private matter for the individual." Religious advocacy, like petitioners' effort to persuade community residents to "instill"] "Christian values" in their children "from an early age," serves the community only in the eyes of its adherents and yields a benefit only to those who already believe.10

In other words, religion is "private" and religiously informed opinion of no public benefit.

It is inconceivable that a public official would say that about any other worldview. If feminists, gay-rights activists, Afro-centrists, or even secular conservatives tried to communicate their ideas about child rearing to the public, Abrams would never say they should keep their ideas to themselves, or that their ideas "yield a benefit only to those who already believe." In an open society, we presume that the "uninhibited, robust, and wide-open" exchange of viewpoints benefits us all.

We do not yet live in the post-modern world; perhaps we never will. It is heartening that Abrams's argument was rejected by a unanimous Supreme Court. Many millions of Americans find the meaning of life in their churches and synagogues, through their religious traditions, and in personal encounters with their God. Religion has not been confined to the purely private, but informs discussions of justice and provides a framework for community. Unsecular America has not lost its voice. But in most of academia, and in many walks of life dominated by the secular elite, the news of the death of God has been taken to heart and the voice of religion is all but silenced. We live in an age when previously marginalized voices are welcomed to the public dialogue. But religion, somehow, is different. Religion must be kept under wraps. This essay is a diagnosis, and a warning—and perhaps also a plea for old-fashioned broadmindedness.

II. EARLY LIBERALISM AND THE FREEDOM OF RELIGION

To talk about post-modernism requires us first to talk about modernism. And to talk about modernism is to talk about "liberalism," which is modernism's politics. Liberalism is the doctrine (or family of doctrines) that places individual freedom at the center of political aspiration. For the most part, the liberalism we see today is secular liberalism. We tend to forget that liberalism was born of concerns about religion. Virtually all the great political thinkers of the formative stage of liberalism—Hobbes, Bodin, Spinoza, Bacon, Hooker, Milton,
Sidney, Locke, Hume, Bayle, Voltaire, Montesquieu, Montaigne, Smith, Burke, and Rousseau, not to mention more obviously "religious" figures like Calvin, Luther, More, and Erasmus—grappled with the issues of religion and government. Liberalism came about when and where it did because the Protestant Reformation made the individual believer the judge of religious truth ("God Alone is Lord of the Conscience") and thus made freedom of thought a pressing question for all thinking individuals. Religion and religious freedom were therefore at the very heart of the liberal project. Liberalism meant many things, but above all it meant that every person has the freedom to worship God in accordance with the dictates of his own conscience. This was the key to achieving both freedom of the mind and civil peace.

Initially, liberalism was understood principally in terms of what we would now call "limited government": government must be confined to certain limited ends and the rest would be left to private persons in the private sphere. As applied to religion, this meant that the magistrate was given no power to superintend the spiritual health of the citizens. As applied to the economic sphere, this would lead to the belief in a free-market economy; but it is important to realize that the implications of liberalism for religion were older than—and philosophically prior to—the realization of its implications for economics. Milton and Locke developed sophisticated theories of religious freedom more than a century before Adam Smith brought us the theory of the free market.

Liberalism was favorably received, especially on this side of the Atlantic, in part because of its consistency with two central teachings of Protestant Christianity. The first of these is the two-kingdoms theology of Augustinian thought—a

12. Of course, there are many other factors that contributed to the rise of liberalism. For example, the ensuing diversity of beliefs resulting from the Protestant Reformation also gave rise to ruinous religious conflicts in most of the European nations of the seventeenth century. My intention here is not to provide a comprehensive intellectual history, but to call attention to the close connection between liberalism and the question of religion.


theology carried forward in different ways by Luther and by
the Calvinist Reformed tradition to which our Puritan and
Presbyterian forebears adhered.\textsuperscript{15} The two-kingdoms theology
conceived of man as owing allegiance to two different sets of
authorities, the spiritual and the temporal. "God has appointed
two kinds of government in the world,"\textsuperscript{16} explained Isaac
Backus, a Baptist leader and one of the most influential
advocates of religious freedom at the Founding. These
governments "are distinct in their nature, and ought never to
be confounded together; one of which is called civil, the other
ecclesiastical government."\textsuperscript{17} Religious freedom, in this view,
involved the jurisdictional separation of these two sets of
authorities. Connecticut preacher Elisha Williams drew an
analogy to one king attempting to govern the people of another
kingdom:

\begin{quote}
[If CHRIST be the Lord of the conscience, the sole King in his
own kingdom; then it will follow, that all such as in any
manner or degree assume the power of directing and
governing the consciences of men, are justly chargeable with
invading his rightful dominion; He alone having the right
they claim. Should the king of France take it into his head to
prescribe laws to the subjects of the king of Great Britain;
who would not say, it was an invasion of and insult offer'd to
the British legislature.\textsuperscript{18}
\end{quote}

The state should thus confine itself to matters of worldly
concern, so as not to invade the province of the spiritual
sovereign.\textsuperscript{19}

While theological in its origin, the two-kingdoms idea lent

\begin{footnotes}
15. \textit{See St. Augustine, The City of God} 376-77 (Marcus Dods trans., 1950); 2
\textit{John Calvin, Institutes of the Christian Religion} 184 (Ford L. Battle ed. &
trans., 1975); 45 \textit{Martin Luther, Temporal Authority: To What Extent It Should
Be Obeyed, in Luther's Works} 75, 81-129 (Walther I. Brandt ed. & J.J. Schindel
trans., 1962); see generally \textit{Arlin M. Adams & Charles J. Emmerich, A Nation

16. \textit{Isaac Backus, An Appeal to the Public for Religious Liberty} (1773),
reprinted in \textit{Political Sermons of the American Founding Era} 334 (Ellis
Sandoz ed., 1991) [hereinafter \textit{Political Sermons}].

17. \textit{Id.} at 335.

18. \textit{Elisha Williams, The Essential Rights and Liberties of Protestants}

19. Locke defends a similar position in his \textit{Letters on Religious Toleration},
though primarily in the interest of civil harmony. \textit{See Michael W. McConnell, The
Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L.
\end{footnotes}
powerful support to a more general liberal theory of government, because once the government could be limited in one respect, it could be limited in others. The state could no longer be understood as omnicompetent. This idea provided probably the most important counterweight to the common Enlightenment belief that the best form of government was enlightened despotism. It can be argued that of the two great intellectual upheavals of the early modern period, the Enlightenment and the Protestant Reformation, the latter was the more significant for the advance of political liberty. Of course, much blood was spilled for conscience—not least by Protestants—before these implications of Protestant doctrine became apparent and ultimately dominant.

The two-kingdoms view of competing authorities is at the heart of our First Amendment. The first paragraph of the most important document explaining the Founders’ conception of religious freedom, James Madison’s *Memorial and Remonstrance Against Religious Assessments*, reasons as follows: “It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.”

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must also do it with areservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Here we see the confluence of Lockean social contract theory and two-kingdoms theology: Madison understands the civil authority as constituted by consent of the governed and the spiritual authority as ordained by the Universal Sovereign.

20. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* § 1 (1785), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 64 (Rutledge, J., dissenting).
21. *Id.*
Significantly, Madison gives precedence to the latter over the former. Religious freedom is both necessary and inalienable because it follows from the duties owed to God by His creatures. Indeed, religion is defined in the Virginia Declaration of Rights as "the duty which we owe to our Creator." Men have no right to consent to civil government that would stand in the way of their duties to the Universal Sovereign. "It would be sinful for a man to surrender that to man which is to be kept sacred for God," according to Madison's constituent, the Baptist leader John Leland.

The second theological notion that paved the way for liberalism was the emerging concept of what the Baptists called "soul liberty." This is the belief that faith, to be valid and acceptable to God, must be uncoerced. Under this view, it is literally impossible as a theological matter for government power to improve a citizen's spiritual state. In the words of Elisha Williams:

That faith and practice which depends on the judgment and choice of any other person, and not on the person's own understanding judgment and choice, may pass for religion in the synagogue of Satan, whose tenet is that ignorance is the mother of devotion; but with no understanding Protestant will it pass for any religion at all. No action is a religious action without understanding and choice in the agent.

The idea of soul liberty derives from the doctrine of salvation through grace: the only way that unregenerate man can come to faith and salvation is through the intervention of God. It is worse than useless—it is blasphemous—for an outside party, the government for example, to presume to supplant the free act of God.

24. WILLIAMS, supra note 18, at 62. This is only one of numerous sermons and religious tracts making a similar point.
25. This is closely associated in Protestant doctrine with the idea that God's revelation to man through the scriptures is perfect and accessible to all, and should be the sole authority for faith and practice. Thus, Elisha Williams maintained that
The soul liberty doctrine is reflected in the foundational documents of the First Amendment. It is revealing that the Virginia Bill for Establishing Religious Freedom, authored by Thomas Jefferson and shepherded through the General Assembly by James Madison, begins with a theological proposition:

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . .

God created the mind free; though being "Lord of body and mind," He chose not to propagate faith through coercion; attempts to influence religious faith through government power are inconsistent with God's plan; a coerced faith is invalid and unacceptable to God—these are not secular arguments. The pen may have been Jefferson's but the content came from the revival tents of Baptist enthusiasts; the Bill for Establishing Religious Freedom is based on Protestant doctrine.

The soul liberty idea also paved the way for a broader conception of liberalism. Just as the two-kingdoms theology points in the direction of limited government, the doctrine of soul liberty implies and leads to liberty in general, or to the "pursuit of Happiness," as it is put in the Declaration of Independence. In other words, each person is free to pursue the good life in the manner and season most agreeable to his or her conscience, which is the voice of God. If God did not exercise His omnipotent power to coerce Adam and Eve to live according to His precepts, He must have wanted mankind to be free creatures. Surely no earthly authority has a better claim to rule than God Himself. It is no accident that peoples who

it is impossible to be true that any can have right or authority to oblige Christians to believe or practice any thing in religion not true or not agreeable to the word of GOD: Because that would destroy the sacred scriptures from being the only rule of faith and practice in religion to a Christian.

Id. at 73.


27. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
accepted Protestant theology were the first to accept liberal political theory. No one would have said that liberalism at the time of the Founding was inconsistent with or hostile to religious freedom, for religious freedom was one of its principal commitments and preoccupations.

III. MODERN LIBERALISM AND FREEDOM OF RELIGION

At its beginning, then, liberalism was intellectually connected to religious thought and strongly supportive of religious freedom. But matters did not stay that way. As liberalism developed, it departed from its religious roots. Three particular developments had especially important implications for religious freedom.

A. Liberalism As Ideology

The first is that liberalism, understood as limited government, gave way to liberalism understood as an ideology—the advocacy of a particular way of life. A liberal regime requires liberal citizens. Liberal citizens are those with liberal virtues. What are the liberal virtues? There are a number of answers that could be given to this question, but among them, surely, are the virtues of individualism, independence, and rationality. It is not my intention to criticize individualism, independence, or rationality, all of which, properly understood, can be excellences of the human being as well as of the liberal citizen. But like all human characteristics, they are susceptible to misunderstanding and distortion, and so misunderstood these three virtues are in tension with the religious way of life.

Religion is typically more communitarian than individualistic. It calls for a transcending of self. The good life, seen through the eyes of biblical religion, is one of mutual obligation and submission. The commandment is to love God, and to love your neighbor as yourself; the last will be first; and to lose one’s life is to find it. Individualism can be threatening to the religious sensibility because—understood in a particular way—it can foster and legitimate selfishness, self-love, even

self-worship. The idea of independence or autonomy, similarly, can conflict with the conviction that we do not choose but we are chosen by God, whose law governs the universe. It is closely akin to pride, which is the deadliest of the theological vices. Autonomy, too, can become a perversion of conscience: conscience is the ability and responsibility of each individual to conform to the dictates of the moral order, while autonomy requires conformity to no one but oneself. And rationalism can easily be understood as opposed to faith and tradition. It can degenerate into skepticism and nihilism, the ultimate irrationality.

From a secular point of view, it is difficult to appreciate the religious impulse. Faith seems antithetical to reason and obedience to higher authority seems submissive and antidemocratic. A liberalism based on individualism, independence, and rationalism thus has a tendency to see traditional religion as authoritarian, irrational, and divisive—as a potential threat to our democratic institutions rather than as one of their sturdiest pillars, as was typically thought at the Founding. Today, it is not unusual to find law professors writing that religions “undermine rather than mutually reinforce habits of mind necessary for democratic decision-making,” or that religion is “fundamentally incompatible with [the] intellectual cornerstone of the modern democratic state.” Justice John Paul Stevens has called religions “divisive forces” and told us that it is vital to keep these forces out of our public schools—even when the religious activity in question is voluntary, extracurricular, and student-initiated. This, he says, is because the schools are “the symbol of our democracy and the

33. See, e.g., Alexis de Tocqueville, Democracy in America 293 (J.P. Mayer ed., 1969) (reporting that Americans considered religion “necessary to the maintenance of republican institutions” and that he had come to agree with them); Washington’s Farewell Address (Sept. 17, 1796), reprinted in 1 Documents of American History, supra note 22, at 169, 173 (religion is the “indispensable support[ ]” for republican government).
most pervasive means of promoting our common destiny."37 Needless to say, modern liberals see no need to keep other "divisive forces" out of the schools. Indeed they are the first to protest "censorship" when Soul on Ice or books containing vulgar and offensive language are removed from the curriculum.38

With such a change in perspective, freedom of religion came to be seen as less important than freedom from religion. It is revealing that Felix Frankfurter, the prototypical liberal of this school, described religious freedom as "freedom from conformity to religious dogma,"39 and Justice Harry Blackmun describes the Establishment Clause as protecting "secular liberty" (not "religious liberty").40 This is a far cry from those who understood religious freedom as willing obedience to the sovereignty of God, and gave it pride of place in our First Amendment.

The shift from liberalism-as-limited-government to liberalism-as-ideology has been both obscured and exacerbated by the pretense that it is merely being "neutral" among competing conceptions of the good life. Somehow, "neutral" came to mean "secular"—as if agnosticism about the theistic foundations of the universe were common ground among believers and nonbelievers alike. Religion (like other direct human experiences) is unverifiable and unfalsifiable, and secular liberals naively believed that this distinguished it from other ways of thinking about the world, which were assumed to be free of this epistemological flaw. Secular, "objective," reasoning was the neutral starting point; any religious reasoning was "controversial," "subjective," and—in public matters—inappropriate. Thus, in any controversy in which secular liberals sought to include one book in the curriculum and remove another, while their religious opponents sought to remove that book and include the other, it was always the latter who were said to be "interjecting" their beliefs into the curriculum.41

37. Id.
38. See the briefs filed in support of the respondent in Board of Education v. Pico, 457 U.S. 853 (1982). For a description of the materials in controversy, see id. at 897-903 (appendix to dissenting opinion of Powell, J.).
41. Cases in which secular liberals successfully sought removal of books over
lifers were being neutral and nonsectarian—no matter how offensive and unfounded their choice of curriculum might seem to persons of a different mindset.

B. Toleration As Indifference

A parallel development was that liberalism came to be associated with the idea that individuals have no legitimate interest in the attitudes, opinions, and character of others within the community. Thus, the state was limited in its power over the individual conscience not because conscience is too important to brook government control, but because the consciences of others do not affect our lives. Jefferson could say that “it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg,” without finding it necessary to distinguish between his interests as a citizen and his interests as a person. However, to the evangelical Christians who spearheaded the drive for religious liberty in the United States, such a distinction was all-important. They could agree that the state should stay out of the business of saving souls, but it mattered deeply and intensely what their neighbors believed. That was why the evangelicals spent so much time evangelizing. That was the spirit of the Great Awakening.

The problem with the proposition that the individual is not affected in any serious way by the character and beliefs of others is that it is manifestly not true. Obviously we are affected by such issues of character as whether our neighbors are racists, sexists, respectful of the environment, tolerant, industrious, or civil. We have no hesitation today in using state power to inculcate beliefs and attitudes that we deem important to our life together. We do not wait until bad attitudes and antisocial principles “break out into overt acts against peace

42. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1955) (1787).
and good order." We design our curricula and redesign our institutions to bring about desired changes in attitude. This has created the strange phenomenon of modern liberalism: a liberalism that still proclaims its neutrality toward competing ideas of virtue and the good life, but is committed in practice to the promotion of particular ideals and—even more—to the eradication of others. In practice, liberals are neutral only about matters toward which they are indifferent.

Fortunately, modern liberals are usually indifferent toward religion, at least as long as it stays in its place. Thus, there can be widespread agreement that members of the Native American Church should be permitted to ingest peyote in the privacy of their distant hogans, and even that practitioners of Santería should enjoy no less freedom to kill animals than hunters already enjoy. But when churches stand against principles or interests with more popular currency—when they forbid interracial dating in their schools or refuse to employ mothers with small children outside the home—they are unanimously rebuffed by the Supreme Court and scarcely a voice is lifted on their behalf. Even before the recent shift in interpretation of the Free Exercise Clause, free exercise cases were almost always losers: virtually any plausible public purpose was deemed sufficient to override the right of religious exercise. If religious freedom is confined to those aspects of our practice that are of no interest or concern to our neighbors, it does not amount to much.

44. This is what Stanley Fish calls his first law of tolerance dynamics: "Tolerance is exercised in an inverse proportion to there being anything at stake." Stanley Fish, Almost Pragmatism: Richard Posner's Jurisprudence, 57 U. CHI. L. REV. 1447, 1466 (1990).
45. An impressive array of civil liberties organizations and academics (including this author) joined in support of a petition for rehearing in Employment Division v. Smith, 494 U.S. 872 (1990).
46. A similarly impressive array of civil liberties organizations joined in an amicus curiae brief (written by this author) in support of the petitioners in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).
C. The End Of Limited Government

The third important development is that liberalism ceased to be understood as standing for limited government. Welfare-state liberalism has so eclipsed Lockean liberalism that the latter is no longer even denominated "liberalism" in common speech. With the rise of the welfare-regulatory state, the spheres of religion and government were no longer distant and distinct (with the government in charge of commerce and civil order and the churches in charge of charity and the inculcation of goodness and truth); the state extended its regulatory jurisdiction over broad aspects of life that formerly had been private and frequently religious, creating conflicts both with religious institutions and with the religiously motivated activity of individuals. The government could regulate the church itself: whom it could hire,\(^51\) for what hours and at what salary,\(^52\) what internal rules it could enforce,\(^53\) what it could teach the children of its believers,\(^54\) and so forth. As government expands, conflicts between religious and public values proliferate.

It should be remembered that when the First Amendment was proposed and ratified, the government had little or no involvement in education, social welfare, or the formation and transmission of culture. These functions were predominantly left to the private sphere, and within the private sphere religious institutions played a leading role. As the government has assumed wider and wider responsibility for the funding and regulation of these functions, the idea of a "secular state" has become more and more ominous. When the state is the dominant influence in the culture, a "secular state" becomes equivalent to a secular culture. Religious influences are confined to those segments of society in which the government is not in-

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51. EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982). But see Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding the constitutionality of a statutory exemption that permits churches to hire from within their faith, for functions that are nonprofit in nature). Previously, the Free Exercise Clause protected churches to some degree in this area, see Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986), but it is doubtful that this protection survived Smith.


involved, which is to say that religion is confined to the margins of public life—to those areas not important enough to have received the helping or controlling hand of government.

Nowhere is this development more evident than in the field of education. It is no accident that a large proportion of all religion cases in the Supreme Court have involved schools, for the takeover of education by the government has been the most profound cultural change in American history. At the Founding, almost all education—primary, secondary, and higher—was under religious auspices. Harvard, Yale, Princeton, William and Mary, Amherst, Williams—all were Christian institutions in substance as well as in name through much of the nineteenth Century and in some cases into the twentieth. As late as the 1840s, Tocqueville reported that almost all lower schools were taught by ministers of the gospel.\textsuperscript{55} It was only in the 1840s that government-operated schools gained a monopoly on public funding in the large cities (after tumultuous controversy between the Protestant elite and the largely Catholic immigrant classes, who fought vainly for a pluralistic educational system). By the close of the century, government-operated schools dominated the field of basic education, the only holdouts being the Catholic schools and a scattering of Jewish, Dutch Reformed, Lutheran, Quaker, and upper-class private schools.

Moreover, educational reformers were more than willing to use their new-found control over the education of the youth to inculcate a cultural ideal, often called by nineteenth-century reformers “Americanism,” based on democratic patriotism, liberal Protestantism, and the virtues of hard work, self-discipline, and self-reliance. Through education the liberal reformers would assimilate the millions of newer immigrants, frequently Catholics and Jews, into the American way of life, which included a reasonable, non-sectarian, watered-down, Protestant religion. This was accomplished over the objections of not just Catholics and Jews, but of more traditional evangelical Protestants, none of whom could understand why “public” schools should be dominated by the values and ideology of only one segment of the population.\textsuperscript{56}

\textsuperscript{55} De Tocqueville, \textit{supra} note 33, at 295 n.4.

\textsuperscript{56} For descriptions of these struggles, see Charles L. Glenn, Jr., \textit{The Myth of the Common School} (1988); Diane Ravitch, \textit{The Great School Wars, New York City, 1805-1973: A History of the Public Schools as Battlefield of
More recently, twentieth century educational reformers have pursued the same project in a more secular hue, no less offensive to traditionalist Catholics, Protestants, and Jews but lacking the overt connection to liberal Protestantism. John Dewey, for example, contended that the public schools have an "ethical responsibility" to inculcate social values derived from scientific and democratic principles and to convert children away from the superstitions of their families.57 Bruce Ackerman argues that a goal of "liberal education" is "to provide the child with cultural materials" in her resistance to parental values so that she "may forge the beginnings of an identity that deviates from parental norms."58 Unlike Dewey, Ackerman does not claim that the new "values" are better or more "scientific" than the old, but maintains that this is a "neutral" way to build liberal citizens who will think for themselves. A genuinely neutral education would, of course, work both ways—undermining the unbelief of the unbeliever as well as the belief of the believer. Ackerman, however, does not appear to have considered the possibility that the schools be used to "provide the child with cultural materials" to overcome the lack of values in the home, nor does he advocate mandatory religious education for the children of atheist parents.59 The most recent trend is to use the school for the inculcation of what is called "multi-culturalism," which in practice is not multi-cultural at all, but simply another distinct ideological position hostile to the traditional culture. Education increasingly seems to promote a new set of values no less sectarian than the old: environmentalism, safe sex, opposition to whatever is thought to be racism and sexism, sexual freedom, and a critical posture toward the role of the West in the oppression of the rest of the world.

It should be obvious to anyone who ponders the matter

57. JOHN DEWEY, MORAL PRINCIPLES IN EDUCATION 7-10 (1975).
59. I do not imply that such affirmative teaching would be either possible or desirable. What "values" should the schools inculcate? What religion should they teach? Who should decide? If Ackerman were genuinely concerned about neutrality, he would be forced to grapple with these issues, for while undermining the affirmative teachings of the home is easy, introducing serious moral and religious alternatives is far more difficult. Ackerman, however, is silent about this. His "neutrality" seems purely negative and destructive.
that education cannot possibly be "neutral" toward all competing points of view. Which historical figures should be profiled as "role models" in our textbooks? Columbus? Jefferson? Sitting Bull? Robert E. Lee? Brigham Young? Malcolm X? Sara Weddington? Mother Theresa? How do we teach biology? Creationism either is, or it is not, an intellectually respectable challenge to Darwinian evolution. To include the creationist challenge is to give it legitimacy; to exclude it is to privilege the Darwinian orthodoxy and to shelter it from critical evaluation. How do we teach about sex? To some, sexual modesty and shame are bulwarks against immorality; to others, sexual modesty and shame are obstacles to premeditated contraception. The first task of sex education is to break down that sense of shame so that teenagers will feel comfortable about discussing, procuring, and using contraceptives: that is why sex education is so controversial. We do not know whether to teach virtue or not, and we do not know what virtues to teach. Love, faithfulness, and obedience? Or autonomy and self-assertion? Which is immoral: homosexuality or the belief that homosexuality is immoral?

The answer, in modern liberal America, is that these issues will be fought out in the political and professional arenas and the dominant factions will win—except that religiously oriented viewpoints are excluded from the outset. In the marketplace of ideas, only those tainted by religion are, from the outset, denied a place.

Studies by the National Institute for Education, People for the American Way, Americans United for Separation Between Church and State, and the Association for Supervision and Curriculum Development have been surprisingly uniform in their finding that religion has been systematically excluded from the public school curriculum, including such subjects as history, social studies, and humanities, where it unquestionably plays a part. Educational psychologist Paul Vitz, who

62. See Mary E. Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. CHI. L. REV. 453, 467-68 (1992) ("Self-sacrifice is often women's sin... A woman's greatest temptation is to hide her talents rather than develop them, sacrificing her development as an autonomous self in order to serve others.")
63. O.L. DAVIS, JR., ET AL., LOOKING AT HISTORY: A REVIEW OF MAJOR U.S.
conducted the most comprehensive such study of elementary and secondary school curricula, concluded:

public school textbooks commonly exclude the history, heritage, beliefs, and values of millions of Americans. Those who believe in the traditional family are not represented. Those who believe in free enterprise are not represented. Those whose politics are conservative are almost unrepresented. Above all, those who are committed to their religious tradition—at the very least as an important part of the historical record—are not represented.64

One can go through elementary and secondary school today and not be aware that religion has played—and still plays—a major role in history, philosophy, science, and the ordinary lives of many millions of Americans. I sense the effect in my own elementary school-age children: they wonder how I can think God and Jesus Christ are so important to the workings of nature and history when they never hear about such things in school. A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all.

Liberal neutrality, it turns out, is of a very peculiar sort. And what has occurred in education has also occurred, perhaps less brazenly, in other areas of life that have come under government control. The government sphere is rarely overtly hostile to religion. But by its silence, coupled with its receptivity to competing secular ideologies, the government has become a major factor in the secularization of society.

That is where liberalism brought us. What does post-modernism have to say to this situation?

IV. POST-MODERNISM: CORRECTIVE OR AGGRAVANT?

Post-modernism is more a congeries of attitudes and ideologies than it is a single, coherent philosophical position. It has usefully been defined as embodying four interrelated concepts:

64. Paul C. Vitz, Censorship: Evidence of Bias in Our Children’s Textbooks 22 (1986).
(1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted. (4) Because language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.65

For present purposes, the central insight of post-modernism is the exposure of liberalism as just another ideology. What postmodernists have taught us is that the supposed neutrality often claimed for liberalism is really only a mask for a system and a way of life that now seems to postmodernists to be based upon patriarchal, white, male, European, and bourgeois interests and values. There is no neutral, objective vantage point from which to view the world; we are all prisoners of our own perspectives; the beginning of wisdom is to recognize the potential worth and value of others different from ourselves.

In this sense, advocates of religious freedom should find much to commend in post-modernism.66 If "what we think of as knowledge is always belief," then religion can reenter the serious world of intellectual inquiry on a presumptively equal footing—one belief against another, and let's see which offers the most persuasive account of the human experience—not because its status has improved, but because its positivist com-

66. I do not mean that adherents to traditional biblical religion should (or could) find post-modernism congenial as a philosophical proposition. The denial of any objective basis for knowledge seems incompatible with the belief in a God who has revealed Himself to mankind, and the denial of the objectivity of any text seems incompatible with the view that the scriptures can be the perfect guide to faith and practice. My point is simply that a world dominated by postmodernists might be thought less likely to treat religious modes of thinking as outside the bounds of reasonable discourse, since postmodernists believe there are no such bounds. On the prospects for a postmodern theology, see Nancy Murphy & James W. McClendon, Jr., Distinguishing Modern and Postmodern Theologies, 5 MODERN THEOLOGY 191 (1989).
petitors have been stripped of their epistemological advantage. Given its message that secular liberalism is no longer entitled to a privileged place on account of its ostensible neutrality, post-modernism would appear to augur a revitalization of religious freedom. In a post-modernist world, maybe religious ways of thought could be restored to legitimacy and cease to be marginalized.67 As Professor Fred Gedicks has stated:

If this post-modern insight is correct, then secularism has no exclusive claim as the language of American public life. Public religious discourse was discredited as arbitrary subjectivity by a secular critique that pretends to be neutral and objective, but which beneath that pretense is itself arbitrary and subjective. There can no longer be any empirical argument for keeping religious discourse out of public life.68

Why, then, does it seem not to work out that way? Why is it that most of the post-modernist movements that we see in law—critical legal studies, feminism, critical race theory and so forth—seem by and large in their actual political activity to be hostile and detrimental to religious freedom? Post-modernism, it turns out, represents not just a critique of liberalism but an intensification and exacerbation of the very features of liberalism that created the conflict with freedom of religion.

A. The Attack On The Public-Private Distinction

If welfare state liberalism supplanted the earlier understanding of liberalism as limited government, post-modernism takes us an additional step. Post-modernism tells us that the very distinction between the public and the private is incoherent and destructive. A common feature of the post-modern jurisprudential movements is the attack on the public-private distinction, especially as it bears upon the constitutional doctrine of state action.69 If the contours of “the private sphere”

67. One sees this, at times, in Stanley Fish. See Stanley Fish, Liberalism Doesn't Exist, 1987 DUKE L.J. 997.
(for example, private property) are socially constructed, then any decision by the state to protect "the private"—or even to leave it alone—is a political decision; it is "state action." If the state chooses to allow a private club to discriminate (when it could just as easily forbid the discrimination), that is "state action." If a poor person starves, it is not the result of impersonal forces but of the state's failure to redistribute resources. If the state fails to prevent domestic violence (perhaps because of a misguided respect for the "privacy" of the home) it is a social failure.

Yet the public-private distinction (the state action doctrine) is utterly indispensable to a theory of religious freedom. We cannot have religious freedom without it. The very same conduct can be either constitutionally protected or constitutionally forbidden, depending on whether those who engage in it are acting in their "private" or their "public" capacities. If a group of people get together and form a church, that is the free exercise of religion. If the government gets together and forms a church, that is an establishment of religion. One is protected; one is forbidden. It is inconceivable that we could construct a theory of freedom of religion which does not distinguish at some level between the activities of the individual believer and the activities of the sovereign.

In *Corporation of the Presiding Bishop v. Amos*, for example, the government made an exception to its employment discrimination laws allowing churches to hire members of their own faith. This was challenged as an establishment of religion, but the Court upheld it. The pre-post-modernist majority naively asserted that a "law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Justice O'Connor, evidently influenced by post-modernist thinking, explained that this analysis seemed

71. Id. at 337.
to obscure far more than to enlighten. Almost any government benefit to religion could be recharacterized as simply "allowing" a religion to better advance itself. . . . The Church had the power to [force its employees to conform to the church or lose their jobs] because the Government had lifted from religious organizations the general regulatory burden imposed by [the civil rights laws].

This is a restatement of the familiar deconstruction of the public-private distinction. If there is no difference between government "lifting a regulatory burden" (that is, not interfering with private action) and government conferring an affirmative benefit, then there is no difference, in principle, between guaranteeing the free exercise of religion and erecting an establishment.

Less obviously, but to the same effect, Justice Brennan argued that the Amos case presented a "confrontation between the rights of religious organizations and those of individuals." This, too, is a denial of the force of the public-private distinction. It treats as equivalent "rights" the freedom of a religious community to choose for itself who its agents are to be, and the "right" of an outsider to invoke the coercive power of the state to force the religious community to hire him. It presupposes that an individual's "rights" run equally against public and private institutions.

Once the public-private distinction is obliterated—once private power and public power are treated as equally threatening and once the government is understood to act whenever it refrains from interfering with the acts of private individuals—religious freedom cases become hopelessly indeterminate. Thus, Justice O'Connor is forced to decide the Amos case on the

72. Id. at 347 (O'Connor, J., concurring in the judgment). This argument was echoed by Professor Mark Tushnet, the leading Critical Legal Studies theorist in the field of religious freedom: "One might respond, of course, that the government indeed put the Church in a position to put [the employee] to that choice by relieving the Church of its obligation to comply with the general antidiscrimination requirement." Mark Tushnet, The Emerging Principle of Accommodation of Religion (Dubitante), 76 GEO. L.J. 1691, 1705 (1988). Tushnet's interjection, "of course," shows just how obvious post-modernist thinking now seems to post-modernists. Non-post-modernists might be tempted to respond that "of course" Tushnet's statement presupposes, incorrectly, that the government has the rightful authority to impose a legal obligation on the Church to hire unbelievers.

73. Amos, 483 U.S. at 340 (Brennan, J., concurring in the judgment). This argument, too, was echoed by Professor Tushnet. Tushnet, supra note 72, at 1705 ("Accommodating one interest—that of . . . the employee in Amos—necessarily impairs the same religious interest on the other side").
basis of an utterly contentless “endorsement test” (the Religion
Clauses’ equivalent of “we know it when we see it”),74 and
Justice Brennan is forced to give precedence to institutional
over individual free exercise rights—which might be correct,
but is hardly self-evident and which, under the majority ap-
proach, is unnecessary to decide.

B. Tolerance And The Debunking Of Neutrality

A second reason that modern liberalism ceased to be con-
sistent with a robust notion of religious liberty was that liberal-
ism turned out not to be merely a neutral arbiter among com-
peting understandings of the good life, but to embody certain
substantive principles, among them individualism, indepen-
dence, and rationality. Now that has been unmasked by post-
modernists. What happens next?

For the most part, with some exceptions, post-modernists
in the legal and political arenas have treated the debunking of
liberal neutrality as an opportunity for partisanship in the
service of a controversial vision of liberation. As one academic
commentator on post-modernism has observed:

Many [post-modernists] are political activists and political
advocates. They adopt positive political positions based on
explicitly stated values and goals. They move from
deconstruction and reconstruction to construction, despite the
intellectual logical contradiction involved in denying modern
foundations and then positing one’s own vision as in some
ways “better.”75

Thus, while multi-culturalism and political correctness may
seem to be logically incompatible positions, they often are
found in the same people. The logical path seems to be as fol-

74. For demonstrations that the “endorsement” test has no determinative con-
tent, see Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L.
Rsv. 115, 148-51 (1992); Steven D. Smith, Symbols, Perceptions, and Doctrinal
Illusions: Establishment Neutrality and the “No Endorsement” Test, 86 Mich. L.
Rev. 266 (1987); see also William P. Marshall, “We Know It When We See It”: The
Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986).

75. PAULINE M. ROSENAU, POST-MODERNISM AND THE SOCIAL SCIENCES: IN-
power. So the post-modernist advocate pleads for openmindedness to various points of view (multi-culturalism) when out of power and suppresses dissent (political correctness) when in power.

This is the phenomenon of selective multi-culturalism: boundless tolerance and respect for some voices, and ruthless suppression of others. Religion is an especially vulnerable target because religion represents the wisdom of the ages, which is an obstacle to the transformation of society. With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant. Thus, feminists and gay-rights activists appear to feel no hesitation in using government power to force recalcitrant believers to change their evil ways. Churches, for example, should be forced to hire female priests and gay ministers, even if that is contrary to their own religious commitment. A public school should be used, in Kathleen Sullivan’s words, to “inculcate commitments to gender equality that are incompatible” with traditional interpretations of the Bible. Parents are stripped of the right to withdraw their children from sex education programs that are offensive to their religion or moral code. Catholic hospitals are forced to teach their medical students to perform abortions. Many post-modernists have ceased to value freedom in its own right, but only as a means of promoting their own substantive ends. Thus, according to one feminist legal scholar, the Free Exercise Clause was a mistake, because “religion perpetuates and reinforces women’s subordination, and religious freedom impedes reform.”

Even the unmasking of liberal neutrality has been selective. It is recognized that the liberal tradition was patriarchal and Euro-centric, but rarely is it pointed out that liberalism is

76. See Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980) (attempt to force church to employ a homosexual organist); cf. Becker, supra note 62, at 484 (proposing that churches that discriminate on the basis of sex in their selection of leaders be punished by denial of tax exemptions).
also secular. Indeed, post-modernists find it convenient to keep in place some of the intellectually discredited doctrinal baggage of liberalism when the issue is religion. The great exemplar of this phenomenon is Professor Mark Tushnet, a Critical Legal Studies scholar of great distinction and an authority on the question of religion under the First Amendment. Tushnet is the first to expose and deconstruct the seeming neutrality of the common law of property or contract; but when it comes to supposedly neutral laws that impinge on the practice of religion, Tushnet has resurrected the most formalistic of positions.\(^{81}\) According to Tushnet, a law that imposes the same secular standards on the religious and the non-religious alike is neutral toward religion. This is a defensible position to take on some jurisprudential grounds (though I disagree with it), but it is surprising, to say the least, to hear it from the mouth of a Critical Legal Scholar.

The effect of selective post-modernism is to allow secular ideologies to use political muscle to advance their causes, including using the public schools to inculcate their ideals, without even the psychological constraint of liberal neutrality, but at the same time to preserve liberal formalism in court to ensure that religion is not included in the public dialogue. Thus, in New York City the children are read *Heather Has Two Mommies* in the first grade and given information on anal intercourse in the sixth;\(^ {82}\) but, as the Tenth Circuit recently held, *The Bible in Pictures* must be removed from the shelf of the fifth grade classroom library.\(^ {83}\)

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"God is dead! God remains dead! And we have killed him!"
If you dispute that fact, you have the inalienable right to sing, weep, laugh, and mumble, so long as you do it in private. That is the freedom of religion in the post-modern age.
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81. See Mark Tushnet, "Of Church and State and the Supreme Court": Kurland Revisited, 1989 SUP. CT. REV. 373.