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Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions

W. Cole Durham, Jr.*

Alexander Dushku**

Religious organizations and institutions are among the most significant “mediating structures” situated between individuals and the “megastructures” of state and society.¹ This is a natural reflection of the wider influence of religion as one of the most profound organizing and nourishing forces shaping individuals, community, and culture. Religion cannot help but be thought of as a pervasive and vital aspect of social life, particularly if one conceives of religion expansively as embracing the multitudinous frames of reference that human beings use to organize their understanding of social reality and the cosmos. Stated differently, religion and *Weltanschauung* constitute a crucial medium in which the dialectic of individual and community unfolds. In Robert Cover’s words, “[t]he normative universe is held together by the force of interpretive

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1. The contrast between “mediating structures” and “megastructures” is used here in the suggestive sense originally advanced by Peter Berger and Richard John Neuhaus. PETER L. BERGER & RICHARD J. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 2, 3 (1977). The reference is to the contrast between those human-sized institutions such as the church, the family, the neighborhood, workplace organizations, and schools, which help mitigate and reduce the sense of alienation of modern life, and the massive governmental institutions and bureaucracies that are so often the source of the alienation.

commitments,"² and it is religion broadly conceived that generates and sustains those commitments.

By "dialectic of individual and community" we mean the dynamic interaction of social and rhetorical structures revolving around, mediating, and sometimes resolving tensions between individuals and the larger community. At the level of society, one pole of this dialectic is the recognition that social cohesion demands that individual members of society share some base set of common understandings and beliefs. In the words of Alexis de Tocqueville,

[N]o society could prosper without such beliefs, or rather that there are no societies which manage in that way. For without ideas in common, no common action would be possible, and without common action, men might exist, but there could be no body social. So for society to exist and, even more, for society to prosper, it is essential that all the minds of the citizens should always be rallied and held together by some leading ideas; and that could never happen unless each of them sometimes came to draw his opinions from the same source and was ready to accept some beliefs ready made.³

Russell Kirk has pushed Tocqueville's conclusion even further, claiming that

[U]ntil human beings are tied together by some common faith, and share certain moral principles, they prey upon one another. In the common worship of the cult, a community forms. At the heart of every culture is a body of ethics, of distinctions between good and evil; and in the beginning, at least, those distinctions are founded upon the authority of revealed religion. Not until a people have come to share religious belief are they able to work together satisfactorily, or even to make sense of the world in which they find themselves.⁴

Secular pluralists would no doubt disagree with Kirk about the scope of the needed "common faith." But that disagreement would have been unthinkable before the American experiment with religious liberty. Until then, the need for common beliefs

2. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

3. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 433-34 (J.P. Mayer ed. & George Lawrence trans., Doubleday & Co. 1969) (1966).

4. RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 14 (1991).

was taken to be axiomatic and implied the need for enforced religious homogeneity, typically in the form of an established church. Prior to the American experience, the Lockean insight that toleration would unlock centripetal forces (emanating from the gratitude of tolerated dissenters) that would help stabilize a regime, rather than unmanageable centrifugal forces that would sunder it, remained at best plausible theory.⁵

Note that assumptions about the necessity of an integrating set of shared beliefs retain plausibility in pluralistic settings at two levels. First, there is the residual "lowest common denominator" notion implicit in ideas such as Rawlsian "overlapping consensus"⁶ or in appeals to putatively neutral benchmarks such as the notion of "secular purposes" for governmental action.⁷ Second, integrating beliefs play a significant role in shaping the subgroups that are the constituents of a pluralistic society. Shared beliefs are often a fundamental aspect of what defines a group and differentiates it from others. It is also worth noting that the pressure for social cohesion (i.e., support for common beliefs and homogeneity) can take both the negative form of marginalization of the unorthodox⁸ and the positive form of consolidation and reinforcement of the "common conscience."⁹

The other pole of the dialectic stands opposed to pressures for homogeneity. It calls for pluralism and for protection of religious autonomy and diversity on the part of both individuals and groups.¹⁰ The persuasiveness of this call has

5. JOHN LOCKE, A LETTER CONCERNING TOLERATION 55 (2d ed., Bobbs-Merrill Co. 1955) (1689).

6. JOHN RAWLS, POLITICAL LIBERALISM 39-40, 133-72 (1993).

7. Thus, the now dilapidated but recurrently invoked *Lemon* test for Establishment Clause violations attempts to ascertain state neutrality in religious affairs by inquiring, in the first prong of a tripartite test, whether challenged state action has a "secular purpose." *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The underlying assumption is that secular purposes are cognitively accessible to everyone and constitute a neutral core of shared common sense values on which agreement (or agreement to agree) can be obtained in a secular polity.

8. See Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 723-29 (1986).

9. EMILE DURKHEIM, THE DIVISION OF LABOR 108-09 (George Simpson trans., Free Press 1966) (1893).

10. Protection of individual religious autonomy is a central thrust of the protection of religious liberty, both in national constitutional law and the international law of human rights. See, e.g., U.S. CONST. amend. I; GRUNDGESETZ [Constitution] [GG] art. 4 (F.R.G.); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 55, U.N.

earned for religious liberty a high position in the pantheon of fundamental human rights, albeit one that is exposed to the weather and constantly subject to the threat of erosion. Religious liberty protections are apparent in international human rights instruments,¹¹ constitutional provisions,¹² statutes governing the creation of legal entities such as religious corporations,¹³ special exemptions afforded religious activity,¹⁴ and, generally, in the special significance that

Doc. A/6316 (1966), 999 U.N.T.S. 171 (1976) (art. 18) [hereinafter Civil and Political Covenant]. At both levels there is increasing recognition that protection of religious life necessarily entails protection of religious communities, and this in turn requires protection of group rights and institutional autonomy. Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Group Rights*, 1989 WIS. L. REV. 99, 166-69; W. Cole Durham, Jr. & Dallin H. Oaks, *Constitutional Protections for Independent Higher Education: Limited Powers and Institutional Rights, in ACCOUNTABILITY—KEEPING FAITH WITH ONE ANOTHER* 69, 78-86 (1980).

11. Civil and Political Covenant, *supra* note 10, at 55 (art. 18); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), *as amended by* Protocol Nos. 3 & 5 [hereinafter European Convention]; American Convention of Human Rights, O.A.S. Treaty Series No. 36, at 1, OEA/ser. L/V/II.23, doc. rev. 2 (entered into force July 18, 1978); Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-Operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference, Jan. 17, 1989, 28 I.L.M. 527, 534 (1989) (Vienna Concluding Document).

12. See, e.g., CONSTITUCIÓN arts. 14, 19, 20 (Argentina); AUSTL. CONST. § 116; BUNDES-VERFASSUNGSGESETZ art. 7, § 1 (Austria); CONSTITUIÇÃO FEDERAL art. 5 (Brazil); CAN. CONST. pt. I, § 2 (Constitution Act 1982) (Canadian Charter of Rights and Freedoms); CONSTITUCIÓN POLÍTICA arts. 13, 18, 19 (Colombia); SUOMI HALLITU SMUOTO arts. 9, 83 (Finland); CONSTITUTION arts. 2, 77 (France); GRUNDGESETZ art. 4 (Germany); INDIA CONST. arts. 15, 16, 25, 26; ISR. CONST. §§ 7, 22; COSTITUZIONE arts. 8, 19, 20 (Italy); KENPO arts. 19, 20 (Japan); KENYA CONST. art. 78; MALTA CONST. art. 40; CONSTITUTION art. 23 (Monaco); STATUUT VOOR HET KONINKRIJK DER NEDERLANDEN art. 6 (Netherlands); CONSTITUCIÓN arts. 34, 35 (Panama); CONSTITUCIÓN art. 70 (Paraguay); CONSTITUIÇÃO FEDERAL art. 41 (Portugal); CONSTITUCIÓN art. 16 (Spain); BUNDESVERFASSUNG arts. 27, 49, 50 (Switz); TURK. CONST. art. 24; CONSTITUTION art. 17 (Zaire). English translations available in ALBERT P. BLAUSTEIN ET AL., *RELIGIOUS LIBERTY IN THE WORLD'S CONSTITUTIONS* (forthcoming) (manuscript on file with W. Cole Durham, Jr.).

13. See, e.g., CAL. CORP. CODE §§ 9110-9690 (Deering 1979 & Supp. 1993) (California Religious Corporations Act); REVISED MODEL NONPROFIT CORP. ACT §§ 1.40(30), 1.80, 2.02(a)(2)(iii) (1987) (defining "religious corporation," listing the constitutional protections enjoyed by religious corporations, and requiring the articles of incorporation to state whether a corporation fits the definition of "religious corporation").

14. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting children from mandatory school attendance laws); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (sustaining tax exemptions); *Welsh v. United States*, 398 U.S. 333 (1970) (exempting religious believers from military service); *Sherbert v. Verner*, 374 U.S. 398 (1963) (accommodating sabbatarian work schedules); *CONSCIENTIOUS*

contemporary legal systems attach to laws that affect religious life and religious institutions.

Within this dialectical force field, complex narratives unfold. An apt comment by Edwin Gaustad on American religious history could well be extended to this domain: "[i]n the beginning was complexity, and the complexity has endured."¹⁵ Indeed, the complexity has increased over time. Our aim in this Article is to reflect on one of the fundamental influences shaping this highly complex and interactive process: the opposition between traditionalist and secularist orientations. In our view, this constitutes one of the deepest tensions shaping the legal environment of religious intermediary institutions.¹⁶ To a large extent, the conceptual categories and legal doctrines we use to think about the role of religious intermediary institutions derive from a social setting in which the fundamental problems grew out of internecine rivalries between diverse religious groups. But increasingly, it is the divide between traditionalists and secularists that constitutes the fundamental challenge for pluralism in contemporary society. In this transformed context, one can no longer assume that secular ground will constitute a neutral domain where resolution of religious tensions can occur and where the basis for a common life can be found. From the traditionalist perspective, secular ground has become suspect and, indeed, threatening.

In this Article, we first examine the traditionalist-secularist tension in a number of settings that suggest the depth and range of its influence on intermediary institutions (Section I), and then address some of the factors that shape individual and societal responses to religious institutions

OBJECTIONS IN THE EC COUNTRIES (European Consortium for Church-State Research ed., 1992) (reporting similar legal exemptions from throughout the European Community).

15. EDWIN S. GAUSTAD, *FAITH OF OUR FATHERS* 3 (1987).

16. Ironically, there is a sense in which this tension is an outgrowth of religious belief and the resulting dynamics of religious pluralism. As Owen Chadwick argued in his Gifford Lectures, "Christian conscience was the force which began to make Europe 'secular.'" OWEN CHADWICK, *THE SECULARIZATION OF THE EUROPEAN MIND IN THE NINETEENTH CENTURY* 23 (Cambridge Univ. Press 1990) (1975). The call of conscience created forces which eventually led to pressures "to allow many religions or no religion in a state, and [to] repudiate any kind of pressure upon the man who rejected the accepted . . . axioms of society." *Id.* For another analysis of dialectic tensions of religious liberty and social coherence, see Ashby D. Boyle, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 55 (1993).

(Section II). We then analyze what we view as the betrayal of free exercise and ambivalence about accommodation in the Religion Clause jurisprudence of the United States Supreme Court (Section III). Finally, we analyze some of the dangers of wooden separationism and the more general hazards of epistemologically privileging the secular (Section IV).

If our argument is correct, one of the most crucial roles played by religious intermediary institutions is their capacity to transform mundane aspects of everyday secular existence, infusing them with meaning and transcendent significance. The ability of religious institutions to perform this role is profoundly important for social life, and yet dangerously fragile. Religious organizations need to be given space and sensitive protection if they are to make the generative and regenerative contribution to social life that they (and in many respects, they alone) can make. As important as the impulse to find and develop common discourses in society is, this goal cannot be pursued at the cost of the institutions that generate transformative, uncommon discourse.

I. THE TRADITIONALIST-SECULARIST TENSION AS THE FUNDAMENTAL TENSION SHAPING THE INTERACTION OF LAW AND RELIGIOUS INTERMEDIARY ASSOCIATIONS

The influence and vitality of religious traditions varies in intensity and impact among cultures and within a particular culture over time. These changes occur in response to contingencies over which a particular tradition has little control. Wars of survival or conquest, drought and famine, persecution, and a seemingly endless array of other such factors may sap or strengthen the vitality of a religious tradition. The presence of charismatic spiritual leaders, able scholars, or a receptive populace may lead to periods of flourishing. Religious traditions may undergo significant regeneration as old beliefs and practices are found applicable to new circumstances. Conversely, periods of peace and material prosperity may lull a nation into a sense of material complacency in which religion is neglected. Under such conditions the spiritual strength of a religious community may wane as the religious tradition recedes from cultural primacy.

Such changes assure that the environment of religious intermediary institutions remains in constant flux. This in turn results in explicit revision of legal norms and, more subtly, in

shifting shades of meaning as the changing pattern of events casts new light on the legal landscape.

Even without overt forces driving a culture toward or away from religious traditionalism, there appears to be an innate tension between religious and more secular world views in virtually all cultures. This tension reflects a deeper dialectic within each human being. Sir Thomas Browne, writing in the 1600s, was surely not the first to note the tension between the "speculative mind eager for knowledge and the devout spirit moved by faith."¹⁷ Projected outward from the individual into culture, these competing forces manifest themselves with varying degrees of predominance in a society's institutions and culture. Moreover, different subcommunities in a particular society may be more influenced by one orientation than the other. Certainly the legal and scientific elites of recent generations have tended to be more secularist than traditionalist.

A. *The Maine/Diamond Debate: Toward an Interactive Model of the Traditionalist-Secularist Dialectic*

During the 19th century, it became commonplace to think of the movement of intellectual history as a shift from traditionalist to secularist attitudes. One thinks, for example, of Auguste Comte's beliefs that every science and every society must move through theological and metaphysical stages on the way to achieving the stage of positive science.¹⁸

Sir Henry Maine's account of legal history reflects similar assumptions. He viewed the relationship between religion and law as an evolving one that progressed from a general fusion of law and religion in customary societies to increasing separation of the two domains. In his words, "There is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance."¹⁹ But the "path of progress moves, ac-

17. LEONARD NATHANSON, *THE STRATEGY OF TRUTH: A STUDY OF SIR THOMAS BROWNE* 109 (1967). See generally SIR THOMAS BROWNE, *RELIGIO MEDICI AND OTHER WRITINGS* (E.P. Dutton & Co. 1951) (1642) (arguing that religion and science can co-exist harmoniously in the individual and in society).

18. 1 AUGUSTE COMTE, *THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE* 3 (Harriet Martineau trans., 1896).

19. HENRY MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 5 (London, Spottiswoode and Co. 1891); see W. Cole Durham, Jr., *Religion and the Criminal Law: Types and Contexts of Interaction*, in *THE WEIGHTIER MATTERS OF THE LAW:*

cording to Maine, from this primitive blurring of law and religion toward more sophisticated systems in which the realms of law and religion are more clearly delineated."²⁰ In this view, law evolves (that is, improves) from being heavily infused with religion in primitive societies to a more secular configuration. Thus religion is "an important co-founder of . . . law, but one whose contribution can be dispensed with once a more advanced stage of civilization is attained."²¹

In reality the relation of the secular and the religious sides of law is much more complex. As A.S. Diamond was able to show by 1935, Maine's account of the fusion of religion and law in primitive societies relied on overly simplistic inferences drawn from the mere concatenation of religious and secular matters in legal materials.²² Diamond's view was that aside from obvious areas of interconnection, such as the domain of sacral crimes and the institution of oath-swearing,²³ ancient law was no more religious than modern law. But this view was also an oversimplification, this time erring on the secularist side.

What the Maine/Diamond debate exemplifies is the tendency to conceive of the respective roles of traditionalism and secularism in the formation of a cultural norm as an "either-or" proposition: either the criminal law originates from and is infused with religiosity, or its roots are primarily secular. The picture seems to be that secularists and the traditionalists are engaged in a long-term struggle for hegemony in which the winner takes all. Yet, "[t]he reality is that the . . . law may be both religious and secular at the same time, or that individuals within a particular culture may see it, at alternating moments, as one and then the other and then the other again."²⁴ Seen in this light, the traditionalist-secularist polarity is not so much a clue to the teleology of history as a permanent tension in human affairs.

Few of us are wholly secular or wholly religious in our outlooks. Rather we tend to shift in and out of these modes of

ESSAYS ON LAW AND RELIGION 193, 197 (John Witte, Jr. & Frank S. Alexander eds., 1988).

20. Durham, *supra* note 19, at 197.

21. *Id.*

22. See A.S. DIAMOND, PRIMITIVE LAW PAST AND PRESENT 45 (Methuen & Co. 1971) (1935).

23. *Id.* at 47.

24. Durham, *supra* note 19, at 199.

perceiving reality, at times finding ourselves under the influence of religion and at others more susceptible to the secularist perspective. Therefore, instead of analyzing an individual or community as either religious or secular, a more accurate model would conceive of individuals and communities as being in constant motion along a spectrum extending from the purely religious to the purely secular, and continuously vacillating toward or away from one or the other extreme.

Clifford Geertz's commentary on the debate between Lévy-Bruhl and Malinowski concerning the nature of "native thought" captures the point we wish to make. Lévy-Bruhl interpreted native thought primarily in mystic terms,²⁵ whereas Malinowski interpreted it in a more secular, rationalist manner.²⁶ Geertz, however, insightfully perceived that both were overlooking the ability of natives—and all individuals—to be both secular and mystical in their outlooks. Geertz's analysis of this debate is worth quoting at length.

The movement back and forth between the religious perspective and the common-sense perspective is actually one of the more obvious empirical occurrences on the social scene, though, again, one of the most neglected by social anthropologists, virtually all of whom have seen it happen countless times. Religious belief has usually been presented as a homogeneous characteristic of an individual, like his place of residence, his occupational role, his kinship position, and so on. But religious belief in the midst of ritual, where it engulfs the total person, transporting him, so far as he is concerned, into another mode of existence, and religious belief as the pale, remembered reflection of that experience in the midst of everyday life are not precisely the same thing, and the failure to realize this has led to some confusion, most especially in connection with the so-called primitive-mentality problem. Much of the difficulty between Lévy-Bruhl and Malinowski on the nature of "native thought," for example, arises from a lack of full recognition of this distinction; for where the French philosopher was concerned with the view of reality savages adopted when taking a specifically religious perspective, the Polish-English ethnographer was concerned with that which they adopted when taking a strictly common-sense one. Both

25. LUCIEN LÉVY-BRUHL, *HOW NATIVES THINK* 35-68 (Lilian A. Clare trans., 1926).

26. BRONISLAW MALINOWSKI, *MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS* 17-87 (1948).

perhaps vaguely sensed that they were not talking about exactly the same thing, but where they went astray was in failing to give a specific accounting of the way in which these two forms of "thought"—or, as I would rather say, these two modes of symbolic formulations—interacted, so that where Lévy-Bruhl's savages tended to live, despite his postludial disclaimers, in a world composed entirely of mystical encounters, Malinowski's tended to live, despite his stress on the functional importance of religion, in a world composed entirely of practical actions. They became reductionists (an idealist is as much of a reductionist as a materialist) in spite of themselves because they failed to see man as moving more or less easily, and very frequently, between radically contrasting ways of looking at the world, ways which are not continuous with one another but separated by cultural gaps across which Kierkegaardian leaps must be made in both directions²⁷

This passage suggests the need, in analyzing the tensions between traditionalist and secularist conceptual paradigms, to take account of the innumerable ways in which these *Gestalt*-type switches between religious and nonreligious orientations occur and to acknowledge that such switches are a natural and vital aspect of individual and social life.

Indeed, one of the critical values of religious mediating structures may be that they facilitate precisely this human ability to move back and forth between religious and nonreligious orientations. In a deep sense, it is precisely the capacity to infuse secular phenomena with deeper meaning that makes religious institutions so significant. Furthermore, if this capacity is a significant aspect of the justification of religious liberty, a thoroughly secularist interpretation of religious liberty is likely to prove defective by remaining blind in its very nature to this critical transformative process that religious liberty is designed to protect.

B. The Tension Between Traditionalist and Secularist Orientations at the Foundation of Liberal Theory

John Locke's *Two Treatises of Government* provide another illustration of the tension between religious traditionalism and secularism, this time at the foundations of classical liberalism. In these two works Locke unleashes a secularist attack upon

27. CLIFFORD GEERTZ, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 87, 119-20 (1973) (footnotes omitted).

entrenched medieval religious and political traditions, especially as those traditions had been recently articulated in Sir Robert Filmer's work, *Patriarcha*.²⁸ Locke targeted the doctrine of the divine right of kings in his *First Treatise*, inflicting a devastating blow. From our modern perspective, particularly with the advent of feminism, it is tempting to view Filmer's argument for absolute monarchy and patriarchalism as easily refutable and hence to suspect that Locke merely used Filmer as a convenient antagonist to illustrate the obvious superiority of his own theories. But this was hardly the case. Far from being Locke's whipping boy, Filmer's scripturally-grounded patriarchalism was considered at the time to be even more formidable and threatening (at least to liberal secularists) than the absolutism of Hobbes's *Leviathan*. The power of Filmer's perspective came from its traditionalist roots. In Stuart England, the biblical injunction to "Honor thy father and thy mother" was extended to encompass obedience and loyalty to the king and his magistrates.²⁹ Similar patriarchal notions in England can be traced at least to the time of Edward VI.³⁰ Against the divine right of kings, Locke deployed his version of the law of nature—essentially the law of empiricist reason. Reason, Locke opined, reveals that there is nothing more obvious than that "[c]reatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection."³¹ Reasoning from this "self-evident" postulate of human equality, Locke developed his theory of social contract, arguing that the only legitimate basis of government is the consent of the governed.

The point here is that there is a tension between traditionalist assumptions and the very foundations of liberal theory.

28. SIR ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680).

29. GORDON J. SCHOCHET, *THE AUTHORITARIAN FAMILY AND POLITICAL ATTITUDES IN 17TH CENTURY ENGLAND: PATRIARCHALISM IN POLITICAL THOUGHT* 6 (1988); see W. Cole Durham, Jr., *Comment: The Relationship of Constitution and Tradition*, 53 SO. CAL. L. REV. 645, 646 (1980).

30. Durham, *supra* note 29, at 646.

31. JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 309 (Peter Laslett ed., rev. ed., Cambridge Univ. Press 1963) (3d ed. 1698); see generally Robert A. Goldwin, *John Locke*, in *HISTORY OF POLITICAL PHILOSOPHY* 477 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987) (surveying Locke's argument that government has limited powers and exists only by consent of the governed).

This is not to say that the two are necessarily mutually exclusive. After all, it was Locke himself who first clearly recognized that the legitimacy and stability of a political regime could be enhanced by tolerating a range of religious outlooks.³² But at least some highly secularized versions of liberalism conflict sharply with traditionalist assumptions. Even more problematic, such unduly anti-traditionalist approaches can lead to the unintended erosion of the intermediary institutions that nourish and contribute to the development of the individuals who ultimately assert Lockean rights.

A contemporary version of this tension has resurfaced in Michael Sandel's critique of Rawlsian liberalism.³³ The problem with Rawlsian theory, according to Sandel, lies with its premise that "unencumbered selves"³⁴ choose the fundamental principles of justice from behind a "veil of ignorance."³⁵ This premise necessarily ignores the contribution that influences such as tradition and religion have on the formation of individual character and personhood. The result is that Rawlsian liberalism is skewed toward atomizing individualism from the beginning and cannot adequately account for the significance of religion and tradition in social life. The practical consequence of this bias is that insufficient attention is paid to protecting the intermediary institutions that perform the critical nurturing role that excessively individualist liberalism leaves out of its account. At the level of legal doctrine, this can lead to a view that sacrifices fragile intermediary institutions in the process of rigorously enforcing individual rights.³⁶

32. See LOCKE, *supra* note 5, at 55.

33. Michael J. Sandel, *Introduction* to LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

34. Sandel, CRITICS, *supra* note 33, at 5.

35. JOHN RAWLS, A THEORY OF JUSTICE 12, 136-42 (1971).

36. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109-20 (1991). This view has not prevailed at a number of critical junctures in religious liberty adjudication in the United States, but it has certainly had forceful advocates. In *Wisconsin v. Yoder*, for example, Justice Douglas in dissent urged sacrificing the patterns of education necessary for the survival of the Amish community to the "right" of Amish minors to secular education that would be valuable to them if they chose to leave the Amish community. 406 U.S. 205, 241-46 (1972). Similarly, an underlying question in the *Amos* case was whether the right of religious organizations to structure their own internal affairs, including work relationships, should give way to general equalitarian norms of non-discrimination. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). Liberal norms have had the most success overriding traditionalist approaches in Native American

C. *The Tension Between Secular and Religious Perspectives in the Debate over Family Values and Children's Rights*

Still another situation where we can observe the tension between religious and secular perspectives is in the debate over family values and children's rights. In a thoughtful article wrestling with this tension, Professor Bruce Hafen identifies two strands running through American family law: an individual rights orientation and a tradition protective of the family.³⁷ In many ways, these two approaches to family law are simply modern analogues to the tension between Lockean liberalism and Filmer's traditionalism. Again, they are not necessarily mutually exclusive, though excessive acceptance of the rhetoric of rights can lead to erosion of traditional family structures. Recognizing that the integrity of the family tradition, including parental authority, is often essential to the individual and social development of children, Hafen argues:

[I]ndividualism must remain embedded in the context of its corollary obligations to family and community if the individual tradition itself is to survive in a meaningful form [T]here is no serious evidence that society has outgrown the need for the preparatory role of the family tradition, nor has industrial society discovered substitute institutions or relationships adequate to fulfill the functions historically performed by the family.³⁸

Therefore, the argument proceeds, it is preferable that children serve an apprenticeship to parental authority rather than being prematurely abandoned to abstract autonomy rights.

Such sentiments are deeply embedded in the Judeo-Christian tradition as well as in the religious traditions of other cultures.³⁹ But increasingly, such traditionalist outlooks are challenged by secularist forces in the children's rights move-

contexts. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439 (1988).

37. Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 610-30.

38. *Id.* at 657.

39. One example of this traditional sentiment in a non-Western culture is the Confucian notion of filial piety, which likewise reinforces the traditional obligations of children to parents. Confucius, *Analects* ¶¶ 56-60 in 1 SOURCES OF CHINESE TRADITION 27-28 (W. Theodore de Bary ed. & W. Theodore de Bary et al. compilers, 1965).

ment. Secularist advocates urge that children's rights should clearly prevail over parental interests in order to protect children from the authoritarianism and patriarchalism of the family. For these advocates, child "liberation" is an important goal. One commentator went so far as to suggest,

[A]sking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will then become better people, but more for ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself.⁴⁰

Another writer claimed that "the family's vital role in authoritarianism is entirely repugnant to the free soul in our age."⁴¹ This same author supported a restructuring of society along radical secularist lines for the benefit of children.⁴²

Few would dispute that some situations warrant intervention in dysfunctional families for the "best interests of the child." But thoughtless pursuit of rights for rights' sake, without thought about the deeper impacts on the larger role of the family in society, seems unwarranted.⁴³ Such positions are diametrically opposed to traditionalist conceptions of society and family. When these two perspectives and their corresponding social prescriptions are viewed along side each other, one can observe the theoretical and policy conflicts that emerge from the deep tensions between traditional religious convictions and more secular outlooks.

D. The Traditionalist-Secularist Tension as the General Gravitational Force Field Defining the Environment of Intermediary Institutions

The examples provided to this point are isolated examples of a much wider rift between secularist and traditionalist world views that James Davison Hunter has described with the phrase "culture wars."⁴⁴ Hunter argues that American society

40. RICHARD FARSON, BIRTHRIGHTS 31 (1974).

41. Paul Adams, *The Infant, the Family and Society*, in CHILDREN'S RIGHTS 51, 52 (Paul Goodman ed., 1971).

42. *Id.* at 76. Adams proposed "to end war as an institution; then to eliminate poverty; then racism; and finally to put an end to the meaninglessness of living in a bureaucratized society." *Id.*

43. See GLENDON, *supra* note 36, at 121-30, 136-38.

44. JAMES D. HUNTER, CULTURE WARS xi-xii (1991).

is experiencing a deep polarization between what he calls the "orthodox" (traditionalist) and "progressive" (secularist) sides of American culture.⁴⁵ Hunter traces the "nub" of present disagreements over a wide variety of social issues to differing conceptions of the source of moral authority.⁴⁶ By "orthodox" (or what he calls "the impulse toward orthodoxy"), Hunter refers to "the commitment on the part of adherents to an external, definable, and transcendent authority."⁴⁷ Usually orthodoxy entails some belief in God as the creator and sustainer of a universally applicable moral order. Adherents of the orthodox orientation tend to be religious conservatives, though they often come from a broad range of very different religious traditions. What unites them is the belief that a transcendent authority defines "what is good, what is true, how we should live, and who we are."⁴⁸ Being transcendent and fixed, such authority is also "sufficient for all time."⁴⁹

In contrast, Hunter defines the "progressivist impulse" as the "tendency to resymbolize historic faiths according to the prevailing assumptions of contemporary life."⁵⁰ Progressivists are not necessarily irreligious, and in this sense, our "traditionalist-secularist" dichotomy does not exactly track Hunter's orthodox/progressive dichotomy. The advantage of his terminology is that it accounts for the frequent alignment of the liberal wing of many religious denominations with what are otherwise essentially secularist positions. We prefer the "traditionalist-secularist" description of the divide because we think it more accurately indicates the source or grounding of normative ordering in the two orientations, as well as the underlying sources of tension. Moreover, characterizing the secularist side as "progressive" affords the secularists what traditionalists would regard as an unfairly favorable (and certainly non-neutral) label.

While Hunter's "progressives" may be religious, they have a "strong tendency to translate the moral ideals of a religious tradition so that they conform to and legitimate the contemporary *zeitgeist*."⁵¹ Consequently, moral authority for them is

45. *Id.* at 43-46.

46. *Id.* at 42-43.

47. *Id.* at 44 (emphasis omitted).

48. *Id.*

49. *Id.*

50. *Id.* at 44-45 (emphasis omitted).

51. *Id.* at 44.

more "defined by the spirit of the modern age, a spirit of rationalism and subjectivism,"⁵² than it is by the spirit of tradition and religious authority. In fact, "truth tends to be viewed as a process, as a reality that is ever unfolding."⁵³ As a result,

[t]he traditional sources of moral authority, whether scripture, papal pronouncements, or Jewish law, no longer have an exclusive or even a predominant binding power over [the lives of progressivists]. Rather, the binding moral authority tends to reside in personal experience or scientific rationality, or either of these in conversation with particular religious or cultural traditions.⁵⁴

As progressivist and orthodox ways of interpreting the world increasingly clash, a historic cultural realignment is occurring. Protestants, Catholics, and Jews have long disagreed over matters of scriptural interpretation and religious authority. Inter- and intra-sect strife has been a feature of American cultural life from the nation's beginning. But now the lines are being fundamentally redrawn. "At the heart of the new cultural realignment are the pragmatic alliances being formed across faith traditions"⁵⁵ to oppose the cultural advance of progressivist and secularist social visions. As a result of this realignment, we are observing in America an increased politicization of the tension between pervasively secular views and traditional religious conceptions of moral authority and the good.

During the 1980s, secularists were quick to criticize the rise and political engagement of the religious right. But those same secularists were slow to recognize that the hazards of political divisiveness and possible political disintegration no longer emanated from sectarian divisions, but from the religious/secular divide itself. Before the transformation described by Hunter, secular positions and interests provided a relatively neutral common ground where citizens from divergent belief systems could come together. Now it is the non-neutrality of the secular ground that is precisely the problem. Consider what this means about the *Lemon* test—one of the critical doctrinal vehicles for articulating the meaning of religious liberty in the

52. *Id.*

53. *Id.*

54. *Id.* at 45.

55. *Id.* at 47.

United States. Under the first prong of the *Lemon* test, a state action must have a secular purpose to comply with the Non-Establishment Clause.⁵⁶ One of the deep problems of the culture wars in which we are enmeshed is that in many areas secular purposes are profoundly non-neutral,⁵⁷ and it is secular purposes that religious groups most fear. A central challenge in the current situation is that believers in our society—and we emphasize that it is not just believers in unusual or marginal groups, but the “orthodox” across the board—are feeling threatened by the course of secularization.

II. THE IMPACT OF TRADITIONALIST AND SECULARIST PERSPECTIVES ON ATTITUDES TOWARD RELIGIOUS INSTITUTIONS

A. *Different Conceptions of Religious Traditionalism*

As in all other contexts of group interaction (family, workplace, neighborhood, school, etc.), religious influence can have both brighter and darker sides. By its nature, religion entails moral authority; and moral authority may be employed for good or ill. Typically, then, positions along the traditionalist/secularist divide vary according to personal experiences with religion. For some, religion is a source of transcendence, communion, and positive character formation. For these, religion furnishes spiritual possibilities: revelation, divine authority, miracles, saints and sinners, heaven and hell, and so on. By teaching moral absolutes in a world dominated by relativism, religion serves to remind the believer that life transcends reason and the present. In a religious world view, mortal existence becomes moral existence and life assumes universal meaning. Where individuals associate in organized religious communities, places of worship become meeting places where believers can congregate, renew their faith, and regain hope. Religious communities provide the social structures within which free individuals find themselves and explore the depth of their humanity.

However, for others religious influence has been experienced as a form of oppression, or superstition. For these individuals, religion—especially traditional religion—is seen as

56. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

57. Kent Greenawalt argues, for instance, that purely rational approaches are unable by themselves to resolve many of society's deepest questions. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 98-172 (1988).

tyrannical and virtually always authoritarian. One feminist author has suggested, for instance, that religion unjustly defines male-female relationships.

The Judaic-Christian tradition has served to legitimate sexually imbalanced patriarchal society. Thus, for example, the image of Father God, spawned in the human imagination and sustained as plausible by patriarchy, has in turn rendered service to this type of society by making its mechanisms for the oppression of women appear right and fitting.⁵⁸

Thus religion creates and preserves a power structure within which women (and children) are more readily abused—physically, emotionally, and sexually. From this perspective the tyranny of religion extends beyond the mere sacralization of female oppression. With its universalist morality, religion attempts to compress all existence into pre-defined categories of right and wrong, natural and unnatural. As a result, human experimentation and diversity, individual self-actualization, and even true spiritual expression are suppressed. Hence religion is associated with a totalitarian approach to life. Further, religion tends to be perceived as a set of quaint superstitions that are neither empirically grounded nor logically defensible. As a result, religious ideas are easily manipulable by those desiring to preserve and enhance the power of religious and social hierarchies.

B. Different Experiences with Religious Traditionalism Shape Political Views of Church and State

These two opposing attitudes tend to generate different attitudes toward traditionalist and secularist perspectives of culture, society, and politics. Of course, as Geertz points out, few people completely adhere to either of these two orientations.⁵⁹ Rather, personal attitudes toward traditionalist mores and social prescriptions differ and no doubt fluctuate in complex ways depending on the nature of one's experience with traditional values. Those who experience traditional values as a positive influence are much more likely to urge some form of state protection of traditionalism. Such individuals may even

58. Mary Daly, *After the Death of God the Father: Women's Liberation and the Transformation of Christian Consciousness*, in WOMAN SPIRIT RISING: A FEMINIST READER IN RELIGION 53, 54 (Carol P. Christ & Judith Plaskow eds., 1979).

59. *Supra* note 27 and accompanying text.

support the protection of traditional values directly through state and community action. For example, traditionalists have consistently sought to protect conventional views on sexual morality through laws restricting, banning or otherwise combatting pornography,⁶⁰ nude dancing,⁶¹ homosexual conduct,⁶² abortion,⁶³ contraceptives,⁶⁴ and teenage pregnancy.⁶⁵ The extent to which such efforts to "enforce morals" are legitimate has, of course, become a central jurisprudential debate.⁶⁶ Its centrality is a sign of the depth of the tension separating traditionalists from secularists. Wherever one stands on the merits of this issue, neutrally resolving the dispute promises to be a difficult task.

Beyond protecting traditional values themselves, traditionalists often advocate legal procedures, institutions, and doctrines that protect and preserve the institutions that shelter, nourish, and perpetuate these values. The Religion Clauses, especially if construed in a manner which focuses on the importance of religious intermediary institutions,⁶⁷ can play a cru-

60. See *Miller v. California*, 413 U.S. 15 (1973) (states have a legitimate interest in prohibiting dissemination or exhibition of obscene material).

61. An ordinance banning nude dancing was recently sustained in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991). Other cases dealing with this issue include *Newport v. Iacobucci*, 479 U.S. 92 (1986); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981); *Kenosha v. Bruno*, 412 U.S. 507 (1973).

62. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

63. Of course, such laws were invalidated by *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. See, e.g., *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990) (*Akron II*); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (*Akron I*); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Maher v. Roe*, 432 U.S. 464 (1977). The Supreme Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), reaffirmed the core holding of *Roe* and has left traditionalists few legislative options, except perhaps in areas where state action is designed to persuade rather than coerce women to carry pregnancies to term.

64. The Supreme Court struck down regulation of contraceptive use by married couples in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and extended this holding to distribution to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

65. See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (sustaining the Adolescent Family Life Act of 1982 against facial challenge).

66. See, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); JOEL FEINBERG, *HARM TO OTHERS* (1984) (especially 65-70); JOEL FEINBERG, *HARM TO SELF* (1986); JOEL FEINBERG, *HARMLESS WRONGDOING* (1990) (especially 3-38, 124-75); JOEL FEINBERG, *OFFENSE TO OTHERS* (1985); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

67. The structural approach advocated by Mary Ann Glendon and Raul Yanes suggests an approach to religion clause jurisprudence that is particularly sensitive to the importance of religious liberty as a protector of mediating institutions. See

cial role in protecting the fragile meaning-generating structures in the social environment. For instance, in *Wisconsin v. Yoder*⁶⁸ the Supreme Court supported the cultural and religious traditions of the Old Order Amish when it held that the Amish were entitled to an exemption from certain state compulsory schooling requirements under the Free Exercise Clause of the First Amendment. On the other hand, as all too many of the Supreme Court's Native American cases demonstrate, failure to protect such communities can profoundly disrupt a way of life.⁶⁹

In contrast with those who have had positive experiences with traditional values, individuals who have experienced religious traditionalism as a negative and oppressive influence are more likely to urge control of religious organizations. Some with attitudes that trace back to the secular Enlightenment exhibit open hostility toward organized religion, viewing it as a pillar of the *ancien régime* and its traditionalist heirs or, at a minimum, as a source of disintegration and separatism in contemporary society.⁷⁰ Their attacks on religion often focus on the despotic role they perceive religion to have played in preventing people from enjoying their natural rights and using their rational minds. Such attitudes are apparent today in anxieties about Islamic and Christian fundamentalism and other marginal groups such as the Unification Church, Scientology, and Krishna Consciousness. This anxiety often results in pressure to invoke state mechanisms to hassle or restrict the activities of such groups, or to urge state non-intervention in what is euphemistically referred to as "deprogramming."⁷¹

Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 534-50 (1991).

68. 406 U.S. 205 (1972).

69. See, e.g., *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439 (1988) (sustaining approval of construction of a government road through land held sacred by Native American community, despite an express finding that this would destroy the community's way of life).

70. See generally JOHN DEWEY, *A COMMON FAITH* (1934).

71. For the most part, such pressure has not ultimately been successful, but deprogramming activities have been a major source of travail for some smaller religious groups. See, e.g., *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982), cert. denied, 463 U.S. 1229 (1983); *Rankin v. Howard*, 633 F.2d 844 (9th Cir.), cert. denied, 451 U.S. 939 (1980); *Eilers v. Coy*, 582 F. Supp. 1093 (D. Minn. 1984). For an attempted justification of deprogramming efforts, see Richard Delgado, *When Religious Exercise Is Not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief*, 37 VAND. L. REV. 1071 (1984).

*C. Differing Internal Orientations of Religious Traditions
Toward Church/State Relations*

In addition to one's experience with religion in general, the nature of a particular religious tradition's historical experiences and its substantive beliefs can also affect its orientation toward the individualist/communitarian divide in diverse ways. Religious belief does not necessarily translate into a communitarian orientation. Roger Williams, for example, was deeply religious but had radically individualistic beliefs that emerged from his theological convictions about the tendency of government to corrupt religion.⁷² Other religious views have led to much more communitarian outlooks. Catholic social theory, for example, often has a more communitarian cast.⁷³ Mormonism combines a communitarian orientation born in the crucible of the 19th century⁷⁴ with deep theological beliefs in human freedom, especially freedom of conscience.⁷⁵ Such blending of diverse strands undercuts simplistic or stereotypical analysis. In Mormonism, for example, the hierarchical nature of priesthood authority is tempered by the belief that the divine authority is lost if it is exercised with any degree of unjust domination or coercion.⁷⁶ This permits the needs of the religious community for order to be squared with protecting the sanctity of the individual.

In like manner, there are varying secular perspectives towards religious traditionalism, ranging from open hostility to deep appreciation. From at least the time of the Enlightenment, some secularists have been deeply suspicious of religion—especially organized religion. For some, religious organizations are simply one more “megastructure” in society, from which they feel profoundly alienated. On the other hand, some

72. MARK D. HOWE, *THE GARDEN AND THE WILDERNESS* 6 (1965).

73. See, e.g., A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 220 (1985).

74. For thoughtful accounts of the tensions between individualism and communitarianism in Mormon culture, see LEONARD J. ARRINGTON ET AL., *BUILDING THE CITY OF GOD: COMMUNITY AND COOPERATION AMONG THE MORMONS* 15-62 (1992); EDWIN B. FIRMAGE & R. COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, at 48-58 (1988); JAN SHIPPS, *MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION* 67-86 (1985).

75. *THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* § 134 (1981).

76. *Id.* § 121:41-46.

secularists are deeply conscious of the kinds of contributions that religion makes to society, believing religion deserves respect as one of many possible lifestyles that individuals in a free society might select. John Rawls and Kent Greenawalt are leading figures in this category.⁷⁷

*D. The Non-neutrality of Neutrality:
Privileging the Secular Voice*

For reasons that go beyond the scope of this paper, it appears that many in academia, the media, and the legal community view religion as oppressive or largely irrelevant to their personal lives.⁷⁸ As a result, a pervasively secular voice dominates these very influential sectors of American society and operates to suppress the voices of religious traditionalism in subtle but powerful ways. This leads to a privileging of secular outlooks among intellectual elites that discounts other, faith-oriented ways of experiencing the world. The practical consequence is that elites often overlook the needs of religious institutions or treat them with insufficient deference and respect. Even well-intended secularists often fail to understand the full ramifications of some policies they suggest. Yet if, as we contend, it is precisely by transforming the secular—the mundane and the everyday—that religious institutions make many of their most central contributions, approaches to religious liberty that insist on privileging secular outlooks and bracketing out the influence of religion's transformative power necessarily fail to protect what is perhaps the most central dimension of religiosity.

One particularly prominent form that secularist attitudes toward religion take is an insistence that all participants in public discourse use religiously-neutral vocabulary.⁷⁹ The idea is that religion is inherently private and subjective, and cannot be "understood" in the public market place of ideas. Public

77. GREENAWALT, *supra* note 57; RAWLS, *supra* note 6; RAWLS, *supra* note 35.

78. GREENAWALT, *supra* note 57, at 6.

79. See BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 359 (1984); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 3-30 (1980) [hereinafter ACKERMAN, JUSTICE]. For a view that recognizes the importance of publicly-accessible premises of argumentation, yet affords more respect to religious positions, see GREENAWALT, *supra* note 57, at 49-84; Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990); Kent Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 B.Y.U. L. REV. 245.

discourse needs to be "neutral" and "rational," and accordingly, religious speech should stay out of the public square. Many modern liberals contend that since religious experience is not verifiable through objective means, it has no place in the objectivist realm of public life.⁸⁰ The result of this approach is the systematic privileging of secularism over religious traditionalism in politics. Religion is thereby marginalized and rendered impotent to affect *on its own terms* the public policy of the nation. This does not imply that religious viewpoints cannot sneak into the public debate disguised in secular garb. They can and often do. But in leaving behind the language of faith and tradition to don secularist attire, the true nature, appeal and strength of religious conceptions are necessarily obscured. This robs religious convictions of their persuasive force, enfeebling them in the struggle against the secularist hegemony in the public square. With traditional and religious institutions unable to defend their validity adequately under the secularist terms of the debate, secular government has progressively narrowed the range of permitted religious contributions to public life by shifting the line between public and private spheres so as to enlarge the former at the expense of the latter. The result in America has been that the "wall of separation between church and state" has sometimes become a wall of exclusion that continuously pushes religion into social and political irrelevance. Thus, armed with the rhetoric of neutrality, those who are not inclined toward religious traditionalism have excluded from the public square many of the cultural voices with which they disagree.⁸¹

The postmodernist critique of the metaphysical foundations of liberalism and the failure of what Alasdair MacIntyre has called "the Enlightenment project"⁸² of working out the metaphysical and epistemological foundations of moral and political life have undermined the plausibility of the idea of a neutral,

80. ACKERMAN, *JUSTICE*, *supra* note 79, at 3-30. Even liberals like Kent Greenawalt who are sympathetic to religious sensibilities would only allow religious convictions into the public arena under narrow conditions. *See, e.g.*, GREENAWALT, *supra* note 57, at 215-43.

81. Peter Berger suggests that what we may be witnessing in this process is the manipulation of constitutional symbols to achieve the cultural dominance of the highly secularized "knowledge class." Peter Berger, *From the Crisis of Religion to the Crisis of Secularity*, in *RELIGION AND AMERICA: SPIRITUALITY IN A SECULAR AGE* 14, 19 (Mary Douglas & Steven Tipton eds., 1983).

82. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 36-78 (2d ed. 1984).

secular discourse that can provide a universally shared foundation upon which social and political institutions can be built.⁸³ Post-modern analysis exposes theoretical neutrality and objectivity as myths. In the absence of any absolute standard of neutrality, the secular order can claim no privileged position in the process of community building. Both the secular and the religious worldviews are equally non-neutral. Classic liberalism, then, is merely one way of relating to the world. Religious traditionalism emerges as another that can make equal claims to participate in political discourse. In a parallel vein, post-modern critique suggests that the public/private distinction lacks objective grounding. Thus the placement of the line between public and private, a divide which dramatically affects the place of religion in America, is not a neutral boundary reflecting objective social realities. Secularist pretensions have had a pervasive impact on Supreme Court adjudication in the religion clause area, resulting in what Professor Gedicks has called "[t]he privileging of secular knowledge in public life as objective and the marginalizing of religious belief in private life as subjective."⁸⁴

Even more important, the critique of modernist metaphysics discredits the view that belief and fact can be adequately distinguished in the molding of public policy. Thus the perception that the state can coherently exclude the religious voice from public discourse is a mirage. So the postmodern critique alters the fundamental questions in the debate over religion and politics. Instead of asking (incoherently) how or whether there should be a role for religion in public life, the question becomes how ought we to relate with people in the public arena who are religious? Or, how are we, religious and nonreligious citizens alike, to *be* together? What are our ethical and political obligations to each other, given who we are in this time and place?

Unfortunately, such questions are asked all too infrequently. Instead, relying on a defunct metaphysics, our media, academic, political and legal elites overtly privilege the secular world view, while subtly (or not so subtly) disparaging traditional religious perspectives. The most obvious example is the

83. See generally MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 57-76 (1988).

84. Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 681 (1992).

Supreme Court's rejection of a Louisiana statute requiring public school teachers to teach creation science whenever evolution was taught.⁸⁵ The Court chose simply to ignore the secular purposes advanced by the state in defense of the law, treating them as a ruse concocted by religious fundamentalists to advance their beliefs. Whatever the ultimate merits of the creation science debate may turn out to be, its advocates at least deserved credit for gathering empirical data that raise questions about evolutionary dogmas, and their views deserved more respect than they were given when they were summarily rejected by the Court. Whatever else one may think of the controversy, the Court's decision can scarcely be said to be neutral as between world views. In a finite world, no school system can be expected to teach all possible world views, and in a pluralistic world, state endorsement of sectarian doctrine is inappropriate. It does not follow that secularist outlooks deserve absolute hegemony.

The creation science case is merely one of many contexts in which secular interests receive favored treatment. We recognize that in many situations what is involved is a legitimate effort on the part of the state to avoid problems that inevitably arise when affirmative pecuniary aid to religious or quasi-religious institutions is involved—most notably the additional complexities for assuring equal treatment and for avoiding coerced support of particular religious orientations by non-adherents. We are not calling here for the unravelling of the Supreme Court's decisions proscribing such aid,⁸⁶ though we recognize that at least some of the twists and turns of this jurisprudence seem unnecessarily hostile to religion. In any event, greater sensitivity to religious concerns could be displayed.

This systematic privileging of secular convictions in our courts and, more generally, in the public square causes religious individuals and groups to feel marginalized and excluded. Aware that secularist perspectives can impinge upon their ways of life, and that there is no neutral reason why such

85. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

86. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Wolman v. Walter*, 433 U.S. 229 (1977); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

views should always prevail in public policy at the expense of more religious worldviews, religious people are beginning to resist the power of secularism in the political arena. The profound cultural realignment along orthodox and progressive (or traditionalist and secularist) lines discussed above⁸⁷ is a result, in part, of the state favoring almost exclusively one side of the tension between secular and more traditional conceptions of life. As religious groups become increasingly suspicious of the rhetoric of secular neutrality, such favoritism only serves to heighten the traditionalist/secularist tension.

III. THE BETRAYAL OF FREE EXERCISE AND AMBIVALENCE ABOUT ACCOMMODATION: THE *SMITH* AND *WEISMAN* DECISIONS

Recent developments in the United States Supreme Court's treatment of religious liberty issues and their impact on religious intermediary associations must be examined against the background of the overlapping individual/community and traditionalist/secularist dialectics that we have described thus far. The focus in this section will be on two of the Court's leading Religion Clause cases of the 1990s—one dealing with "free exercise" of religion and the other dealing with the prohibition of laws "respecting an establishment of religion."⁸⁸ The free exercise case, *Employment Division v. Smith*,⁸⁹ was particularly harmful, since it effectively gutted the religious freedom protections afforded individuals in the United States. At a time when the United States has assumed special prominence in international affairs, the case is detrimental not only at home, but in the signal it sends abroad. It represents a fundamentally misguided conception of religious liberty that recurs all too frequently in practice both within the United States and even more frequently elsewhere. As this Article goes to press, it is anticipated that the *Smith* debacle will be corrected within a few weeks by passage of the federal Religious Freedom Restoration Act ("RFRA").⁹⁰ For good or ill, this means that future

87. See *supra* notes 44-55 and accompanying text.

88. The First Amendment Religion Clause provides, in its entirety, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

89. 494 U.S. 872 (1990).

90. For analysis of this Act and its significance, see Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, and Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U.

free exercise claims will be decided by applying statutory rather than constitutional law in the United States. While it is hoped that RFRA as a functional matter will restore the protections previously afforded to religious liberty by the First Amendment, there is some risk that prevailing on a statutory RFRA claim will not have the same symbolic significance that vindication of a constitutional claim has long carried in American culture. Moreover, as with any statute, there is a practical risk that particular protections may be eroded by subsequent legislative enactments.

The Non-Establishment Clause case, *Lee v. Weisman*,⁹¹ is less dramatic, but reflects uncertainties about how state and religious activity should be allowed to interact in an open society.

A. *Free Exercise Betrayed: Employment Division v. Smith*

The Religion Clause of the First Amendment is not merely a terse formulation of normative expectations in the United States with respect to religious liberty. It embodies one of the deepest principles of liberty for all human beings. Indeed, religious liberty is not only a "first freedom," but also the oldest of the internationally recognized human rights. It was afforded international protection at least as early as 1648 in the Peace of Westphalia.⁹² Yet it is a right that is constantly at risk in every society because of intense countervailing social and political pressures and because of the inconvenience to government officials of accommodating religious differences. In part because of the ongoing historical experience with these pressures, the right to religious freedom has undergone substantial development spanning centuries. The central tragedy of the *Smith* decision is its betrayal not only of what "free exercise" originally meant to the American framers,⁹³ but of all that it has come to mean, both in the United States and elsewhere, in the two centuries that have followed.

In order to perceive the magnitude of the betrayal, it is necessary to analyze the *Smith* case against the longer evolu-

L. REV. 73.

91. 112 S. Ct. 2649 (1992).

92. Treaty of Westphalia, October 24, 1648, in 1 MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967, at 7 (Fred L. Israel ed., 1967).

93. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

tion of the right to religious freedom. In *Smith*, two Native Americans, Alfred Smith and Galen Black, were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church.⁹⁴ When they applied for unemployment benefits their applications were denied by the State of Oregon under a state law disqualifying employees "discharged for work-related 'misconduct.'"⁹⁵ The case arrived at the Supreme Court on appeal from an Oregon Supreme Court decision holding that the sacramental use of peyote was protected by the Free Exercise Clause of the First Amendment and that, therefore, Black and Smith were entitled to payment of unemployment benefits.⁹⁶

In a surprising decision that abandoned decades of precedent, the *Smith* Court held that there is no free exercise exemption from generally applicable laws that unintentionally penalize religious worship.⁹⁷ Put another way, generally applicable neutral laws were held to override religious liberty. The Court jettisoned the doctrine, applied at least since 1972,⁹⁸ that permits burdens on religious liberty only if supported by a compelling state interest that could be achieved in no less restrictive way.⁹⁹

Part of the tragedy of the *Smith* decision was that it was so unnecessary. The issue of the continued vitality of the compelling state interest test had not been briefed (because all parties had assumed it was the applicable test). There was no pressing reason that this issue had to be reached. Moreover,

94. 494 U.S. 872, 874 (1990). There have never been any worries about either the bona fides of the Native American Church or about whether the "cloak of religion" was being invoked to shield use of a recreational drug. The Native American Church is ancient and clearly uses peyote for sacramental purposes. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 7. Peyote buds are "tough, bitter, difficult to chew, and frequently cause nausea or vomiting" and are thus an unlikely subject of recreational use. *Id.* (citing EDWARD F. ANDERSON, PEYOTE: THE DIVINE CACTUS 161 (1980) & JAMES S. SLOTKIN, THE PEYOTE WAY 98 (1956)).

95. 494 U.S. at 874.

96. *Smith v. Employment Div.*, 721 P.2d 445, 449-50 (Or. 1986).

97. *Smith*, 494 U.S. at 878-79. "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 decline to do so now." *Id.* at 882. See also Gedicks, *supra* note 84, at 687-93 (criticizing the *Smith* decision).

98. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

99. *Id.* at 214-15.

the Court could have concluded, as Justice O'Connor did in her concurrence, that Oregon's interests in enforcing its drug laws were sufficiently compelling to override the religious liberty claims asserted in the case. By taking this approach, the Court could have reached the same functional result without dismantling its traditional free exercise jurisprudence. But the majority eschewed this less drastic approach.

The opinion of the Court, authored by Justice Scalia, was no doubt motivated at least in part by Scalia's more general tendency to believe that courts should be maximally deferential to legislative enactments.¹⁰⁰ Beyond that, the Court justified its decision first on the grounds that granting exemptions to generally applicable laws on account of religious convictions was flirting with social chaos.

Any society adopting such a system 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.¹⁰¹

In one of the few bright spots in the decision, the Court also reasoned that involving judges in the determination of whether a religious practice was central to an individual's religion and therefore deserving of a religious exemption from a general law would enmesh courts in an impermissible inquiry into the centrality of particular beliefs or practices to a faith.¹⁰² Finally, the Court sought to distinguish past cases granting free exercise exemptions to certain generally applicable laws by suggesting that all such cases involved "hybrid claims" in which a free exercise claim was conjoined with some other constitutional

100. See Stephen Wizner, *Judging in the Good Society: A Comment on the Jurisprudence of Justice Scalia*, 12 CARDOZO L. REV. 1831, 1840-41 (1991); see also George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (analyzing the philosophical and methodological hallmarks of Justice Scalia's jurisprudence).

101. *Smith*, 494 U.S. at 888 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

102. *Id.* at 886-87.

protection (such as free speech) in order to give the free exercise claim sufficient strength to prevail.¹⁰³

The *Smith* decision is problematic for a variety of reasons that have been catalogued at length in the literature and need not be recapitulated here.¹⁰⁴ The major problem is that any neutral, generally applicable law, however insignificant and ill-conceived, can trump religious liberty. This places smaller religious groups that lack significant political influence at constant risk of having their religious freedom rights violated by an intolerant or inadvertently insensitive majority. Moreover, individuals or groups whose religious liberty is burdened by a law, administrative regulation, or other state action no longer have any leverage (in the form of a threatened law suit) to induce government bureaucrats to accommodate religious practices. In general, in the modern bureaucratic state, where government regulation increasingly pervades all social space, there is the danger that meaningful religious liberty will be buried, whether deliberately or not, under a mass of administrative rules and guidelines and often sacrificed to lower order bureaucratic values such as administrative efficiency.

Another profoundly disturbing result of *Smith* is the relegation of religious liberty to second class status in the hierarchy of rights. No longer able to stand on its own feet, the right to free exercise of religion is conceived under *Smith* as a hobbled right that must be bolstered with rights of expression or association (or penumbral family rights that Scalia would attack in other contexts) in order to successfully challenge a general law.¹⁰⁵

103. *Id.* at 876-82.

104. The approach followed by the Court does not comport with the Free Exercise Clause as probably understood by the constitutional framers. See generally McConnell, *supra* note 93; Michael W. McConnell, "God is Dead and We Have Killed Him!": *Freedom of Religion in the Post-modern Age*, 1993 B.Y.U. L. REV. 163, 166-72. For general criticisms of *Smith*, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). Even the staunchest supporters of the decision recognize that it was poorly reasoned. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991).

105. To date, other courts have not been able or inclined to derive much mileage from hybrid rights claims. See Shawn Gunnarson, Note, *No Constitutional Shelter: The Ninth Circuit's Reading of the Hybrid Claims Doctrine in American Friends Service Committee Corp. v. Thornburgh*, 1993 B.Y.U. J. PUB. L. 413. In the context of the *Smith* decision, the "hybrid rights" theory appears to be not so much a genuine doctrine as a highly artificial construct employed to avoid the need to ex-

Problems such as the foregoing constitute the primary betrayal in *Smith*—the undercutting of rights previously protected. Justice Scalia responds to this type of criticism in part by claiming that there have in fact been relatively few Supreme Court cases that have sustained free exercise claims. This argument fails to take into account the number of free exercise claims that have been vindicated in lower courts and, even more significantly, the incalculable number of instances in which lower level officials have been deterred from encroaching on religious liberty so long as the compelling state interest test could be invoked. Viewed in this light, the magnitude of the “primary” betrayal is immense.

Beyond this, there is a second-level sense in which the decision betrays decades and indeed generations of progress in the field of religious liberty. A full account of this development is beyond the scope of this Article; a brief overview will need to suffice.

The starting point for our purposes is the history of religious liberty in the period following the Reformation. The applicable principle then was summed up in the phrase *cuius regio, eius religio*, which was enunciated in connection with the Peace of Augsburg in 1555.¹⁰⁶ Under this principle, the secular prince was given the right to dictate the religion of his realm to assure a religiously homogeneous population. Dissenters could move to a friendlier domain or possibly practice the “freedom of the hearth” (i.e., the freedom to believe what they would at home so long as the belief was not manifested outside the confines of the home). Beyond this, they had little other recourse. In short, the secular ruler or the state under this regime had virtually unlimited discretion in imposing limitations on religious liberty and was free to impose burdens or outright prohibitions on non-preferred religions.

pressly overrule *Wisconsin v. Yoder*. Justice Scalia may have been driven to this by worries that he might lose the vote of one or more of his colleagues in support of his opinion for the Court in *Smith* could not be squared with *Yoder*. Construed with sufficient breadth, the hybrid rights doctrine could undo much of the damage inflicted by the *Smith* decision. Because religious liberty claims almost always overlap with other constitutional claims—freedom of speech, press, assembly, equal protection, etc.—hybrid claims can be asserted in most contexts in which “pure” religious liberty claims are available. It is still too early to tell whether this avenue holds much promise. The expected passage of the Religious Freedom Restoration Act may obviate the need for the Court to address this issue.

106. 1 HAJO HOLBORN, A HISTORY OF MODERN GERMANY: THE REFORMATION 243 (1976).

As compared with such absolute discretion, the requirement that emerged by the late 18th century that only generally applicable limitations could be imposed marked a considerable advance. The basic notion was that religious liberty would be recognized within the limits established by law, with the understanding that only neutral laws of general applicability would count as appropriate limiting laws. In a famous formulation that is still recognized in German constitutional law, "Every religious body shall regulate and administer its affairs independently *within the limits of the law valid for all*."¹⁰⁷ The state was still free to impose any limitations on churches that it liked, but under this *rule of law constraint*, it could only do so if it was willing to impose the limitation generally on all religious groups, including those that were dominant or otherwise favored. Early versions of religious liberty, such as those enunciated toward the end of the 18th century, tended to assume that this rule of law constraint on religious liberty limitations would be adequate to safeguard religious liberty concerns.

The rule of law constraint is still evident in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁰⁸ with its insistence that "Freedom to manifest one's religion or beliefs shall be subject *only to such limitations as are prescribed by law*."¹⁰⁹ The European Court of Human Rights has held that this phrase "does not merely refer back to domestic law but also relates to the quality of law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention."¹¹⁰ Arguably, any law that specifically targets or imposes special burdens on a particular religious group, or that is retroactive or unduly vague, would run afoul of this requirement.¹¹¹

Essentially, what *Smith* holds is that religious liberty under the First Amendment is to be equated with this rule of law constraint. Thus, *Smith* is a throwback to the days of enlightened despotism. There can be no doubt that effective im-

107. GRUNDGESETZ [Constitution] [GG] art. 140 (F.R.G.) (incorporating art. 137(3) of the Weimar Constitution) (emphasis added). The italicized phrase dates back to the 18th century.

108. European Convention, *supra* note 11, art. 9, para. 2, 213 U.N.T.S. 222.

109. *Id.* (emphasis added).

110. Malone Case, 82 Eur. Ct. H.R. (ser. A.) at 32 (1984).

111. For a now classic summary of the various ways legislation may run afoul of rule of law constraints, see LON L. FULLER, *THE MORALITY OF LAW* 33-41 (rev. ed. 1969).

sition of this constraint marked significant progress historically and that it can continue to provide significant safeguards today. But the years since the end of the 18th century have taught that additional constraints on the permissible limitations of religious liberty are vital if a vibrant system of religious freedom is to emerge.

Since the end of the 18th century, as societies began to have more experience with genuine regimes of religious liberty, sensitivity grew concerning recurrent problem areas. The requirement found in Article 9 which permits only those limitations necessary for "interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others"¹¹² summarizes these problem areas. A variety of significant cases fall into these categories. Without evaluating the merits of such cases, several situations come to mind: the legality of requiring immunizations,¹¹³ the permissibility of objecting to blood transfusions,¹¹⁴ the 19th century Mormon polygamy cases,¹¹⁵ contemporary problems with "drug" churches,¹¹⁶ human¹¹⁷ or animal sacrifice cases,¹¹⁸ to name a few. Differing societies may draw differing conclusions about exactly where the borderline of religious liberty should be drawn, but we are aware of no society that fails to recognize the need for some limitation on religious liberty in at least some of the foregoing areas.

At the same time, it did not take long to realize that the list of permissible grounds for encroachment on religious liberty summarized in Article 9 was so broad that it could justify almost as much intervention in religious liberty as the *cuius regio* principle. And while the rule of law constraint provided some assurance that governmental power would not be abused,

112. European Convention, *supra* note 11, art. 9.

113. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

114. *See, e.g., In re President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

115. *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878); *see also Cleveland v. United States*, 329 U.S. 14 (1946) (Mormon split-off group).

116. *See, e.g., United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968), *cert. denied* 386 U.S. 917 (1967); *North Carolina v. Bullard*, 148 S.E.2d 565 (N.C. 1966); *cf. People v. Woody*, 394 P.2d 813 (Cal. 1964) (peyote use in long-established Native American Church).

117. Stephen L. Pepper, *The Case of the Human Sacrifice*, 23 ARIZ. L. REV. 897 (1981).

118. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217 (1993).

history has demonstrated that this constraint is not enough to assure meaningful religious liberty. Many of the major religious persecutions of the last two centuries have been carried out under the guise of laws that are at least formally general and neutral. All that is necessary to encroach on religious liberty while remaining faithful to the rule of law constraint is to pass laws that prohibit everyone in the population from engaging in conduct that is of concern only to a particular religious group. Note that this often happens not because of intentional animus against a particular group, but because those passing the law are unaware of its adverse impact on a lesser-known religious group.

Because of this deficiency in the rule of law constraint, most advanced systems have further restricted the state's ability to limit religious liberty. As phrased in Article 9, this is the requirement that freedom to manifest religion shall be subject only "to such limitations as . . . are necessary in a democratic society in the interests of public safety, [etc.]"¹¹⁹ The Strasbourg Court has construed this to mean that the interference with a right must be motivated by a "pressing social need" and must be "proportionate to the legitimate aim pursued."¹²⁰ While contracting states enjoy a certain "margin of appreciation" in determining how this applies in their own national setting,¹²¹ interference with a right as fundamental as freedom of religion should be no greater than necessary and should utilize the least intrusive means possible. This corresponds to the compelling state interest test under United States law prior to *Smith* which, at least in theory, was designed to protect religious communities from the state, thus helping to ensure the viability of such communities. For instance, in direct contrast to the United States Supreme Court's refusal in *Reynolds v. United States* to exempt Mormons from bigamy laws on the basis of religious belief,¹²² the Court in *Wisconsin v. Yoder*¹²³ granted the Old Order Amish a constitutional exemption from certain compulsory schooling laws. Even though the Court found that the state had a high interest in providing for the education of children, it nevertheless held that the Free

119. European Convention, *supra* note 11, art. 9.

120. Case of Silver and Others, 61 Eur. Ct. H.R. (ser. A) at 38 (1983).

121. *Id.* at 37.

122. 98 U.S. 145, 166-67 (1878).

123. 406 U.S. 205 (1972).

Exercise Clause protected the Amish people's desire to preserve the integrity of their traditional religious culture.¹²⁴

If religious liberty is to have genuine practical meaning, this type of heightened requirement for any legislation (or other state action) that encroaches on religious liberty is vital. Failure to insist on this type of constitutional requirement implies that the majority, subject to the rule of law constraint, can override the religious liberty claims of minorities virtually at will. It is simply too late in world history to be content with religious liberty protections that allow that kind of infraction. The approach pursued by the *Smith* Court fails to grasp what is most central to the tradition of religious liberty and fundamentally betrays the content, the historic progress, and accepted international standards with respect to one of the supreme values of human life.

B. The Exclusionary Wall of Separation: Lee v. Weisman

*Lee v. Weisman*¹²⁵ was a much anticipated decision that some scholars thought might alter the Supreme Court's approach to Establishment Clause jurisprudence. While *Weisman* was under consideration, Professor Mary Ann Glendon and Raul F. Yanes that "[s]ix of the present Justices [were] on record as dissatisfied with the Court's attempt in *Lemon v. Kurtzman* to place mortar in the crumbling wall of separation [between church and state]."¹²⁶ Glendon and Yanes hoped that the Court would use this opportunity to depart from its "excessively separationist" interpretation of the Establishment Clause and move toward a more holistic approach to religious liberty.¹²⁷ On these grounds, however, *Weisman* turned out to be a disappointment.

The Supreme Court's decision in *Lemon v. Kurtzman* created a tripartite test to determine if a state interaction with religion violates the Establishment Clause. To satisfy the Establishment Clause, *Lemon* requires that a government practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.¹²⁸ In

124. *Id.* at 234-36.

125. 112 S. Ct. 2649 (1992).

126. Glendon & Yanes, *supra*, note 67, at 547-58; see *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing the current test for Establishment Clause questions).

127. Glendon & Yanes, *supra* note 67, at 547-48.

128. *Lemon*, 403 U.S. at 612-13; see Committee for Pub. Educ. & Religious Lib-

Lemon itself the Court held that the two statutory schemes before the Court violated the entanglement prong of its newly articulated test. As a result, the state could not reimburse nonpublic elementary and secondary schools for the cost of teachers' salaries, textbooks, and instructional materials in certain secular subjects. Nor could it directly pay teachers of secular subjects in nonpublic elementary schools with a supplement of fifteen percent of their annual income. Chief Justice Burger wrote that because public funds would have to be monitored to ensure that they were in fact being used solely for secular purposes, both programs would result in an impermissible entanglement of secular government with religion and therefore were unconstitutional under the Establishment Clause.¹²⁹

While the application of the *Lemon* test yields results that reflect sound principles of church-state separation in many cases, wooden application of the test has too often resulted in insensitive refusal to make appropriate adjustments and accommodations of religion and its role in American life.¹³⁰ Thus, *Lemon* has been invoked to strike down a federal program that for years had benefited educationally deprived students from low income families because it entailed sending publicly employed teachers into parochial schools.¹³¹ It has led to arcane discussions over how much secularity is necessary to sanitize the religiosity of Christmas displays on public lands.¹³² Increasingly, decisions which have pushed the *Lemon* test to secularist extremes have resulted in subtle and not so subtle privileging of secularist outlooks and the marginalization of religion in society. All too often, the Supreme Court and lower courts have weighed in on the secularist side of the innate tension between religious traditionalism and secularism.

Many concerned with the excessively secularist tilt resulting from rigid application of the *Lemon* test had hoped that the

erty v. Nyquist, 413 U.S. 756, 773 (1973).

129. *Lemon*, 403 U.S. at 619, 621-22, 625; see also Glendon & Yanes, *supra* note 67, at 502-03 (briefly discussing *Lemon*).

130. See generally Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

131. *Aguilar v. Felton*, 473 U.S. 402 (1985); see *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

132. See, e.g., *County of Allegheny v. A.C.L.U.*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Supreme Court in *Lee v. Weisman* would be more sensitive to the need for a religious voice in our culture.¹³³ But in the end, the Court proved reluctant to depart from the encrusted precedent of *Lemon*.

Weisman involved a school girl and her father's challenge to the constitutionality of graduation prayer in public schools.¹³⁴ Deborah Weisman and her father sought, under the Establishment Clause of the First Amendment, to permanently enjoin the public middle and high schools in Providence, Rhode Island from inviting members of the local clergy to give invocations and benedictions at those schools' graduation ceremonies.¹³⁵ It was the custom of the Providence School District to give the invited local clergy a pamphlet before graduation entitled "Guidelines for Civic Occasions," which was prepared by the National Conference of Christians and Jews.¹³⁶ "The Guidelines recommend[ed] that public prayers at nonsectarian civic ceremonies be composed with 'inclusiveness and sensitivity'"¹³⁷ The school principal provided Rabbi Gutterman with the pamphlet prior to the graduation and advised him that the prayers should be nonsectarian.¹³⁸

133. Brief for the United States as Amicus Curiae at 8, 12-13, 15-16, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (No. 90-1014).

134. 112 S. Ct. 2649 (1992).

135. *Id.* at 2652-53. In their efforts, the Weismans, both Jewish, opposed the nonsectarian prayers of a Jewish Rabbi, Leslie Gutterman. The prayers were remarkable not for their eloquent affirmation of faith, but for their conspicuous secularity, even sterility. The invocation went as follows:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

Id. at 2652-53. Significant social division or sectarian strife is unlikely to be provoked by such pronouncements.

136. *Id.* at 2652.

137. *Id.*

138. *Id.*

The Court framed the issue in *Weisman* as "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment."¹³⁹ With a narrow five-Justice majority, the Court held that nonsectarian prayer at high school graduations (in circumstances where "young graduates who object are induced to conform") is unconstitutional.¹⁴⁰ While this outcome was disappointing to those who had hoped for a rethinking of the *Lemon* test and for a more accommodationist approach, it is difficult to know what to make of this case. After all, at least five Justices, including Justice Kennedy, who authored the *Weisman* opinion, had repeatedly suggested that the *Lemon* test was ripe for reconsideration.¹⁴¹ Nonetheless, Justice Kennedy wrote an opinion that both explicitly declined to reconsider *Lemon* and, for the most part, ignored it. The opinion instead focuses on coercion, asking whether the government had coerced "anyone to support or participate in religion or its exercise."¹⁴² What exactly this portends for Establishment Clause jurisprudence remains unclear.¹⁴³

139. *Id.*

140. *Id.* at 2661.

141. *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring in judgment) (listing instances when members of the Court have suggested revisiting the *Lemon* test).

142. *Weisman*, 112 S. Ct. at 2655.

143. At first blush, *Weisman* appeared to preclude any form of graduation prayer in public high schools. The Fifth Circuit, however, has subsequently sustained a school district resolution permitting prayer at high school graduation exercises where discretion whether to include prayer is left to the choice of the graduating class and the prayer itself is given by a student volunteer. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). In a closely reasoned opinion, the court held that *Weisman* was distinguishable. The Court concluded that nothing in *Weisman* undercut a finding that allowing prayer furthers a secular purpose of solemnizing graduation proceedings. *Id.* at 966. Further, while the reasoning in *Weisman* eroded some of the grounds for thinking that graduation prayer had a primary effect of advancing religion, the court concluded that on balance the primary effect of the school district resolution at issue remained secular. *Id.* at 967. Particularly since students rather than clergy would offer prayers permitted in *Jones*, the court saw no basis for a finding of excessive entanglement. *Id.* at 967-68. Further, assuming that the resolution would be implemented in a non-discriminatory manner, and recognizing that the resolution did not make prayers mandatory, the court found no endorsement of religion. *Id.* at 968-69. Finally, the court distinguished the coercive impact of prayers permitted by the resolution, because they were not directed by school officials, they were both non-sectarian and voluntary, and they reflected the will of peers, "who are less able to coerce participation than an authority figure from the state or clergy." *Id.* at 969-71. Similarly, in *Harris v. Joint Sch. Dist. No. 241*, 821 F.

It remains quite clear, however, that the impact of the Court's decisions is to foster an atmosphere that is pervasively secular and subtly hostile toward traditional, religious outlooks. Moreover, a majority of the Court still presses the notion of a neutrally-situated "wall of separation between church and state" long after such rhetoric has become philosophically incoherent.¹⁴⁴ The public/private distinction implicit in the Court's delineation of the boundaries of state and church continues to wall religious influence out of social significance. The Court's position in this area is troubling. Its statement that "[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere"¹⁴⁵ goes to the heart of the Court's troubles. Such an assertion might make sense in two situations: first, where we could neutrally divine with some degree of accuracy the "natural" line that separates "public" from the "private"; or second, where government's activities are so limited that excluding its involvement with religion is, even if not neutral, irrelevant. (For example, if all government did were to set traffic rules, the exclusion of all religious influence from these decisions would not be very controversial; few would even care to object.) But neither of these two situations exists. Justice Kennedy and his colleagues on the Court cannot define a private or public sphere with any degree of ideological coherence; and we are far from the minimal state where church/state questions would be largely irrelevant. The result is a perverse paradox: in its very effort to guard against "divisive sectarianism" in the public square, and to achieve maximal "neutrality,"

Supp. 638 (D. Idaho 1993), the court granted a motion for summary judgment in favor of a policy which allowed students to vote on whether graduation prayer could be held. The policy also allowed students to decide whether a student or minister should offer the prayer, or whether a moment of silence should be provided. If the reasoning of the *Jones* and *Harris* court survives, the impact of *Weisman* will be substantially reduced.

It is too early to tell whether the holding in *Weisman* will be extended beyond the sensitive setting of secondary schools. Prayers before legislative bodies have been sustained in the past. *Marsh v. Chambers*, 463 U.S. 783 (1983). Traditional prayers in other settings, such as city council meetings or judicial proceedings that involve primarily mature individuals and where non-participation is less stigmatizing, may withstand constitutional scrutiny. *But see* North Carolina Civil Liberties Union Legal Found. v. Constancy, 947 F.2d 1145 (4th Cir. 1991), cert. denied 112 S. Ct. 3027 (1992) (judge's practice of beginning court sessions with prayer violated establishment clause).

144. See *supra* notes 82-84 and accompanying text.

145. *Weisman*, 112 S. Ct. at 2656.

the Court reinforces and intensifies the most fundamental polarization of our time—that between traditionalist and secularist orientations. In its concern to preserve appropriate separation, the Court strives to separate religion from all facets of the ever-expanding agenda of the state with the result that religion is more and more marginalized and society is increasingly bereft of anything transcending the secular.

IV. THE HAZARDS OF CONTEMPORARY ANALYSIS

A. *The Hazard of Wooden Separationism, and the Need for Accommodation*

Properly conceived, separation of church and state is an important part of American culture, but when invoked without sensitivity to the values and institutions it is designed to safeguard, it can be a hazardous slogan. For decades the Soviets prided themselves on their particular version of separation of church and state, which basically called for the exclusion of religion from any domain in which the state was present.¹⁴⁶ The obvious practical implication of this policy was the marginalization of religion in social and political life.

It is exceedingly unlikely that separationist pressures in the United States would ever permit a regime as openly hostile to religion as the aggressively secularist government of the former U.S.S.R. However, interpretation of the Establishment Clause of the United States Constitution in a manner that woodenly insists that religion be excluded from any state-permeated domain can have consequences that differ only in degree. With the rise of the welfare state, governmental institutions play roles that penetrate all aspects of contemporary life. Applying an interpretation of the Establishment Clause in the modern setting that is conceptually designed for the minimalist night watchman state has an inevitable tendency to skew the social balance in favor of secularists and against traditionalists.

In today's sprawling regulatory state, it is particularly vital that the idea of church/state separation be invoked in ways that are liberating rather than marginalizing. Separation needs to be understood in the sense of making space for the transformative influence of religion and allowing it to extend

146. Albert Boiter, *Law and Religion in the Soviet Union*, 35 AM. J. COMP. L. 97, 115-24 (1987).

its fragile tendrils into new areas. Because state action in the complex modern setting can easily have adverse impacts on religious institutions, the state should be required to accommodate religious institutions to the maximum extent feasible. As the state invades more and more of social space, exemptions and accommodation become ever more critical if religious institutions are to survive the growing harshness of an increasingly secular environment.¹⁴⁷ Some of the most important social tasks are best carried out by religious organizations, and wooden separationism may preclude that from occurring.¹⁴⁸

One particularly troubling version of the problem of wooden separationism can be seen in the recurring contention that state programs which reflect or coincide with religious views violate the Establishment Clause. This contention has been particularly visible in litigation challenging abortion regulation,¹⁴⁹ but it can easily surface in other contexts. If this type of contention were to prevail, it would effectively banish religious values from public discourse, thus blatantly privileging secular over religious values. Such an approach turns the central values of the First Amendment on their head, muzzling religious speakers and holding that they, alone among the participants in political discourse, are proscribed from sharing the full richness of their opinions with others in the public square. Fortunately, the Supreme Court has consistently rejected this line of argument.¹⁵⁰

B. The Hazard of Epistemological Privileging of the Secular

The deeper and more general hazard in the modern law of religious liberty is what we have called the "epistemological privileging of the secular." Modern consciousness is so filled with secularist assumptions that this hazard often goes unnoticed. Secular discourse is so pervasive that the subtlety of its dominance is often overlooked. As a result, religious narratives

147. See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685, 692-93 (1992).

148. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (permitting funding of sign language interpreter for student attending religious educational institution); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (rejecting a facial challenge to a federal aid program that permitted funding of programs sponsored by religious organizations in light of the distinctive contribution they could make to combatting teenage pregnancy).

149. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980).

150. *Id.* at 319 (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

stand out as unusual; for many they have curious—even frightening—links to the transcendent and the numinous. Secular narratives are so tied to the ordinary that they blend into the unnoticed background of common sense.

Our sense is that religious believers on the whole are better at understanding secular discourse than vice versa. Secularist accounts of reality, including secularist accounts of religious liberty, always seem to let something vital slip out. They are inevitably reductionist. They attempt to reduce the description of reality to a seemingly neutral, secular discourse but remain blind to the richness and diversity of religious discourse. The very canons of what counts as neutral and secular bracket out modes of discourse engendered by the transformative influence of religion.

Part of what we need is a deconstruction of this neutralist discourse. In the crucible of the religious strife following the Reformation that helped forge our modern conceptions of religious liberty, it made sense to think of secular categories as a neutral Archimedean vantage point from which compromise on issues of radical disagreement could be worked out. But in an age when the key polarization on a whole range of issues such as abortion, the family, homosexuality, education, media and the arts, and law is no longer denominational, but originates instead in the tension between religious believers and secularists, invoking secular discourse as a neutral ground seems hopelessly circular and naive.

In the last analysis, religious liberty is about resolving cultural disagreements that go “all the way down.” Religious liberty first emerged at a time when disagreements about religious doctrine had this character. We have learned much about how to live with this kind of division, though certainly not enough. However, in our time, the much more critical divide runs between those who believe and those who do not, between practicing adherents of religious traditions and those who claim emancipation from those traditions. Religious liberty needs to be understood in ways that can make common life in a society characterized by such radical pluralism possible.

What is frightening about the image of culture wars is its picture of society polarized into two opposing camps that radically disagree. To paint a more pleasant picture of society, we need concepts, theories and practices which, while showing genuine respect to all sides, will help expand the basis for a community of understanding between the two sides of contem-

porary culture wars, and prevent that vital domain from being attenuated into nothingness.

V. CONCLUSION

Unfortunately, the polarization suggested by the notion of culture wars is an all too accurate characterization of the fundamental tensions in modern society. The question is whether the unravelling threads of our social fabric can somehow be held together. Preserving that tapestry may depend on the willingness of individuals to acknowledge the extent to which all of us exist in, and struggle with, the tensions between traditionalist and secular perspectives. In a sense, then, the cultural polarization we have discussed creates a profoundly unnatural human and social condition. The debate is framed in stark alternatives of the "secular" and the "religious." These positions drive individuals, who are by their natures neither wholly secular nor entirely traditionalist, into one of two opposing camps. But life is not a simple choice between the traditional and the secular. Our pathways always weave in and out of both modes of experience—and the precise character of our experience as we tread any particular stretch of road hinges critically on the "little platoon[s]"¹⁵¹ (to borrow Burke's phrase)—on the intermediate groups—with which we walk. The ultimate impoverishment of either/or reasoning in this domain is its failure to recognize that the actual texture of life offers a "both/and." Our multifarious social contexts can place us daily in both highly secular and highly religious environments, requiring that we be on both sides of the secularist/traditionalist divide within a short span of time. What is vital for the protection of the full richness of life is a political consensus that yields individuals the largest social space practicable wherein they may move freely between these competing yet intertwined modes of experience. In our highly secularized society, this dictates that we grant space and relevance to religious mediating structures—to our churches, dioceses, synagogues, mosques and congregations. Walls of separation and cramped interpretations of religious freedom such as that in *Smith* simply will not do.

What is vital for experiencing the full meaning of our individual and communal paths is dialogue—dialogue with our-

151. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 135 (Conor C. O'Brien ed., Penguin Books 1969) (1790).

selves, dialogue within our own sub-communities, and broader dialogue at the level of society. As each person must reconcile within himself the traditional and the secular without self-destructing, so too must society. We believe that lawyers can play a particularly significant role in this process. They are one of the few groups that has the patience to engage in reasoning that is longer than the length of headlines or sound-bites. There is of course considerable risk that the high degree of secularization of the profession undermines its capacity to play a mediating role. But whatever the role of lawyers may turn out to be in this larger social process, it is vital to find ways to fight forces that cripple dialogue coming from both sides of the cultural divide. We need to resist the temptation to oversimplify. We are all guilty of using oppressive discourse—of demonizing or at least stereotyping adversaries. We need to learn to stop throwing stones.

Reflecting on the risks of tyranny in a democracy, Tocqueville argued:

Formerly tyranny used the clumsy weapons of chains and hangmen; nowadays even despotism, though it seemed to have nothing more to learn, has been perfected by civilization.

Princes made violence a physical thing, but our contemporary democratic republics have turned it into something as intellectual as the human will it is intended to constrain. Under the absolute government of a single man, despotism, to reach the soul, clumsily struck at the body, and the soul, escaping from such blows, rose gloriously above it; but in democratic republics that is not at all how tyranny behaves; it leaves the body alone and goes straight for the soul. The master no longer says: "Think like me or you die." He does say: "You are free not to think as I do; you can keep your life and property and all; *but from this day you are a stranger among us.*"¹⁵²

We must learn how to conduct dialogue without being or making strangers. We need to learn more of genuine toleration and respect. We can care about other people and maintain friendships even if we deeply disagree. The alliances in recent years among the traditionalists are one of the positive lessons we have learned. Among other things, this experience has taught us the importance of respecting enclaves that various groups

152. TOCQUEVILLE, *supra* note 3, at 255 (emphasis added).

construct to pursue their communal life, as well as the need to avoid the facile tolerance of expecting everyone to be pluralistic in exactly the same way.

A great source of hope in dealing with the disintegrating discourse around us is to reconstruct and restore the basis for a community of discourse capable of establishing lines of communication between the competing discourses clamoring around us. We may walk partially incommensurable paths, but we have too much social experience to take seriously those who claim that meaningful inter-group understanding is impossible. There are many of us who hear both (or even many) sides. Religious intermediary associations can play an extremely important role in this process, if we will but let them. The genius of democracy is that if we allow open processes and continue to listen to persons—not merely to stereotypes and to reified ideas—we can begin to understand competing visions. If we strive to understand and to unleash the transformative yet fragile power of religion, we may hope for new visions transcending those that have gone before.