

1993

# Postmodernist Architectures in the Law of Religion Symposium: New Directions in Religious Liberty

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## Recommended Citation

1993 BYU L. Rev. 97 (1993)

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# Postmodernist Architectures in the Law of Religion

*Ruti G. Teitel\**

## I. INTRODUCTION

What do I mean by postmodernist architectures in the law of religion?<sup>1</sup> Postmodernism refers to the contemporary status of the study of knowledge. It is characterized by a transcending of the terms of the modern period; yet the paradox of the postmodern is its coincident response to the modern.<sup>2</sup> Just as the term “postcommunism” encompasses a response to communism, and just as we search for a political identity beyond opposition to communism, so too we grope for a cultural identity beyond the modern. In a graphic way the terms remind us of the extent to which meaning derives from context—here from an oppositional context.<sup>3</sup>

What, then, characterizes a postmodernist perspective on the law of religion? Across disciplines, a postmodernist

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1. In this Essay I claim architectural metaphors dominate writing in the law of religion. These metaphors are the graphic manifestations of contemporary conceptions about the relation of religion to public life.

The clearest place to start in examining the relationship between modernism and postmodernism is in architecture. This may be because architecture, though closely concerned with all the debates about modernism and modernity of this century, is an area of cultural practice in which movements and stylistic dominants are much more conspicuous and less arguable than elsewhere . . . .

STEVEN CONNOR, *POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* 66 (1989).

2. See Andreas Huyssen, *Mapping the Postmodern*, in *CULTURE AND SOCIETY: CONTEMPORARY DEBATES* 355, 355 (Jeffrey C. Alexander & Steven Seidman eds., 1990) (“The term ‘postmodernism’ itself should guard us . . . as it positions the phenomenon as relational. Modernism as that from which postmodernism is breaking away remains inscribed into the very word with which we describe our distance from modernism.”).

3. See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (Winston Moore & Paul Cammack trans., 1985).

approach implies an understanding of indeterminacy. All is interpretation.<sup>4</sup> In the theorizing of constitutional law we were latecomers to the issue, yet the past decade's debate over constitutional interpretation frames the question: To what extent, as an interpretive community, have we shifted paradigms from adherence to the notion of ostensibly neutral foundational principles to acknowledging and even embracing indeterminate, multiple perspectives to constitutional interpretation?<sup>5</sup> In rejecting totalizing narratives, and in embracing contextual narratives, recent critical challenges to the approaches to legal interpretation, from race and feminist theory in particular,<sup>6</sup> proceed in postmodernist fashion.

What is there beyond indeterminacy? The postmodernist challenge to a unitary view seems logically to lead to propounding a principle of pluralism.<sup>7</sup> "Post-modernism means the end of a single world view and . . . 'a war on totality', a resistance to single explanations, a respect for difference and a celebration of the regional, local, and particular."<sup>8</sup>

Yet conversely and intriguingly, the logic of postmodernism also leads away from pluralism, and backwards and forwards to universalism. In incorporating the new technology with its radical increase in communication, postmodernism implies interconnectedness and movement away from pluralism toward syncretic and universalist norms.<sup>9</sup>

The paradox of the postmodern is its embrace of these seemingly conflicting principles of pluralism and universalism.<sup>10</sup> I introduce the postmodern paradox here

4. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

5. Compare Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971), with Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 *NW. U. L. REV.* 1137 (1983).

6. See Joel F. Handler, *The Presidential Address, 1992: Postmodernism, Protest, and the New Social Movements*, 25 *L. & SOC'Y REV.* 697 (1992).

7. See Charles Jencks, *The Post-Modern Agenda*, in *THE POST-MODERN READER* 10, 11 (Charles Jencks ed., 1992) ("pluralism is the leading 'ism' of post-modernity").

8. *Id.*

9. In postmodernist theorizing, the pluralist strain is widely recognized, but not so the universalist strain. An exception is architectural theory. Postmodernism's potential for universalism lies in its aggressive deconstruction (destruction) and recombination of both traditions. In this Essay, I argue these two seemingly opposite directions are manifest in contemporary manifestations of the relation of religion to public life. See Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 *CORNELL L. REV.* 747 (1993).

10. The universalist direction is seen in theorizing in theology such as in

because these apparently opposing aspects are clearly seen in contemporary developments in the law of religion.

To what extent are these two apparently conflicting aspects of the postmodernist paradox evinced in religion in public life? Much of postmodernist critique implies recognition of limits to the Enlightenment narrative about knowledge. Perhaps the brightest line in the Enlightenment account was the line demarcating faith and reason.<sup>11</sup> Whether in political or constitutional theory, the rethinking of the Enlightenment narrative has an impact on our thinking about the role of religion in public life.

The contemporary shift to a postmodernist paradigm implies a challenge to prevailing constitutional discourse. The rejection of modernism's dualisms is seen in the changing vocabulary of the First Amendment Religion Clause jurisprudence.

## II. FROM WALLS TO PUBLIC SQUARES

This Essay's title refers to the language and, in particular, to the organizing metaphors we have been using in our discussion of the constitutional law of religion. Postmodernism invites us to analyze the language we have been using to account for religion. The title suggests a shift in the metaphors used to describe the relation of the law to religion. Let us analyze the rhetoric of the prevailing jurisprudence from a postmodernist perspective. Postmodernism rejects the notion of a fixed connotation of meaning outside language in its context. Accordingly, the significance of the Religion Clause jurisprudence is illuminated by analysis of the words in context and, in particular, by analysis of the pervasive oppositional pairs that are modernism's legacy.

The Enlightenment's "foundational" oppositional pair are religion and reason. The postmodernist critique of the rhetoric of the law of religion challenges this distinction, highlighting areas of epistemological overlap. Dualisms pervade the constitutional jurisprudence of the Religion Clauses. The

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liberation theology, in particular in the work of Harvey Cox and David Griffin. See generally HARVEY COX, *RELIGION IN THE SECULAR CITY: TOWARD A POSTMODERN THEOLOGY* (1984); DAVID R. GRIFFIN, *GOD AND RELIGION IN THE POSTMODERN WORLD: ESSAYS IN POSTMODERN THEOLOGY* (1988).

11. For an account, see generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

division of the Religion Clause doctrine into two sides, subjective and objective, reinforces the modernist parameters to the law of religion. Other oppositional pairs are church and state, religion and politics, religion and science, sectarianism and secularism, the individual and the community, and the private and the public spheres. Perhaps the significance of each element of the pairs derives from its place in the pair.

The First Amendment Establishment Clause concerns relating religion to public and private institutions, while the First Amendment Free Exercise Clause concerns the impact of the law on the personal. The doctrine of the two clauses is thoroughly oppositional. The Establishment Clause doctrine encompasses the law concerning the organized aspect of the law of religion: What constitutional principles guide the relations of our societal institutions—the church and the state? Just as the term suggests, “free exercise” doctrine instead describes the constitutional law relating to the individual and her conscience.

Under the Establishment Clause doctrine, the Court has asked: To what extent does the state’s action have the effect of advancing religion? How ought this be gauged; how does one measure effect? A majority of the Court has said the proper perspective is that of the “reasonable observer.”<sup>12</sup> Thus, the Establishment Clause inquiry sets out to be “objective” in nature.

Under the Free Exercise Clause doctrine, in contrast, the Court has asked: To what extent has the government’s policy impacted on the individual’s ability to practice her religion? On this side of the constitutional doctrine, the inquiry becomes subjective. What is relevant, the Court has said, is the effect of the government’s action, not for a hypothetical or idealized “reasonable observer,” but instead for the particular petitioner.<sup>13</sup>

Establishment doctrine offers a purportedly objective approach to assessing the impact actions of the state have on religion. Free exercise doctrine offers a subjective, individuated approach. The two doctrines appeared to proceed on parallel

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12. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989) (opinion of Blackmun, J.) (citing *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O’Connor, J., concurring)).

13. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding the right of Amish children to an exemption from state mandatory school attendance laws).

tracks, occasioning critique in legal academic scholarship for the apparent absence of a coherent conception of religious constitutional rights.<sup>14</sup>

Yet from a postmodernist perspective, whatever coherence there may be in the church-state doctrine derives precisely from its oppositional nature. What enabled the continuity of the constitutional law of religion were its arguably dichotomous principles. The close connection between the two sides of the church-state doctrine is evidenced in the contemporary challenge to the doctrine. If there is a connection between the two sides of the doctrine, as we would expect, the critique of doctrine under either clause would often imply the critique of both.<sup>15</sup>

The division of the Religion Clause doctrine into two sides, subjective and objective, reinforces the Religion Clause jurisprudence's modernist underpinnings. The shadow cast by the metaphor of "the wall"—its allusion to separation—dominates the area. And the development of the law of religion in turn affected the religious sector's own understanding of the boundaries of its legitimate role in the public sphere.

The contemporary shift to a postmodernist paradigm and its rejection of modernist dichotomies implies a change in the vocabulary of the Religion Clause jurisprudence. My claim is that there has been a significant change in the metaphors used, both in the jurisprudence and in the scholarly writing of the law of religion. Outside the law, the paradigm shift can also be seen where there is a change in the way we talk about values in culture.

The organizing metaphor of the "wall of separation" has given way to the metaphor of the "public square." What does the change signify? Let us begin with the metaphor of the "wall of separation." A wall has two sides; a wall expresses a dualism. What does it divide? What is included? What is excluded? What is included and what is excluded is determined by the various communities which situate themselves on either side of the wall.<sup>16</sup> In a now classical work on American

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14. See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

15. See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 247-56 (1988).

16. Even in early American constitutional thought, at least three distinct

religious life, Mark Howe characterized the wall as that which separated the "garden" from the "wilderness."<sup>17</sup> But whose garden? Whose wilderness? For believers, the garden was clearly the place of belief, and the wall was its legal protection. For nonbelievers the converse was true. The wall's significance is a function of context, of place and/or perspective.<sup>18</sup>

The metaphor of the wall has also long dominated our political theory, separating our political world into communist and liberal democratic—enslaved and free. With the destruction of the political wall, an attack has also been launched on the wall dividing secular and sacred. Challenges emanate from various directions: there is the broad postmodernist attack on modernism; from legal academia, there is the claim of how stripped-down the doctrine of the wall; from the faith communities, there are claims about how barren the religious landscape.

The wall as the leading metaphor for religion in public life is now giving way to the public square. For some time the image of the public square has dominated scholarly writing in the area. In legal writing, it appears in the work of Michael Perry.<sup>19</sup> In theological writing, it appears in *The Williamsburg*

conceptions of the wall emerged: those of Roger Williams, Thomas Jefferson and James Madison. For Roger Williams, the wall served to protect the churches and religious freedom more generally. For Thomas Jefferson, the function of the wall was to protect the state. And for James Madison, the wall served a dual function of simultaneously separating and protecting the church and the state from each other. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 816-17 (1978).

In his treatise, Tribe offers these three conceptions and argues that the three apparently diverging conceptions actually converge upon principles of voluntarism and separatism. *Id.* at 818. Yet perhaps notwithstanding Tribe's claim, what is intriguing about the metaphor of the wall is its capacity to accommodate so many diverging conceptions of the relation of law to religion, arguably precisely because of the wall as metaphor's minimalism.

17. MARK D. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965).

18. The doctrine of the wall is exemplified under the Establishment Clause, see, e.g., *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (barring prayer in the public schools, the Court declared the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion").

For an illustration under the free exercise side of the First Amendment doctrine, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding the right of Amish children to an exemption from state mandatory school attendance laws).

Read together, *Engel* and *Yoder* delineate the parameters of the wall. From one side of the wall, *Engel* said religious activities must be kept separate from public institutions; from the other side of the wall, *Yoder* said religions must be permitted to thrive, free of secular control on the side of the divide.

19. See generally MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION*

*Charter*, a document authored by a group of religious and political leaders offering a consensus statement on what principles ought to govern religion in public life.<sup>20</sup> Reverend Richard Neuhaus' *The Naked Public Square*<sup>21</sup> is redolent postmodernist imagery. If the "naked" is the "private," Neuhaus calls for the "private" in "public." If the "naked" is the "vacant," Neuhaus calls for the "fleshing out."<sup>22</sup>

As an architectural form, what is comprehended by the public square? In the postmodernist critique of architectural theory, the line has shifted away from abstraction and minimalism, toward architecture with a narrative.<sup>23</sup> It is a move toward representation. Unlike a wall's simple two-sidedness, a square circumscribes an area. In architecture, a public square defines a common area, one with the potential for shared use by the community.

What does the popularity of this architectural metaphor tell us about the contemporary understanding of the part of religion in public life? I believe the metaphor of the "public square" evokes a rich conception of culture surfacing in contemporary controversies over the public sphere. The turn to the term suggests that prior separationist principles embodied in the doctrine of the wall could not account for the development of a third space. The third space is the enormous growth in public culture. The "public square," therefore, is not public in the sense we have been using it in the law for the last forty years, not public in the sense of governmental, and not public in the sense ordinarily juxtaposed to private or individual. It is a sense of public in the architectural sense. It is an invented public, a representational public. It is a sense of the public as it appears in the many controversies over the

AND MORALITY IN AMERICAN POLITICS (1991).

20. See THE WILLIAMSBURG CHARTER (1988), reprinted in, 8 J.L. & RELIGION 5 (1990).

21. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984). I introduce and discuss the convergence of these various developments in Teitel, *supra* note 9.

22. See Teitel, *supra* note 9; NEUHAUS, *supra* note 21. See generally FIRST THINGS: A MONTHLY JOURNAL OF RELIGION AND PUBLIC LIFE (see especially the monthly column entitled *The Public Square: A Continuing Survey of Religion and Public Life* by Richard J. Neuhaus).

23. For a discussion of related developments in architecture theory, see Henreich Klotz, *Postmodern Architecture*, in THE POST-MODERN READER, *supra* note 7, at 234, 241 ("the characteristic objective of postmodernism—to create an architecture of 'narrative contents'").



uses of public education, public universities, the mass media, museums, parades—wherever we understand the public sphere to be.

What is signified by the public square metaphor is illustrated in the crucible of the multiculturalism debate. Demands for equal recognition for gender, race, and sexual orientation in the public universities, the public schools, other public institutions, and public spaces, reveal a shared conceptualization of a public square in our society. What principles ought to govern this public square? In the multiculturalism debate, the struggle has been waged over the “politics of recognition.”<sup>24</sup> In that debate, the demand is for application of a principle of “equal recognition.”<sup>25</sup>

The claims raised in the multiculturalism debate, I contend, have been raised for some time in another arena—in controversies over church and state, religion and politics. It is strange that the multiculturalism debate has virtually excluded questions about religious orientation, when over time the question of religious diversity has consistently challenged the conception and workings of our public sphere.

### III. ORIGINAL AND NEO-RELIGIOUS PLURALISM

For some time now, critical theory has challenged our thinking about the relationship between identity and law. In this regard, critical theory has proceeded from the perspective of race, gender, ethnicity, and sexual orientation.<sup>26</sup> Strangely, critical theory work has not yet been explicitly recognized from the perspective of religious identity, nor is it the subject of contemporary scholarly controversy. The reason may lie in the comparatively longstanding nature of our religious pluralism. As distinguished from the much more recent public recognition of our racial and ethnic diversity, since the time of our founding extensive religious diversity has simply been a social fact of our national identity.<sup>27</sup> In America, religion is our first

24. See Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM AND “THE POLITICS OF RECOGNITION” 25, 25-26 (Amy Gutmann ed., 1992) (discussing “[t]he need, sometimes the demand, for recognition”).

25. In a larger work I explore this development as it relates to religion, and I term it a demand for “equal representation.” See Teitel, *supra* note 9.

26. See, e.g., Handler, *supra* note 6.

27. See Teitel, *supra* note 9. Of course, racial and ethnic diversity have been present since the founding, but the issue I am concerned about here is the nature of the public perception of American diversity. And with respect to this point

pluralism.<sup>28</sup> Religious pluralism in America unquestionably predates the Constitution.

Long before postmodernism's pluralism revival, there is a historical record of religious pluralism. The nature of our early religious pluralism is discussed in the works of public historians like Michael Kammen and Bernard Bailyn. Colonial rhetoric tells us something about the colonial understanding of the problems posed by religious pluralism. Religious multiplicity was simply accepted as a fact; the vital question was its scope, and its boundaries. The writing of the period reveals the profound challenge posed by the massive religious pluralism in colonial life. In American colonial life, religious diversity meant instability. Bernard Bailyn refers to the denominationalism of the time as "establishments of . . . irregularity."<sup>29</sup> For the colonists, the issue was how much diversity and how much instability were socially tolerable. The "instability" was in the fluidity of religious affiliation—in the substantial movement between denominations. Michael Kammen characterizes the diversity as an "unstable pluralism."<sup>30</sup>

The eighteenth century dilemma in church-state relations was to what extent to allow religious separatism, while maintaining a semblance of political stability. The urge to religious division was considered uncontrollable; its limiting principle was maintaining political union.

Colonial discourse concerning religious multiplicity referred to the problem of religious affiliation. In this regard, the colonial rhetoric distinguished "sectarianism" and "denominationalism." "Sectarianism" was considered a threat to the prevailing political order, while "denominationalism" was considered to be reconcilable with the local secular government.

Our original religious pluralism informed our early political and constitutional theory. As in the colonial debates, the dilemma was how to preserve religious pluralism while maintaining some level of stability. An illustration of this

alone, religious diversity was a unique aspect of colonial public culture. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 246-72 (1967).

28. The word the Framers used is "multiplicity," which appears to be the linguistic precursor to "pluralism." See Teitel, *supra* note 9.

29. See BAILYN, *supra* note 27, at 249.

30. See MICHAEL KAMMEN, *PEOPLE OF PARADOX: AN INQUIRY CONCERNING THE ORIGINS OF AMERICAN CIVILIZATION* 60 (1972).

debate is the federalist use of religious multiplicity as the touchstone for their reasoning about the principles accommodating diversity in political opinion.<sup>31</sup> Just as religious norms were thought better separated from public life, *The Federalist No. 10* offers a somewhat negative view of multiplicity of religious opinion as "faction," and goes on to extend this view to political opinion. Yet *The Federalist No. 10* also offers a principle for political stability through political diversity. Many of the Constitution's institutional arrangements—federalism, a bicameral Congress, checks and balances—reflect this accommodation.<sup>32</sup>

In the eighteenth century, America's broadest pluralism was religious pluralism. Today we can see this pluralism is original and yet enduring. Modernist principles enabled preservation of this pluralism, and they may yet be of guidance in the postmodernist revival.

#### IV. PARCELING UP THE PUBLIC SQUARE

The multiculturalism debate suggests the way to best protect cultural pluralism is to apply a principle of equal representation.<sup>33</sup> But what is meant by a principle of equal representation? What is the aspiration: equality of representation outcome, or equality of opportunity to representation? Equality of opportunity or equality of access to representation in the public square cannot be equated with nor does it necessarily signify an equality-of-representation outcome. A postmodernist approach could lead in paradoxical directions to pluralist, but also to universalist, representations in the public sphere. Contemporary constitutional controversies illuminate these paradoxical aspects of the nature of religious identity represented in the public sphere.

Unlike the wall, the public square conception contemplates some shared space. How is such space created? It is created at the site of the wall's destruction. It is created by eviscerating the boundaries. How are the modernist boundaries destroyed? I contend constitutional litigation in the church-state area is being used to challenge the entrenched boundaries.

Returning to our metaphors, the competition for equal

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31. THE FEDERALIST No. 10, at 131, 136 (James Madison) (Benjamin F. Wright ed., 1961).

32. See *id.* at 134-36.

33. See Teitel, *supra* note 9.

representation in the square is vividly seen in the “equal access” debate over the public schools. I understand the equal access campaign for public-school prayer clubs as a demand for equal representation and legitimation of religion in the public sphere.<sup>34</sup> A Supreme Court decision in the last Term neatly illustrates the phenomenon. *Lamb’s Chapel v. Center Moriches Union Free School District*<sup>35</sup> involved a challenge by an evangelical church to school district rules barring the use of school facilities for religious purposes.

*Lamb’s Chapel* offers a wonderful postmodernist paradigm of the effort to integrate religion in public culture. Once the case is reconceived as implying a controversy about equality of representation, the case offers rich manifold representational possibilities. Deconstructing the *Lamb’s Chapel* opinion offers at least three layers of representational imagery in public culture.

Perhaps the most obvious layer appears in the merits of the case. The controversy in the case directly implicates a question of representation in the controversy over the after-hours uses of the public schools. The struggle in *Lamb’s Chapel* over access to the public schools raises profound questions about the purposes and uses of this aspect of the public sphere. The determination of what constraints may constitutionally be placed on the school’s use triggers a First Amendment analysis which depends on an underlying conception of the public.

The case implies a second layer of representation in public culture. In its petition in the case, *Lamb’s Chapel* sought access to the public schools in order to show a six-part film series. According to the church’s description of the film series, the films describe a “civil war of values.”<sup>36</sup> “[T]he film series would discuss . . . the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values . . .”<sup>37</sup> The “culture war” is the struggle between secular humanism and religious morality over the control of public life, including control over mass media, public education, and the arts. The controversies include issues

34. See Teitel, *supra* note 9.

35. 113 S. Ct. 2141 (1993) (holding the application of a public school district rule barring use of school facilities for religious purposes to prohibit the after-hours showing of a religiously-centered film on family values to constitute viewpoint discrimination violative of the First Amendment’s Free Speech Clause).

36. *Id.* at 2145 n.3.

37. *Id.* at 2144.

about the nature of the family, sexual orientation, abortion, and pornography.<sup>38</sup>

The controversy over the showing of the film at the public school, even after hours, constitutes a struggle over a potent symbol of public representation. For children, of course, the public schools and the cinema are the two leading constituent elements of their public sphere. A third may be the church. All appear and are interwoven in this case.

Yet another layer of cultural representation is constituted by the Supreme Court's opinion in the case. Justice Scalia's concurring opinion makes the most direct reference to the broader issues in the case, and to the Court's role. Scalia's lighthearted concurrence expressly acknowledges the Court's own role as imagemaker in the public sphere. In a playful cinematic allusion to the film at stake in the merits, Scalia's opinion refers to the controlling separationist Establishment Clause precedent as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad."<sup>39</sup> Scalia plays with the Court's own role as imagemaker in the public sphere and characterizes the readers of the Court's opinion as "our audience."<sup>40</sup> The opinion's recognition of the public image, and of its reader/audience is a rare acknowledgement of the Court as a representational aspect of the public sphere.<sup>41</sup>

The Court's recognition of its "audience" is a recognition that a judicial opinion's meaning is interpreted in a relationship. The cinematic imagery is played up in the majority opinion's response to Scalia, with Justice White's majority opinion referring to "Justice Scalia's evening at the cinema."<sup>42</sup> It is also an unusual acknowledgement the Court

38. One segment of the film series, named *The Family Under Fire*, "views the family in the context of today's society where a *civil war* of values is being waged." *Id.* (emphasis added). For argument regarding the broader notion of a culture war in America for control of societal values, see JAMES D. HUNTER, *CULTURE WARS: THE STRUGGLE TO CONTROL THE FAMILY, ART, EDUCATION, LAW, AND POLITICS IN AMERICA* (1992).

39. *Lamb's Chapel*, 113 S. Ct. at 2149 (Scalia, J., concurring in the judgment).

40. *Id.* at 2150.

41. *See id.* ("The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so." (emphasis added)).

42. *Id.* at 2148 n.7; *see id.* ("While we are somewhat diverted by Justice Scalia's evening at the cinema, we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." (citation omitted)).

writes opinions not in a vacuum, but for an audience and in a context.

The demand for equality in the representation of religious claims in public education can also be seen in two recent cases concerning graduation prayers in the public schools. In *Lee v. Weisman*,<sup>43</sup> the Court evaluated a claim to equal representation of prayer at public school graduation. *Jones v. Clear Creek Independent School District*<sup>44</sup> focuses the question of equal recognition more clearly: Where there is little or no official involvement, may students elect to pray at public school graduation? In *Clear Creek*, what remains is the fusion of two compelling symbols: the public school children's prayers with the public school site, a constitutive element of the public sphere.

The demand for equal recognition of religious claims is not only seen in litigation over access to public education, but also in the struggle for public financial support for religious education. Some would distinguish these cases as seeking public support for private religious life, but more and more the cases cannot be accounted for in this way. I contend that the closest analogy to the "parochial aid" cases are emphatically not other funding cases, but rather all of the other litigation implicating access to public culture. Whether cases implying support in the way of particular monies or services for the teaching of religious values, what is at stake is expansion in the projection of religious values into the public realm.

43. 112 S. Ct. 2649 (1992). In *Weisman*, a majority held school officials had promoted school prayer in violation of the First Amendment Establishment Clause by drafting prayer guidelines and by choosing a cleric to deliver the graduation prayers.

44. 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

In its challenge in the Fifth Circuit, the American Civil Liberties Union argued that an offense to the First Amendment Establishment Clause lay in the majoritarian voting process by which the prayer decision was imposed on the nonpraying students who constituted a political minority and thus were losers in the process.

This ACLU argument follows from the organization's broad philosophy that constitutional rights ought not be subject to majority determination. But arguments based on process have their limitations—ultimately constitutional rights are in fact determined by a majority, even if by a supermajority. *See, e.g.*, U.S. CONST. art. V.

Is *Clear Creek* troubling because of the process? Doesn't the ACLU's emphasis on process suggest nothing remains at stake in the merits of the case? Appealing on grounds of process utterly evades the cultural significance of organized prayers held at the site of the public schools. If we consider this symbol of public culture as a tangible benefit, then we can begin to think about developing principles that might effectively protect juridical equality in the public sphere.

From a postmodernist architectural perspective, the cases are better understood as inversions. Rather than scaling the wall, the wall folds into itself to project religious values out into the public sphere. What appears to be the demand for public support for religion is simultaneously, and invertedly, also religious support for the norms of the public square.

Examples of what I characterize as the private/public inversion can be seen in recent church-state caselaw. In *Zobrest v. Catalina Foothills School District*,<sup>45</sup> the constitutional question before the Court was whether the First Amendment Establishment Clause permits a public school district to provide a sign language interpreter for a student in a parochial school. Under the current doctrinal standard, the Court asks whether the interpreter's work advances religion. If so, it is violative of the First Amendment Establishment Clause. Yet to what extent is it possible to separate out religious and secular interpretation? *Zobrest's* establishment inquiry into the nature of the interpreter's work and into how it is interpreted is an elegant allusion to a much broader problem about the role of constitutional law in defining the boundaries of religion in the public sphere.<sup>46</sup> Under the Establishment Clause doctrine the

45. 113 S. Ct. 2462, 61 U.S.L.W. 4641 (U.S. June 18, 1993). The Court, Chief Justice Rehnquist for the majority, attempts to analogize to welfare cases and not to the other Establishment Clause cases: "[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge . . ." *Zobrest*, 61 U.S.L.W. at 4643. By analogizing to funding precedent, the Court attempts to avoid the questions about the uses of the public sphere raised by this line of church-state cases.

46. In *Zobrest* the majority attempts a formalist modernist approach in their characterization of the interpreter.

[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. Notwithstanding the Court of Appeals' intimations to the contrary, the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance.

*Id.* at 4644 (citation and footnotes omitted) (emphasis added).

But the *Zobrest* dissenters see the distinction between provision of funds and provision of an employee as "not merely one of form." *Id.* at 4647 (Blackmun, J., joined by Souter, J., dissenting). Justices Blackmun and Souter say "this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause." *Id.*

"[T]he graphic symbol of the concert of church and state that results when a public employee . . . mouths a religious message." *Id.* "Our cases make clear that government crosses the boundary when it furnishes the medium for communication

relevant question is whether a challenged governmental activity is interpreted as religious or secular. Yet if one were to apply a principle of equal representation, might applying such a principle even imply a mandate of equal recognition of religious claims? How would this be achieved? How can an equality-of-representation outcome be achieved?

*Parents Ass'n v. Quinones*<sup>47</sup> and *Grumet v. Board of Education*<sup>48</sup> raise the question of religious values on public school grounds or in public transportation and illuminate how the question of public support for religious schools is inverted and might alternatively be understood as a question about the extent of representation of religious norms in the public sphere. In *Grumet*, New York's Court of Appeals analyzed the problem of the creation of a public school district exactly coterminous with a religious enclave. Perhaps the proposal can be conceptualized as a phony, a private, a paper public square.<sup>49</sup>

Another area of current controversy in public education, with a spillover into popular culture more broadly, is over control of the content of the public school curriculum. The call for the "rainbow curriculum" evinces the "equal representation" approach. The "rainbow curriculum" controversy has largely been waged relating to race, ethnicity, and gender claims.<sup>50</sup> Nevertheless, the earliest church-state litigation over equal representation in the public school curriculum implicated religious claims. For example, *McCullum v. Board of Education* rejected an equal access argument, grounded in pluralism, for religious education classes in the public schools<sup>51</sup>; the more recent challenges to the curriculum include the demands for

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of a religious message." *Id.*

47. 803 F.2d 1253 (2d Cir. 1986) (holding unconstitutional the creation of a wall to support female Hasidic students in public school under the aegis of a federally funded remedial education program).

48. No. 120, 1993 WL 241389 (N.Y. July 6, 1993), *aff'g* 592 N.Y.S.2d 123 (N.Y. App. Div. 1992) (holding unconstitutional as First Amendment establishment a New York statute creating a public school district coterminous with a religious enclave in order to provide handicapped school children with special public services). "We conclude that this symbolic union of church and state effected by the establishment of the . . . school district under [the challenged statute] is sufficiently likely to be perceived . . . as an endorsement . . . or . . . as a disapproval . . ." *Id.* at \*12.

49. But the court pierced through the proposed square: "Thus, only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board." *Id.* at \*12.

50. See, e.g., *Board of Educ. v. Sobol*, No. 3324-93 (N.Y. Sup. Ct., Albany County filed July 23, 1993) (pending challenge to New York "rainbow curriculum.")

51. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).



equal recognition of "creationism science."<sup>52</sup>

How ought America's religious pluralism be represented in public life? Beyond public education, other contemporary controversies over the public sphere concern public displays and parades. In two public religious symbol display cases, the Eleventh and Sixth Circuits held in diverging directions, a conflict likely to lead to Supreme Court disposition.<sup>53</sup>

Another illustration of the struggle for equal representation in the public sphere is the controversy over holiday parades—in particular St. Patrick's Day parades. As in the curriculum debates, these controversies pit gay-rights groups against religious groups. The arguments in recent litigation over the New York parade are illustrative. The Ancient Order of Hibernians argued that the parade constitutes private religious expression even though it implies a public display. Conversely, the city argued the parade is an official display, and that therefore the municipality may properly select parade participants whose ideals align with the principles of non-discrimination.<sup>54</sup> Neither argument nor characterization fully accounts for the nature of the parade. The pursuit of public display space relating to race and religion claims attests to a vital power struggle over equality of representation in the public square.

Controversies over religious representation are still conceived as questions concerning First Amendment freedom of speech.<sup>55</sup> The judicial approach continues to adhere to a modernist perspective which attempts to shore up an increasingly thin line between private and public spheres. The First Amendment speech doctrine inquires about the nature

52. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down Arkansas statute prohibiting the teaching of evolution).

53. In *Chabad-Lubavitch v. Miller*, 976 F.2d 1386 (11th Cir. 1992), *reh'g granted and opinion vacated*, 988 F.2d 1563 (1993), the Eleventh Circuit held unconstitutional the display of a large menorah at a state capitol, while in *Congregation Lubavitch v. City of Cincinnati*, No. 92-4016, 1993 WL 243782 (6th Cir. July 8, 1993), the Sixth Circuit upheld the display of a menorah in a comparable public space. In *Cincinnati*, a district court allowed an eighteen-foot menorah to be displayed at a municipal public square. This holiday display was followed by a Klan display of a ten-foot cross at the square. The Klan display prompted substantial unrest, leading to calls to close the forum. *Id.* at \*1.

54. *Right Parade Ruling, Wrong Message*, N.Y. TIMES, Mar. 2, 1993, at A20.

55. The New York Civil Liberties Union offers the Solomonic remedy of two parades. What the "two parade" or "more speech" alternative neatly evades is any consideration of the significance of the public recognition of the Saint Patrick's Day parade.

and characteristics of the forum: is it public, private, or limited?<sup>56</sup> The doctrine of the forum is thought to offer a neutral principle, but it is difficult to imagine how a doctrine dependent on the characterization of the forum can be considered freestanding from the question of how we envision our religious landscape.

Under a public-forum analysis, the question the Court asks is: What use did the government previously allow within this space? Past use determines future use. Under the forum doctrine, if there has been a past religious use, the government may not discriminate against the present claim. But what does this analysis imply? Reliance on the forum analysis implies that where there has not been a past religious use, there cannot be a present religious use. Yet perhaps the government does not conceive of the past use as a "religious use." This doctrine of the forum is a powerfully conservative principle; in protecting the *status quo*, it excludes those seeking new access to public culture. Such use of the current First Amendment doctrine analysis imposes a disparate impact on religious minorities.

Controversies over the representation of religion in public culture illuminate the Court's struggle over the breakdown of the Enlightenment distinction between the private and public spheres. Something is at stake the modernist framework is not able to encompass. To what extent can our ever-increasing pluralism be equally represented? And if it cannot be, what are the implications for our conception and delineation of the public sphere?

Let us return to the postmodernist paradox, for it offers yet another perspective on representation. An alternative to the search for equality of pluralist religious representations is the search for universal religious culture. These syncretic representations graphically evince the breakdown in the modernist distinction between the sacred and the secular.<sup>57</sup>

#### V. POSTMODERNIST PARADOXES: PLURALISM AND THE GLOBAL RELIGION

Let me turn now to illustrate the other side of the

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56. See, e.g., *United States v. Kokinda*, 497 U.S. 720 (1990).

57. I introduce the term "syncretic representations" in a longer piece on this development. See Teitel, *supra* note 9.

paradoxical postmodernist look of religion in the public sphere. Again, my illustrations derive from the Establishment Clause caselaw. *Lynch v. Donnelly* was the first Supreme Court decision to address the constitutionality of a public holiday symbol display. When it came down, *Lynch* was heavily criticized for upholding a Nativity display as secular because it was displayed in the context of other symbols, such as wishing wells, reindeer, and Santa Claus.<sup>58</sup> Yet the *Lynch* display well illustrates the postmodernist look of American religion today: pastiche, kitsch, hodge-podge, an eclectic and rich amalgamation of the sacred and the profane.

The breakdown in the categories of law and religion can also be seen in judicial consideration of public school graduation prayer. *Lee v. Weisman*<sup>59</sup> illustrates how American religion has changed partly in response to constitutional law. To deconstruct the graduation prayer in *Weisman* is to reveal an intricate composite of theological, political and constitutional motifs.<sup>60</sup> The constitutional law of religion implies the deconstruction and recombination of the sacred and the secular, of prayer and of constitutional law in a new hybrid transmutation of both.

Another illustration of the new religion is the curricula in the public schools. Rather than a traditional teaching of the three American religious holidays, there has been movement to a shared winter holiday of Christmas, Hanukkah, and Kwanza, representing a fusion of traditions. The new global religion at one level offers a way to equally represent religious diversity in public life. But the fusion also incorporates the motif of the law, and of constitutional law in particular.

There has long been American "civil religion."<sup>61</sup>

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

59. 112 S. Ct. 2649 (1992).

60. The text of the graduation prayer at issue in *Weisman* illustrates the fusion of the religious and the secular-legal; that fusion has become "traditional" in American civil religion and is emblematic of postmodernism. "For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You . . . . 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." *Id.* at 2652.

For a thoughtful discussion of the fusion of religion and constitutional law in American culture, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

61. See Robert Bellah, *Civil Religion in America*, in *CULTURE AND SOCIETY*, *supra* note 2, at 262, 262 ("few have realized that there actually exists alongside of and rather clearly differentiated from the churches an elaborate and well-institutionalized civil religion in America").

Traditional American civil religion was used to serve political purposes. But the new postmodernist religion appears to be more of a transformation. Postmodernism's global religion presents a much greater challenge to traditional religion as we know it. It may ultimately be a question of accepting that we are post-Enlightenment religion and that both religion and law are changing at the same time, and also have a symbiotic impact on each other.

The controversies here discussed raise the question of whether there are principles available to govern religion in public life. The postmodernist paradox offers diverging directions, of pluralist and universalist representations, and the law of the Religion Clauses paves the path for change. Yet the question of which metaphor represents religion in the public sphere—wall or public square—implies first a conception of the look of a desirable religious landscape.

This Essay began by addressing the current changes in the language of our church-state jurisprudence. Analysis of that language tells us of a breakdown in the separation between private and public spheres and between religious culture and law. This is the point from which new theorizing about the constitutional law of religion ought to begin.

