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ARTICLES

DOGMATOMACHY—A “PRIVATIZATION” THEORY OF THE RELIGION CLAUSE CASES

GERARD V. BRADLEY*

I. INTRODUCTION

Someone asked Edmund Burke if he was happy for the mass of Frenchmen liberated by the revolutionary events of 1789. “The effect of liberty to individuals,” Burke, ever solicitous of good order, replied, “is that they may do what they please: We ought to see what it will please them to do before we risque congratulations”¹ Thousands of miles away, but at almost precisely the same historical moment, James Madison surveyed the pleasures of a diverse, fractious people—his own—with this, and Burke’s postscript that “liberty, when men act in bodies, is power,”² undoubtedly in mind. In the Tenth Federalist, Madison contemplated the constitution of an historically unknown phenomenon: a politically stable, free society comprised of varied religious, ethnic, and economic groups. How could order be maintained in the face of such potentially mischievous “factions”? Madison realized that the options were limited. Civil tranquility could be reliably purchased by guiding everyone to the same opinions and interests, as was practically the case in traditional and authoritarian polities, but available in the new republic only at the cost of liberty. Thus, in Madison’s exquisite formulation:

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.³

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1. Burke, *Reflections on the Revolution in France*, in *THE BURKE-PAINE CONTROVERSY: TEXTS & CRITICISM* 3 (R. Browne ed. 1963).

2. *Id.*

3. *Federalist No. 10*, in *THE FEDERALIST* 56 (P. Ford ed. 1898).

Contracting liberty until politically relevant opinion converges is, as Madison correctly understood, the sole "cure" for the dangers of faction. And the only alternative is to treat the symptoms—to control the mischiefs of factions. But this Madisonian option not only portended, but implied, a tumultuous, even confrontational politics. Nevertheless, the Federalist steadfastly maintained that political conflict, even when fueled by sectarian zeal, is the irreducible price of freedom, and that extension of the theater of factional friction across a large republic would result in some rough equilibrium.

But even this insubstantial comfort is easily overstated. While it can hardly be said that Madison intended chaos, it can no more be said that the constitution he expounded intended order. The system as such neither aspired to be, nor asked to be, judged by that norm. This, of course, is the startling feature of our Constitution—its muteness on the centripetal force essential to its operation. Thus, the high-stakes constitutional gamble explained by Madison hoped to achieve manageable conflict fueled by diversity and freedom, instead of a politically molded national community of similarly minded men and women.

Madison unequivocally subsumed the problem of differing religious opinions under that of political faction. He considered the "unequal distribution of property" the most durable source of faction, but lumped "zeal for different opinions concerning religion" with a host of "latent causes" of faction, all more or less reducible to human nature.⁴ His response, however, was the same—empowerment—no matter what the cause. "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source."⁵ Now, some two hundred years later, the Supreme Court has squarely rejected the Madisonian synthesis in the course of interpreting the religion clauses that it says Madison authored. In Burke's fashion, the Justices have witnessed the pleasures of the faithful, and tendered their regrets. Having seen enough of liberty's consequences, the Court, in a quartet of 1985 cases, finally concocted its cure for the mischief of faction. Despairing of damage control, the Court undertakes not to empower sects, but to neuter them. The Justices intend not merely to rid the body politic of irritation rooted in "zeal" for differing religious opinions—that can be accomplished through a variety of techniques—but to do so in a most un-Madisonian, and contraconstitutional, way. The Justices suffocate religious factions not by assigning them all (in the first instance) the same religious beliefs, but rather by assigning the same estimate of the political relevance of those beliefs: none. The Court is now clearly committed to

4. *Id.* at 57.

5. *Id.* at 63.

articulating and enforcing a normative scheme of "private" religion, a scheme implicit in the cases since the opening of the modern era in *Everson v. Board of Education*.⁶ "Privatization" accounts for what the Court has wrought in its church-state opus, and it is neither more nor less than a war of attrition upon "religious consciousness." Privatization is the Court's "final solution" to the problem of religious faction.

The appellation "religious consciousness" as used in this context is not a direct reference to that fourth level of human consciousness identified by Bernard Lonergan as the locus of religious experience.⁷ Rather, it is informed by the recognition that "religion" is, at root, composed of experiences of a reality accessible through sensitized consciousness, a reality the believer experiences as compelling. That is, the believer regards it as objective truth, as an undeniable fact. Further, the insights into human existence distilled or derived from religious experience are, at least in monotheistic traditions like Christianity, Judaism, and Islam, inevitably social. There can be no other result when there is *one* God and *all* humanity is His offspring. It is surely the case that, as a matter of fact, Jews, Christians and Moslems have interpreted their collective existence in history through the medium of religion. The term's analytic value is highlighted by the simple fact that, in so claiming a uniquely authoritative basis for social insights, religion rebuffs those detractors who (rightly or wrongly) would liken or reduce it to psychology, to mere occultism or superstition, or to cultural relics without objective significance, and identifies itself as a potent source of political ideals and norms. While the term "religious consciousness" denotes a field much broader than the political, one way to blunt religion's political saliency is to co-opt the whole field. Hostility to "religious consciousness"—the conviction that religion contains objectively true insights into human social existence—is, in the only important sense, hostility to religion. Denying "liberty" to "religious consciousness" is denying religious liberty. To put the main point differently, the Court conceives religion not as social but as intrasubjective, not as objective truth but as subjective preference. Further, the Court extends constitutional protection *only* to its preferred conception and manipulates doctrine and cases in a way that can only be understood as attempts to extinguish religious consciousness.

This Article is explanatory in purpose. Its premise is that the cases since *Everson*, particularly last Term's, are most profitably understood as judicial attempts to move religion into the realm of subjective preference by eliminating religious consciousness. For the far greater part, this is intentional. The vocabulary in the Article is frequently not the Court's, but the ideas expressed are ones consciously entertained by the

6. 330 U.S. 1 (1947).

7. See, e.g., B. LONERGAN, *METHOD IN THEOLOGY* 105-07, 258-62 (1972).

Justices since *Everson*. Most importantly, there is little doubt that every current member of the Court subscribes to the privatization campaign, even if one or more thinks of it in different terms. Nevertheless, although criticism of the Court's handiwork may surface at various points, the discussion is firmly intended as an essential *prelude* to full critical evaluation. What is "really going on" must be fully explored and articulated before it can be pronounced good or bad, "liberal" or "conservative." That preliminary task is the one at hand.

Part II sharpens and adds context to the general statement so far, and demonstrates that discovery and examination of the underlying normative view, privatization, rather than discussion of programmatic results, constitutional doctrine, and thematic content, are the only worthwhile analytical chores in the area. The warrant for this claim is hardly obscure—observation reveals and Justices admit that the Court strives, literally, to govern the entire experiential realm of "church and state," and does so by the light of a fundamental vision of their own fashioning from extraconstitutional sources. Indeed, the opinions quite voluntarily give up these diversions as little more than turgid background noise without analytic value. Part II ends with the relatively effortless excavation of "religious liberty" as the proffered unifying norm. This unhelpful denouement is attended by Part III. "Religious liberty" is unpacked and initially inflated into the twin evils of "sect domination" and "oppression of individual conscience." It is here that the punishing labor of retrieval commences. Meticulous inspection of last Term's cases,⁸ buttressed by attention to the unfortunately ne-

8. Those cases are *Aguilar v. Felton*, 105 S. Ct. 3232 (1985); *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985); *Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985); and *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). *Aguilar* and *Grand Rapids* were companion taxpayer challenges to what was originally Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701-3386 (1976), which was superseded in 1982 by Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3301-3876 (1982). For convenience, the Court called the questioned provisions "Title I." "State and local education agencies" were authorized to receive federal funds "to meet the special educational needs of educationally deprived children," and the statutory coverage was confined to areas with a high concentration of low income families. *Id.* § 3801. Most importantly, the administering school districts were obligated to meet the special educational needs of all eligible children *whether or not they attended public schools*. *Id.* § 3806. The Grand Rapids School District implemented this congressional command through a "Community Education and Shared Time" program, in which public school personnel taught courses in parochial schools during regular school hours to parochial school students. In addition, adult education courses, taught by parochial school teachers working "part-time" for the district, were offered after school in the parochial school buildings. The Shared Time courses were "remedial" or "enrichment" courses generally unavailable in the private schools. The adult courses duplicated ones available in local public schools. The Court determined that the program "impermissibly advanced religion" in three ways:

First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or be-

glected case, *Bob Jones University v. United States*,⁹ reveals the ultimately responsible theoretical view. Part III fleshes out this "privatist" construct through a maieutic pattern comprised of three useful inquiries about the recent cases: What is "religion"? How does it descriptively irrupt into "politics," and what follows from these irruptions? And most importantly, by what criteria are those effects judged desirable or undesirable? These questions do not themselves constitute a legal analysis. Rather they are convenient assistants to understanding the cases. They represent a system only in that they possess some internal relationship. The first two inquiries are largely descriptive excursions into the opinions. They elicit how the Justices think the world of church and state really works. The prescriptive is fully present when the twin evils of sect domination and oppression of conscience are squeezed together to reveal a unifying, judicially enforceable norm.

liefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

Grand Rapids, 105 S. Ct. at 3223-24.

New York City encountered a Catch-22 backlash in its implementation of Title I. Only public school teachers, monitored by public school supervisors, were involved in the remedial and guidance services offered in the largely Catholic private schools. This effectively insured against improper religious advancement, but just as effectively insured an impermissible church-state entanglement. That is, the "pervasive monitoring," as the Court saw it, necessary to survive the second inquiry established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), necessarily resulted in a violation of the third *Lemon* inquiry. *Aguilar*, 105 S. Ct. at 3237.

In *Thornton v. Caldor, Inc.*, the following statute was invalidated by the Supreme Court:

"No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."

CONN. GEN. STAT. ANN. § 53-303 (West 1985).

The petitioner's decedent was discharged from a managerial position in one of the respondent's stores for refusing to work on his Sabbath, Sunday. The Supreme Court concluded that the statute had "a primary effect that impermissibly advances a particular religious practice"—Sabbath observance—in violation of the second *Lemon* test. *Thornton*, 105 S. Ct. at 2918.

Parents of children attending Mobile, Alabama public schools challenged classroom "religious observances" in *Wallace v. Jaffree*. At issue before the Supreme Court was a statute authorizing a period of silence for "meditation or voluntary prayer." ALA. CODE § 16-1-20.1 (1984). The convoluted pedigree of the statute persuaded the Court that the addition of "or voluntary prayer" to an existing moment-of-silence statute was the operative event. That the addition was "an effort to return voluntary prayer" to public schools meant it had "no secular purpose" and conveyed a message of "endorsement" of religion as well. *Wallace*, 105 S. Ct. at 2491.

9. 461 U.S. 574 (1983).

That pincer movement is the province of the third question. The observations and insights collected in the first two parts reinforce the final finding—"privatization" is the normative construct deciding the cases.

Part IV takes the vision so elucidated, recasts it in Madison's vocabulary, and shows how the Court has turned the Madisonian synthesis literally on its head. This inversion is betrayed not only by the imprisonment of religion in a nonpublic ghetto but also, and more dramatically, by the judicial prophylaxis thrown up to thwart escape. Because the Court's vision *is* prescriptive and the privatization of religious reality *is not* easy, a relatively high degree of socialization is required to keep faith effectively at bay. Judicial forays into religious consciousness are, therefore, necessary. Part IV explores those forays that intrude upon religious consciousness even when it is located in, by all reckoning, the "private" sphere. The notion of "religion contrary to public policy" developed in *Bob Jones* and the Court's otherwise puzzling resistance to a sect-equality reading of the establishment clause are discussed in detail. The objective in doing so is simply to measure the explanatory value of the thesis by applying it to troubling cases. Finally, if privatization explains the cases, what explains privatization? Why, in other words, do the Justices like it so much? Part IV answers this question by concluding that the pull of the "perfect Constitution," whose broad tendency to penetrate all social groups and institutions, including religious ones, with "universal" ordering principles, necessarily implies the destruction of religious consciousness. Through sustained combat against the social, political, and cultural manifestations of religion as authoratively intersubjective, the Justices strive to reduce religion's claims of public truth to implausible nonsense. While the Supreme Court, along with the entire governmental apparatus, is both legally and practically unable to ordain, at a stroke, the demise of religious consciousness, this Article fairly supports the view that virtually the full measure of judicial power is deployed to accomplish precisely that end. It is therefore a contest for normative supremacy in the public sphere, a bitter rivalry between combative orthodoxies, or dogmatomachies.

II. THE NORMATIVE VIEW

Supreme Court treatment of church-state issues has become nothing less than a national soap opera. Easily among the most visible of each Term's rulings, the opinions are eagerly, sometimes breathlessly, awaited by an interested public not confined to the Court's usual audience, the professional bar and legal academy. It is easy to see why. Even when the operative stakes are truly minimal, as in the recent mo-

ment-of-silence case, *Wallace v. Jaffree*,¹⁰ the litigation is widely regarded as a crucible in which a substantial portion of national identity is being forged. Even otherwise contending forces blithely assume that "are we a Christian society?" is the question implicitly litigated. The results in each case are then endlessly combed for every trace of an answer. Whether awareness of the real issue—does religion as a whole have any public significance?—would heighten or diminish public concern is unclear. Neither is it surprising that, given this public appetite, the media instantaneously broadcast and analyze the various opinions in each case, pronouncing "shifts" and "drifts" to the "right" and to the "left," and sometimes back to the middle. The entire spectacle imitates the ambience of a hostage crisis in which unlimited reports by enthusiastic correspondents frequently conceal the fact that nothing at all is actually happening, that important things are unchanged.

The media posturing is far from harmless. Besides taking ordinary people on an unnecessary roller coaster ride, it affects the results. Given the raw policymaking quality of the Court's church-state project, and the didactic rhetoric of the opinions, it appears that the opinions of last Term were affected by a desire to overcome, or atone for, the popular view of *Lynch v. Donnelly*¹¹ as a "conservative" triumph. A majority of the Court will therefore be relieved to hear the initial media reaction to the recent cases—a judgment clustered about the preliminary observation of one law professor who pronounced a "return" to the "mainstream" of previous, presumably pre-*Lynch*, cases.¹²

Scholars, for the most part, have also treated *Lynch* as some kind of rightward tilt, if not stampede,¹³ when in fact nothing of theoretical significance occurred in that case or, for that matter, in any other case during the 1983-84 Term. Because *Lynch* went no place,¹⁴ whence can the Court return? Yet, there are negative consequences in this conclusion too because such commentary obscures the fundamental coherence and continuity of the Court's opus from 1947 to the present moment. Even though professional opinion will probably echo that of the media by pronouncing a "shift" to the "center," last Term marked no turn in any direction, just a great leap forward that finally achieved the ground targeted in 1947. Indeed, *all* of the modern opinions are but exceedingly belabored footnotes to the theoretical account in *Everson*, articulated by Justice Douglas some years later: "The Constitution decrees that religion must be a private matter for the individual, the family,

10. 105 S. Ct. 2479 (1985).

11. 465 U.S. 668 (1984).

12. *Rebuilding Jefferson's Wall*, TIME, July 15, 1985, at 73.

13. See, e.g., Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770.

14. See *infra* note 135 and accompanying text.

and the institutions of private choice"¹⁵ To appreciate this as the constitutional kerygma, however, it is necessary first to peel away three distracting layers of dispensable chaff.

"Movement," like that of an overwrought ping-pong ball, *does* appropriately capsulize the cases at the most obvious level of analysis—the level of books, bus rides, and prayers. Viewed from this perspective, last Term might indeed signal a move to the middle. True, perhaps, but trivial and uninteresting as well. The senselessness here is itself multi-tiered. The operative results of the cases defy all attempts at alignment with principle, neutral or otherwise. Accordingly, they can be catalogued, but not explained. It is difficult, for instance, to follow the line from "no aid to religion," as commanded in *Everson*, to bus rides in mid-day for field trips, which are forbidden by *Wollman v. Walter*,¹⁶ without hitting morning and afternoon rides to and from school, which are permitted by *Everson*. In addition, the seemingly random and certainly inconsistent results of prior cases make prediction impossible. Here, the "atlas" problem typifies the folly of attempting analysis—if the state may safely provide private school pupils with books, but not with maps, what about books of maps?

This unsatisfying situation worsened during the past Term in which the inconsistencies previously noted between cases were concentrated in a single opinion. In *Wallace v. Jaffree*,¹⁷ the Supreme Court simultaneously maintained the following positions: 1) "voluntary prayer" in a public school is constitutionally permissible; 2) the state may designate a moment of "silent meditation" during which students "may pray"; 3) the state may, apparently, also designate that moment as one for "voluntary prayer," so long as the two designations are contemporaneous; 4) a separately enacted designation of a moment of voluntary prayer, however, violates the requirement of government neutrality toward religion; 5) "meditation" is a form of prayer; 6) repeat step 2.

Decades of inconsistencies make departure from this analytical level mandatory. It is enough to add that there are now programmatic results in decided cases that fully support both sides in the same case. After validation of tax exemptions in *Walz v. Tax Commission*,¹⁸ for example, any financial assistance short of a full operating subsidy can be classed as a lesser included aid to religion. Yet, the constitutional rule of "no-aid," as applied in *Meek v. Pittenger*¹⁹ and *Wollman*, seems virtually airtight. Further distinctions in the hope of reconciliation meet similar fates. The "entanglement" infirmity detected by the Court in

15. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (Douglas, J., concurring).

16. 433 U.S. 229 (1977).

17. 105 S. Ct. 2479 (1985).

18. 397 U.S. 664 (1970).

19. 421 U.S. 349 (1975).

last Term's *Aguilar v. Felton*²⁰ truly pales beside the entanglements incident to basic state accreditation requirements. After *Aguilar*, however, any working relationship between public and private school authorities is arguably unconstitutional. Add to this swirling cauldron the unpredictability of when the Justices will appeal to prior operative results as a rule of decision, and the account of programmatic results is truly about as enlightening as a lecture on color is to a blind man.

At the doctrinal level, last Term was the best of times and the worst of times. The uncertainty surrounding the famous three-part test in *Lemon v. Kurtzman*²¹ engendered by *Marsh v. Chambers*,²² which did not apply the test at all, and *Lynch v. Donnelly*,²³ which applied the test with explicit reservation about its utility, was authoritatively eliminated. All of the Justices, with the probable exception of Justice Rehnquist, appear to have affirmed their allegiance to *Lemon*, and this good news appreciated with the Court's obvious preference for establishment over free exercise analysis for cases in which both apply. The bad news is that the good news does not matter—the "test" no longer even purports to decide cases. That it never actually did has long been clear. The *Lemon* test is back, but to "serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."²⁴ The "line" is contorted indeed. For example, Justice Brennan's attempt in *Grand Rapids School District v. Ball*²⁵ to draw a line bisecting the parochial school aid cases yielded a grotesque figure resembling the twenty-eight sided election district struck down in *Gomillion v. Lightfoot*.²⁶

Of course, the *Lemon* analysis has always been one of degree rather than of principle, as the formulations themselves, such as "excessive" entanglement, or "principal," "primary," or "direct" effect, reveal. Explicitly treating the three parts as only "sensitizing concepts" at least makes sense of accumulated reality. But it is now also explicit

20. 105 S. Ct. 3232 (1985).

21. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As expressed by the Court, the constitutionality of any statute challenged under the religion clause is controlled by three tests: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted).

22. 463 U.S. 783 (1983).

23. 465 U.S. 668 (1984).

24. *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3222 (1985) (quoting *Meek v. Pittenger*, 421 U.S. 349, 359 (1975)). Justice Rehnquist's historical critique of the Court's church-state opus for the past 40 years suggests that the *Lemon* test is no longer even the appropriate guideline for resolving religion clause issues. See *Wallace*, 105 S. Ct. at 2508-20 (Rehnquist, J., dissenting).

25. *Id.* at 3227-30.

26. 364 U.S. 339 (1960).

that no test exists to structure the constitutional inquiry and protect the issues from unconfined judicial management. At the same time, the "three" parts in *Lemon* are apparently congealing. "Secular purpose," never an important factor, after *Wallace* seems to be no more than the obverse of "religious purpose," so that legislation lacks a secular purpose if its purpose is to promote religion. Promoting religion is already prohibited by the second part of the test. Moreover, the chief constitutional vice identified in *Wallace*, *Grand Rapids*, and *Aguilar*—the "symbolic union" of church and state—comprises, in the Court's analysis, a fusion of the second and third prongs. This thematic synthesis both disposes of the cases and transcends the doctrinal level altogether. The logical consequence of tactile dependency thus lights the exit sign. If *Lemon* does no more than "sensitize" the Court, the worthwhile inquiry is, what does it sensitize the Court to?

Free exercise doctrine, or what is left of it, is in no better shape. The most interesting and most frequently litigated branch of it, the "conduct exemption" doctrine, was gutted by the reasoning in *Thornton v. Caldor, Inc.*²⁷ Conscientious exemption from generally applicable law, as articulated in *Sherbert v. Verner*,²⁸ *Wisconsin v. Yoder*,²⁹ and *Thomas v. Review Board*,³⁰ requires that infringements of "religious liberty" be justified by showing that they are the least restrictive means of achieving some compelling state interest. Thus, conscientious individuals are armed with presumptive authority to break laws curtailing their freedom to act on religious beliefs. This misguided doctrine can be described as either anarchic or anarchical and only extra-doctrinal judicial foot work masquerading as a "balancing test" keeps application of the doctrine from its logical destination in chaos.

Discovering that the religion clause "tests" are little more than sieves through which broader judicial values pass unfiltered is enough to direct attention to that value plane. But there are three more reasons for redirecting our gaze. One is a consequence of having two not completely unified clauses. Which carries the day when both apply? By what criteria does the Court conceptualize a given set of facts as an "establishment" rather than a "free exercise" problem? By what criteria has the establishment clause achieved its obvious ascendancy in the church-state realm? Because, as Justice O'Connor accurately remarked in *Thornton*, any state attempt to promote free exercise is inconsistent with the establishment clause prohibition of state promotion,³¹ is not the *only* important question in many cases not *what* the *Lemon* test

27. 105 S. Ct. 2914 (1985). The Court did not expressly relate its rationale to this doctrine, but the effects of the Court's rationale on the doctrine are evident.

28. 374 U.S. 398 (1963).

29. 406 U.S. 205 (1972).

30. 450 U.S. 707 (1981).

31. 105 S. Ct. at 2919 (O'Connor, J., concurring).

reveals, but *why* it is applied?

The answer to that question forces the inquiry to another level. So does a second reason, or really, a second question. Why should the *Lemon* test be applied in lieu of some other test once the establishment clause enters the picture? Put differently, what analytic construct or animating vision produced the *Lemon* test? Why, most especially, should sect-neutral aid to religion violate the establishment clause when that aid has no palpable coercive effect on anybody?

The final warrant for detouring around doctrine is not for what is immediately beneath or behind it, but for what is beside it. The various elements of the *Lemon* and free exercise analyses are actually cognate expressions of what are here called church-state "themes," elsewhere frequently labelled first amendment "values" or "policies." "Primary effect," for instance, contains the related establishment clause values of "neutrality" and "voluntarism," as well as *Everson's* cornerstone proscription of aid to religion. "Voluntarism," reformulated as "freedom of conscience," captures much of free exercise rhetoric and substance. "Excessive entanglements" is another phrase for the granddaddy non-establishment theme, "wall of separation," whose flip side of "symbolic union" emerged last Term as the leading villain of the piece. "Divisiveness," as in "the-purpose-of-the-establishment-clause-is-to-avoid-political-friction-along-religious-lines," is nevertheless still a leading player. Fading into the background is the "accommodation" theme so much evident in *Marsh* and *Lynch*. In those cases, historical inquiry dressed up a theme first articulated by Justice Douglas in *Zorach v. Clauson*,³² who understandably concluded that, in a society composed of religious people, some innocuous spillover into the public realm is tolerable. The value of "moving over" to these doctrinal analogues is prospective analytical advance on one or both of two fronts. First, the new terms themselves may reveal the theoretical view not apparent from the tests. Second, careful inspection of the themes may lead to an ultimately satisfying construct buried somewhere beneath them.

This thematic mosaic, while possessing some genuine analytic information, is still not the stopping point. Preliminary and fairly obvious deficiencies suggest the need for some supplementation of these themes before the real picture can be brought into view. One deficiency is the absence of brakes. How far should "divisiveness" take us? Should it be all the way to the appellant's position in *Harris v. McRae*,³³ that legislation be invalidated because religiously motivated people outspokenly favored it? If so, should "religious" people be permitted to participate in public life at all? Do negative answers to either of these propositions countenance a "symbolic union" of church and state? On the other

32. 343 U.S. 306 (1952).

33. 448 U.S. 297 (1980).

hand, if religiously propelled individuals are disenfranchised, either literally or figuratively, is government "neutrality" between religion and "irreligion" sacrificed? This raises the second preliminary problem. The themes established are often in conflict, and external criteria are necessary to harmonize them. Is the result in *Lynch*,³⁴ for instance, a permissible accommodation of the community's desire somehow to symbolize its deepest collective identity, or is it a prohibited union of realms that must be kept apart? Is the moment of silent, voluntary prayer a classic embodiment of "voluntarism" in that it commendably attempts to provide some spiritual freedom within a state-mandated, bureaucratically controlled public school, or is it a "conscription" of non-praying students and thus a violation of the same precept? In each case, as in most religion clause litigation, many values are in play and they line up on opposite sides. Each party may even rely on the same theme. Resolution of the issues requires careful calibration of each theme's relative distribution, and application of an external theory capable of establishing some rough pecking order of values. Finally, what if a value determined to be paramount turns out to be so indeterminate as to be analytically, as opposed to rhetorically, useless—like the now perforated, serpentine "wall of separation"?

At its best, this scheme of themes is no more than a set of frequently bickering connotations, or sensitizing concepts, desperately in need of efficient management. One cannot even treat them as a set of apparently random dots that, when connected in mechanical fashion, provide a clear picture, because their inadequacies require a preformulated vision before integration can be attempted. This process of integrating, ordering, defining, and particularizing has been underway for nearly forty years, and the 1984-85 Term clearly represents at least a penultimate stage of development. The climax is heralded by the rhetorical retreat of the *Lemon* test. While careful to pay homage to this triune god of church and state law, and emphatically to affirm the deity's survival, each of the four opinions last Term was almost fully constituted not by comparison of facts to *Lemon*, but by explanation of how negation of a thematic concept like "neutrality" or "symbolic union" resulted in a violation of the *Lemon* test. In this critical sense of doctrinal "afterthought," the cases rest foursquare upon preceding "conservative" analyses like *Lynch* and *Marsh* in which constitutional values resolve church-state conflicts without genuine mediation by "tests."

An even more remarkable development evident in each of the four

34. *Lynch* allowed the city of Pawtucket, R.I. to erect a Christmas display, which included a crèche or nativity scene, in a park owned by a nonprofit corporation and located in the heart of the city's shopping district. The court found no violation of the establishment clause despite the concededly religious significance of the crèche. 465 U.S. 668 (1984).

opinions is the primacy of a single theme: "religious liberty." This, according to the Court, is the central, unifying policy of the two religion clauses and, assertedly, the distillate of prior cases. Unhappily, the phrase tells us nothing. It is found in the Soviet Constitution as it is, constructively, in ours, and there is little similarity between the regimes' treatment of religious belief. Nor is the Court's current use of the theme intuitively accessible even to one steeped in the American vocabulary of church and state. If "religious liberty" is the organizing principle, for example, the anticipated result in each case last Term was probably the one that was ultimately rejected by the Court. Specifically, each of the challenged state institutions represented effectively and purposefully, with the possible exception of *Wallace*, entirely sectarian enhancements of the free exercise of religion with no uninvited intrusion on conscience (with a caveat for the Court's unpersuasive argument to the contrary in *Wallace*).³⁵ Just as curiously, how did "religious liberty" triumph while the free exercise clause was vanquished? How has non-establishment, ordinarily and accurately viewed as a norm of structural relations designed to maintain civil peace and order, metamorphosed into primarily a guarantee of freedom?

At a minimum, these curiosities suggest a highly stylized use of the term "religious liberty," a term poised to decide cases aided only by the animating vision of the Justices who give it life. Nor is light cast upon it by its chief analytical manservant, "symbolic union of church and state." This phrase is a genuine judicial *carte blanche* through which a state program or practice that a majority of Justices concludes might be construed by some impressionable individuals as a "symbolic" (read, "abstract") union of church and state is found to violate the Constitution. This veto power accruing to atypical, if not imaginary, persons exercised by abstract demons is literally contentless and infinitely open-ended. It is not a principled norm at all and has no built-in mechanism for becoming one. It does not aspire to logical consistency and is not limited to an identifiable set of "church-state issues" like school prayer or parochial school aid. Given its plebiscitary nature, these qualities should not be expected. In short, it is the perfect vehicle for a Court ready to roam the religio-political landscape, running down rumors of angels with eviction notices in hand.

The commentator's task then is to discern what "religious liberty" consists of and how the Court essays to guarantee it. The cases, beginning with *Everson* and ending with *Aguilar* and *Grand Rapids*, are the raw materials from which to fashion the answers. But they constitute "sources" only in that they contain the vision's *expression*. They are not the vision's source. Put differently, detective work in the opinions can tell us what the Court's theoretical view is, but not much about

35. 105 S. Ct. at 2490-91.

why the Court takes it as the appropriate theoretical view. The primary reason is that the constitutional warrant claimed by the Court—history, especially the intention's of the first amendment's authors—certainly does not support the Court's assertions,³⁶ and it is hard to believe at this point that the Justices really think it does. Indeed, individual members of the Court quite readily concede that history has little to do with what they are doing. Second, none of the other traditional sources of constitutional interpretation, including constitutional text and structure, precedent, and governmental practice, support the theoretical view first articulated in *Everson* and *McCollum v. Board of Education*,³⁷ and respected ever since.³⁸ Third, while candor has not here been the Court's strong suit, some of the Justices have admitted that the Constitution is, in Phillip Kurland's phrase, an "excuse" for the decisions, and not a reason for them.³⁹ Justice Jackson, for instance, asserted in 1948 that key establishment clause issues were matters on which "we can find no law but our own prepossessions."⁴⁰ More recently, Justice White, after previously admitting that history did not answer the vital questions, fessed up. The Court, he said, has simply "carved out what [it] deemed to be the most desirable national policy governing various aspects of church-state relationships."⁴¹ The fourth and final reason resides in what follows. Elaboration of the theoretical view captured in the notion of "privatization" reveals a construct so quintessentially modern that it could only occur to minds alive in a late, if not postindustrial, society like post-war America, and that it is found nowhere in pre-*Everson* constitutional source materials.

III. RELIGION AND THE "PRIVATIST" CONSTRUCT

The submission is to see almost forty years of holdings as the gradual and sometimes haphazard elaboration of a single theoretical view, a coherent construct that disposes of cases directly, without mediation by autonomous "tests" or "values." The 1984-85 cases are most important because the system so painstakingly constructed by a score of Justices since 1947 was finally perfected in them, and the coherence and emphasis of the most recent opinions underscore the predictive value of the view implicit in them. The purpose of this Part is to extract that

36. G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (to be published by Greenwood Press in early 1987).

37. 333 U.S. 203 (1948).

38. G. BRADLEY, *supra* note 36.

39. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 14 (1978).

40. *McCollum v. Board of Educ.*, 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

41. *Committee for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting).

vision of church-state relations beginning with only the seemingly paradoxical fact that, despite volumes of cases painstakingly regulating religion, the Court has never provided a constitutional definition of it.

A. *What Is "Religion"?*

"The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." With that command, the Supreme Court, in *United States v. Ballard*,⁴² interpreted the first amendment to interdict every government attempt to ascribe "truth" or "falsity" to "religious" assertions. As a result, all that could be measured was the good faith or "sincerity" of the believer. The ultimate question was, did the person actually evince an individual belief in the beliefs asserted? Predictably, then, the Supreme Court has not squarely provided a constitutional definition of religion. Notwithstanding *Ballard's* stricture, however, and presumably consistent with the first amendment's veil of agnosticism, *United States v. Seeger*⁴³ filled out the statutory term "religious training and belief." Articulating what commentators opined was a constitutionally compelled, "functionalist" conception of belief, the Court swept within the phrase's reach

all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the . . . definition.⁴⁴

Ultimately, the Court concluded in *Seeger* that "[the issue] is whether the beliefs proposed by a [draft] registrant are sincerely held and whether they are, in his own scheme of things, religious."⁴⁵ To use Paul Tillich's exact term for the phenomenon the Court described, purely ethical beliefs might be an individual's "ultimate concern" and, thus, "religious." While ostensibly rejecting a "substantive" definition characterized notably by an extra-mundane component, and thereby reaching perhaps a putatively "liberal" result, the Court cut deeply into *Ballard*. "Sincerity" was no longer the sole inquiry. Agnosticism was formally maintained, but a new dimension, the "constitution" of religious belief, was added. Whether or not individual maxims are true or false, the whole is not "religious" if it falls short of the depth and comprehensiveness characteristic of some yardstick "religion." The yardstick is not necessarily any religion having a "god." The believer may

42. 322 U.S. 78, 86 (1944).

43. 380 U.S. 163 (1965).

44. *Id.* at 176.

45. *Id.* at 185.

attach that label to whatever entity she chooses and build a "religion" around the designated "god," but the constitution requires more. Classic, and by no means unrealistic, examples are value systems containing materialistic or egoistic "ultimate concerns." A Marxist, or a disciple of Ayn Rand, encompasses all of experience within such categories. He orders his life and interprets past, present, and future by them. But such conceptions of life are not "religious" in the Supreme Court's view. Neither, presumably, is "secular humanism," which, however defined, never crosses the horizon into transcendence. The focus of this Article is elsewhere, but it is important to note in passing this stage that, whatever else is true of the Court's definitional efforts, it is not true that "sincerity" is the only constitutionally permitted inquiry. *See* *ger* makes clear that the first amendment permits sorting of what "native speakers" claim to be "religious" along lines other than sincerity. One of these lines, for instance, is the "constitution" of religion as comprehensive, ultimately inclusive, and, in some important sense, extramundane. Without the last constituent element, the distinction between "secular" and "religious," indispensable to the Court's church-state edifice (especially in school cases), is difficult to make out.

The more important constituent element of "religion" is not a constitutionally permitted judicial improvisation, but a judicially pronounced constitutional imperative. It is helpful to start with *Ballard's* catalogue of paradigmatic "religious" questions, the kinds of questions that are publicly irrelevant, involving miracles, the Divinity of Christ, life after death, and the power of prayer.⁴⁶ For instance, did Jesus really turn water into wine at the Cana wedding feast? Did He raise Lazarus from the dead? Was Jesus Himself raised on Easter morning? Put differently still, *Ballard* hinted that the Constitution required indifference only to questions to which the law was already indifferent. There was no suggestion, for instance, that the moral duties and social vision contained in the Sermon on the Mount were "religious" questions.

Ballard's hint effectively became law in *Everson*, and has been ever since. Writing for the Court in *Everson*, Justice Black envisioned a "wall of separation" that "rescued the temporal institution from religious interference."⁴⁷ In his influential dissent, Justice Rutledge said that the Constitution made the religious function "altogether private."⁴⁸ One year later the Court reaffirmed the "two sphere" doctrine in *McCullum*. By 1971, Justice Douglas was simply echoing an embedded constitutional principle in locating religion within private institu-

46. 322 U.S. at 87.

47. 330 U.S. at 15 (quoting *Watson v. Jones*, 80 U.S. 679, 730 (1871)).

48. 330 U.S. at 52 (Rutledge, J., dissenting).

tions.⁴⁹ Emphatically reaffirmed by the Court last Term,⁵⁰ the public/private "two sphere" distinction laid down by *Everson* is a linchpin of church-state law.

By so circumscribing the "religious" function, *Ballard's* agnosticism survives, but its effective reach is diminished, if not trivialized. A court still may not ask whether the teachings of the parables are "true" or "false." It does not need to. When those teachings break out of the private sphere, however, their "religious" pedigree engenders constitutional resistance as an intruder upon alien turf. The Court's definitional efforts are but a surrogate for the privatization campaign and those efforts should be conceived as follows: something called "religious liberty" is the constitutional problem, and an effective device to cure the mischief portended is simply to render the subject of that "liberty" innocuous. This technique makes belief-conduct distinctions, for instance, superfluous. That dichotomy pertains to the scope of the "liberty" attached to "religion." If "religion" does not pertain to public or political behavior, it really does not matter how much liberty that religion entails.

To backtrack, the Court claims that the Constitution relegates religion to a "private" realm separate from the sphere of government, politics, and the "public." Is this inconsequential rhetoric, or does it really "bite"? It is, for one thing, the specific conception of "religion" contemplated by the Court seeking to carve out the "most desirable policy" on church-state issues. The most obvious example is the conduct exemption. First articulated in its present form by the *Sherbert* Court in 1961,⁵¹ and reaffirmed more recently even as judicial fear of "divisive," religiously inspired political behavior increased,⁵² it seemingly abolishes the belief-conduct divide and presumes that law can be safely subordinated to religion. So stated, it is truly anomalous and, thus, predictably undercut by *Thornton*. The doctrine *must* assume that religion will not often intersect with law, that the "private" sphere is in fact ordinarily distinct from the "public" one. The contrary assumption transforms the doctrine into either sheer lunacy because it invites anarchy, or assumes a popular religious consciousness uniformly refuted by the Court's entire opus. That is, the Court might be assuming that "conscience" *does*, as a rule, intersect law, but that the meeting is jovial, that the two harmonize in the ordinary case. While the former assumption presumes a plurality of religious views, the latter is staked upon a homogeneity that is not only empirically absent but also

49. *Lemon*, 403 U.S. at 625 (Douglas, J., concurring).

50. *Grand Rapids*, 105 S. Ct. at 3230.

51. 374 U.S. at 403 (holding that "appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation").

52. *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981).

inconsistent with the Court's own frequently expressed understanding that ours is a religiously diverse society which, but for the containment of religion by the Court and the Constitution, might erupt into sectarian warfare at anytime. It is also worth a passing note that the only beneficiaries of the conduct exemption in Supreme Court hands have been separatist, politically indifferent groups such as the Amish, Jehovah's Witnesses, and Seventh Day Adventists.

Probably just as obvious an example is that most enduring constitutional theme—"wall of separation." Whatever its analytical shortcomings, it unquestionably has organized discussion of the issues for forty years. It does not just presume that religion is distinct from government, but requires it. Other central church-state "values" or "themes" do likewise. The "entanglements" proscription concedes only an irreducible minimum of actual overlap between the two spheres, and the minimum contemplated is, in absolute terms, small. The religion clauses require government "neutrality," both among sects and between "religion" and "irreligion." This is otherwise expressed as a command to refrain from endorsing, aligning, or siding with, religion or a particular brand of it. These values require and contemplate that government go about its business without encountering "ultimate concerns." Implicit, therefore, in the religion clauses is the formulation of a California court that treated the disposal of fetal remains as an establishment clause problem. As explained by the court, because the fetus is not "universally" regarded as a human being, any state action showing a preference for this belief, such as burying the remains, will be strictly scrutinized under a compelling-state-interest, least-restrictive-means test.⁵³

The "two-sphere" metaphor thus has both proscriptive and descriptive components in that it sees confinement of religion to a private realm of voluntary, nongovernmental institutions as both constitutionally required and empirically plausible. This latter point needs clarification. The Justices do indeed concede some analytical untidiness in their model of spherical solitude, some fissures in the wall of separation. But that sums the concession. The Court clings to "neutrality," "separation," and the "public/private" divide as viable governing norms that should, can, and do order everyday reality. They clearly believe that experience closely tracks the constitutional metaphors and a tolerable level of judicial tinkering can keep the realms in their proper, almost mutually exclusive, alignment. In fact, the metaphor sustains the best of both practical worlds. Religion and government each thrive best when left alone by the other, or so says the Court.

Brief comparison of the two constituent elements described reveals

53. *Feminist Women's Health Center v. Philibosian*, 203 Cal. Rptr. 918, 924 (Ct. App. 1984).

a powerful dissonance built into the Court's system. It is not easy to see how religion—characteristically all-encompassing and ultimately compelling, according to *Seeger*—can be compartmentalized within a “private” area, much less prosper there. Nor is it readily apparent how any government, especially a modern welfare state and world power like the United States, can avoid taking stands on “ultimate” or “religious” issues as pacifists, to cite just one example, have little difficulty appreciating.

The third constitutive feature of religion intends to reduce this tension, but in the process further trivializes *Ballard*'s “blind scale” of religious freedom. The question obviously generated by the discussion to this point is one of location. Just *where* does the public/private line intersect experience? A preliminary response to that question corresponds to the issue presently addressed, the scope of the “private” sphere of untrammelled religious liberty. How much space is on religion's side of the wall of separation in that domain of state abstention?

Not much. Less prosaically, the unencumbered “private” sphere is no more than a cocoon wrapped around the solitary individual. The 1984-85 cases unanimously and unequivocally treat “conscience” as the seat of religious freedom, the paradigmatic if not sole addressee of the constitutional guarantees. Additionally, the cases do so with an emphasis that is difficult to overstate. Writing for the Court in *Wallace*, Justice Stevens called “the individual's freedom of conscience . . . the central liberty that unifies the various clauses in the First Amendment.”⁵⁴ Justice Stevens buttressed the claim with an earlier observation by the Chief Justice, who dissented in *Wallace*, that the “purpose” of the first amendment is to reserve “the sphere of intellect and spirit . . . from all official control.”⁵⁵ This “fixed star” in our constitutional system is one of the “few absolutes” of church and state, according to the Court in the recent Title I cases.⁵⁶ Government-sponsored “indoctrination” is utterly forbidden because it would have “devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State”⁵⁷ This observation's precise context illumines the atomistic quality of the freedom threatened. As the Court observed, the students whose liberty was endangered “presumably” attended parochial schools “precisely in order to receive religious instruction,”⁵⁸ yet government aid, which eases the financial burden of attending, still poses a substantial risk of state-sponsored indoctrination.

Of course, state aid adds nothing to the “coercive” atmosphere (to

54. 105 S. Ct. at 2487.

55. *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

56. *Id.* at 2489.

57. *Grand Rapids*, 105 S. Ct. at 3224.

58. *Id.* at 3226.

use the Court's revealing term) already present in religious schools. If anything, the reverse effect is achieved by removing the perception of "outsider" status accompanying exercise of a constitutional right, articulated in *Pierce v. Society of Sisters*,⁵⁹ that disqualifies "impressionable young minds" from an otherwise universally available benefit program like Title I. However perverse, the Court's reasoning is not stupid, and it spotlights the Justices' individualized conception of religion. By penetrating a religious community such as the parochial school, and by resting analysis upon the "voluntarism" of an individual member's reception of training voluntarily undertaken, the Court fills out its constitution of religion along intrasubjective lines. The Court's rhetoric suggests that the youth of the subjects in primary school cases makes the analysis special, but that specialness is, at the very most, a sensitized standard inquiry. The undeviating concern of the Court remains that of insuring a market place of religious notions in which everyone—adults as well as children—is free to choose belief or unbelief without government "tipping" of the choice in any direction. In this sense *Lynch* and the Title I cases share the same vice. As the *Lynch* dissenters and the Title I majority argued, even a seemingly innocuous sign, if it can be identified with the state in *any* way, undermines this freedom. In each case, there is a prohibited "symbolic union" of church and state.⁶⁰

Some tentative conclusions now suggest themselves. While "religion" is undoubtedly something that groups and institutions are about, the (hypothetically) unencumbered conscience is what the constitutional guarantees are about. Hence, "religion" is, analytically, an individual performance. Those who would further seek refuge from this thesis in the particulars of the Term's cases need to consider the, practically speaking, gossamer involuntariness detected by the Court in the *Grand Rapids*, *Aguilar*, and *Wallace* cases. The state's active involvement in *Wallace* was theoretically indistinguishable from the remote connection between church and state in the school cases, and understandably so. In an atomistic regime in which fluency consists of mastering the vocabulary of "symbolic" "abstract" "union," a rational basis test is all that is necessary. If a reasonable but very impressionable person could detect a state endorsement of religion, the Constitution is offended. Given this paradigm, the next inquiry may be whether *all* group-centered constitutional privileges, such as the institutional autonomy doctrine of *Jones v. Wolf*⁶¹ and worship assisting municipal ordinances like that struck down in *Larkin v. Gretel's Den*,⁶² work forbid-

59. 268 U.S. 510, 534-35 (1925).

60. See, e.g., *Grand Rapids*, 105 S. Ct. at 3226-27.

61. 443 U.S. 595 (1979).

62. 459 U.S. 116 (1984).

den coercive effects upon not only "outsiders," but young members of the "endorsed" group as well.

The Supreme Court's conception of religion is, on the other hand, absolutely not "secularized." The cases neither contemplate, countenance, nor encourage the reduction of religious belief to social theory or political ideology, and the opinions frequently strive to protect religious institutions from the "corrosive secularism" carried by, for example, administratively entangling aid programs like Title I. There is more than genuine solicitude here. The politicization of religion would quite obviously explode the Court's carefully crafted construct. If religion is indistinguishable from public policy, the opinions are nonsense. This is why *Seeger's* "liberal," that is "functional," definition of religion cannot be taken seriously. A "religion" constituted entirely of moral or ethical beliefs has no constitutional home because it would consist almost exclusively of intersubjective social duty. It is inevitably and entirely public. Religion, as the Court understands it and notwithstanding *Seeger*, necessarily involves transcendence. If there is not theism, then there must at least be contemplation so that there is something intrasubjective to compartmentalize. Deeply spiritual religion is fine, mysticism even better. The more ineffable the religious experience, the less amenable it is to doctrinal formulation and, derivatively, to theologies of praxis. Concomitantly, the religious "community" in mystic traditions is more a loose association of individuals⁶³ than a tightly wrapped unit capable of effective social action. Any suggestion, then, that the Court is hopeful of secularizing religion thoroughly misunderstands the cases. A de-divinized public sphere (i.e., a distinct situation also sometimes called "secularization") is assuredly the Court's objective, and the Justices quite accurately perceive the better, but by no means sure, method of acquisition to be the full divinization of religion. At least a deeply spiritualized faith portends detachment from the fallen world of politics, whereas secularized religion makes engagement of the public realm mandatory.

"Secularization" is the polar opposite of the Court's conception of religion. *Ballard's* "sincerity only" test is dangerously misleading, as is a simple "belief-conduct" divide. *Seeger's* "functional" conception is at least relatively inadequate. "Privatization," with its deep connotation of "intrasubjective," fairly captures the constitutional "definition" of religion. *Ballard's* agnostic framework is still formally maintained, for the vast agglomeration of "public" religion is not declared "false," just constitutionally unprotected. The practical effect is the same. Regulation occurs and follows from a constitutionally inspired orthodoxy, an orthodoxy that rules not in the name of "truth" but, at least ostensibly, in the name of order. The resulting "orthopraxis" cuts off the oxygen of

63. Quakers are an example of this type of community.

liberty to believers, insuring that the faithful enjoy an abundance of a freedom to be religious within the confines of their separate minds.

B. *How Does Religion Penetrate the Public Sphere and How Should the Irruptions Be Treated?*

“For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance.”⁶⁴ That observation from the Court’s most recent establishment clause opinion is the theoretically requisite constitutional calculation of costs and benefits. Its essence is that religion sometimes helps individuals get through their days, but socially it is dangerous and oppressive. While the view is empirically deficient—one wonders, for instance, where the socially transformative Christian vision of Martin Luther King, Jr. fits into the Court’s framework—the Justices from all appearances regard it as experientially accurate. The opinions contend that religion irrupts into the public sphere on an episodic basis, and that the episodes are always theoretically inappropriate. The specific warrants for these claims confirm and sharpen the increasingly familiar portrait of intrasubjective religion and, additionally, frame the succeeding inquiry into the Court’s genuine governing norm, the attack upon religious consciousness.

That religion infrequently pricks at the public balloon is the observational scaffold on which the theoretical edifice is constructed. It may thus be sufficient at this point to apply estoppel principles and move on. But more than logical consistency hems the Court in, and in any event, there is more to the account of religion’s public career than its inconstancy. First, religion characteristically breaks out in the guise of obviously religious incursions on public culture. Historically, these irruptions include issues of public religious observances such as prayer, crèche, crucifix, Christmas carol, and Sabbath regulation, and institutional or “church” questions such as state aid of various sorts and institutional autonomy issues. For now at least, the situation is further clarified by *Harris v. McRae*’s resolve that the coincidence of law and specific religious tenets presents no establishment clause problem.⁶⁵ The result is a fairly crisp recognition of *when* the religion clauses are implicated, even if identifying which one of them is involved remains problematic. Further, it is demonstrably the Court’s view that such

64. *Grand Rapids*, 105 S. Ct. at 3222.

65. 448 U.S. 297 (1980). This settlement is temporary in that later cases, if not earlier ones, reveal the absence of a theoretical cap on religion clause issues. In the short run, the *Harris* settlement obtains. In the long run, privatization intends that normative thinking about political issues not be affected by religious belief.

“church-state” issues more or less exhaust religious detours into the political realm. Initially, the Justices evince little interest in other putatively “religious” issues even though they are obviously concerned with the entire front between religion and politics. More telling and analytically distinct is the pyramid-like relationship between the specific problems addressed and the rationale of their resolution. In *Thornton*, for example, a fairly compact Sabbath-enhancement problem evokes a sweeping constitutional generalization that reduces “religion” to a personal interest like watching television.⁶⁶ A truly minute adjustment, like the addition of “or voluntary prayer” to the list of authorized activities during a moment of silent meditation, thrusts deeply into freedom of conscience. School aid cases, notably including those last Term, are routinely resolved by the twin spectres of sectarian warfare (i.e., “divisiveness”) or inquisitorial oppression. At the top of this pyramid are usually insignificant actualities and at the bottom are truly seismic theoretical repercussions. In between is, apparently, a drastic overconceptualization comprised of symbolism and prophylaxis, not even barely concealing a Court persuaded that the whole religious genie can be kept in the “private” bottle through adroit resolution of these seemingly trivial issues. Thus, in the Court’s view of reality, the rhetoric is commensurate with the problem. The problem is the relationship between the two spheres of government and religion; this manifests itself practically as a “church-state” problem.

Also manifest by this point in the analysis is the Justices’ ambivalent account of the believer’s psychology. What kind of belief, and believer, are so effectively stymied by Court-delivered setbacks on this range of issues? Why should religious zeal be quieted by denial of feeding rights at the public trough, which is the practical effect of the various aid cases, or by rollback of a nasty cultural imperialism that the Court treats as incipient oppression and that is surely not the objective of the “zealots” on, for example, the Falwellian “new right”? The answer must be that, after these issues are resolved, the fire burns out or, in other words, that, after this point, the religious appetite for public engagement is satiated. Once the public fisc is secured and the public square walled off from conceited attempts at purely symbolic hegemony, religious agitation is stilled. A genuinely startling rendition of what belief means to the believer thus resoundingly confirms the “privatization” thesis that if religion possesses any objective truth claims at all, they are not public truths. Religious individuals instead are propelled into politics by the pursuit of money or unwarranted preferences in the hierarchy of public symbols.

These impressions are confirmed by the Court’s vocabulary of religious intrusion. The opinions presently treat the public influence of reli-

66. See *Thornton*, 105 S. Ct. at 2918 n.9.

gion not only as pernicious but the content of it as "ideological,"⁶⁷ ordinarily understood as a set of ideas in service of class interests. The Court thereby denudes religion of its objective value, but more impressively, if "ideological" is used wittingly, separates public argumentation from actual motivation and belief. Rooted in a different issue context but on the same theoretical plane, *Thornton* gratuitously reduced the Third Commandment to an "interest" indistinguishable from the desire to take it easy. The Court insisted that the religion clauses give "no one the right to insist that in pursuit of their own *interests* others must conform their conduct to his own religious necessities."⁶⁸ This, of course, was dictum as the Sabbatarian claimed no such right or any constitutional benefit at all. Rather, his employer insisted upon a constitutional prohibition on statutory accommodation of Sabbath observers. The Court observed, nevertheless:

Section 53-303e(b) gives Sabbath observers the valuable right to designate a particular weekly day off—typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but non-religious reasons for wanting a weekend day off have no rights under the statute. For example, those employees who have earned the privilege through seniority to have weekend days off may be forced to surrender this privilege to the Sabbath observer; years of service and payment of "dues" at the workplace simply cannot compete with the Sabbath observer's absolute right under the statute. Similarly, those employees who would like a weekend day off, because that is the only day their spouses are also not working, must take a back seat to the Sabbath observer.⁶⁹

What about employees who like to watch bowling on weekends? Or cut the grass? Theirs, too, is a lot indistinguishable from, for instance, one who perceives a biblically derived duty and experiences it as the unalloyed command of God.

Thornton presented no claim by the believer to a religiously derived public "truth," and so the Court had no occasion explicitly to deny that such a creature exists. But the opinion did much more than that. It said that the Constitution forbids legislative recognition of even intrasubjective truth claims, that the uniquely compelling quality of religious belief as experienced by the solitary believer is simply not cognizable. As a matter of constitutional law, the relationship of belief to believer is the same as that of bowling ball to bowler. Anything more solicitious runs afoul of the non-establishment injunction. Again the logical inquiry is: does this version of "privatization" invalidate all leg-

67. See, e.g., *Grand Rapids*, 105 S. Ct. at 3226.

68. 105 S. Ct. at 2918 (citing *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)) (emphasis added).

69. 105 S. Ct. at 2918 n.9.

islative accommodation of free exercise as well as the special rule of "autonomy" for intracommunal disputes? After *Thornton*, the apparent answer is "yes."

While it is hard to take *Thornton* seriously as description, it is *not* intended as pure prescription. The normative component is obvious enough and constitutes the main thrust, but there is no apology for so trivializing belief, no trace of embarrassment or irony in the words excerpted above. And the attribution of relativism to the solitary believer is a predictable consequence of privatization. As religion is shoved back into individual cells and stripped of all public validation, the believing subject frequently loses her grip on faith. Belief becomes unstable, and its content shallow and incoherent, as individuals expected to choose, construct, and maintain entire religions falter. The believing subject in such a marketplace of religious ideas naturally experiences difficulty conceiving of one's own beliefs as objectively "true," of one's God as the God of all mankind, especially when mankind has no interest in "your" God. Indeed, heroic effort is sometimes required to avoid internalizing the relativism with which the polity, quite properly, views the various claims of religious truth and to insist that, at least in monotheistic traditions, religious truths apply to believer and infidel alike. Consequently, it may well be that the Court *does* regard the ordinary believer as self-consciously choosing "values" that "comfort" and "inspire," but that are not thought to be intersubjectively exportable. As such, the observation is not untrue, simply well overstated. What cannot be overstated, however, is the dramatic inversion of past cases accomplished by *Thornton*.⁷⁰ Perhaps the only virtue of the "conduct exemption" doctrine has been its basis in the textual injunction to refrain from burdening the "free exercise" of religion. Paramount among religious exercises presumably is worship, and the appeal of a case like *Sherbert v. Verner* lay in its sensitive recognition of the "uneven" effect of apparently neutral laws, such as unemployment compensation regulations, in light of the believer's need to "keep holy the Lord's day." The centuries-long explicit and implicit establishment of Protestantism in this country, which was given the Supreme Court's blessing in *McGowan v. Maryland*,⁷¹ insures that Sunday Sabbatarians generally encounter little conflict between work and worship obligations. That tight congruence is relaxed for Saturday Sabbatarians like Jews, and is absent for Friday observers like Black Muslims. But it was precisely *Sherbert's* admirable solicitude for historically mistreated religious mi-

70. Again, while a "pure" conduct exemption, *see supra* notes 51-52 and accompanying text, was not before the Court in *Thornton*, survival of the doctrine is, or will be, inconsistent with *Thornton* and the privatization scheme as a whole. If it survives, it will be, as before, a kind of flaccid liberal gesture to politically impotent religionists or will concern issues of no political importance.

71. 366 U.S. 420 (1961).

norities that invalidated the Connecticut law in *Thornton*. Friday Sabbatarians cannot, consistent with the first amendment, enjoy the advantages that a history of Protestant hegemony has bestowed upon almost all Christians. In attempting to equalize the sectarian situation, the Connecticut legislature imposed apparently unconstitutional economic burdens upon employers and other employees.⁷² The Court's opinion clings to the "unyielding weighting in favor of [the statutory right of] Sabbath observers," and says that a more "reasonable accommodation" of the competing interests might pass muster.⁷³ It is hard to see how. The employer claimed no generalized "right" to reasonable economic behavior by the legislature, and one hopes that states may still create rights that cost employers money. Otherwise we are back to *Lochner*. Anyway, the Court soon refuted its own claim by unequivocally fingering the constitutional vice as the Sabbatarian/bowler distinction itself, and not some inflated version of it. One practical result of clinging to a balancing of "interests" is maintenance of judicial supremacy. The vice of the Connecticut statute may be, in the Court's view, its failure to provide for case-by-case judicial arbitration, or domestication, of religious claims of privilege. The unmistakable message of *Thornton* is that *any* inconvenience, be it economic or otherwise traceable to special treatment of belief or believers obliges others to conform their conduct to individual religious necessities in violation of the first amendment. That the Court may yet sustain conduct exemption claims should not really surprise because church-state is an area in which the Justices are singularly tolerant of inconsistencies. *Thornton's* predictive value is, at least, this: it resonates melodiously with the overall thrust of privatization, and privatization will prevail except when the contrary result is politically harmless.

Given this account, it is not surprising that religion's infrequent public appearances are treated with disdain. Somewhat unexpected is the unanimity of the contempt. One can scour the cases from *Everson* forward and from *Aguilar* backward without uncovering a single word of unqualified praise for "public" religion. The faint hosannas wafting from the cases are, roughly, that: 1) religion can be a nice thing in the private lives of individuals; 2) there is an inevitable spillover from private to public, and some innocuous portions of it can be accommodated reasonably; and 3) church-related schools have made "enormous contributions to our national life,"⁷⁴ *but* public schools are constitutionally preferred, aid to private schools is divisive and ordinarily unconstitutional, and the state must always stand clear of them while still confin-

72. The only example given is, curiously, the government itself, specifically Connecticut's local school boards. *Thornton*, 105 S. Ct. at 2918.

73. *Id.*

74. *Grand Rapids*, 105 S. Ct. at 3220.

ing them to the private sphere. More startlingly, forty years of painstaking inquiry by various Justices quick to acknowledge the obvious cultural centrality of religion have produced neither theory, hypothesis, theme, system nor even bare recognition of constructive engagement between religion and public life. Put differently, the cases contain literally no positive account of church and state. When faith encounters the outer world, the results are always negative. While one may question this categorization of the anti-slavery revivalist preachers who framed the abolitionist conscience, or the enduring pacifist witness of the Quakers, or the Reverend Martin Luther King, Jr., or even clerical activists, like the Berrigans, who helped bring the Vietnam War to a close, the Court apparently does not. The verdict of the Justices has never wavered. The twin evils of despotism (i.e., "sect dominance") and chaos (i.e., "divisiveness") cover the field and justify the privatization of religion.

C. *The Governing Norm: Privatization Exposed*

The least that can be said about the two-headed devil of church and state is that it is not what it appears to be, that the Court again uses key terms in a highly nuanced fashion. It turns out that the ostensibly governing principles simply do not convey what is at the apex of the normative hierarchy, the intended demise of religious consciousness. This section carefully searches for the precise meaning of both divisiveness and oppression, and recovers a common root in privatization.

The "divisiveness" presently discussed is *not* strictly that putative fourth *Lemon* prong, or second "spur"—"political," as opposed to "administrative," entanglement—of the third *Lemon* inquiry. It is instead more generally one-half of the answer, "oppression" being the other half, to these questions: *Why* is religion a bad influence upon political society? *Why* should it be "separate" from "public" activity and something about which government should be "neutral"? As a discreet doctrinal pigeonhole, the checkered career of "divisiveness" is relatively uninteresting, although Justice Brennan has indicated a willingness to resolve cases on its strength alone.⁷⁵ Its vital uses are justificatory and integrative. It warrants and unifies subservient themes, doctrines, and precedent. As such a fundamental rationale, "divisiveness" has a long and distinguished pedigree. Justice Jackson opined in *Everson* that the first amendment "above all" was designed to "keep bitter religious controversy out of public life" by denying access to public influence.⁷⁶ The end of such strife, Justice Rutledge wrote in the same case, will either

75. See *Meek*, 421 U.S. at 385 (Brennan, J., concurring in part and dissenting in part).

76. 330 U.S. at 27 (Jackson, J., dissenting).

be domination by the strongest sect or constant turmoil and dissension engulfing the entire society.⁷⁷ Justice Black, author of the majority opinion in *Everson*, wrote in 1968 that the establishment clause “was written on the assumption that state aid to religion . . . generates discord, disharmony, hatred, and strife among our people.”⁷⁸ Justice Rutledge continued, in *Everson*: “Public money devoted to payment of religious costs . . . brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any.”⁷⁹ Even Justice Harlan, normally not easily alarmed, observed in 1970 that “political fragmentation on sectarian lines must be guarded against”⁸⁰ and expressly deputized “voluntarism” and “neutrality” as humble servants of this paramount concern.⁸¹ The seminal *Lemon* opinion fully explained:

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . The potential divisiveness of such conflict is a threat to the normal political process. . . . The history of many countries attests to the hazards of religion’s intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.⁸²

By last Term, a virtual shorthand was sufficient to trigger the now subliminally embedded sanguinary connotations. Religion can serve “powerfully to divide societies,”⁸³ parochial school aid offers “an all-too-ready opportunity for divisive rifts along religious lines in the body politic,”⁸⁴ and administrative entanglements increase the “dangers of political divisiveness along religious lines.”⁸⁵ The power of the “divisiveness” image resides solely in the terrors it evokes in the reader’s mind, and the mental picture conjured is no less than genuine sectarian warfare. If historical memory falters, contemporary examples abound. And one may fairly claim that the opinion writers *want* us to think of Northern Ireland and Lebanon, if not the Ayatollah Khomeini himself, when they speak of sectarian divisions in society.

“What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political sys-

77. *Id.* at 53-55 (Rutledge, J., dissenting).

78. Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting).

79. *Everson*, 330 U.S. at 53.

80. *Walz*, 397 U.S. at 695 (opinion of Harlan, J.).

81. *Id.*

82. *Lemon*, 403 U.S. at 622-23 (citations omitted).

83. *Grand Rapids*, 105 S. Ct. at 3222.

84. *Id.* at 3222-23.

85. *Aquilar*, 105 S. Ct. at 3239.

tem to the breaking point.”⁸⁶ So stated by Justice Harlan, it is easy to see how the privatization of religion follows because if faith is not politically relevant, it cannot lead to political conflict. So stated, however, it is also either terribly odd or terribly reactionary. It is at least peculiar to presume that a judicial decree can handle what a democratic polity cannot. For example, slavery was no less sinful in the eyes of God after *Dred Scott* than before it, nor has *Roe v. Wade* detectably quieted abortion agitation. The problem is that the obvious cases of sectarian “divisiveness” involve dividers who regard the entire system, courts included, as illegitimate and oppressive. Deploying constitutional doctrine against actual or threatened extraconstitutional behavior hardly seems a promising *modus operandi*. The Justices most often appear to contemplate a less volatile present, but also endeavor to keep the genie in the bottle through a constant vigil for the slightest indication of church-state union or sectarian commotion. In fact, nothing like “divisiveness” has *ever* actually happened in a Supreme Court case save for the limp suggestion by the dissenters in *Lynch* that a lawsuit sufficiently proved divisiveness,⁸⁷ a proposition that offered a favorable ground of decision for the cost of filing. The Court is clearly engaged in an entirely prophylactic effort, one that has constitutionalized the relationship of church to state without *any empirical* confirmation of the “evil” that assertedly justifies it. Requiring just a “clear and present danger” of sectarian strife, for instance, would eliminate the “divisiveness” rationale from every case that ever employed it. Nevertheless, the Court is prepared to pay for the order of some remote, hypothetical future with the liberty of the present. More obviously repressive regimes at least get an immediate return on their investment.

There is another variant of “divisiveness-as-intense-conservatism” that is more than the true but trivial observation that the doctrine’s *raison d’être* is preservation of the systemic status quo. Perhaps better labelled “divisiveness-as-ideology” is that part of the “strife-avoidance” rhetoric that covers for a highly selective issue agenda, utilized either to accomplish a preferred result on a particular political question or to focus political energy upon items the Court deems most pressing. The starting point is Justice O’Connor’s suggestion to limit “divisiveness” analysis to parochial school aid cases.⁸⁸ The apparent logic of the suggestion is straightforward—belief is politically, or peculiarly, salient when religious institutions, as such, vie for money, thus conforming to the privatist paradigm that irruptions are not pursuits of social truth.

86. *Walz*, 397 U.S. at 694 (opinion of Harlan, J.).

87. *Lynch*, 465 U.S. at 702-03 (Brennan, J., dissenting).

88. *Id.* at 689. So starkly stated, this obviously is a logical possibility only for a distinct doctrinal inquiry—“divisiveness” will always be present as normative alpha and omega. Yet, Justice O’Connor’s point, and those following, inform subsequent discussion of the precise nature of the “divisiveness” identified by the Court.

But if not, why should believers care more about getting public succor than anybody else? Or if the money is understood to make transmission of faith from old to young possible or more feasible, why do Roman Catholics run so many of the parochial schools? Do Protestant parents not care about educating their children in the faith? In reality, Catholic schools were, until quite recently, a consequence of the Protestant establishment in the public schools, and state aid has always been an ensuing appeal for a "rough justice" in annual educational appropriations. The issue has never implicated religious truths, just public ones like "equality" and "justice." Most importantly, it has never been agitated in a way distinguishable from political conflict generally, and the Court has done nothing except assert, without a scintilla of evidence, the contrary. Now that nonpublic schools, especially inner-city Catholic ones like those affected by the *Aguilar* ruling, are largely, or even predominantly, attended by non-Catholic minorities fleeing public schools, isolation of this issue is illogical. Quality education, not transmission of the faith, is the point. Yet, the Supreme Court brusquely denied the analytical significance of those realities, noting in *Aguilar* that it is "simply incredible" to think parochial schools have abandoned their "religious mission."⁸⁹ Even so, the suggestion is that students now typically attend to acquire not the Catholic faith, but the superior "secular" education available in Catholic schools. State funding is thus no longer, if it ever was, an issue portending "sectarian" strife. Still, the institution remains subject to the same "divisiveness" scrutiny it earned when parochial school aid was an issue on which respectable people could express their anti-Catholicism.

The *Walz* opinion of a deeply troubled Justice Harlan suggests another issue genesis of divisiveness doctrine. The challenged practice in that case—tax exemptions dating from the colonial era—could not have prompted Justice Harlan to assert as he did the primacy of "divisiveness" in church-state law.⁹⁰ Edward Gaffney suggests what did.⁹¹ *Walz* was written in the midst of cleric-led, morally and religiously inspired, bitterly divisive Vietnam War protests, which followed on the heels of similar civil-rights era demonstrations. Gaffney opines that Harlan wrote with his eye on those issues,⁹² and in fact, Harlan's opinion further refers to religious agitation on secular issues like birth control and abortion as examples of public religion "to be guarded against."⁹³ Whatever Justice Harlan's personal views on those various

89. 105 S. Ct. at 3238 n.8.

90. 397 U.S. at 694 (opinion of Harlan, J.).

91. See Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

92. *Id.* at 210 n.29.

93. *Walz*, 397 U.S. at 695 (opinion of Harlan, J.).

questions, "divisiveness" is frequently a matter of whose ox is gored. One classic example is Jerry Falwell's criticism of clerical participation in civil-rights marches as a mischievous mix of religious ministry and politics. A second example is *Roe v. Wade's* attempt to defuse the divisive abortion issue, even while the Court avoided every opportunity to constitutionally scrutinize the conduct of the Vietnam War. Justice Harlan probably had a truly nonpartisan concern for order. But is it not a sufficient rejoinder, if not enough to quiet his fears, that, but for public religion, blacks might still be riding the rear of the bus on their way to fight in Southeast Asia?

A more robust issue agenda underlay the *Lemon* test itself, as the Court's opinion in that case made explicit:

To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.⁹⁴

Here the problem is not *whose* ox is gored, but that anybody's is. Evidently, as the Justices set priorities for the political agenda, any excitement, much less genuine "divisiveness," engendered by state financing is too much. The stakes are not worth it and not unexpectedly, because the Court's position has always been that America's children belong in "common" public schools.

The remarkable claim that the religion clauses authorize the Court to reshuffle the whole political calendar, cancelling out unimportant concerns to make room for questions worth dividing on, has not been further explicated by the Justices. It nevertheless tips the observer that tranquility per se is not the end of "divisiveness" concerns. After all, racial justice, including race-conscious politics, is high on the Court's list of approved political activities, even if in the present climate it is undoubtedly more conducive to enduring social hostility than sectarian politics. In fact, roughly the same "liberal" wing most determined to make race a structural component of the political process is also most determined to remove all traces of religious consciousness from public life. The latter is too divisive, even though the whole of American history witnesses the chronically destabilizing effects of racial politics, which truly dwarf in comparison the disorder traceable to public religion.

None of this implicitly denies either that race-related turmoil has

94. 403 U.S. at 622-23.

been "worth it" or that the religious mind has frequently been at or near the surface of political life in this country. It merely affirms that, evaluated solely according to a "volume of discord" test, religion warrants no special treatment. Consequently, the "divisiveness" analysis, uniquely applied to the religion clauses primarily by Justices who otherwise never hesitate to seek "justice" at the expense of communal concerns for order, flows from some concern other than harmony, at least understood, as the Court propounds it, as the absence of palpable, system-stretching conflict.

That much is clear from *Lemon*. Religious consciousness is more "distracting" than "divisive," again as the latter term is ostensibly defined by the Court. Or religion is "divisive" in the specialized sense that it "distracts" from important (i.e., "worth dividing on") issues and thereby artificially "divides" people who should as yet be "undivided."

What is the "harmony" contemplated by the Court? If, as we have seen, it is uniquely threatened by religion, but is not the ominous "sectarian warfare" metaphorically paraded by the Court, is it purely intellectual—a matter of rival systems of thought? Is this not the practical reality of a "divisiveness" that never actually occurs, but that *might* in some distant, ahistorical future, unless the Court now attends an airtight prophylaxis of its own design? Is it not then "religious consciousness," denoting that objective truth exists, that it may be social, and that it can be known by means such as revelation that are thoroughly inaccessible and resistant to ordinary public discourse, that ultimately rankles? If not, what is the "divisiveness" overcome by the public school in *McCollum*?

As a result [of the released time program challenged in that case], the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and *in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. . . . [These] are precisely the consequences against which the Constitution was directed* when it prohibited the Government common to all from becoming embroiled . . . in the destructive religious conflicts of which the history of even this country records some dark pages.⁹⁵

Or in *School District v. Schempp*?

It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. . . . This is a heritage neither theistic nor atheistic,

95. 333 U.S. at 228 (opinion of Frankfurter, J.) (emphasis added) (footnote omitted).

but simply civic and patriotic.

. . . The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. . . . The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent.⁹⁶

Now it appears that the “parochial” school itself is “divisive,” and not some fictional agitation over state aid to it, because it is “undemocratic.” And religion is a “divisive” presence in public schools because it undemocratically divides children by reinforcing their differing religious identities, and not because it will induce Jewish and Christian kids to start brawling. Justice Frankfurter’s uniquely slippery slope, which is apparently a vertical incline coated with axle grease, is analytically insignificant because it *is* unique to the religion clauses and because it simply gives a *reason* for drawing the operative battle line at consciousness. It does not dispute the location. Indeed, if the imagery implies simply that the religious mind is inherently zealous and the religious person a latent fanatic, then there is no place else to establish the front—any point less remote from the capital invites defeat in the war.

Before further testing of the hypothesis as an explanatory vehicle, some filling out of the claim itself is appropriate. The incompatibility of “religion” and “democracy” taken charge of by the Court is not that between a specific religious tenet, for example, that the fetus is a human being, and the position of the Court in *Roe v. Wade*. Neither does the tension reside in a general disagreement over the extent to which Christianity, or Judaeo-Christian ethical insights, underlie, fuel, or implicitly explain or justify part of American political institutions. The problem is deeper and broader. It is that liberal democratic theory and theoretical religion conclusively diverge at the starting line. Most simply, religion is, above all, teleological and liberal democratic theory is, above all, not only nonteleological, but also anti-teleological. Put differently, Oxford philosopher John Finnis rightly observes that liberal theorists like John Rawls prefer “thin” theories of the good because they fear that anything else will lead to an authoritarian politics.⁹⁷ Specifically, each of the great Western religions carries a rather fully developed conception of man’s individual destiny, such as “salvation,”

96. 374 U.S. 203, 241-42 (Brennan, J., concurring) (emphasis in original) (citations omitted).

97. J. FINNIS, *FUNDAMENTALS OF ETHICS* 48-50 (1983). Never mind that the fears are ill-founded. The role assigned to individual choice by a particular religion will determine its democratic tendencies. And surely the tradition of individual liberty in America is more because of, rather than in spite of, the centrality of Protestantism to that tradition.

and the techniques for arriving there, such as the teaching that "I am the Way, the Life, the Truth." Together they constitute what, to the believer, amounts to objectively verified accounts of "duty," both intra- and intersubjective, both personal and social. As the Court fully appreciates in its definition of religion as "ultimate concern," this duty stands in critical relation to the law. The Court strives to sever this religion at the root. Consciousness of religious insights as uniquely compelling, objective truths must be eliminated.

By pursuing the privatization of religion, the Court seeks complete mastery of religion's socially manifest truth. "Divisiveness" rhetoric, the ostensible, bloody version, is nothing more, nor less, than a *post hoc* justification for privatization. It has no other intrinsic appeal, validity, or utility. It is the Court's rhetorical Munich or Vietnam—an historical memory so terrible that its invocation ends discussion even before the appropriateness of the analogy is explored. Of course, no one wants the United States to become another Iran. But the real question is whether there is *any* warrant for suggesting it might. In response, the Court rests upon unadorned ipse dixit or unsubstantiated attribution to the framers, an attribution that is in fact undeserved.

The superficial level is, as usual, the less interesting. Religion is the divisive factor, not political conflict generally or religio-political turmoil specifically. The Court does not, and could not realistically, expect to measurably influence the actual content of religious belief because it is generated by and from nonpublic sources. Its focus, consequently, is upon the compelling quality of belief. So long as religious duty is taken as uniquely obligatory (i.e., what the one true God expects of all His children, believer and nonbeliever alike), religion threatens to irrupt and dominate the normative structure of the presently compartmentalized political sphere. This is so because faith's account of, for example, "equality" or "privacy" or "sexual orientation" or abortion or the origin of the species is superior to the law's. The Court's monopoly on such prescriptive thinking can be feasibly maintained only by relativizing belief, by inducing the believer to view the "social gospel" as just another "ideology" or "interest" that must be ordered within the public realm according to constitutionally derived norms of justice.

Hence, the profile of public schooling as a microcosmic two-sphere world is proffered. Apparently, by educating without implicating religion, the school powerfully transmits privatization to the young, preparing them for a bifurcated adulthood as self-consciously as John the Baptist prepared the way for Jesus. Further, bringing children of various faiths together for a common experiment that submerges religious identity is another way of saying that faith may be checked at the door. Or if it is admitted, belief is simply an interesting "feature" or "preference" of one's classmate—a matter of taste—but most emphatically neither indelible nor ultimately distinguishing nor uniquely compelling.

Without understating the obvious, though limited, utility of the public schoolroom, the relativizing, and thus homogenizing, effect of this educational melting pot is unmistakable. Indeed, this effect seems to be what distinguishes the "democratic" philosophy of education from parochial schooling "which offers values of its own."⁹⁸ Most importantly, because the public school is a miniature restatement of privatization theory, it does no more than restate the justification for the theoretical view. No doubt the public school has always been and continues to be justified, at least in the Court's view, as a necessary centripetal force in a pluralist society. That justification implicitly assumes that there is, in some important sense, a democracy reinforcing, and therefore "democratic," cast of mind susceptible of development in the common school. The suggestion here is simply that the democratic personality inculcated is, perhaps primarily, a religious construct. To be exact, its outstanding feature at the present time is its capacity to initiate budding religious consciousness into the privatization scheme. And it is still unjustified because assertions that order is otherwise imperilled are dangerously question-begging. These assertions too simply restate a salient question of political theory—to what extent, if any, does concern for systemic preservation justify government shaping of the mind? The answer is probably one of degree, just as the difference between Hobbes and Mill is one of degree. But the Supreme Court everywhere thumps a categorical denial by preaching that the "mind," "spirit," and "intellect" must be absolutely free of government interference and attempts at orthodoxy, and that the first amendment requires a free "marketplace of ideas" that must include religious ideas. These turgid judicial declarations now too appear as highly stylized terms of art.

D. *Liberty of Conscience*

If "divisiveness" as governing norm blithely participates in the familiar notion that maintenance of the "democratic" order depends upon attitudes which are uniquely threatened by religious consciousness, is not fear of "sect-dominance" and steadfast devotion to "liberty of conscience" an opposite, and therefore compensating, thrust in the cases? Apparently so, but actually not. This second paramount evil reduces under examination to a complementary devotion to good democratic order that is sustained by implacable hostility to the religious mind.

The superficial discrepancy is overwhelmingly apparent. Whereas fears of "divisiveness" may predictably have led to a correcting centripetal focus, the "liberty of conscience" championed by the Court is unmistakably centripetal. Indeed, one might legitimately wonder how any

98. *Schempp*, 374 U.S. at 242.

society, especially a culturally diverse one like ours, could perpetuate itself while remaining devoted to the sweeping liberty articulated last term in *Wallace*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" ⁹⁹ One might also legitimately wonder how, if this injunction is sufficiently encompassing to exclude a moment of "silent" voluntary prayer in the public school, the public school itself, especially that of *McCullum* and *Schempp*, survives first amendment scrutiny.

Yet the tension is not obvious enough to have attracted the Court's eye. "Divisiveness" and "oppression" concerns consistently work the cases like a veteran tag-team, utilizing the peculiar strengths of each to vindicate all challengers. Challenged programs like Title I frequently violate both cardinal principles, and there has never been a case in which the Court has been obliged to choose between the two aspirations. The Justices have never encountered, at least admittedly, a practice with even remotely equal countervailing centripetal (i.e., oppressive but strife avoiding) and centrifugal (i.e., liberty enhancing but divisive) properties. Not even compulsory, state-administered public education has caused the choice to be made. The rare introspective episodes simply flip-flop a slight relative ascendancy. Justice Harlan in *Walz* maintained that "voluntarism's" appeal lay partly in its capacity to diminish "divisiveness," ¹⁰⁰ while elsewhere the Court intimates that "divisiveness" is more a hypothetical stage through which society passes on the route to sectarian oppression.

Perhaps the unexpected cooperation is explained by the less obvious sense in which the Justices deploy each concept. Here the Court's language is sometimes quite revealing. Analysis is carried by comparing an oft-repeated vintage account of religious liberty with the undeniable triumph of a small portion of that account, as demonstrated by the language and results in various recent opinions. First the old, via Justice Roberts for a unanimous Court in the 1940 case of *Cantwell v. Connecticut*:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. ¹⁰¹

99. 105 S. Ct. at 2489 (quoting *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

100. 397 U.S. at 695 (opinion of Harlan, J.).

101. 310 U.S. 296, 303 (1940).

Consider in turn: 1) the demise of the "conduct exemption" portended by the rationale of *Thornton*; 2) *Thornton* itself, in which the Court, after repeating that "[u]nder the Religion Clauses, Government must guard against activity that impinges on religious freedom,"¹⁰² invalidated a statute accommodating Sabbath observance because it impinged upon the nonreligious convenience of employers and co-workers; 3) *Bob Jones University v. United States*,¹⁰³ in which the freedom to order a wholly voluntary religious community was subordinated to federal constitutional norms, thus introducing the truly alarming concept of religion "contrary to public policy"; 4) the Court's unremitting hostility to that unique mix of worship, organization, and free exercise, the parochial school; and, 5) just the more obvious limitations imposed upon *Cantwell* by privatization generally.

Now listen to the Court's opinions from last Term. First, from *Wallace*, "*Cantwell*, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various clauses of the First Amendment."¹⁰⁴ Second, also from *Wallace*, "[T]he Court has unambiguously concluded that the individual freedom of conscience protected . . . embraces the right to select any religious faith or none at all. This conclusion derives support . . . from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful"¹⁰⁵ Third, from *Grand Rapids*, "Such indoctrination [exemplified by Title I] . . . would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State"¹⁰⁶ And finally, also from *Grand Rapids*,

[A]n important concern . . . is whether the symbolic union of church and state effected by . . . governmental action is sufficiently likely to be perceived by adherents . . . as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. . . . [Symbolic union] is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.¹⁰⁷

Joining the considerations produces the following working hypothesis: the Court's self-described constitutional duty is *not* that of accommodating, much less enhancing, the capacity of believing individuals or

102. 105 S. Ct. at 2917.

103. 461 U.S. 574 (1983).

104. *Wallace*, 105 S. Ct. at 2487.

105. *Id.* at 2488.

106. *Grand Rapids*, 105 S. Ct. at 3224.

107. *Id.* at 3226.

faith communities to live out their chosen commitments, but instead is that of maintaining ideal, non-pressurized laboratory conditions in which solitary persons “freely choose” a set of ultimate beliefs. “Religious liberty” is focused with laser-like concentration on that climactic moment of choice. Making certain that appropriate conditions obtain when decision time arrives is the ultimate constitutional concern, to which all other putative “liberty” claims are subordinated. The Court is *not* an impartial referee among contending beliefs. Instead, it makes “certain” that the rest of the government is. As stated in *Grand Rapids*:

The solution to this problem [of religion and society] adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion. Only in this way can we “make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary” and “sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma.”¹⁰⁸

In other words, the Constitution expounded by the Court requires a well-stocked marketplace of identically priced religious ideas populated by consumers with identical purchasing power.

The Court stands ready to take calculations to the last decimal point. How else to appreciate the new religion clause fetish, “symbolic union of church and state,” and the fastidiousness with which it was applied to Title I? Unquestionably the vice of “symbolic union” is government partiality, a signal of approval or disapproval to the market advantage of a particular belief. The remarkable feature of this doctrine is its unparalleled sensitivity, as “symbolic” fairly suggests. The “mere appearance” of union, even in the eyes of “impressionable” children, is enough, even if the children are beneficiaries of the symbolic benefit conferred. This is truly a marketplace with a vengeance—the shopper who spies a bargain suffers a deprivation of constitutional liberty! Herein lies the Court’s stinger, and it is powered by the unrivalled ascendancy of “free individual choice.” Parochial school aid unmistakably assists the already converted to practice the faith they previously “chose”; yet it is unconstitutional because it imperceptibly diminishes their children’s freedom to choose.¹⁰⁹ Hence the tenuous situation of

108. *Id.* at 3222 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

109. The Court assumes, however, that those who attend parochial school are “undecided” about their faith. Evidently, the appropriate conceptualization is that such youngsters attend schools in which the faith of their parents is foisted upon them. Why parochial schools are not unconstitutional for this reason alone is unclear.

the conduct exemption, institutional autonomy, and worship enhancement doctrines beside the threat articulated by *Thornton*. Each is a privilege flowing to the already faithful. Is not each a "symbolic union" as much as Title I was? Does not each community benefitted receive a preferred position in the marketplace? Are not the yet-to-choose of each assisted sect thereby influenced, as much as in *Aguilar*, to "choose" the faith of their parents? It does not matter that there need be, and frequently is, nothing sect-preferential about these doctrines. Title I was universally available, at least until the Court read children in religious schools out of it. And here is where the Court's analysis begins to unravel.

The "marketplace" metaphor represents the confluence of several critical religion clause themes. "Symbolic union" is constituted by government partiality and thus violates the "neutrality" injunction. In so doing it impermissably "advances" religion, contrary to the second prong of the *Lemon* test, and may simultaneously "entangle" church and state in violation of the third. All of these things are bad because they infringe upon "voluntarism," a term fleshed out by the "marketplace" account. It is thus interesting to note that the account does *not* explain what the Court is doing except, again, in an oblique way. For example, how can Title I "endorse" or be "partial to" anything if it is universal in scope? Why, for example, should the archetypical Catholic twelve-year old in St. Malachi's grade school perceive government approval of Catholicism when similarly situated kids in the neighboring Jewish Day School and P.S. 108 receive identical treatment? If Title I falters, how does tax-exempt status for all schools not? In any event, how is the marketplace less free and equal if government treats each view on display in precisely the same manner? An endorsement that does not discriminate is not an endorsement, and the required "neutrality" is preserved in pristine form by judicial abstention. Further, why is the marketplace not adequately serviced by what everyone agrees is the establishment clause's irreducible minimum—sect-equality? For instance, what about "nonreligion" and the "nonreligious"? So long as "religion" is defined as an individual's "ultimate concern," the circle is closed because everybody has *that* kind of religion.

Wallace exemplifies the superfluity of "endorsement" analysis in a sect-neutral regime. The Court-identified problem was voluntary prayer as a "state-favored practice." The Justices might have said that "prayer" was a sect-preferential term because it peculiarly denotes conversation with a personal God who can be known by Man and who cares enough about Man to engage him in conversation. It obviously has no application to persons whose ultimate concerns are not theistic, and little, if any, to Deists whose God is quite remote and inscrutable. A solution that did not occur to the Court is to label the moment of silence as one for reflection upon all ultimate concerns, whatever they may be. Or, to use the parallel vocabulary of *Seeger*, a minute for "re-

ligious reflection." Who is left out by such a formulation? If no one is, how is the marketplace adversely affected? Moreover, why is the educational marketplace not more appropriately constituted by genuine competition among schools, religious and secular, as proponents of school vouchers contend? How is the public school not "endorsed" by what the Court wrought in *Aguilar*? Are not children of marginal means who need Title I services now almost obliged to attend public schools, and is not their liberty to choose religious education thereby stifled by the Constitution, as interpreted by the Court?

Of course it is, but the prospect no doubt fails to alarm the Court because it can, and does, govern the public school directly with its "marketplace of ideas" metaphor, except for religious ideas, or rather, just one religious idea, the religious conception of truth. Religious consciousness is *not* welcome in that market, and the Court's studied failure to insist on "neutrality" there reveals the precise sense in which the "marketplace" image captures the judicial enterprise. It seems that the medium is the message, that the subjective criterion of truth which the market metaphor unmistakably and blatantly preaches is the constitutionally required consciousness. One's *relation* to religious claims of objective truth is like that of a consumer in the marketplace: one selects that item most suited to individualized needs, aspirations, or quirks, and this act of choice by the sovereign consumer bestows "value" upon the inert matter. It is now "useful." Successful integration of the consumer item into one's life habits is the only relevant means of "validation." After a while, religion may even stop claiming insight into objective reality and, as a purveyor of religious goods, buy into the market mentality as well.

The happy consequences for the Court's privatization project are obvious as the personal quality of the transaction conduces to individualized and thus socially impotent religion. Faith communities will more likely be loose associations of the already converted, and attempts at unified public action will be stymied not only by the overt entrance barriers thrown up by the Court, but by the believer's own sense that public religion "imposes" one's "values" on others—values that the believer has no reason to expect will be welcome in others' lives. Not only is the Court's monopoly on political prescription then secure, but internalization of the marketplace criteria assures popular ratification of the lifestyle "privacy" and "autonomy" doctrines as well. Both spheres then function as privatization theory ordains. The political realm is rather tightly orchestrated by internally generated norms ultimately determined by the Supreme Court, while no intersubjective norms intrude on the "autonomy" of what is left of life in the private, including religious, realm.

A proprietary conception of truth is the message, and the "marketplace" image is the didactic vehicle. The public school is again a helpful heuristic device. The ostensible portrait of the common school as a

mini-marketplace is of course self-refuting. How does the equality of ideas justify such a massively coercive institution, especially in preference to accredited alternatives like the religious school. Beyond that is the dissonance created by the Court's concession to the sociology of knowledge through statements such as, "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."¹¹⁰ What kind of marketplace is it in which the consumers cannot read price tags and know not the value of the dollar? If it is the noncurricular ambience that makes the public school more attractive to the Court because that environment is uniquely "democratic," as *Schempp* and *McCollum* contend, then the market is indeed skewed. It is not a marketplace at all but, not surprisingly, a culture, a reinforcing, socializing institution. Yet the marketplace metaphor neatly captures the heart of the preferred personality type—a person who approaches the varied ideas on display, whether in books or exemplified in the lives of others, as an agnostic consumer. In holding that "values" are to be subjectively chosen while "facts" are either true or false, the imagery makes the only distinction necessary to blunt religious assertions of truth. The "democratic" atmosphere and the marketplace image are one and the same, and together they work, one fears quite successfully, to internalize the criteria of truth that make subsequent "voluntary choice" of religious ideals safe for the republic.

That values are the product of an objective, more or less verifiable account of reality is the idea effectively excluded from the marketplace, and religious artifacts that signal its underlying presence are similarly treated. Consider the exclusion of religion from the ordinary public forum. The moment of silence case involved a noncurricular pause during which students could quietly do what they pleased. The Alabama legislature pronounced "voluntary prayer" an authorized activity in a confessed effort to get religion into the classroom in a way consistent with previous Supreme Court decisions. They did so but for the fact that trying to get as much religion into public life as possible lacks a "secular purpose." Moreover, by adding "prayer" to the list of activities permitted, they made it a "favored practice."¹¹¹ By following precisely the same analysis, the Court may easily invalidate the Equal Access Act in 1986.¹¹² At a minimum, the issues surrounding the equal access bill

110. *Grand Rapids*, 105 S. Ct. at 3226.

111. Is there any doubt that, notwithstanding its universal applicability, addition of "all religious reflection" to the list would trigger a similar judicial response?

112. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), cert. granted, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-773) (appeal based on refusal of school to permit wholly student-initiated nondenominational prayer club to meet during regularly scheduled activity period under Equal Access Act, 20 U.S.C.A.

cannot legitimately be distinguished from the issues in *Wallace*. The congressional purpose, like Alabama's, was to insure that religion was among the authorized activities during pre- and post-school noncurricular periods. How does this acquire a "secular" purpose or avoid the appearance of preferring religion to other authorized activities? The practical result is the same—everything but religion is permitted to compete in the public school marketplace.

Consider also the "creation science" controversy. Whether a true "science" or not, there is *nothing* "neutral" or market-like about judicial exclusion of it from the classroom. What is being said to a literalist Christian, for instance, when he is told in biology class that man evolved from lower forms of life, if it is not that the teaching in the book of Genesis, as the student understands it, is false? Why, for that matter, does posting the Ten Commandments on the schoolroom wall lack a "secular purpose," which was the Court's position in *Stone v. Graham*,¹¹³ as opposed to possessing a sect-bias? Is there any doubt that "secular" society would be better off with widespread observance of them? These are not instances of secularized discussion of religious ideas or personalities that can be conducted safely because controlled by proprietary truth. Instead, they witness without mediation the uniquely authoritative character of religious claims, that is, religious consciousness. The parochial school is here the classic case. The Court makes its life as difficult as possible, mainly by fulfilling its own prophesy that parochial schools educate the classes, not the masses. Almost every legislative attempt to equalize access to them, as under Title I, for instance, is invalidated by the Court *because* the parochial school is not egalitarian enough.

If "free and voluntary" choice among competing religious values, without government partiality, is the justificatory norm, how "neutral" is a public sphere denuded of religious symbols? How powerfully do religious assertions of social truth resonate in the minds of individuals reared in the public school? What do judicial assertions, such as that in *Thornton*, which equated Sabbath observance with relaxation, teach "impressionable" youngsters about the nature of religious belief? How powerful is the witness value of the conduct exemption, which recognizes a uniquely compelling, overriding bond between belief and believer, and thus how powerful its anticipated demise? What does the Court teach by perpetually fine-tuning the ultimate marketplace choice while neglecting the unique needs of the already converted it previously recognized in *Cantwell*? How can a Court so riveted by the environmental effects of mere "appearances" and imperceptible "symbolic unions" deny that it is fashioning a world in which the truth claims of

§§ 1071-73 (Supp. 1985).

113. 449 U.S. 39 (1980).

religion are increasingly implausible, if not impossible? And will the Justices lament the passing of the religious consciousness that is, admittedly, their adversary?

IV. PRIVATIZATION AND THE DESTRUCTION OF RELIGIOUS CONSCIOUSNESS

The discussion so far contends that religious consciousness "divides" society and is singularly excluded from, even attacked by, the constitutionally protected "religious liberty." The formal claim, then, is that extirpation of religious consciousness is the ultimate governing norm of the religion clauses and, hence, their intended objective. In Madisonian vocabulary, a communal or fraternal politics is induced by universal participation in the *same* public norms, the superintendence of which is a judicial function. This national community or "family" is unattainable so long as religious opinions extend to questions of governance, even so long as variances in intrasubjective lifestyle are thought to implicate objective truths. The regime of justice will indeed be stymied by the radically ontological "otherness" of, for example, homosexuals until "sexual preference" and mere "value judgment" is substituted for "error" or negation of objective truth. Again, it is not the tenets that need change, just what it means to subscribe to them. To borrow an image from Lonergan, the Court intends control of the river bed (i.e., the nature of belief) over which all streams (i.e., beliefs) must flow. Put differently still, the important happenings in the cases are occurring beneath the currents of dogma at the intersection of cognitive theory and epistemology. "Tolerance" is not even the right term for the regime being molded by the Court, for that word attaches some significance to the lifestyle chosen. Rather, once religious consciousness is harnessed, the nonpublic "values" of others are simply no one else's business. But the further test of this explanatory hypothesis is its capacity to account for the unaccounted for, to illumine cases whose holdings are otherwise anomalous or bizarre. The constitutional primacy of the *Schempp/McCollum* public school is a potent example. The threatened extinction of the conduct exemption is another. This Part focuses upon hitherto unexplored oddities beginning with the mildly interesting secularization of worship accomplished by *Thornton*. The objective is again to gauge the explanatory value of the privatization scheme.

The starting point is to appreciate that *Thornton* presented no "conduct exemption" claim. Unlike the classic cases of *Yoder* and *Thomas*, Thornton's aspiration was not primarily to act in conformity with religiously derived, but nonetheless strictly ethical, duty.¹¹⁴ The

114. *Yoder* was even further removed from "worship" and flowed more from a cultural than a religious imperative.

other landmark case, *Sherbert*, similarly involved a Sabbatarian claim, but is distinguishable because it involved a claim of constitutional, not statutory, privilege. The similarity, nevertheless, sharply distinguishes the two cases from the conduct exemption analysis each endured, for Sabbatarian obligations are above all liturgical, not ethical. While worship may be a compact part of an overall day of rest, at least as it has evolved in Christianity, the entire day is still hallowed. In branches of Judaism and in some lesser known Christian sects, actual group worship consumes most of the Sabbath. Whether or not *Sherbert* should have been analyzed as a *Yoder/Thomas* conduct exemption claim, it certainly was not, in fact, like those cases. Ethics and worship are not cognate activities, even when they are equally religious in origin. While moral theologians confessedly inquire into intersubjective duties, they do not purport to be ritualists and do not mistake themselves for sacramental theologians. In fact, worship has *no* cognate, no analogue. While there may be a twilight area appropriately called "ritual observance," such as the nontemple-related duties of the orthodox Jewish Sabbatarian, the distinction between simple righteous conduct and worship is not thereby blurred. In Roman Catholicism, it is the difference between the injunction to respect innocent life, which does not and should not lead to the constitutionally privileged destruction of abortion clinics, and obligatory assistance at Mass, which should be solicited by Court and legislature, and can be without harmful side effects. Worship is a singular activity, uniquely appropriate to the adoration of God. God deserves to be worshipped, and so people who know God worship Him. In the process, the believer may come to know God more intimately, but only very derivatively improve his understanding of social obligation. In the end, it is still the "Lord's Day."

Not only are ethics and worship actually quite distinct, there is no constitutionally based need to treat them as if they were not. The text does not require it, and the available historical gloss suggests that, while worship was emphatically a core concern of the free exercise clause, conscientious "conduct" contrary to law was no concern at all. More important, "worship" is necessarily intracommunal while the "conduct" of the conduct exemption ordinarily is not. The anarchic tendency of the latter, which probably suffices to discard the doctrine, simply is not present in the former.

Cantwell understood all this and talked of a right to worship separate from the free exercise of religion. And even though *Sherbert* mistakenly equated constitutional analysis of Sabbath duties with other religiously derived ethical obligations, *Thornton* broke entirely new ground because it forbade *state legislators* from distinguishing worship from bowling. Not only is the Constitution oblivious to the differences ignored in *Sherbert*, it now requires statutory blindness to the difference between attending temple and playing golf as well. That the religion clauses are responsible for this runaway agnosticism is, even at

this point, surprising.

Why the gratuitous humiliation of the Sabbath in *Thornton* when the statute appeared indistinguishable from the constitutionally required legal norm of *Sherbert*? Besides all the people who will now either reduce church attendance or lose their jobs, the teaching of the case is plain: the law regards the uniquely religious act of paying homage to God—the epitome of religious consciousness—as uniquely pedestrian.

If the fate of worship accommodation is now tied to the precarious future of the conduct exemption, what is the prognosis for the remaining *Cantwell* category of liberty—the “institutional autonomy” doctrine? An unbroken line of decisions dating from 1871¹¹⁵ required judicial abstention on “internal ecclesiastical disputes” over faith, doctrine, discipline, and church polity. Most often litigated by schismatics contending over church property, this agnosticism followed from *Ballard*'s more general version,¹¹⁶ and undertook to effectuate the fundamental constitutional purpose of strict governmental neutrality toward theological questions. “The law knows no heresy, and is committed to the support of no dogma.”¹¹⁷ Opinions that refer to a “lack of jurisdiction” to resolve contracomunal squabbles are, in a sense, quite correctly decided. Because of the constitutionally imposed theological indifference, courts cannot deduce a rule of decision from the relevant religious sources. The disputed faith claims are, as a matter of law, equally plausible.

The classic statement of the view is found in *Watson v. Jones*:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.¹¹⁸

The unmistakable and intended effect of this free exercise liberty

115. *Watson v. Jones*, 80 U.S. 679 (1871).

116. *See supra* text accompanying note 42.

117. *Watson v. Jones*, 80 U.S. at 679, 728 (1871).

118. *Id.* at 728-29.

is the creation of an extraterritorial enclave of personal relations governed solely by nonlegal (that is, theological) principles. Judicial deference to authoritative church resolution of doctrine and discipline, so long as the affected parties are willing participants in the religious community, is a function of the "two-sphere" metaphor. Within a private, voluntary setting, religion is protected from the "corrosive secularism" of state interference so thoroughly that in *Aguilar* the mere prospect of on-site, albeit occasional, state monitoring of Title I programs raised "more than an imagined specter of governmental 'secularization of a creed.'"¹¹⁹ The non-entanglements prong of *Lemon* insured against this risk so that the underlying "separationist" vision might blossom: government and religion each operate most effectively within mutually exclusive domains. The practical result was an intracomunal freedom to identify a faith and to practice a regimen wholly foreign to the law. Thus, the Roman Catholic Church may maintain a male priesthood as well as a celibate discipline for everyone not married, and enforce each through expulsion from the community if necessary, even though if adopted by a political community these rules would invade precious constitutional rights of equality and privacy. That the internal order of the two spheres differs dramatically is thus an observation no more interesting than that if my aunt were a man, she would be my uncle.

Here, as elsewhere, the "wall of separation" was less than impervious. When experience inhabited both spheres, such as in a formal employment contract between a teacher/nun and principal/mother superior, courts *could* resolve the issues without theological inquiry. The problem, then, was theological fallout from the secular rule of decision and integration of the repercussions into the decisional mode. In *Jones v. Wolf*,¹²⁰ the Supreme Court formally invited judicial intervention of this kind, apparently assuming that "neutrality" survived intact the "secular" resolution of an internal dispute. The *Jones* dissenters rightly apprehended the unconstitutional secularization thereby effected. The only neutral stance, the one rejected by the majority, was absolute deference to the internally designated authoritative church organ. In any event, the *Jones* majority opinion at least possessed two attractive limitations. First, it appeared at times applicable only to property contests, and second, it required courts to leave faith and doctrine alone, thus preserving the nonintersecting relation between theology and law.

These saving features were eradicated by the Court in *Bob Jones University v. United States*¹²¹ and with them was also eradicated the theoretical basis of the institutional autonomy doctrine. Now, what the

119. *Aguilar*, 105 S. Ct. 3239 (quoting *Lemon*, 403 U.S. at 650).

120. 443 U.S. 595 (1979).

121. 461 U.S. 574 (1983).

Court concedes to be a sincerely religious, solely intracommunal rule of personal discipline (i.e., devoid of property implications) can be "contrary to public policy," and, hence, a constitutionally permissible basis for discriminatory legislative treatment. While it is difficult to keep the holding within the factual context of *Bob Jones*, even the most limited reading of it is eye-opening. Congress, and presumably the states, may, consistent with the religion clauses, subsidize, or withhold subsidies from, religious groups according to the public approval rating of the group's beliefs. A group whose discipline is "contrary" to the "common community conscience" is disqualified from benefits otherwise available to all religious institutions. In the process, and perhaps most alarmingly, the Court transforms an unambiguous *Watson v. Jones* issue into, once again, a conduct exemption case. Through analysis that is sheer torture, the Justices liberate themselves from plain statutory language to confront an "exemption" claim that is then redundant, and from a statue which by that time is twisted into an obviously unconstitutional shape.

The Court in *Bob Jones* conceded that a sincere Biblical exegesis underlay the University's prohibition of interracial dating and marriage, a policy typical of the tightly controlled, Christian-oriented life of the student body. Violations of this disciplinary rule result in expulsion, as do promotion or encouragement of violations. The injunction and sanctions apply to students of all races, and Bob Jones University had a race-neutral admission policy when the case was decided. The composite institutional portrait embraced by the Court revealed "a religious and educational institution [whose] teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities."¹²²

From this profile it is easy to see that the only question in the case is *whether* this community's order should conform to "public policy," for already uncovered are a plenitude of regulations that could never be legitimately adopted by a politically organized community. Once the Court justifies critical comparison of public and private, the result is foregone. In that posture, the school's attitude toward miscegenation is one of its lesser sins because that prohibition is probably much closer to the community's conscience than most of what the more cosmopolitan in outlook would call a puritanical code of personal conduct. As Mencken might say, it would be hard to have a good time at Bob Jones. If the state adopted the very same rules, the number of constitutional privileges violated would probably reach double figures.

Thus, the Court's belabored effort to remove "any doubt that ra-

122. *Id.* at 580.

cial discrimination in education violates deeply and widely accepted views of elementary justice"¹²³ is unnecessary. If that does not convince, it is undisputed that "religious screening" in admission will not do, so long as one is applying public school norms to religious institutions. Nevertheless, it is still noteworthy that the Court does not make a very convincing case. If what Bob Jones University does is so bad, why is the student regimen itself not illegal? If the religion clauses foreclose a flat prohibition, what does that imply about conflicting "public" and "private" norms? If a statutory ban is not forbidden, the death of institutional autonomy is unmistakable. The Court actually relies primarily upon a thirty-year-old public policy against segregation, its irrelevance to Bob Jones University being fudged by the Court through description of the admissions policy as "racially discriminatory." The opinion fails to note that state laws against interracial marriage were not invalidated until 1967,¹²⁴ and even now public opinion probably lags behind that constitutional development. More importantly, the Court produces *no* settled public sentiment that private institutions should behave as the state must. Finally, the intuitively suggested judicial role in free exercise cases is to protect the unpopular and the unorthodox from the community's conscience, not to bludgeon dissenting sects with it.

The Justices handily transform these communal immunity concerns into a conduct exemption claim by sustaining a statutory norm that emasculates the former. The basic tax exemption for religious and educational organizations is conditioned by the requirement that "the purpose of the trust may not be illegal or contrary to public policy."¹²⁵ The Court's reworking of the statute so that it approximates "exempt status for religious organizations bereft of tenets contrary to public policy" places the University currently as obviously outside the exempt class as it was within it before the limiting construction. The casuistry of the majority opinion, which in an earlier time would have been derided as "jesuitical," is fully exposed by the other opinions in the case. The University is effectively obligated to fall back from the statutory defeat to an explicit free exercise defense, which the Court immediately and without justification treats as a *Yoder/Thomas/Sherbert* plea. At first, the opinion waffles on whether the University is "burdened" by the denial of tax-exempt status by observing that denial of benefits will have a "substantial impact" upon religious schools, but "will not prevent those schools from observing their religious tenets."¹²⁶ The Court eventually concedes that something less than a pogrom may trigger free

123. *Id.* at 592.

124. *Loving v. Virginia*, 388 U.S. 1 (1967).

125. Since it is hardly the purpose of the University to forbid interracial marriage, even a single repugnant institutional practice apparently suffices.

126. *Bob Jones*, 461 U.S. at 603-04.

exercise analysis, but the ground gained by the University is quickly lost. The Justices have no trouble adducing the necessary "compelling state interest" and figuring the absence of "less restrictive means," which is not surprising because the majority had already expended pages establishing the urgency of ending "racial discrimination" in education.

The problem with the constitutional analysis is like that with the recipe for chicken soup—first you must catch the chicken. *Before* examining a *Thomas* claim, a Court must first determine that a neutrally cast, otherwise valid law is actually before it. In what sense is "subsidization" of only state-approved faiths "neutral," and how is that not an accurate account of *Bob Jones*? If Bob Jones University loses because it forbids adherents to marry outside their race, what of Catholic seminarians who are forbidden to marry anyone at all? For that matter, how can Catholic schools retain tax-exempt status so long as the church refuses to ordain women, and teaches the objective sinfulness of contraception? Are not gender equality and privacy overriding public policies? How is the autocratic polity of hierarchical churches squared with the fundamental constitutional principle of "one-man, one-vote"? While we may be accustomed to Congress playing "carrot-and-stick" with the states and other political and economic institutions, constitutional authority to so treat religious institutions hardly follows. A bewildering footnote reveals the Court's awareness of this: "We deal here only with religious *schools*—not with churches or other purely religious institutions; here the governmental interest is in denying public support to racial discrimination in education."¹²⁷ But the Court cannot mean that "religious schools" have no free exercise protection because if they do not, why does the text so carefully refute the "conduct exemption" claim? "Public support" too is an analytical diversion. If *Walz* swallowed whole tax exemptions for religious institutions, a fortiori, the public supports institutions "contrary to public policy" in the *Bob Jones* sense, and contrary to their own individual sensibilities. The balance of the note simply confirms the suspicion that free exercise is now subordinate to public orthodoxy.

The Court's remaining efforts to squeeze "neutrality" into the tax law upheld in *Bob Jones* are similarly unpersuasive. The Court holds up the "neutrally cast child labor laws" of *Prince v. Massachusetts*, which prohibited pamphlet distribution by minors, and notes that there "[t]he Court found no constitutional infirmity in 'excluding [Jehovah's Witness children] from doing what no other children may do.'"¹²⁸ But the analogy to *Bob Jones* just does not fizz. In *Bob Jones*, the statutory classification is religion itself, with a rider excluding those with unpop-

127. *Id.* at 604 n.29 (emphasis in original).

128. *Id.* at 603 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944)).

ular theologies. The proper equation would be eliminating the tax exemption for Jehovah's Witnesses *because* their view of child labor was contrary to that of public authorities. Another troubled footnote brushes aside an establishment clause charge of sect-bias. The Court opined that "a regulation does not violate the [clause] because it 'happens to coincide or harmonize with the tenets of some or all religions.'" ¹²⁹ Still, how does a statute that intentionally and explicitly excludes religions with peculiar theologies "happen to coincide" with the remaining conformists? The same footnote applauds the "non-entanglement" virtue of the result that avoids a messy inquiry into the "sincerity" of the "racially restrictive practice." Yet, the Court had already assumed that Bob Jones University *was* sincere, and the hasty dispatch of the consequent religious freedom claim indicates no need actually to analyze sincerity at all. Moreover, tax-exemption litigation always begins with an inquiry into the bona fides of the putatively "religious" group. Otherwise, fulltime truck drivers with mail order divinity degrees would qualify for tax-exempt treatment. But the footnote is even more mischievous than that. It suggests a non-establishment obstacle to *every* free exercise assertion, because "sincerity" is also the minimum threshold showing for free exercise treatment.

Put most bluntly, if the statute in *Bob Jones* is not unconstitutionally sect-discriminatory, what is? And if an entirely intracommunal, faith-inspired discipline is supposed to mimic constitutional norms, to what "autonomy" should religious institutions aspire? Why is the result in *Bob Jones* not precisely the "corrosive secularism"—the imperious penetration of the private sphere by alien public influences—that the Court elsewhere fears on religion's behalf?

"Corrosive secularism" is apparently, after *Bob Jones*, a ratchet that stems the flow of religious currents into the public sphere, but does not slow the incursion of political norms into the private realm. And the University's ban on interracial dating, unlike the racist admissions policy of the Goldsboro Christian School in a companion case,¹³⁰ was entirely a private affair because the only persons affected by the discipline were those who voluntarily submitted to it.¹³¹

This sieve-like quality of the private sphere is easily understood if one focuses upon the organizing norm that produced, and continuously

129. *Id.* at 604 n.30 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

130. *Id.* at 583-85.

131. Even the Supreme Court does not say that an outsider wishing to attend Bob Jones University has a right to do so on her own terms. Prospective students must, as Congress should, take the University as they find it. The overworked rhetoric of the opinion, however, does suggest such a right, and it is hard to see how a flat ban on racial policies in *all* schools, including religious ones, now could be overturned by the Court.

manipulates, the two-realm metaphor. Bob Jones University is best understood as a uniquely irritating eyesore on the church-state landscape, an eyesore that a judiciary hostile to religious consciousness felt they needed to blot out. The college stood defiantly atop an intersubjective religious truth that mocked an important political tenet of our time and witnessed the contingent, limited quality of constitutional norms. While the entire deposit of precedent and doctrine suggested that neither truth could, especially as aggressor, legitimately bridge the gap between the private and public spheres, not a single member of the Court seriously considered the religion clauses as a shield for Bob Jones University. The University was instead a redoubt of religious consciousness whose very existence, however private, provoked the Court. "As noted earlier, racially discriminatory schools 'exer[t] a pervasive influence on the entire educational process,' outweighing any public benefit that they might otherwise provide."¹³² The "pervasive influence" eyed by the Court is purely symbolic, or rather, a matter of religious witness that, like a church spire in a totalist society, needed to be razed. No longer a question of right, it is simply a judicial calculation of the distance between religious truth and political orthodoxy. Suggesting that *Bob Jones* is better explained, and thus limited, by the unique affront to liberal sentiment posed by "racial discrimination" misses this broader tension between political and religious truths. Anyway, it is hardly reassuring to note that the Justices' political sensibilities will condition their hostility to religious consciousness.

The result in *Bob Jones* is one reason why the Court effectively eschews a sect-neutral interpretation of the establishment clause—sect-partiality is a much more adept tool for domesticating religious consciousness. For that matter, why does the equal protection clause not stop the Court from anything more? Specifically, is not the Court's treatment of Title I, for instance, clearly a prohibited discrimination on the basis of religion? It is usually supposed that hostile treatment based on religious belief is at least suspect. After the Title I cases it is clear that belief itself¹³³ requires hostile treatment. Hence, it appears that equality as well as free exercise are constitutional imperatives squashed by privatization. The admitted sense in which the Court rejects sect-neutrality, though, is that the first amendment is not "merely" sect-egalitarian, but is also a prohibition of all aid and encouragement of religion, even if nondiscriminatory among faiths and between religion and "irreligion."¹³⁴

132. *Bob Jones*, 461 U.S. at 604 n.29 (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)).

133. Note the absence in Title I cases of any antisocial or prohibited behavior other than the exercise of the right established in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

134. In light of *Seeger*, see *supra* text accompanying notes 43-46, it is unclear

Why is nondiscrimination not ambitious enough for the Court? "Endorsement" is then no longer a problem, even if the opinions have yet to recognize it. The liberty to choose from an untrammelled marketplace is more, rather than less, serviced by genuine sect-equality than by the privatization preferred by the Court. Indeed, it is fairly apparent that the marketplace, notwithstanding the Court, is compromised by the two-sphere methodology. Neutrality is surely a more defensible interpretation of the constitutional tradition, and free exercise, then as now, protects against genuine individual coercion. Even the ostensible divisiveness fear of politically active zealots is quieted, for without any prospect of sectarian advantage, "dominance" is impossible and fanaticism, therefore, largely a waste of energy. The remaining inducement to "fanatics" like pro-lifers—that of capturing "neutral" laws—remains unchanged. Abortion restrictions, for instance, are valid in the *present* regime even if they "happen to coincide" with the tenets of particular faiths. In sum, sect-equality seems to solve all the identified problems but one: it makes no distinction whatever between "public" and "private" religion. This, however, is virtuous, for the attempt to maintain an empirically elusive "wall of separation" is responsible for the disarray in the cases. The only available critical observation of sect-equality is *that* it does not relegate religion to the private sphere, and *that* is why "mere" nondiscrimination needs fortification.

The stakes are evident in even a seemingly innocuous yuletide holiday display. They are purely "symbolic" of course and, thus, critical to a contest between competing accounts of truth for influence upon the "impressionable" public mind. The *Lynch* majority's unsound "historical analogue" methodology aside,¹³⁵ the correct approach in the prevailing judicial dispensation was articulated by the dissenters who felt that the crèche was undeniably a religious sign and that Pawtucket both supported and promoted it. There was, at a minimum, as great a "symbolic union" between Christianity and Rhode Island in *Lynch* as there was between New York City and, for the most part, Roman Catholicism in *Aguilar*. Hence, privatization required its demolition whether or not the nativity scene was sect-particular, which unquestionably it was. The passage of time should amply reveal the *Lynch*

what operational definition the Court would give to "irreligion."

135. The *Lynch* Court, apparently in search of a viable "original intent" approach to church-state, asked whether the challenged practice—nativity scenes—had a late eighteenth century counterpart. The majority found President Washington's Thanksgiving proclamations a persuasive analogue. 465 U.S. at 675 & n.2. The dissenters probed more directly for the "Framers' intent" regarding crèches. 465 U.S. at 718-25 (Brennan, J., dissenting). While such antiquarian poll-taking should *inform* the search for the norm ratified in the establishment clause, it is *not* a *substitute* for principle. Otherwise, one wonders if the next case will oblige the Court to ascertain whether the framers "intended" nativity scenes with the wise men and the Angel Gabriel in them, or if they preferred just the shepherds and a few donkeys.

majority holding as but a non-theoretical, theoretically anomalous "blip"—like legislative chaplains—on the church-state screen, which is quite what it purports to be.

The "neutral" alternative would rescue the crèche *only* if the public facilitation of it amounted to provision of a "public forum" that, at other times of the year, was similarly available to others without content restriction. Why this denouement should be unacceptable to a Court bent on the privatization of religious consciousness is obvious—it saves one irritation by adding countless others to it. Soon, a Court pushing a hermetic privacy upon religion would be staring at a public landscape literally teeming with transcendent irruptions. Worse, everyone else, especially youth facing that climactic moment of religious choice, would be staring at it too. Notwithstanding the fact that no particular religious symbol enjoyed a preferred place, the effect upon the Court's project would be devastating. In such a holy environment, one could not help but "absorb" the belief that religion is publicly relevant, and that its claims are indeed social truths.

In pastoral terms, this landscaping is the "pre-evangelization" stage in which missionaries, simply by "witnessing" their faith in everyday situations, make their later conversion efforts more fruitful. By that time, the religious insights expressly proposed to the unconverted resonate with experience or "ring true," making sense of the world as ordinarily encountered. Reception into the faith is then a genuine possibility, even in alien cultures. Without previously planting some empirical confirmation of faith's propositions, however, conversion is practically impossible.

A Court whose sociology of knowledge prizes symbolic, subliminal, and environmental modes of communication cannot gainsay the primary effect of its crusade to keep religion off public terrain. Who in the world would "choose" to believe religious claims of socially integrative truth in the despiritualized marketplace fashioned by the Court? That few will find those claims even plausible is hardly coincidental.

Finally, and most revealingly, what follows the forced evacuation of the religious is not a literally naked public square but rather one that is quite ornately, if eclectically, attired. It would be at least faintly Madisonian if privatization paved the way for a classic liberal politics of interest aggregation, or even a purely technocratic polity. Actually trailing in the unequivocally imperious wake instead is a normatively bloated polity. The close identity between judicial "privatizers" and "perfect" constitutionalists, who would impose a constitutionally inspired "just" result upon nearly every political problem, demonstrates that indeed a bare-knuckled brawl between consciousnesses is underway. Justices Marshall and Brennan, for example, are rarely accused of an amoral, value-free approach to constitutional adjudication even while they lead the charge against politically influential religion. It is not, therefore, *whether* moral values, philosophical principles, and so-

cial truth shall control, and selectively overrule, political outcomes, but rather *whose* truths shall so reign.

This is the "movement" worth watching. It is troubling enough that, as a result of an undifferentiated state action doctrine, *every* politically organized community, even the smallest, remotest, most homogeneous local school district, is bound by norms applicable to, and primarily designed for, a polyglot society of 235 million. That a Harlem school board is thereby prevented from concluding that Huckleberry Finn's "step'n fetchit" depictions of "niggers" are inappropriate for their children,¹³⁶ and that Skokie's Holocaust survivors must endure the swastika and black boot once again¹³⁷ illustrate, if nothing more, the differences between the substance of community and the substance of constitutional, hence universal, principles. The general observation implicit here is that, in communities constituted by meaning, what people say really matters. Because it is bedrock constitutional law that opinion is absolutely protected, religious and other genuine communities are, simply, endangered by application of the first amendment to them.

Nevertheless, *Bob Jones* truly dwarfs public school first amendment cases like *Board of Education v. Pico*¹³⁸ and *Tinker v. Des Moines School District*¹³⁹ in significance. That universalistic norms should penetrate the "private," nongovernmental religious community is still a quantum leap of logic, and not of degree. It is indeed an overall tendency of liberal thought to inflate norms like "privacy," "autonomy," "equality," and "due process," derived from constitutional sources to govern a society of differently minded strangers, into general "truths" of interpersonal relations. Of course, they are not. Basically, and with Michael Sandel's help,¹⁴⁰ when persons animated by a shared vision of their purpose in life commit themselves to living together by that light—that is, when they form a community—the "conditions" of justice are simply absent. So too may be the norms of justice. At least they have no application *ex proprio vigore*. More apparent still is the absence of any connection—notwithstanding misguided attempts to liken the Constitution to scripture and the Court to prophets—between the traditional sources of constitutional order and those of communal order. It is the difference between the text, structure, and history of an eighteenth century document and, for instance, the Roman Catholic canons and the primacy of Peter.

The Justices at first glance seem to have absorbed all this, taking

136. See, e.g., *A Century Later, Huck's Still Stirring Up Trouble*, N.Y. Times, Feb. 4, 1985, at A8, col. 2.

137. *National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977).

138. 457 U.S. 863 (1982).

139. 393 U.S. 503 (1969).

140. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

as a first premise that religion and law have nothing to do with each other and thus operate in mutually exclusive spheres. The effect of *Bob Jones* is to undermine (correctly) that premise. Political norms *have* no necessary influence on religious communities, yet religion's encompassing account of existence necessarily influences the polis. Accordingly, the opinion understandably relies upon a ratchet analysis, but the ratchet is, tragically, backwards. *Bob Jones* is hence much more than another example of liberalism's failure to develop any coherent theory of groups and the Constitution. It is not a "blind" spot but a purposeful incursion by an imperial Constitution, with the sparsest of efforts to justify it, and with barely a note of protest from either the media or academe. Its blithe *presumption* that religion ought to imitate the state marks it as the most important church-state episode of our time.

V. CONCLUSION

When Madison opted to "empower" rather than smother religion, it bespoke a genuinely heroic commitment to freedom. Unlike our own, his was a time of total belief when there were, almost literally, no atheists or devotees of "irreligion," and unbelief was publicly unsustainable until even the late nineteenth century. More importantly, in Madison's time and again until almost 1900, religion was universally experienced by the believer as participation in an extant, divine reality. That is, even in a pluralistic religious environment, faith was emphatically *not* "relativized." Most importantly, the founding generation, in a way our own generation can appreciate only through creative imagining, inhabited a "sacred cosmos" right here on earth. They built and sustained a public culture whose substance was religious, effectively Protestant. Further, historians tell us that, in the nineteenth century, sectarian identity and religious belief were the constituent features of political life and made up the fundamental "fault line" of political existence.¹⁴¹

Measured by these factors—extent, quality, and political saliency—"empowering" belief was, until recently, quite risky business. Measured by the same factors, however, "privatization" of faith was never less necessary than in the post-War period during which the Court gave it to us. Indeed, in the modern era, developments such as mass communication, nationwide transportation, inflation of the middle class, and dispersal throughout society of middle-class values have produced for the first time a truly "national" culture. The resulting social homogeneity is historically unparalleled and is least conducive to the religious ferment ostensibly feared by the Court.

The Justices occasionally appear to have a grip on the times because they never claim to fear what religion is actually doing, just what

141. See, e.g., P. KLEPPNER, *THE THIRD ELECTORAL SYSTEM 1853-92* (1977).

it did and may do again. If so, there should be no doubting the imperial quality of their endeavor to give us a better view of life than we would choose for ourselves. Unlike Burke, however, who offered no apology for a teleological politics grounded, in his case, in Christian morality, the Justices are not eager to don the mantle of illiberalism they have so justly earned in the course of betraying our constitutional legacy.

The sadder truth may be that the Court indeed perceives itself as doing the dirty but indispensable work of saving the republic from faith unchained, and are thus, sadly, obliged to reject Madison's gallant gamble. If so, the only criticism necessary is that the Justices hopelessly misread the age. We are much closer to a numbing uniformity of sentiment than we are to even a figurative sectarian conflagration. And privatization is hardly the answer. Rather, overcoming the dehumanization implicit in the separation of individual existence into political, economic, religious, and cultural performances, each severally and tightly controlled by internally generated norms, is the challenge of our time. Unfortunately, here the Court is not part of the solution, but part of the problem. Most disheartening of all is the nagging perception that the Court thinks law is the missing integrative factor.