CONSTITUTIONAL ARGUMENTS IN CHURCH BANKRUPTCIES: WHY JUDICIAL DISCOURSE ABOUT RELIGION MATTERS

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I. Introduction

Three Roman Catholic dioceses—Portland (Oregon), Tucson, and Spokane—filed for Chapter 11 bankruptcy in 2004. Those filings, and the sexual abuse scandals that preceded and in large part precipitated them, raise the central question of this article: what does the Constitution have to say about the matter?

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Some say, "Nothing." Proponents of this position point to the fact that bankruptcy is a voluntary, neutral, statutory process available to any entity that can make a good faith claim of the need for financial reorganization. They argue that by submitting to this process, a diocese accepts the application of the civil law, just as that law would apply to any other entity.[1] Others say that the Constitution does matter—that it compels the bankruptcy court to respect the restrictions set forth in the church's canon law, especially with regard to a bishop's powers.[2] Those holding this position point to examples of civil law deference to church law, especially when ecclesiastical and financial decisions are inextricably connected. They argue that similar deference should be given in the diocesan bankruptcy context.

Hundreds of millions of dollars turn on the answer to this question. Each diocese argues that the bishop cannot, under canon law, include the assets of the parishes and schools as part of the debtor's estate in bankruptcy.[3] Creditors—comprised largely of victims—claim that an examination of real estate title documents alone, showing ownership of parishes and schools vested in the bishop, is enough to warrant inclusion of all parish and school assets in the debtor's estate. Including the parish and school assets in the Portland, Oregon diocesan bankruptcy would mean, according to victims' attorneys, an estate of about five hundred million dollars, as opposed to nineteen million dollars in purely diocesan assets.[4] In Tucson, including the parish and school assets means an estate of what victims' attorneys estimate at one hundred ten million dollars as opposed to sixteen million

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[1] *See, e.g.*, Marci Hamilton, *Did the Portland Catholic Archdiocese Declare Bankruptcy to Avoid or Delay Clergy Abuse Suits? The Risk of Bad-Faith and Noncooperative Church Bankruptcies*, July 13, 2004, http://writ.news.findlaw.com/hamilton/20040713.html (last visited Aug. 10, 2005). *See also* Christina Davitt, *Whose Steeple Is It? Defining the Limits of the Debtor's Estate in the Religious Bankruptcy Context*, 29 SETON HALL LEGIS. J. 531 (2005).

[2] See Melanie DiPietro, *The Relevance of Canon Law in a Bankruptcy Proceeding*, 29 SETON HALL LEGIS. J. 395, 422 (2005), for the argument that "canon law may be controlling on the merits."

[3] *See* Nicholas Cafardi, *The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis*, 29 SETON HALL LEGIS. J. 361 (2005).

[4] Steve Woodward, *Parishioners Could Be Defendants*, THE OREGONIAN, May 26, 2005, at A1. One hundred twenty-four parishes are within the Portland Archdiocese. *Id.*

dollars in purely diocesan assets.[5] And in Spokane, it could mean eighty million dollars, instead of eleven million dollars in purely diocesan assets.[6] The contest over resources available to victims for compensation, resources available to the church for sacramental and service ministries, and resources available to the faithful for worship, education, and service, comes sharply into focus.

The bankruptcy process in this context will define the civil payment obligations of, and assure the institutional survival of, a religious entity. The process will also take into consideration the claims of other "stakeholders"—primarily the parishes and schools. Given the undeniable impact of this process on religious institutions, it seems facile to conclude that the Constitution has nothing to say about the matter. On the other hand, it seems equally facile to conclude that the Constitution would require a court to defer to religious law when the church is seeking reorganization within the government's own processes. Yet, these extreme positions of constitutional irrelevancy and unquestioning deference to church law both have support in the U.S. Supreme Court's unwieldy and contradictory jurisprudence interpreting the Religion Clauses of the First Amendment.

Rather than discuss the two "sides" of the debate and predict which "answer" should prevail, however, I would like to explore a different, more fundamental issue. Underlying these disparate answers of constitutional irrelevancy and constitutionally required deference are two dramatically different ways of speaking about religion, within the constitutional discourse. A language that possesses heightened sensitivity to the uniqueness and sacral quality of religion gives expression to a jurisprudence that explicitly faces the religious nature of an act or institution. A language that demystifies religion and ignores its unique or sacral qualities gives voice to a jurisprudence that more readily treats the religious act or institution in nonreligious terms. The way in which the Supreme Court describes religion creates an

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[5] Stephanie Innes, *Diocese Files Bankruptcy*, ARIZ. DAILY STAR, Sept. 21, 2004, at A1; Stephanie Innes, *Diocese Set to Split with its Parishes*, ARIZ. DAILY STAR, Sept. 22, 2004, at B1. Seventy-five parishes are within the Tucson Diocese. *Id.*

[6] Virginia de Leon, *Parishes Seek Deal to Stop Litigation*, THE SPOKESMAN-REVIEW, June 25, 2005, at A1. Eighty-one parishes are within the Spokane Diocese. *Id.*

environment receptive to some legal arguments and hostile to others. My thesis is that the current environment—one that de-emphasizes the sacral qualities of religion—simply cannot support legal arguments calling for the application of canon law in the bankruptcy context. I will point to one possible "middle way" through the polarized discourse.

The Court's discourse about religion is specifically meant to construct an understanding of religion for the limited purpose of constitutional interpretation. The Court does not purport to provide full expression of religion in theological, sociological, or historical terms. Thus, the way in which religion is described is highly manipulable, especially as it relates to the particular approach employed to determine the proper relation between law and religion. A civil libertarian/strict separationist reading of the religion clauses highlights, and may even exaggerate, the intensely sacral quality of religious acts and institutions, while a neutralist/accommodationist reading diminishes, and may even deny, that sacral quality.

Examining the content of the Supreme Court's religion narrative (particularly of the last half century) reveals these two distinct patterns, one of sacralization and the other of desacralization. Religion can be spoken of as the holiest of endeavors, pervasive and life-directing, filled with mystery, and bearing a transcendental quality. When such language predominates, as it did in the 1960s and 1970s, religion needs to be protected as a unique and fragile phenomenon of the deepest meaning, or reckoned with as a powerful and potentially oppressive phenomenon. The narrative of sacralization gives expression to individual and institutional religious liberty (under the Free Exercise Clause) and to separation of religion and government (as in the denial of public aid, access, sponsorship, and resources) to avoid government's perversion of religion or religion's perversion of government (under the Establishment Clause).

Beginning with the 1980s, however, the Court's narrative has come to express a desacralized, demythologized religion, a religion that is treated like any other preference, perspective, or analogous conduct. The religious nature of an act or institution is subordinated to a characteristic shared with other acts or

institutions. Religious symbols in civic life are primarily ceremonial and historical. Religious speech is primarily speech. Religious schools are primarily schools. Religious drug use is primarily drug use. Where such language predominates, religious conduct warrants the same treatment as comparable secular conduct. The narrative of a demythologized religion gives expression to a jurisprudence that preserves civic expressions of religion and permits aid to religion on neutral criteria (under the Establishment Clause), protects religious speech (under the Free Speech Clause) and promotes equal treatment for religious and nonreligious acts and institutions (under the Free Exercise Clause).

I take no position on the inevitability or wisdom of coupling heightened religious description with civil liberties/separationism and coupling diminished religious description with accommodationism/neutralism.[7] My overriding concern is the way in which the Court's religious discourse gains independent meaning and influence over time. Quite apart from the particular readings of the clauses, the religion discourse creates a rhetorical environment that is receptive to some language and not others, one in which some arguments find resonance and others cannot. Especially during periods in which a particular construction of religion predominates, the rhetorical environment predetermines the kinds of arguments that will appear natural and unforced, which can in turn reinforce or reorient a particular reading of a clause. Thus, one could say that the discourse sets the preconditions for the application of constitutional principles and in many instances governs the outcome.

Diocesan bankruptcies are being filed at a time when the language of religion clause interpretation emphasizes a demythologized religion, which all but precludes an emphasis on the unique nature of a church institution. The narrative makes it eminently reasonable to say that a diocese should be treated like any other bankrupt entity, thus leading to the logical conclusions that its own internal canon law (like the particular and idiosyncratic business philosophy of a bankrupt corporation) does

[7] Some are, in fact, attempting to couple heightened religiosity with neutrality. *See infra* notes 49 and 102.

not matter and that, ultimately, church bankruptcy implicates no constitutional issues. And especially in light of the clergy sex abuse scandal, why *should* it matter, for civil legal purposes, that this fallible human institution considers itself the Body of Christ, or the People of God, with its own sacred law? In this narrative and cultural context it makes sense to say that the self-definition and internal law of a religious community simply do not matter.

Yet to say without caveat that religious self-definition and religious law do not matter threatens to render the Religion Clauses a nullity. These clauses reveal to us the limited nature of the state, so that people might, in Madison's words, discharge the duty they owe to their Creator, a duty that "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[8] Before it can seem at all plausible that religious self-definition and religious law are relevant to the civil legal world, the jurisprudential narrative must be receptive to such a claim. There must be room for language that acknowledges the unique, sacred nature of religion in order for a church to be regarded as a church, and not simply as any non-profit, charitable institution. But even a constitutional discourse that accepts the distinctive quality of religion does not necessarily result in a jurisprudence in which churches decide unilaterally the terms of their interaction with government. For just as a complete demythologization renders constitutional protection of religion a nullity, an excessive sacralization flies in the face of experience and cannot be sustained in reason. A middle way through the polarized narratives is necessary.

In the present environment, a resort to the authority of canon law will fall on deaf ears; but, I have found the approach of the Diocese of Tucson instructive on this issue.[9] There, the diocese has presented the requirements of canon law—with respect to

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[8] JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 64, 65 (Michael S. Ariens & Robert A. Destro eds., 1996), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (last visited Sept. 9, 2005).

[9] *See infra* Section IV. For a fuller discussion on the applicability of civil trust law in this context, see Catharine Pierce Wells, *Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy*, 29 SETON HALL LEGIS. J. 375 (2005) and Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471 (2005).

defining its assets—by analogy to the civil law of trust. Assets held in trust are not included in a bankrupt entity's estate. It has sought to provide evidence that its actual relationship to its parishes is one of trustee to beneficiary, thereby employing civil legal doctrines that approximate the substantive requirements of canon law. This approach suggests one possible middle way that respects the church's internal requirements while at the same time respecting the constraints of the present rhetorical environment.

Section II of this article describes the Supreme Court's discourse of earlier decisions that emphasize the sacral qualities of religion. Section III tracks the more recent developments of language that diminishes the religious nature of religion. Finally, Section IV briefly explores the meaning of church bankruptcy within this dichotomous context and expands upon the civil trust analogy.

II. The Early Emphasis on Religion's Unique, Sacral Character

The most obvious changes that have occurred within the jurisprudence of both the Free Exercise and Establishment Clauses over the last half-century have been a shift away from a primary focus on religion and its interaction with law, and toward a primary focus on the form of the law regardless of its interaction with religion—what might be called a formal neutrality. In the free exercise area, for instance, the Court has moved from analyzing a law's impairment of a particular religious practice to instead analyzing the form of the law. Under current standards, if the law is facially neutral and generally applicable, and not overtly discriminatory or designed exclusively to suppress the religious practice, it is considered constitutional in most cases, regardless of any actual impairment of religious practice.[10]

A similar shift has occurred in the establishment area. Earlier cases focused primarily on the religious acts and institutions receiving government support or sponsorship, and how such aid or alliance would affect the integrity of both religion and the state. More recently, the Court has shifted its focus away from those religious acts and institutions, and toward the form of the laws

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[10] *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1990).

from which they benefit. Religious institutions may (and sometimes must) have access to governmental money, resources, space, and forums as long as the programs under which those benefits are distributed involve neutral, non-religious criteria, and are not skewed toward benefiting religion. While the move to formal neutrality under the Establishment Clause is not as complete as one finds in the free exercise area,[11] it is a clear and persistent trend in the law.

This shift away from a focus on the interaction of religion and law, and toward a narrower focus on the law itself also finds its analog in the case law involving what is called "church autonomy." This line of cases, implicitly resting on both clauses, historically recognized religious institutions as sovereigns with respect to their own ecclesiastical laws and governance. While that remains true to some extent today, even here the Court has shifted away from a focus on the religious nature of internal religious decisions (which called for judicial deference) and toward a focus on an appropriate method of limited civil court involvement. Courts are free, in most cases, to use "neutral principles" of law in order to adjudicate a church matter as long as well-settled legal principles can be invoked to determine issues without resort to religion.[12] Thus, in all three areas of free exercise, establishment, and institutional autonomy, the emphasis has shifted away from the interaction of religion and law, and toward the form of law and adjudication.

This shift means that the Court's current jurisprudence is so focused on formal questions of how a law is shaped—the extent of its generality and neutrality—that religion becomes irrelevant and is lost in the discourse. Many have lauded this shift on the ground that it takes courts and legislatures out of the business of examining and judging religion, and focuses them properly and squarely on the nature of the law. While I am not among the supporters of this shift, I also do not suggest a simple restoration of the earlier jurisprudence. I do find value, however, in the earlier focus on the interaction of religion and law, which required courts to confront the religious nature of an act or

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[11] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion).

[12] Jones v. Wolf, 443 U.S. 595, 602-04 (1979).

institution. By ignoring religion in its shift toward a "law only" paradigm, the Court has produced a rhetorical context that is either unreceptive or hostile to, or facially manipulative of, a whole host of claims rooted in the religious nature of an act or institution. What follows is a three-part discussion of the main ways in which the early jurisprudence emphasized the unique sacral nature of religious acts and institutions, which served as a predicate to the analysis of the interaction of law and religion.

A. *The Pervasive and Powerful (and Paradoxically Fragile) Nature of Religion*

For the Court, religious systems possess the power to be life-changing and life-directing. The commitments they call forth pervade a community's way of life and an institution's mission and identity in ways that make the sacred and secular inseparable. Religion provides a comprehensive worldview, which we see articulated most fully in the Court's description of the life of the Amish in *Wisconsin v. Yoder*.[13] In this case, Amish parents challenged a compulsory education law that would have required an additional two years of schooling for their children. They considered this law a grave burden on their ability to pass on their faith and way of life in the community, and a threat to the very survival of the community. They sought an exemption from the law to enable their young people to take their place within the farm community. The Court engaged in a lengthy description of the inextricable connection between faith and way of life, a pervasive religiosity that defines all that the Amish do. "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith."[14] The Court paid close attention to the record, which it found to show a "deep religious conviction, shared by an organized group, and intimately related to daily living."[15]

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[13] 406 U.S. 205 (1972).

[14] *Id.* at 210.

[15] *Id.* at 216. The Court continued:
That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal

The very fact that the Court speaks in detail of religious life and commitment is significant, insofar as it makes possible the Court's sensitivity to the needs of this community. After describing the degree of religious separation and purity, the Court focused on the requirements of contemporary society that exert a "hydraulic insistence on conformity to majoritarian standards."[16] The Court noted that regulations like the compulsory education law posed a severe threat to the Amish way of life. Here the Court encountered the paradox of the force and fragility of religion. The Court's focus on the interaction of law and religion resulted in a judicially mandated exemption for the Amish from the law. But it was the Court's detailed emphasis on the intensely religious nature of the Amish way of life that created a rhetorical context receptive to the legal argument that protection for this fragile community from the "hydraulic" pressures of the outside world was a constitutional necessity under the Free Exercise Clause.

In a similar way, the Court emphasized the intensely religious nature of parochial schools. In the context of Catholic schools, religion was, for a time, consistently described as a pervasive and powerful presence. As early as the 1940s the Court was concerned about the parochial schools' role in "indoctrination," and the Court quickly came to recognize church schools primarily as "a powerful vehicle for transmitting the Catholic faith to the next generation."[17] This emphasis justified separationism in Establishment Clause interpretation, particularly during the 1970s, beginning with *Lemon v. Kurtzman*.[18] The test set forth in *Lemon*, which determined when a law violated the clause, required a secular purpose, no primary effect of advancing religion, and no

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> interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

Id.

[16] *Id* at 217.

[17] Lemon v. Kurtzman, 403 U.S 602, 616 (1971) (quoting Di Censo v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970)).

[18] 403 U.S. 602 (1971).

excessive entanglement with religion.[19] Throughout this period of vigorous application of the *Lemon* test, the Court developed the notion that parochial education through high school was "pervasively sectarian."[20] This pervasive sectarianism meant that nearly any aid given to the school automatically subsidized religion and created a symbolic link between church and state in ways that either unconstitutionally advanced religion or entangled church and state.[21] In contrast, Justice White's dissent in *Lemon* emphasized the "dual role of parochial schools in American society: they perform both religious and secular functions."[22] He would have permitted funding of those secular functions. But the Court repeatedly held that the secular functions of religious schools could not be disentangled from their religious functions, and most forms of aid failed Establishment Clause scrutiny.

"Pervasively sectarian" referred not only to the school's mission and goals, but also to the school's physical environment. The Court placed strict limits on the ability of public employees to enter religious schools. Participation by public school teachers in any religious school program was immediately suspect because they:

> [M]ay become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. . . . Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect.[23]

This theme is repeated in many cases; but it suggests more about the power of religion than about the lack of professionalism by teachers. Indeed, the state supervision of public school teachers in parochial schools was necessary to "guard against the infiltration of religious thought."[24]

As it did with the Amish in *Yoder*, the Court sketched a

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[19] *Id.*

[20] Meek v. Pittenger, 421 U.S. 349, 371-73 (1975).

[21] *Id.*; Wolman v. Walter, 433 U.S. 229 (1977).

[22] *Lemon*, 403 U.S. at 663 (White, J., dissenting).

[23] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385, 388 (1985).

[24] Aguilar v. Felton, 473 U.S. 402, 412 (1985).

somewhat paradoxical picture of religion as both powerful and fragile. Liberals on the Court focused not only on religion's threat to the integrity of government, but also on government's threat to the integrity of religion. State involvement in the life of a religious school, in the form of conditions on aid, would so taint and pervert its sacral purity and autonomy, said the Court, that denial of aid was cast as a way of protecting religious liberty. One sees that the Court viewed the Catholic school system, like the Amish community, as a sacral and pure "exit" option, a life-directing alternative to mainstream society, which needed freedom from the state in order to flourish—and which would crumble under the weight of state intervention. This meant that the regulatory oversight that would accompany financial aid to religious schools would intrude upon, and perhaps irrevocably taint, the religious community. Thus, while the *Yoder* Court's emphasis on religion led to a rhetorical context receptive to the legal argument that protection (by exemption) for this fragile community was necessary, the emphasis on religion in the parochial school context led to a rhetorical context receptive to the legal argument that protection (by prohibiting state aid) for this fragile institution was equally necessary.

B. *The Coherent Nature of Internal Religious Legal Systems*

The "church autonomy" line of cases, built upon both free exercise and establishment concerns, also emphasizes the unique nature of church governance and an attendant prohibition on civil court intervention. This jurisdictional autonomy ensures that the state does not involve itself in the sacral functions of a religious community—again, similar to the freedom from interference implied in the "exit option" allowed the Amish and the Catholic parochial school system. Under these cases, churches enjoy jurisdictional autonomy for ecclesiastical disputes that are addressed by internal church processes and laws, even if those disputes implicate property or other civil matters.[25]

The expression of autonomy is at its height when the Court discusses church disputes with clergy, a relationship that is

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[25] *See* Watson v. Jones, 80 U.S. 679, 731 (1872); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115-16 (1952).

understood to contain unparalleled religious intensity.[26] Yet even outside this specific employment relationship, it is generally recognized that churches need a wide berth for self-definition and self-direction. For instance, the Court held constitutional an exemption in Title VII that permitted churches to discriminate on the basis of religion even for employment positions that were arguably secular.[27] Even for these kinds of positions, there is a danger of government perversion of the sacral purity of religion.[28]

This clear sense of the necessary autonomy for a church's self-definition and self-direction is present even in the Court's earliest decision on the matter, *Watson v. Jones*,[29] a nineteenth century case involving a schism and subsequent dispute over ownership of the church building. Because the church was part of a hierarchical polity, the Court held that the decision of the highest internal tribunal should govern.[30] The Court determined that it had no

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[26] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 733 (1976). In the area of church-clergy disputes, internal law governs. *Id.* Decisions regarding hiring, firing, performance and compensation enjoy virtual immunity from civil court review. *Id.*; *see, e.g.*, Combs v. Cent. Texas Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999).

[27] Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987).

[28] Justice Brennan wrote:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. *Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.* . . . The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.

Id. at 341-42 (Brennan, J., concurring) (emphasis added) (internal citations omitted).

[29] 80 U.S. 679 (1872). In the next century, the Court considered this deference to be constitutionally compelled. *See Kedroff*, 344 U.S. 94.

[30] *Watson*, 80 U.S. at 732-35. The *Watson* Court wrote:

competence in matters theological, especially where churches have their own religious legal systems. These legal systems are coherent, and have their own interpreters. Deference to religious legal systems was therefore necessary.[31] This strong respect for systems of religious law continued well into the twentieth century.[32]

C. *The Mystery and Interior Power of Religion*

In the Court's early jurisprudence, its sacralized discourse emphasized two aspects of religion that serve to distinguish it from any other human endeavor: mystery and comprehensiveness. By

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> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of [controverted] questions [of faith] 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.

Id. at 727, 729.

[31] *Id.* at 729.

> [Many churches have] a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

Id.

[32] But the position was not without critics. Some justices voiced concern that the Court had gone too far in trying to avoid intervention in internal religious affairs. Justice Jackson, in dissent, criticized the majority opinion:

> I shall not undertake to wallow through the complex, obscure and fragmentary details of secular and ecclesiastical history, theology, and canon law in which this case is smothered. . . . I do not see how one can spell out of the principles of separation of church and state a doctrine that a state submit property rights to settlement by canon law.

Kedroff, 344 U.S. at 131 (Jackson, J., dissenting). *See also Milivojevich*, 426 U.S. at 727. "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness." *Id.* at 727 (Rehnquist, J., dissenting).

mystery I mean that religious beliefs and practices can be inscrutable, even inexplicable. In one of its earliest descriptions of religious belief, the Court, influenced by William James's works on religion, emphasized the deeply interior nature of religion, as expressed through varied individual mystical experiences.[33] The Court wrote, "Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."[34] The Court echoes this sense of deep interior life later in free exercise cases, in which the beliefs of a Jehovah's Witness, which varied from those of his church, could not be tested against the church's own teaching.[35] "Religious beliefs need not be acceptable, logical, consistent, or comprehensible" to be eligible for constitutional protection.[36] They cannot be captured or defined, nor can they be judged by standards of reason.[37] This suggests a nonrational, even irrational religion, with the individual as the ultimate arbiter of its content.[38] Even in cases requiring deference to church law on grounds of institutional autonomy, the Court has made clear that religious laws are not to be judged by standards of due process rationality to which civil laws would be subject, even in the face of evidence that the religious decision was the product of fraud, collusion, or arbitrariness.[39]

Putting this sense of mystery and interiority together with religion's pervasive influence over actions, communities, and environments, the Court skates close to describing an almost mystical power of religious language and symbols. Interestingly, this power exists quite apart from any influential religious

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[33] United States v. Ballard, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting).

[34] *Id.* at 86. The dissent quotes Henry James: "If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways." *Id.* at 93 (Jackson, J., dissenting).

[35] Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

[36] *Id.*

[37] *Id.*; *Ballard*, 322 U.S. at 78.

[38] For a critique of the individualistic Jamesian definition of religion, see generally JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (1998).

[39] *Milivojevich*, 426 U.S. at 711-12.

institution. Instead, it is connected to some sense of a larger mystery, reminiscent of the biblical idea that "the Spirit goes where it wills."[40] This understanding of religion is certainly present in the descriptions of religion in cases that address religion in the public schools. Given the captive audience of impressionable children in the public school setting, the Court has consistently emphasized the unique power of religious texts and symbols.

Public school students are permitted to hear and see all kinds of texts and symbols, except perhaps obscenity, because this is considered an educationally legitimate "mere exposure" to ideas.[41] But religious texts and symbols are different, particularly in the context of religious ceremony or instruction in the public school context. In those cases, religious language is described as having special power, particularly when school prayer is at issue. In such cases, while the Court could have cast its analysis primarily in terms of the highly circumscribed role of the state in matters religious, the Court instead chose to emphasize both the inordinate power of these words over children, as well as the frailty and delicacy of these words, easily corruptible by state involvement.

The Court's analysis of the one sentence prayer struck down in *Engle v. Vitale*[42] is instructive. The Board of Regents wrote, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[43] In dramatic exaggeration, the Court invokes examples of British history of an established church under the control of a meddling parliament and the widespread persecution of dissenters, and analogizes the prayer to the Anglican Book of Common Prayer. And again, the image of religion's power is coupled with its fragility. The Court writes, "[r]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[44]

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[40] *John* 3:8. "The wind blows where it will, and you hear the sound of it, but you do not know whence it comes or whither it goes; so it is with every one who is born of the Spirit." *Id.*

[41] Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1067 (6th Cir. 1987).

[42] 370 U.S. 421 (1962).

[43] *Id.* at 422.

[44] *Id.* at 432. Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), a prayer offered by

Outside the context of religious ceremony and instruction, the Court has continued to emphasize the power of religious language and symbols. In *Stone v. Graham*,[45] the Court struck down a law requiring the Ten Commandments to be posted in every public school classroom in Kentucky, for the stated purpose of teaching the fundamental legal code of the Western world. The Court, rejecting the proffered secular purpose of the posting, concluded that "the Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."[46] Denying that any educational function would be served, the Court said, "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[47] For the Court, this text has the power—simply by its presence—to influence children.[48]

III. The Discourse of Demythologized Religion

In the last few decades, the religious nature of an activity or institution has been minimized, often to the point of total irrelevancy, in nearly every area of the Court's Religion Clause jurisprudence, except for cases addressing religion in the public school classroom. Conservatives and moderates on the Court have de-emphasized the religious nature of religion out of concern that nearly every religious exemption, accommodation or recognition had become a potential impermissible "advancement" of or

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a rabbi at a graduation was dramatically described as "state-created orthodoxy." *Id.* at 592. The dissent noted that, in content, the words "are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself." *Id.* at 642 (Scalia, J., dissenting). The Court concentrated its discussion on the effect of the prayer on the listener and held that, in the context of a state-sponsored ceremony with peer pressure from other students, it was impossible not to assent or participate in this prayer. *Id.* at 598-99.

[45] 449 U.S. 39 (1980).

[46] *Id.* at 41.

[47] *Id.* at 42.

[48] Similarly, in the recent decision of *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), Kentucky counties responsible for displays of the Ten Commandments were found to lack a secular purpose for those displays in light of persuasive evidence that the religious message of the display was being endorsed. *Id.* at 2745.

"entanglement" with religion under the *Lemon* test.[49] But the demythologizing was not simply a counterweight to a rigid reading of *Lemon*. This practice of re-describing religion in less religious or nonreligious terms has been at the heart of the move toward a more general jurisprudential principle of formal neutrality in the interaction of religion and law.[50]

What follows is a discussion of five areas in which the Court has desacralized religion. Civic expressions of religion have been described as largely nonreligious in nature and function. Religious acts and institutions have been treated on par with comparable nonreligious ones. Religious speech has been considered to be simply a kind of speech. Paradoxically, the rhetorical shifts in these three areas have made possible the preservation of religious symbolism and unprecedented access to government resources and forums. But two shifts in other areas of discourse—captured largely by the absence of description, the failure even to acknowledge burdens on religious practice or to recognize coherent religious legal systems—have made religion invisible for purposes of other constitutional protections.

A. *Preserving Civic Expressions of Religion*

By the 1980s, it was clear that a straightforward application of

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[49] It is important to note that two of the conservatives, Justice Scalia and Justice Thomas, on some occasions use intensely religious description in order to specifically make the point that the religious nature of an act or institution is simply not relevant for purposes of Establishment Clause interpretation. *See* Lee v. Weisman, 505 U.S. 577, 631 (Scalia, J., dissenting); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 71 (2004) (Thomas, J., concurring). *See also infra* note 102. Justice Thomas wrote for the plurality in *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion), upholding aid to parochial schools:

> The religious nature of a recipient [of aid] *should not matter to the constitutional analysis*, so long as the recipient adequately furthers the government's secular purpose. . . . [I]t is most bizarre . . . [to] reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.

Id. at 827-28. These are attempts to uncouple heightened sacralization from the separationist jurisprudence. In this sense, it is a challenge to the idea that the sacred must be separated out (under the Establishment Clause), and may signal the percolation of new ideas. Nonetheless, these same justices have played a major role in supporting the overall demythologizing of religion as described in this section.

[50] *See* discussion *infra* Part III.A-E.

the *Lemon* test threatened the continuation of all sorts of public manifestations of religion. Outside the public school context, where *Lemon* had been vigorously applied, there was concern that a similar vigor would result in overturning a whole host of civic expressions of religion—the national motto, "In God We Trust," legislative prayers, Christmas displays on municipal property, even "under God" in the Pledge of Allegiance, to name a few. Thus, the Court began to find new ways to circumvent *Lemon*.[51]

Predictably, one way to protect such public expressions of religion was to diminish their religious nature. In *Lynch v. Donnelly*,[52] the first of several religious display cases, the Court recharacterized a city-owned Christmas crèche as a passive, historical symbol, heavily dependent upon its commercial context. Rejecting the Establishment Clause challenge, Justice Burger wrote that the city had "principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday."[53] He compared it to "the exhibition of literally hundreds of religious paintings in governmentally supported museums. . . . The crèche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas."[54] The display also contained secular symbols of Christmas, like a Santa and a talking wishing well. Justice Burger denied that the inclusion of the "passive" religious symbol would "so 'taint' the City's exhibit as to render it violative of the Establishment Clause."[55]

In sharp contrast to this "minimally religious" religion, Justice

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[51] In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court did not apply *Lemon* at all to its analysis of legislative prayers, holding them constitutional because of their unique history. *Id.* at 792-95. Justice Brennan objected, saying that the secular purpose prong of the *Lemon* test was violated, as "it is self-evident" that the prayer was "pre-eminently religious." *Id.* at 797 (Brennan, J., dissenting).

[52] 465 U.S. 668 (1984).

[53] *Id.* at 680.

[54] *Id.* at 683, 685.

[55] *Id.* at 670. In a later religious display case, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court held constitutional a holiday display comprised of a Chanukah menorah, Christmas tree and sign saluting religious liberty because, for Justice Blackmun, it "simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society." *County of Allegheny*, 492 U.S. at 616.

Brennan's dissent characterizes the crèche in dramatic, intensely sacral terms, in service to a strict separationist reading of the Establishment Clause.

> [A] nativity scene represents far more than a mere "traditional" symbol of Christmas. The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court's suggestion, the crèche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith.[56]

For Justice Brennan, the commercial context of the crèche, complete with Santa and talking wishing well, is irrelevant.[57] He sounds as though he is describing a scene from the Vatican, not from the Pawtucket shopping district.[58]

A similar demythologizing, with an emphasis on history and ceremony, has occurred in connection with challenges to the use of "God" in certain public or official language. It is interesting to compare Justice Douglas's statement, made in 1952, that "[w]e are

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[56] *Lynch*, 465 U.S. at 711.

[57] Religious texts and symbols more generally in the public square are also sometimes described in intensely religious terms if there is no context to suggest an alternative or additional cultural meaning. The Christmas crèche located at the top of the Grand Staircase in the county courthouse, together with the words "Glory to God in the Highest!" undoubtedly contained a religious message. Justice Blackmun wrote, "Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service." *County of Allegheny*, 492 U.S. at 598. But Justice Kennedy denies the proselytizing power of the display: it is a "passive symbol," which passersby are free to ignore, "or even to turn their backs." *Id.* at 664 (Kennedy, J., concurring in part, dissenting in part).

[58] In the recent case of *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), a similar pattern appears between the majority and dissenters. Justice Rehnquist calls the monument of the Ten Commandments at the Texas State Capitol a "passive monument." *Id.* at 2859. Justice Breyer, in his separate concurrence, writes, "The physical setting of the monument . . . suggests little or nothing of the sacred." *Id.* at 2870. He points out that the park, with seventeen monuments and twenty-one markers, provides a clear historical and moral context for the Ten Commandments monument. *Id.* The park is not a place "for meditation or any other religious activity." *Id.* In contrast, Justice Stevens' dissent focuses nearly exclusively on the religious content of the words of the Ten Commandments. *Id.* at 2873-90.

a religious people whose institutions presuppose a Supreme Being,"[59] with recent opinions on the constitutionality of the words "under God" in the Pledge of Allegiance. While the majority opinion in *Elk Grove Unified School District v. Newdow*[60] did not reach the merits of the issue—whether the words violated the Establishment Clause—Chief Justice Rehnquist and Justice O'Connor each offered separate, substantive analyses in their concurring opinions, which would have found the phrase permissible. But they do not make the confident assertion that our "institutions presuppose a Supreme Being." Chief Justice Rehnquist takes a predominantly historical approach, reciting a long list of evidence of "patriotic invocations of God and official acknowledgements of religion's role in our Nation's history . . . . All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character."[61] The phrase is "but a simple recognition of the fact . . . that our Nation was founded on a fundamental belief in God."[62]

Justice O'Connor diminishes the religious nature of the words more totally, referring to similar phrases as "ceremonial deism," and suggesting their wholly non-religious function.[63] With

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[59] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[60] 542 U.S. 1 (2004).

[61] *Id.* at 41, 47.

[62] *Id.* at 49. Justice Rehnquist writes:

> The phrase is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" . . . [is] but a simple recognition of the fact noted in H.R. Rep. No 1693, at 2: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.". . . The recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase "under God" cannot possibly lead to the establishment of religion, or anything like it.

Id.

[63] Justice O'Connor writes:

> I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history. . . . It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes and oaths. . . . [S]uch references "serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions, expressing

respect to the phrase in the pledge, she writes:

> [T]he phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority. . . . Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to "one Nation under God" in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.[64]

B. *The Erosion of the "Pervasively Sectarian" Concept*

The Court's description of Catholic schools over the years provides an excellent example of the shift in discourse away from an emphasis on a sacral quality. In a separationist era of heightened emphasis on the religious nature and mission (and the attendant "indoctrination") of parochial schools, it was nearly impossible for states to structure aid programs that did not violate the *Lemon* test. Over time, however, the Court began to de-emphasize their religious nature, giving greater weight to their identity as schools, and focusing on the neutral structure of laws allowing benefits to flow to them only as a result of independent parental choice.[65] After several decades of laying this foundation,

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> confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance.

Id. at 57 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984)).

[64] *Id.* at 64-65.

[65] Characterization has always been central to the question of aid to parochial schools. In the first Establishment Clause decision, *Everson v. Board of Education*, 330 U.S. 1 (1947), bus fare reimbursements to parents sending children to parochial schools were held constitutional because they were understood to be general welfare benefits. *Id.* at 18. To the dissent they were monies aiding children to obtain "religious training and teaching." *Id.* at 33 (Rutledge, J., dissenting). Justice Rutledge's dissent continued, "For me, therefore, the feat is impossible to . . . characterize [the reimbursement] as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about." *Id.* at 48 (Rutledge, J., dissenting).

by 2003 it was possible to hold constitutional a tuition voucher program that permitted the use of vouchers at religious schools.[66] In empirical terms, this meant that a government program was making it possible for poor children to attend Catholic schools, practically the sole alternative to a grossly inadequate public school system.

Throughout the 1980s, the discourse regarding aid to Catholic education began to shed the "pervasively sectarian" language and focus on the neutral, generally available nature of educational aid programs. The Court never denies or redefines the religious nature of the schools (as it does with civic expressions of religion). The Court simply ignores their religious nature, deciding that it is simply not relevant to the constitutional inquiry. The shift began with *Mueller v. Allen*,[67] in which the Court reviewed a challenge to a tax deduction for school expenses generally available to all parents. Despite the fact that this was used almost entirely to deduct tuition expenses for religious schools, the Court found that the neutral, generally applicable form of the law (and not its effect) was the relevant factor in the inquiry. Any benefit to religious schools was the result of the private choices of parents; the deduction was therefore constitutional.[68]

A similar emphasis on aid generally available on neutral (non-religious) criteria controlled the analysis in *Witters v. Washington Department of Services for the Blind*.[69] In that case, the Court found it permissible for a state program of financial aid to visually handicapped students to fund a blind student's seminary studies. In the unanimous decision, the Court held that the private choice of the individual to place the money toward religious training saved this from Establishment Clause infirmity. And finally, in *Zobrest v. Catalina Foothills School District*,[70] this emphasis on aid that is generally available on neutral criteria, together with "private

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[66] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[67] 463 U.S. 388 (1983).

[68] The job of emphasizing the religious nature of the schools was left to the dissenters. *See id.* at 404 (Marshall, J., dissenting). "Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools." *Id.* at 409 (Marshall, J., dissenting).

[69] 474 U.S. 481 (1986).

[70] 509 U.S. 1 (1993).

choice," saved the state's provision of a sign language intepreter to a Catholic school student. These services were generally available to deaf children to aid them in school, and the interpreter was in a religious school only because of the parents' independent choice to send their child to a Catholic school. Predictably, Justice Blackmun's dissent emphasized the religious nature of the school and of the speech, and lamented the consequence of the decision to "authorize[] a public employee to participate directly in religious indoctrination," a "conduit for [the student's] religious education."[71]

The steady shift of focus away from the religious nature of the school and toward the structure of the aid program made it possible for the Court to find constitutional a school voucher program structured in a way that made religious and secular schools eligible for participation. The Cleveland tuition voucher program at issue in *Zelman v. Simmons-Harris*[72] was found to be a program of true private choice, "with no evidence that the State deliberately skewed incentives toward religious schools."[73] "Where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a non-discriminatory basis,"[74] the fact that religious schools participate is immaterial.

Justice Souter's dissent in *Zelman* returned to an emphasis on the religious nature—the pervasively sectarian nature—of the schools, and the related notion that any money flowing to these schools is the funding of religious indoctrination.[75] But Justice

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[71] *Id.* at 18, 22 (Blackmun, J., dissenting).

[72] 536 U.S. 639 (2002).

[73] *Id.* at 650.

[74] *Id.* at 653-54 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).

[75] *Id.* at 710-15 (Souter, J., dissenting). Justice Souter wrote:

> In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools,

Souter's and other separationists' efforts to reinvigorate the language of the unique sacral quality of the religious schools in constitutional discourse have not been fruitful. In addition to the minimized religious nature of the parochial school and the new emphasis on the form of aid, the Court has begun to rethink the entire concept of the "pervasively sectarian" institution and has overruled cases, or parts thereof, rooted in that concept.[76] In fact, a plurality of four justices would do away with the pervasively sectarian doctrine altogether.[77] Justice Thomas, writing for that plurality in *Mitchell v. Helms*,[78] argued that "[t]here are numerous reasons to formally dispense with this factor. . . . [T]he religious nature of a recipient [of aid] *should not matter to the constitutional analysis*, so long as the recipient adequately furthers the government's secular purpose."[79]

Although Justice O'Connor refuses to join this group, she eliminated a significant separationist argument when she rejected the concerns about the ability of public school employees to remain professional in a religious school environment. In her majority opinion in *Agostini v. Felton*,[80] Justice O'Connor abandoned the presumption that any teacher on the premises would likely teach religion and the presumption that any aid to the educational function of a parochial school necessarily aids religion. Justice Brennan's concern that the power of the sacred environment could overwhelm the public school employee's proper judgment has been discredited.

C. *Religious Speech Qua Speech*

In addition to saving religious symbols and parochial school aid from the Establishment Clause guillotine, the act of

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and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

Id. at 687 (Souter, J., dissenting).

[76] *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion), overrules *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977). In addition, *Agostini v. Felton*, 521 U.S. 203 (1997) overrules *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (part) and *Aguilar v. Felton*, 473 U.S. 402 (1985).

[77] *See Helms*, 530 U.S. 793.

[78] *Id.*

[79] *Id.* at 826-27 (emphasis added).

[80] 521 U.S. 203 (1997).

demythologizing religion has also led to greater protections for religious speech. Beginning in the 1980s, the Free Speech Clause emerged as a formidable challenge to the Establishment Clause. Characterizing religious speech as speech from a particular (albeit religious) viewpoint meant that it could not be excluded from a public forum. Rather than excluding religion from public space and public resources, which a strict reading of *Lemon* would require, the Free Speech Clause has been read to require its inclusion. But the inclusion is not based on the uniqueness of religion; indeed, it is dependent upon the religious viewpoint being merely one of many viewpoints. Thus, in a series of cases,[81] the "discrimination" toward religion typically required by Establishment Clause analysis was, in certain circumstances, considered unconstitutional discrimination under the Free Speech Clause.

The first case to go down this road was *Widmar v. Vincent*,[82] in which a college Bible club challenged the denial of the use of public university facilities for its meetings. Finding that the university had created an open forum by allowing over 100 student groups to use its facilities, the Court held that the university had engaged in content-based discrimination when it excluded the Bible club. The Court reasoned that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment."[83]

In a dissent that attempted to preserve the distinctive, sacral quality of religion, Justice White was concerned with the obvious change being made to the jurisprudential understanding of religion. For him, re-describing religious practice in terms of speech and association threatened to collapse religion into speech, and deprive the Religion Clauses of their significance.[84]

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[81] Widmar v. Vincent, 454 U.S. 263 (1981); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Ctr. Moriches Sch. Dist., 508 U.S. 384 (1993); Rosenberger v. Univ. of Virginia, 515 U.S. 819 (1995); Capitol Square v. Pinette, 515 U.S. 753 (1995); Good News v. Milford Cent. Sch., 533 U.S. 98 (2001).

[82] 454 U.S. 263 (1981).

[83] *Id.* at 269.

[84] *Id.* at 284-86 (White, J., dissenting). Justice White wrote that the Court's methodology was:

> [F]ounded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment. Not

Widmar was extended legislatively to the high school context through the federal Equal Access Act, which prohibited any public high school with a "limited public forum" (defined as a non-curricular activity period during non-instructional time) "to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited forum on the basis of the religious, political, philosophical or other content of the speech at such meetings."[85] Held constitutional in *Mergens v. Board of Education*,[86] the Equal Access Act protects religious clubs sponsoring Bible reading, fellowship, and prayer because these are understood to be private speech within a limited public forum. The public school classroom and other official settings, such as graduation ceremonies, are not public forums, and could not be open to such religious acts.[87]

The limited public forum concept continued to inform cases throughout the 1990s. Of course the jurisprudential focus was on the private nature of the speech, and the move toward treating it on a par with private secular speech. But the focus on its private nature went hand in hand with minimizing its religious nature. In *Lamb's Chapel v. Center Moriches Union Free School District*,[88] a public school district could not deny permission to a church to use school facilities to show a film. The district considered the Christian film to be religion, properly excludable from the forum, which was created to permit civic use of the schools by community groups. But the Court considered the film to be about "family values" from a religious viewpoint. The district had engaged in viewpoint-based discrimination.

> only is it protected, they argue, but religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle. I believe that this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech. . . . This case involves religious worship only; the fact that the worship is accomplished through speech does not add anything to [the] argument.

Id. at 284, 286 (White, J., dissenting). Justice White thought the group had to make its claim under the Free Exercise Clause alone. *Id.* at 288 (White, J., dissenting).

[85] 20 U.S.C. § 4071(a) (1994).

[86] 496 U.S. 226 (1990).

[87] Lee v. Weisman, 505 U.S. 577, 598-99 (1992).

[88] 508 U.S. 384 (1993).

Justice White's original concern about the characterization of the religious activity as speech dropped out of the picture for a time, but was intensely reignited by Justice Souter's vigorous dissents in several free speech cases.[89] Given his separationist concern that public money should never support religion, and the attendant need to emphasize the religious nature of the speech, he began to voice concern in his dissenting opinions that intensely religious conduct was being improperly re-characterized as speech from a religious viewpoint. In *Rosenberger v. University of Virginia*,[90] a student organization, Wide Awake Productions (WAP) published a Christian magazine called *Wide Awake* and was denied reimbursement of its printing costs, a benefit that other student publications received. Justice Kennedy's majority opinion emphasized the activity as primarily "publication," and secondarily "religious." He wrote:

> The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.[91]

Justice Souter's retort focused on the magazine's primarily religious character. He quoted extensively from the magazine to demonstrate its evangelical content, indeed a "straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ."[92] Following along this characterization, the payment

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[89] See especially *Rosenberger v. University of Virginia*, 515 U.S. 819, 863-99 (1995) (Souter, J., dissenting).

[90] 515 U.S. 819 (1995).

[91] *Id.* at 840.

[92] *Id.* at 867 (Souter, J., dissenting). Justice Souter noted that:

> Even featured essays on facially secular topics become platforms from which to call readers to fulfill the tenets of Christianity in their lives. . . . This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. . . . It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. These are not the words of "student news, information, opinion, entertainment, or academic communication . . . ." (in the language of the University's funding criterion), but the words of "challenge [to] Christians to live, in word and deed, according to the faith they proclaim and . . . to consider

constituted "the direct subsidization of preaching" in violation of the Establishment Clause.[93]

Justice Souter continued his vocal disagreement on the characterization of religious activity in *Good News Club v. Milford Central School*.[94] In that case, a public school board refused to permit a club, the Good News Club, from holding its meetings at the school after school hours. The Court found that an after-school forum had been created and that Milford had engaged in unconstitutional viewpoint discrimination. Similar to Justice Kennedy's subordination of the religious nature of the club in *Rosenberger*, Justice Thomas subordinated the Club's religious nature in order to fit it within the scope of afternoon activities. Justice Thomas does not deny the intensely religious nature of the activity. Instead, he indicates that the activity should be understood in terms of its similarities to other conduct, rather than its distinctiveness, for the purpose of constitutional interpretation. Something can be "quintessentially religious" and still be "characterized properly as the teaching of morals and character development from a particular viewpoint."[95]

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what a personal relationship with Jesus Christ means" (in the language of Wide Awake's founder). The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit.

Id. at 866-68 (Souter, J., dissenting).

[93] *Id.* at 868 (Souter, J., dissenting).

[94] 533 U.S. 98 (2001).

[95] *Id.* at 111. Justice Thomas wrote:

[T]he Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different in kind from the other activities permitted by the school. [The court of appeals said that] the Club "is doing something other than simply teaching moral values." The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which is characterized as "quintessentially religious." With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,'" the exclusion did not constitute viewpoint discrimination. *We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. . . . [W]e can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for*

Not surprisingly, Justice Souter emphasizes an exclusively religious nature of the activity. He writes:

> It is beyond question, that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. The majority avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint." . . . Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.[96]

D. *Religion: Irrelevant Motivation, Irrelevant Burden*

A similar disregard for the religious nature of an act or institution has evolved within free exercise interpretation, with very different implications. Under the Establishment Clause and Free Speech interpretations, the process of minimizing the intensity of religion results in its preservation and protection. But under the Free Exercise Clause, desacralizing religion leads to its general disregard. We have come far from *Wisconsin v. Yoder*, in which the Court focused intensely on the pervasive and life-directing impact of the Amish faith, and on the fragility of the community if the "hydraulic pressures" of modern life were allowed to intervene through the application of law. A mere fifteen years later, the Court's opinion in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[97] which also contained a question about the survival of a religious community, is notable for the paucity of language describing religion.

In *Lyng*, Native Americans had claimed that the construction of a road would irrevocably harm their sacred lands, and destroy the spiritual efficacy of their rituals. Justice O'Connor's opinion, thin on describing religious practices and thick with the concern for federal autonomy in the management of its lands, found no

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their lessons.

Id. at 110-11 (emphasis added).

[96] *Id.* at 138-39 (Souter, J., dissenting).

[97] 485 U.S. 439 (1988).

cognizable constitutional claim because governmental coercion was not involved. Even conceding the lower court's finding of the probable destruction of the religion was not sufficient to sustain a claim. The dissent focused on the Native American community and the impact of the road on the life of the community, much like the Court had done in *Yoder*. In highlighting the unique quality of the sacred lands, Justice Brennan even made the remarkable finding that the Native Americans "have claimed—and proved—that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies."[98]

After *Lyng*, it was a short step to *Employment Division v. Smith*.[99] In that decision, which held broadly that laws that are generally applicable and facially neutral would not violate the Free Exercise Clause, Justice Scalia's majority opinion never discusses the religious practices of the claimants (sacramental use of peyote) or the burden of the law on those practices (a criminal law making the use illegal). It is enough that the law challenged is an across-the-board criminal prohibition.[100]

Smith is as far as one can get from the *Yoder* methodology.

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[98] *Id.* at 467 (Brennan, J., dissenting).

[99] 494 U.S. 872 (1990).

[100] *Id.* at 889-90. Compare this lack of regard for the religious nature of a religious community with his dissenting opinion in *Board of Education v. Grumet*, 512 U.S. 687, 732-52 (1994) (Scalia, J., dissenting). There the community was Satmar Hasidim, much like the Amish and Native Americans, whose lives are pervasively governed by religion. *Id.* at 691. The issue concerned the creation of a separate school district, co-extensive with the boundaries of a village that was populated exclusively by Satmar Hasidim, which the Court found to violate the Establishment Clause because the district reflected "a religious criterion for identifying the recipients of civil authority." *Id.* at 702. But Justice Scalia's dissent discounted the religious uniformity of the group. Calling this law an accommodation not so much of the religious practices, but "more precisely, [the] cultural peculiarities of a tiny minority sect," he asks:

> On what basis does Justice Souter conclude that it is the theological distinctiveness that was the basis for New York State's decision? The normal assumption would be that it was [their cultural distinctiveness], since it was not theology but dress, language and cultural alienation that posed the educational problem for the children.

Id. at 740 (Scalia, J., dissenting). Yet it was the theological distinctiveness of the Amish, and not their cultural distinctiveness that gave them the protection of the Free Exercise Clause. *See supra* notes 13-16 and accompanying text.

Justice Blackmun's dissent, in which the religious life of the Native American community is provided in detail, and the effect of the law is scrutinized, recalls that methodology. Drawing on the way the *Yoder* Court focused on the pervasive, life-directing religion of the Amish, Blackmun focuses similarly on providing the description of the Native American Church's "carefully circumscribed ritual context in which respondents used peyote" and the "considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population."[101] For Justice Scalia, it is appropriate for a legislature that wants to take such information into account to enact an exemption from drug enforcement laws. But it is not appropriate for a court to scrutinize religious phenomena so closely. In fact, it seems that the early emphasis on the language of mystery and interiority in some of the Court's cases contributed greatly to his concern that judicial involvement in this area would lead to chaos.[102]

E. *Ignoring Coherent Religious Legal Systems*

The Court's discourse in the "church autonomy" area has departed from an earlier commitment to apply a coherent religious legal system that addresses issues within its competence, most notably in the property dispute cases. This is the result of a new emphasis on the "neutral principles" approach, which allows courts to adjudicate certain ecclesiastical matters when secular legal concepts are employed. Abandoning its high regard for internal church laws and the expertise of those charged with interpreting them, the Court in *Jones v. Wolf*[103] held that the application of a neutral principles approach to a church property dispute was a constitutionally acceptable method, even though it resulted in a reversal of a church hierarchy's decision. The Court wrote:

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[101] *Smith*, 494 U.S. at 915 (Blackmun, J., dissenting).

[102] *Id.* at 888. Compare this concern with his dissent in *Locke v. Davey*, 540 U.S. 712 (2004), in which he thought the student had suffered clear religious discrimination. There Justice Scalia describes the intensely religious nature of the student's actions. *See supra* note 49.

[103] 443 U.S. 595 (1979).

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.[104]

Where the *Watson* court did not want to touch the organic documents of the church, the *Jones* Court said that the neutral-principles approach "[may require] a civil court to examine certain religious documents, such as a church constitution. . . . In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts. . . ."[105] Deference is required only if such scrutiny would involve a court in the resolution of a religious controversy.[106]

IV. Concluding Thoughts: How Discourse Affects Churches in Bankruptcy

As described in the Introduction, the main issue posed during the pendency of the current diocesan bankruptcies is the definition of debtor's assets. The property question has become central because the three dioceses currently in bankruptcy are each organized as a corporation sole under applicable state law. That form allows the office of the bishop to hold title to property, to sue and be sued, and to enter into contracts, among other things. Because the bishop holds title to all the real property of parishes and schools, it appears that he (and therefore the diocese) owns these assets. The dioceses dispute this, however, saying that under canon law the parishes and schools are separate juridic persons and their assets cannot be taken by the bishop to satisfy diocesan debts.

Dioceses are, of course, free to organize themselves under the corporate law of the states in which they sit, in order to reflect the

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[104] *Id.* at 603.
[105] *Id.* at 604.
[106] *Id.*

requirements of canon law. Parishes and schools can be separately incorporated, which respects their nature as separate juridic persons. The failure to do this, however, leaves the current dioceses (as well as their parishes) in the situation of trying to limit the definition of what the bishop owns despite his record title to the property.

In the Supreme Court's current discourse about religion, for purposes of constitutional interpretation, religion has been largely stripped of sacral identity. The rhetorical environment is receptive to language that treats churches like similarly situated secular entities. And in the bankruptcy context, that might mean treating a diocese like a nonprofit institution would be treated, or, more likely, treating it like those for-profit corporations that filed for bankruptcy because of debt owed to mass tort creditors. In fact, comparable treatment of similarly situated religious and nonreligious actors is of such a high constitutional value under the demythologized discourse and the ascendant "neutrality" view of the Religion Clauses that an emphasis on the religious distinctiveness of the entity simply does not resonate.

What is acceptable within the discourse, in turn, predetermines the kinds of arguments that appear natural and unforced. The argument that a bankruptcy court must defer to canon law, which governs the actions of the bishop, will carry little persuasive force. The suggestion that a church could make use of a legal process while dictating the substance of the law is particularly problematic in cases where the conduct of church leaders has directly contributed in varying degrees to the debtor's financial crisis. Instead, what seems compelling in this context is the argument that the court should apply civil law, as it would in comparable situations, under a neutral principles approach. This, many have argued, means reading the deeds to the real property literally, and recognizing full title in the bishop.[107]

The approach taken by the Diocese of Tucson provides a respectful alternative to the two extremes sketched out above. It has analogized the requirements of canon law—with respect to defining its assets—to the civil law of trusts. The Disclosure

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[107] Note also the analysis set forth in DiPietro, *supra* note 2, which shows the relevance of canon law primarily by interpretation of the civil incorporation statute.

Statement of the diocese[108] sets out the canon law structure, in which the diocese and each of the parishes are shown to be distinct "juridic" persons. The Statement describes in detail the independent governance structure of each parish, and analogizes each parish to an unincorporated association under Arizona law. Since unincorporated associations cannot hold title to real property, the document explains that the bishop holds the legal title while the parish holds equitable title.[109] The Statement then develops the legal-equitable ownership analogy between the bishop and parishes.

> If, for example, the Diocese were to attempt to alienate Parish property, sell Parish property or otherwise affect the Parishes without complying with the applicable requirements of Canon Law, the Bishop would violate Canon Law just as the Diocese (acting through the Bishop), acting as the trustee or holder of property subject to a restriction would be violating the trust or restriction encumbering the property if he took action in violation of the terms of the trust or applicable law.[110]

The Statement then sets out evidence to establish how it is that the parishes own their real property even though title remains in the bishop, which includes a description of the primary role of the parish in acquiring and improving the property. It notes that,

> As the beneficiary of the trust between each Parish and the Diocese, the Parish has a beneficial, equitable and proprietary interest in the Parish Real Property. Consistent with this concept, under Canon Law, the Parish is the owner of its "temporal goods" which includes all real and personal property owned by a Parish. Therefore, civil and Canon Law are consistent with respect to the ownership of the Parish Real Property.[111]

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[108] Disclosure Statement Regarding Plan of Reorganization, *In re* Roman Catholic Church Diocese of Tucson, No. 04-bk-04721, (Bankr. D. Ariz. 2004) (filed Sept. 20, 2004) (on file with author) [hereinafter Disclosure Statement].

[109] The Bankruptcy Court for the Eastern District of Washington has rejected a similar argument made by the Diocese of Spokane, ruling that no trust exists on behalf of the parishes. *See In re* Catholic Bishop of Spokane, 329 B.R. 304 (Bankr. E.D. Wash. 2005).

[110] Disclosure Statement, *supra* note 108, at 20.

[111] *Id.* at 20. In order for this analogy to be successful, many supporting facts need to be proven during the bankruptcy process. The availability of this trust argument should be entirely dependent upon the persuasiveness of the factual record

As is shown by this example, a diocese can retain the integrity of its own religious legal system, while also respecting the bankruptcy process by employing civil legal doctrines that most closely approximate its actual internal structure and operations. When a diocese is able to present persuasive evidence that such a civil trust relationship exists (and only in such cases), the use of the trust analogy shows the bankruptcy court that there is a middle way—a realistic and authentic way—and that the court's choices are not limited to the two extremes of deferring to church law or of reading the title documents to place full title in the bishop. This is fully consistent with the "neutral principles" approaches under *Jones v. Wolf*,[112] which explicitly provided for a comprehensive inquiry and application of civil trust law. And it is a way of acknowledging that the Constitution matters when a church is in bankruptcy.

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demonstrating the existence of a trust relationship. In other words, the mere assertion of the existence of a trust relationship between a diocese and parish should not be sufficient. In fact, the Bankruptcy Court of the Eastern District of Washington found "no evidence to support the creation of a constructive or resulting trust" with regard to parish property. *In re Catholic Bishop of Spokane*, 329 B.R. at 331.

[112] *See supra* notes 103-106 and accompanying text.