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BOOK REVIEW

"God's Litigator"
A Review Essay of *Mere Creatures of the State? Education, Religion, and the Courts: A View from the Courtroom*

Douglas W. Kmiec[*]

William Bentley Ball[1] is likely the most experienced and respected litigator in matters of church and state in America. In some ways, a review of this moderately sized volume could easily dwell upon the importance of Mr. Ball's trial and appellate advocacy and his willingness to shoulder for an entire professional career the task of safeguarding what has been called America's first freedom—the freedom of religion. But it is plain that such autobiography is not Mr. Ball's purpose. Rather, as he states early, this book provides the "view from below"[2]—that is, the view of the "dramas, stories of real people and remarkable events"[3] that shaped the Court's Religion Clause cases in this century. As Ball notes, these cases are not the tabloid stuff of "bloody gloves," rather, these decisions seek to answer the "overarching" question of our times: "How far the state shall have power over our lives."[4] More particularly, these cases pose over and over again the question asked by the book's title: Are our children "mere creatures of the state?"

Certainly, it will always be hoped that this question will be answered negatively in the heart of every parent each day.[5] Catholic

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1 J.D., University of Notre Dame, 1948; partner, Ball, Skelly, Murren & Connell, Harrisburg, Pennsylvania.

2 WILLIAM BENTLEY BALL, MERE CREATURES OF THE STATE? EDUCATION, RELIGION, AND THE COURTS: A VIEW FROM THE COURTROOM 4 (1994).

3 *Id.*

4 *Id.*

5 In a February 1995 poll conducted by Luntz Research for the Of the People Foundation of Arlington, Virginia, 94% answered "parents" and 3% answered "government" to the question: "Who do you feel should be primarily responsible for making decisions concerning the upbringing and education of children—parents or the government?" (Survey available from Of the People Foundation (703) 351-5051).

social teaching declares unequivocally that "those in society who are in charge of schools must never forget that the parents have been appointed by God himself as the first and principal educators of their children and their right is completely inalienable."[6] Surprisingly, given the tremendous legally tolerated or legally inspired encroachment on parental authority existing today, the title question was also answered negatively seventy years ago by the U.S. Supreme Court in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.[7] *Pierce* rejected an Oregon law making it a crime for parents to enroll their children in any but public schools. The Court wrote: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[8] But as forceful as that judicial statement appears, it has not settled matters. As Ball recounts throughout this volume, in terms of both economic freedom and intrusive regulation, the state still competes with and frequently displaces parents as primary educators.

In rejecting Oregon's mandatory public school attendance law in *Pierce*, the Court likened the state's competition with parents to the platonic ideal that "'children are to be common, and no parent is to know his own child, nor any child his parent' . . . [i]n order to submerge the individual and develop ideal citizens."[9] Plato's prescription, even as a matter of speculative philosophy, is jarring and strikes even the most disinterested parent as unnatural. But surely, to many well-intentioned public educators, the platonic analogy paints the state's interest in public schooling too starkly. Is it not possible to see the public school, not as contradiction of parent, but rather as supplement, sustaining a common culture? In other words, is not the primary objective of a government school the nourishing, among children of all faiths, an appreciation for what Tocqueville described as "ideas in common" or "beliefs ready made"?[10]

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6 Pope John Paul II, *The Apostolic Exhortation on the Family (Familiaris Consortio), reprinted in* 11 ORIGINS 437, 451 (1981) (paragraph 40).

7 268 U.S. 510 (1925).

8 *Id.* at 535.

9 Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923) (citing Plato).

10 Tocqueville writes:

> [N]o society could prosper without such beliefs, or rather that there are no societies which manage in that way. For without ideas in common, no common action would be possible, and without common action, men might exist, but

"Beliefs ready made" are very much akin to "self-evident truths." And along these lines, the drafters of the Religion Clauses viewed religious freedom not only as an important and sensitive good in itself, but also as a means to significant ends. The ends were made explicit in the Declaration of Independence,[11] which affirmed those "self-evident truths," including the existence of a Creator God, upon which the American republic, and indeed, all men and women depend for the understanding of existence itself. As John Courtney Murray has written:

> [T]he American Proposition rests on the more traditional conviction that there are truths; that they can be known; they must be held; for, if they are not held, assented to, consented to, worked into the texture of institutions, there can be no hope of founding a true City, in which men may dwell in dignity, peace, unity, justice, well-being, freedom.[12]

The interests of the state in matters of schooling, to portray it most benignly and partially ahistorically,[13] might be said then not to have the crass purpose of stealing children away to some hypothetical common where platonic descendants would neuter their individuality, but rather, the purpose of safeguarding the American philosophy of self-evident truth from one generation to the next. This description of public school purpose seems not only meritorious in the midst of America's "culture war,"[14] but also a conge-

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> there could be no body social. So for society to exist and, even more, for society to prosper, it is essential that all the minds of the citizens should always be rallied and held together by some leading ideas; and that could never happen unless each of them sometimes came to draw his opinions from the same source and was ready to accept some beliefs ready made.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 433-34 (J.P. Mayer ed. & George Lawrence trans., 1969); *cf.* Amy Gutman, *Democratic Schools and Moral Education*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461 (1985) (arguing for the public school as an educator of common culture).

11 The understanding of the Declaration as constitutional document has recently been made more luminous by the scholarship of Professor Trisha Olson, whose carefully documented article on the Privileges or Immunities Clause of the Fourteenth Amendment reveals how the Framers of that Amendment drafted it as a specification of the received higher law principles embodied in the Declaration. *See* Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995).

12 JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS at ix (1960).

13 As Mr. Ball reveals, part of the push for the public or government school monopoly derived from antireligious and anti-immigrant sentiment. BALL, *supra* note 2, at 12, 21.

14 *See* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); DOUGLAS W. KMIEC, CEASE-FIRE ON THE FAMILY: THE PURSUIT OF VIRTUE AND THE END OF

nial premise to religious freedom and tolerance. For example, as Richard John Neuhaus writes in his eloquent and discerning foreword to Mr. Ball's book, "the founders specifically designed a government that would be accountable to higher sovereignties."[15] In the parlance of the founding, the people are the proximate sovereign, though the people themselves affirm the higher sovereignty of God. Any doubt on this score should be allayed by the Declaration's tracing of inalienable right to "the law of nature and nature's God."

But, somehow—and Mr. Ball's book reveals an important part of the how in the context of Religion Clause litigation—the American proposition as re-stated in present-day Supreme Court opinion, be it popularly conceived as liberal or conservative, has severed its connection with God and the self-evident truths; truths that can be derived from reasoned reflection upon a created human nature.

Arguably, Mr. Ball's effort can be seen as friendly to Dr. Harry Jaffa's broader enterprise of exposing the similar severance of constitutional means from philosophical purpose in original intent jurisprudence, especially as that has been described by Judge Robert Bork.[16] The dispute within the originalist camp is too involved to chronicle here. Yet, even though it involves Ball in a fight he does not discuss,[17] it is worth a brief digression. Essentially, the

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AMERICA'S CULTURE WAR (forthcoming 1995) (manuscript on file with author); Douglas W. Kmiec, *America's "Culture War"—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183 (1993).

15 Richard J. Neuhaus, *Preface*, *in* BALL, *supra* note 2, at vii, ix.

16 *Compare* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994) *with* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). *See also Jaffa v. Bork: An Exchange*, NAT'L REV., Mar. 21, 1994, at 56.

17 My colleague Thomas Shaffer rightly points out that Mr. Ball in litigation did not fully specify a reliance upon the Declaration as the "consistent set of philosophical principles" against which constitutional interpretation is to be measured. True, neither in litigation nor in this book does Mr. Ball articulate this focus as forthrightly as it is presented in this review essay. But, as Ball's reference to the Declaration as "the preamble to the Preamble to the Constitution," BALL, *supra* note 2, at 8, I believe fairly suggests, the time for intellectual timidity on this score has long since passed. The Constitution, as amended, contains various claims of freedom (religion and speech for example); it is the Declaration that anchors these claims of freedom in good purpose, or if you will, the common good. We are not free to use either speech or religion to undermine the common good, yet, this is only comprehended when the Declaration's acceptance of "self-evident truths" is part of the organic law of the First Amendment. Similarly, an acceptance of the Declaration's self-evident truths strengthens the federalist structure of the Constitution by reminding us that the application of general, self-evident truths takes place within the smaller sovereignties of state and local government, and often, outside of government

dispute asks whether the Constitution is understandable without the Declaration of Independence. Bork says it is, and Jaffa says it is not. Jaffa has the better of it, though not without some caution. Judge Bork and his formidable intellectual allies[18] are rightly skeptical of judges who disregard constitutional text to conveniently inject their own political or personal preference. What the Bork camp misses, however, is that constitutional text can rarely be fully comprehended, except in light of the nation's fundamental definition of purpose in the Declaration.[19]

Dr. Jaffa is fond of citing originalist support to make his case. He notes, for example, commentary by Madison and Jefferson that the Declaration was "the first of the best guides to the principles of the Constitution."[20] So too, *The Federalist* makes reference to "the transcendent law of nature and nature's God"[21] as well as other fundamental principles of the Revolution. From this, Dr. Jaffa logically reasons that "the standards by which the Constitution is to be justified and defended, are prior both logically and chronologically to the Constitution itself."[22] As Mr. Ball writes similarly, "[t]he Declaration was, in a sense, the preamble to the Preamble to the Constitution."[23] Bork and company frequently complain that these are no more than intellectual snippets, not enough to make the "self-evident truths" of the Declaration a full-

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altogether in church, family, and workplace.

18 *See, e.g.*, Charles J. Cooper, *Harry Jaffa's Bad Originalism*, 1994 PUB. INTEREST L. REV. 189.

19 The debates surrounding the Fourteenth Amendment in the 39th Congress make this clear. For example, Senator Poland spoke of the purpose of § 1 of the Amendment which was to allow congressional enforcement of "principles . . . essentially declared in the Declaration of Independence and in all *other* provisions of the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland). Similarly, Professor Howard Graham after his study of the 1830s reminded legal scholars writing in the 1950s that "[a] generation which enshrines the document of 1787 rather than that of 1776 needs to be reminded that originally the Declaration not only was a *part* of American constitutional law, it was the [superior or paramount law]." Howard J. Graham, *The Early AntiSlavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 610, 612.

20 Harry V. Jaffa, *Slaying the Dragon of Bad Originalism: Jaffa Answers Cooper*, 1995 PUB. INTEREST L. REV. (forthcoming) (manuscript on file with the author).

21 THE FEDERALIST NO. 43 (James Madison).

22 Jaffa, *supra* note 20 (manuscript at 38, on file with author).

23 BALL, *supra* note 2, at 8. My colleague Gerard Bradley characterizes this as the Founders' commitment of the constitutional structure to the "common good," which "did not depend upon the truth of those matters that distinguished" various religious sects even as both the common good and truth fully depended upon God. *See* Gerard V. Bradley, *Deja vu, All Over Again: The Supreme Court Revisits Religious Liberty*, CRISIS, April 1995, at 39, 40.

bodied part of originalism, a part of the organic law. But as both Dr. Jaffa and legal historian Philip Hamburger have written,[24] the Framers did not think they had to constantly cite the obvious.[25]

But what does all this have to do with public schools and religious liberty? Plenty. The severance of the Declaration from the Constitution bemoaned by Dr. Jaffa obscures the American philosophy, and with it, destroys the benign, "common culture" purpose of the public school. And if indeed there is no common culture that informs human inquiry, then families within the manifold faith traditions that had been sheltered or accommodated by that common culture are left puzzled over exactly what the public schools are up to. Worse, too many families of different faiths discover that the individual public or government school that matters to them most—theirs—has been absorbed by secular ideologies of modern man that do not recognize the transcendent value of human life or exalt the pursuit or redistribution of material goods over all else or that purvey a wholly gratification-based view of human sexuality. In these places, the conflict between parent and school is often sharp, and the question of this book's title gets asked in matters of book selection, curriculum, hiring, and teaching emphasis.

We can be reasonably confident that out of the natural law of the Declaration, the Framers would never confuse libel and perjury with protected speech.[26] So too, Mr. Ball reveals how the Framers would think it perverse to see the religious freedom of the Constitution as banning reference to or reliance upon God in matters of education. As Mr. Ball puts it, religious liberty was guaranteed as essential "because religion itself was thought to be."[27]

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24 Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); *see also* Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L.Q. 361 (1993).

25 "[C]ivil law was expected to reflect natural law." Hamburger, *supra* note 24, at 909. Thus, even if, based upon the national stature of Judge Bork as *the* spokesman for faithful originalism, the burden of proof rests with those advocating the Declaration as part of the organic law, that burden has been amply met by the explicit and repeated consideration of this matter in the drafting of the Fourteenth Amendment. *See* Olson, *supra* note 11, at 417-19. As Professor Olson reveals throughout the congressional debate, law was viewed from the natural law perspective—that is, as declared, rather than merely made. For this reason, Congressman Bingham, the chief proponent of the Amendment in the House, would state in numerous ways the view that the Constitution rests on "the transcendent right of nature, and nature's God." CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

26 *See* Hamburger, *supra* note 24, at 935-36.

27 BALL, *supra* note 2, at 9.

In this, good law depended upon morality, which in turn, depended upon religion, even as—plainly and textually—it did not, and should not, depend upon *an* established religion. In petitioning for religious freedom in Virginia, Madison thus saw no incongruity in first invoking the sovereignty of the "Governour of the Universe."[28]

The Supreme Court's disregard of the Constitution's natural law moorings in the Declaration began scarcely fifty years ago.[29] With this disregard, the Court lost sight of the meaning of religious liberty. In the colloquial, it mistook freedom *of* religion for freedom *from* religion. Rather than understanding the Establishment Clause as a vehicle for advancing the free exercise of religion, "the means (no establishment) [was] turned into the end, and the end (free exercise) [was] viewed as a terrible nuisance."[30] Nowhere was this felt more strongly than in the public school. The public school that in an earlier era had acknowledged God as the ultimate authority for the American experiment was "forced to substitute secular and utilitarian values."[31]

Mr. Ball undertakes to explain the disfigurement of the Establishment Clause through the litigation of *Lemon v. Kurtzman*,[32] which despite virtually unanimous judicial scorn as an unhelpful "ghoul-like" apparition,[33] remains the prevailing Supreme Court standard in the establishment area. The case was triggered by Pennsylvania legislation in the late 1960s designed to allow the state to purchase from, and therefore reimburse, nonpublic schools for educational services in mathematics, physical science, physical education, and modern foreign languages. Mr. Ball defended the statute in trial and on appeal to the U.S. Supreme Court. While the Pennsylvania constitution, like many state constitutions, contains an express prohibition of funding sectarian institutions (a fact that Ball documents as originating in anti-Cath-

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28 *Id.* (quoting Madison).

29 Or at least it did not fully surface in the Religion Clause cases until the latter half of this century. The misinterpretation of these Clauses may be traceable, however, to the older substitution of positivism for the natural law tradition which began with the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). *See* Olson, *supra* note 11, at 432.

30 Neuhaus, *supra* note 15, at ix.

31 BALL, *supra* note 2, at 14.

32 403 U.S. 602 (1970).

33 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring in the judgment) (Justice Scalia referred to the Lemon test as "[l]ike some ghoul in a late-night horror movie that . . . stalks our Establishment Clause jurisprudence once again, frightening . . . little children and school attorneys.").

olic bigotry[34]), supporters argued that the particular services sought to be funded were nonsectarian and obviously fulfilled a public purpose that would otherwise have to be borne by the state taxpayer.

This is not a hollow argument. As suggested more extensively below, it deserves conscientious attention as a matter of distributive justice—that is, the proportionate distribution of burdens and benefits within the community. But the argument did not prevail in *Lemon*, but Mr. Ball reveals, it was not solely a Catholic argument, then or now. For example, in the 1960s when the Pennsylvania legislation was pending, Orthodox Jewish leaders spoke in support noting that "the practical effect of the present situation is to tax the parent of each child that attends a religious school; this is obvious discrimination."[35] True, there was Protestant opposition in the 1960s. Ball attributes much of this to the residual Protestant mindset which still saw the public school as its own,[36] or at least as supportive of a shared culture premised upon the Declaration. Today, with government schools forced by dubious legal interpretation to disown the philosophical premises of the nation, the Protestant and the Orthodox Jewish communities have found even greater common cause with the Catholic community.[37]

The argument for a proportionate sharing with *all* schools—public and religious—of education funds raised from the taxes of *all* citizens initially won favor as well in the lower court. Seeing no need for a trial, the district court summarily held in *Lemon* that "no state could exclude individuals 'because of their faith or lack of it, from receiving the benefits of public welfare legislation.'"[38] It is worth noting that in that crisp statement the trial judge properly captured that the object of the Establishment Clause is the promotion of religious freedom, and this freedom very much includes the fair distribution of public benefit.

In retelling the story of the *Lemon* litigation, Mr. Ball mentions without discussion the Court's determination a few years before that had invalidated Bible reading and the recitation of the

34 BALL, *supra* note 2, at 20-24.

35 *Id.* at 25 (quoting the testimony of Aaron D. Twerski of the Yeshiva Achei Tmimim).

36 *Id.* at 23.

37 *Id.* at 78.

38 *Id.* at 28 (quoting Everson v. Board of Education, 330 U.S. 1, 16 (1947)).

Lord's Prayer in public school classrooms.[39] As Mr. Ball observes, it was in this case that the first two prongs of *Lemon* originated—secular purpose and not having the primary effect of advancing[40] religion. Mr. Ball comments that the Pennsylvania funding statute he was defending in *Lemon* "passed that test with flying colors,"[41] but he does not disclose whether he thought those requirements had any merit. This is part of a litigator's perspective of course—to deal with the hand dealt him—but in marvelously clear, twenty-twenty retrospect one wonders if the litigation strategy might not have been better aimed at challenging the test itself. Implicit in the test from the beginning was the mistaken assumption of neutrality between religion and no religion. The Declaration of Independence is *not* neutral—God exists; God created man; man has inalienable rights by his created nature.

This is not to say that neutrality is senseless. But what little sense it contains, can be found only *after* parents are unjustly denied a proportionate share of the tax-derived general education fund and *coerced by law and the economic weight of double taxation* to send their children to the government school. These many years later there is a plausible argument that Mr. Ball directed high talent and litigation energy in *Lemon*, and subsequently in *Meek v.*

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39 School Dist. of Abingdon Township v. Schempp, 374 U.S. 203 (1963).

40 The second prong of this so-called "establishment" test is actually a curious admixture of the establishment and free exercise precepts. The test originated in *Schempp*, where Justice Clark was opining in dicta upon the meaning of both Religion Clauses, when he remarked: "Thus, [the] two clauses may overlap. [The] test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 374 U.S. at 222. Interestingly, as Mr. Ball restates *Schempp*, he describes the second prong as not having "a primary effect advancing religion." BALL, *supra* note 2, at 29. Ball's omission of "or inhibition of religion" reflects the emphasis that the Court has given the second prong in litigation—that is, the Court has only been alert to establishment violations, almost wholly slighting free exercise concerns. This effectively transforms the second prong and thus the governing constitutional objective into the exclusion or avoidance of religion, when the purpose of the Religion Clauses taken together was to advance individual freedom of religion. Justice Stewart perceived this bias in *Schempp* and in his dissent wrote:

> [P]rovisions authorizing religious exercises are properly to be regarded as measures making possible the free exercise of religion. But it is important to stress [that] the question presented is not whether exercises such as those at issue here are constitutionally compelled, but rather whether they are constitutionally invalid. And that issue, in my view, turns on the question of coercion."

374 U.S. at 316 (Stewart, J., dissenting). Indeed, it does.

41 BALL, *supra* note 2, at 29.

Pittenger,[42] toward explaining why second-best funding plans, like the Pennsylvania legislation, did not violate an unwarranted premise—the need for neutrality between religion and no religion. As it turned out, when *Lemon* reached the Supreme Court, the Justices invalidated Mr. Ball's Pennsylvania legislation notwithstanding his explanation. The Court did this by affirming what certainly should be true if it is not, and that is, religious schools—even in secular subjects—can never be neutral. Morality, as St. Augustine reminds us, governs all of life, even geography, mathematics, and the study of language. Thomas Jefferson reminded us of this too, in the Declaration, which means, of course, that even government schools—if they wish to be true to the government that created them—cannot be neutral toward God's existence either.

Nonetheless, there is a significant difference between a government school's non-neutrality, or value commitments, and those of a religious school. The government's "self-evident truths" are few and highly general; indeed, so general, that religious revelation within particular faiths is, in my judgment, needed to make any meaningful application of them in one's day-to-day life, or in the life of the larger community.[43] This is not to say that the government's affirmation of self-evident truth is insignificant; it is indeed critical, because it is that affirmation which invites my faith tradition and yours to freely specify within individual life and congregation exactly what "life, liberty, and the pursuit of happiness" means for abortion, homosexual sodomy, assisted suicide, heterosexual fornication, responsible stewardship of property and environmental resource, and many other topics.

Along these lines, even as it is valuable for defining the playing field of rational inquiry,[44] the government's declaration of

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42 421 U.S. 349 (1975).

43 There is a healthy debate among natural law scholars over how much is knowable by reason alone, and hence can serve as universal moral norm, and that which can only be understood with revelation. *Compare* Carl F.H. Henry, *Natural Law and a Nihilistic Culture*, FIRST THINGS, January 1995, at 54 (taking the position that more depends on revelation and man's will to follow it) *with* Correspondence, *On Natural Law: Carl F.H. Henry & Critics*, FIRST THINGS, April 1995, at 2, 2-8 (various replies to Henry's article).

44 Many metaphors for the relationship between the Declaration and Constitution are possible. I am grateful to Robert C. Cannada, Esq., senior member of Butler, Snow, O'Mara, Stevens & Cannada of Jackson, Mississippi, who has unselfishly dedicated much research and writing to this issue for the playing field metaphor. On occasion, Mr. Cannada has also likened the Declaration and the Constitution to that of corporate charter and by-laws. As he has written to me in correspondence, "[t]he by-laws must be interpreted in accordance with the charter or the corporation will have no stated purpose." Letter from Robert C. Cannada to Douglas W. Kmiec (on file with the author).

self-evident truth is too indeterminate to form the basis for comprehensive educational instruction. Whenever educators take the first step beyond the simple affirmation of the inalienable value of life, for example, they are forced to grapple with philosophical, metaphysical, and primarily, religious ideas of what life consists. And when the government takes that step, whatever it decides, it will divide, it will impose, and it will oppress the religious faith of those whose conscientious study of the Bible, the Koran, or the Torah place them in disagreement. From a far different perspective than my own, this, I believe, was Professor Paul Freund's warning against improper entanglements between church and state,[45] which Mr. Ball cites with displeasure as being the basis for his loss before the Supreme Court in *Lemon.*

Ball thinks Freund's analysis slipshod, and essentially anti-Catholic.[46] It does not have the usual footnoting of a scholarly article, and as Ball recounts, it originated as a speech that received first publication in a less scholarly journal than its subsequent reprinting in the *Harvard Law Review,* to which the Court makes reference.[47] But Freund's thinking, which yields the third "no excessive entanglement" prong of *Lemon*'s now enfeebled standard does make some sense. The significance of the Religion Clauses of the First Amendment is that it puts most of the specification or application of truth, beyond the more general self-evident truths of the Declaration, off limits to government actors. Truth is not a matter of majority vote. When truth is made a matter of majority vote, religious oppression often begins, and that oppression ends in alienation, or worse, violence. Just stand outside an abortion clinic for a while, or at greater risk, go inside.

Law, of course, has to reach or impose some minimal consensus. Nevertheless, the consensus must be ever-observant not to contradict the self-evident truth of the Declaration. The best way to do that is to leave as much specification of truth as possible to smaller sovereigns—individual family, church, school, workplace, local and state government.[48] This is the explicit design of our

45 Paul A. Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680 (1969).

46 BALL, *supra* note 2, at 33-39.

47 *Id.* at 34.

48 The self can only be reasonably understood in these communities. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109-20 (1991) (the rigid insistence on individual right is at the expense of sensitive intermediate institutions, such as the family); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). As Professor Durham and Alexander Dushku have written:

constitutional structure. Consider, for example, the Ninth and Tenth Amendments,[49] and, arguably, the Fourteenth as well.[50] Nevertheless, Mr. Ball highlights for particular criticism the following passage from *Lemon*: "It conflicts with our whole history and tradition *to permit* questions of the Religion Clause to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems which confront every level of government."[51] The Court's statement is not felicitous. It suggests that religious questions are unimportant, and it is that suggestion that Mr. Ball rightly takes to task. But the true sentiment of that statement is that religion questions are *too* important to be left to the government. In the shadow of a constitutionally insupportable conception of the commerce power which allows a bloated federal government to regulate anything it wants,[52] Freund's argument seems wrong because it removes religious adherents from the only game in town—specifying moral truths in federal law. But what is wrong is the game itself, for when the Court allowed the commerce power to expand, it allowed far too many specifications and applications of self-evident truth to be wrongfully taken from family and church. This invites a nation to be perpetually at odds over its own culture.[53]

> [L]iberalism is skewed toward atomizing individualism from the beginning and cannot adequately account for the significance of religion and tradition in social life. The practical consequence of this bias is that insufficient attention is paid to protecting the intermediary institutions that perform the critical nurturing role that excessively individualist liberalism leaves out of its account.

W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 B.Y.U. L. REV. 421, 432.

49 *See* DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 17-46, 132-51 (1992).

50 For a discussion contrary to the popular view that the Fourteenth Amendment was a wholesale transfer of state to federal power, and thus a transformation, BRUCE ACKERMAN, WE THE PEOPLE 45-46 (1991), see Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992). Professor Olson argues that the drafters of the Amendment viewed the states as bound by the first eight amendments and other specifications of national privilege even without the Amendment, and that the Amendment was "to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution . . . ." Olson, *supra* note 11, at 426 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (Congressman Bingham)).

51 BALL, *supra* note 2, at 38 (quoting *Lemon*, 403 U.S. at 622-23 (emphasis supplied by Mr. Ball)).

52 *See, e.g.*, Douglas W. Kmiec & Eric L. Diamond, *New Federalism is Not Enough: The Privatization of Non-Public Goods*, 7 HARV. J.L. & PUB. POL'Y 321, 323-35 (1984).

53 Properly construed, the Religion Clauses create important moral space for smaller sovereigns like families and church congregations to form individual conscience along specific moral and faith traditions, without having these traditions imposed on others. *See*

In my judgment, Mr. Ball's litigation course at beginning, aimed as it was toward the segregation and funding of supposedly secular subjects in religious school, was less well fashioned than the important success he has achieved more recently. The early cases sought to keep religious schools in a maldefined game. A game that marginalizes religion by implicitly insisting that it has to be kept separate from real (viz. secular) education. Mr. Ball's later efforts put parents back in charge, and in so doing, were better positioned to refute the dubious premise that the only acceptable public discourse is one shorn of all religious reference.[54]

In those early cases, *Lemon*, and again in *Meek v. Pittenger*,[55] Mr. Ball did build an impressive factual record at trial to demonstrate that the provision of auxiliary services in various forms (salary reimbursement for secular subjects; remedial testing; speech and hearing examinations) and the supply of instructional equipment (projectors, laboratory equipment) would not occasion the entanglement posited by Professor Freund. Mr. Ball relied upon the promises of good faith and professionalism of the educators who would be supplying the service. The record was ample with this testimony; the Supreme Court didn't believe it, or at least, it did not fully credit it. Unlike Mr. Ball, I believe the Court was correct in not doing so. In striking down the program, the Court wrote:

> Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of im-

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Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 534-50 (1991). But the Religion Clauses, even if properly construed, can facilitate little in behalf of these smaller sovereigns if the misconstruction of federal commerce power or substantive due process allows Congress or the Court to occupy the field. Seldom is the unlimited nature of the modern commerce power and the judicial adventures in the name of substantive due process understood as threats to religious freedom, but they very obviously are. The Constitution must be construed as an internally consistent document.

54 *See* BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 359 (1984); BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 3-30 (1980). Professor Frederick Gedicks ably indicates that similar views have resonated in Supreme Court adjudication, resulting in "[t]he privileging of secular knowledge in public life as objective and the marginalizing of religious belief in private life as subjective." Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 681 (1992).

55 421 U.S. 349 (1975).

permissible conduct is not sufficient . . . .[56]

As I say, Mr. Ball thinks the Court wrong to disregard the record, to find dangers where none exist, to see religion "in purely secular matters."[57] But again, that's the rub—if a religious school is genuinely being a religious school are there any *purely* secular matters? For the sake of religious schools, for the sake of a national culture that desperately yearns for a rich and informed religious base, I hope not. I bet had he not been backed into this awkward posture by prior case law,[58] Mr. Ball might hope not, too. The need for thoroughly informed religious education is what makes this tactic—to "sanitize," to "secularize," or to separately fund putatively secular aspects of religious schools—so hopeless.

Curiously, Mr. Ball sees the loss of significant religious reference more clearly in the Establishment Clause cases he did not litigate personally—the religious college cases. Mr. Ball recounts how the presidents of Catholic colleges in the late 1960s felt a strong need to "secularize" in order to gain both government assistance and acceptance among the "more sophisticated" ranks of higher education. Ball takes issue with a Fordham study that "urged [religious] colleges [to] take overt steps to rid themselves of vital aspects of their religious character."[59] Also coming in for criticism is the 1967 Land O'Lakes statement which Mr. Ball describes as concluding that "Catholic higher education must divorce itself from episcopal authority."[60] Today, this is the *modus vivendi* of many American Catholic colleges, as suggested by the resistance to the implementation of the Holy Father's mild reassertion of ecclesiastical supervision in his encyclical *Ex Corde Ecclesiae*.[61] As Mr.

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56 *Id.* at 370-71.

57 BALL, *supra* note 2, at 45.

58 In Everson v. Board of Education, 330 U.S. 1 (1947), the Court upheld a program which in effect paid the transportation costs of parochial school students. Similarly, in Board of Education v. Allen, 392 U.S. 236 (1968), the Court upheld a program of providing secular textbooks to parochial schools.

59 BALL, *supra* note 2, at 40.

60 *Id.* (citing GEORGE A. KELLY, KEEPING THE CHURCH CATHOLIC WITH JOHN PAUL II 72-73, 77 (1990)).

61 *Reprinted in* 20 ORIGINS 265 (1990). The proposed ordinances of the National Conference of Catholic Bishops implementing this encyclical would give local bishops authority to more or less certify whether the Catholic theological instruction within Catholic theology departments was, in fact, Catholic theology. If it was not, it could be taught as philosophy or contemporary Catholic or political commentary, but not represented as the magisterium—or the teaching authority of the church.

In November 1993, the presidents of Georgetown, Saint Louis University, Fordham, Notre Dame, Villanova, Dayton, Santa Clara, University of San Francisco, Boston College,

Ball relates, the sad if not outright duplicitous part of this tale is that Catholic colleges sometimes "show just enough of a Catholic face to attract youngsters of Catholic families but present a message to all others that they [are], in fact, progressively secular."[62]

Unlike the *Lemon* and *Meek* and other similar elementary and secondary religious school efforts, the exchange of faith for funds worked at the religious college level. In *Tilton v. Richardson*,[63] the Supreme Court concluded that the religious colleges could be given government construction grants because "[t]he institutions presented evidence that there had been no religious services or worship in the federally financed facilities, that there had been no religious symbols or plaques in or on them . . . . There is no evidence that religion seeps into the use of these facilities."[64] One is reminded of the final scenes of Sir Robert Bolt's *A Man for All Seasons*. As Richard Rich perjures himself, Thomas More sees Rich's newly acquired chain of office signifying that his testimony had been bought for the Attorney Generalship of Wales. Thomas More wryly remarks: "Why, Richard, it profits a man nothing to give his soul for the whole world . . . but for Wales!"[65] But for government construction grants, auxiliary services, or even, a modestly higher *U.S. News and World Report* ranking?

The faith for funds scam manufactured in *Tilton* is dishonest, and as Mr. Ball indicates, it has been extended to other church-state conflicts, such as the private display of religious symbols on public property.[66] In this area, the Court has allowed religious symbols only if they did not convey a religious message. This obscuring of religious message can be accomplished by hiding the religious symbol among secular objects like Christmas trees and civic greetings,[67] but then what is the point?

Loyola (Chicago), Detroit-Mercy, University of Saint Thomas, Loyola Marymount and the University of San Diego advised Archbishop Leibrecht of the encyclical implementation committee that under the proposed ordinances "a university would be put in an unnecessarily adversarial relationship with the local Bishop, who would be expected to judge the competency, orthodoxy and probity of life of a professional theologian. Substantial legal and financial liability could be placed upon the Bishop . . . ." Letter to Archbishop Leibrecht (Nov. 29, 1993) (on file with the author).

Translation: If the local bishop exercises the proposed authority, expect to be sued.

62 BALL, *supra* note 2, at 41.

63 403 U.S. 672 (1971).

64 *Id.* at 680-81.

65 ROBERT BOLT, A MAN FOR ALL SEASONS 158 (1960).

66 BALL, *supra* note 2, at 46.

67 *See* ACLU v. Allegheny County, 492 U.S. 573 (1989).

No, the Declaration of Independence which gives our government purpose is not neutral toward God, and the Religion Clauses designed to secure individual religious freedom within the constitutional structure need not be neutral, either.[68] And this suggests why Mr. Ball's later litigation strategy which furthers not neutrality-driven secularization, but individual choice is his crowning achievement. This was the case of Jimmy Zobrest, a profoundly deaf high school student who sought federal assistance for a sign language interpreter that was theoretically available under federal law to all handicapped students. But Jimmy was in a Catholic high school, and relying upon *Lemon*, both lower courts denied him assistance in that sectarian setting. After all, these courts reasoned, the interpreter is a state employee and he would be signing everything, including religious instruction.

When Mr. Ball took Jimmy to the Supreme Court, Justice White asked Mr. Ball if he intended to reconcile all of the Court's establishment cases. To laughter, Mr. Ball responded, "I will not, Your Honor." The joke—as Mr. Ball demonstrates thoughtfully in this book—is at our nation's very dear expense. Founded upon a false and unworkable premise of neutrality, the Court's Establishment Clause cases are beyond reconciliation. And because they are so, Mr. Ball's advocacy in *Zobrest v. Catalina Foothills School District*[69] became crucial. He steered the Court past *Lemon*, which the majority did not even reference in the ultimate *Zobrest* opinion, by focusing upon *individual* religious freedom. The groundwork had been laid for this in the earlier opinions of *Mueller v. Allen*[70] and *Witters v. Department of Services to the Blind*,[71] which upheld tuition tax credits and vocational assistance applied by individuals to either secular or religious institutions. Even in the context of the Court's unwarranted and confused view of neutrality, there could be no impermissible endorsement of religion if monies flowed to

68 My colleague John Garvey describes this as the "split-level" character of free exercise law. He writes:

> Sometimes religious believers and nonbelievers are treated alike; but sometimes the law protects only religious believers. This is not something that we can explain by appeals to consent and fairness. It violates the canon of reciprocity. The only convincing explanation for such a [constitutional] rule is that the law thinks religion is a good thing.

John H. Garvey, God is Good 23 (unpublished manuscript, on file with the author).

69 113 S. Ct. 2462 (1993).

70 463 U.S. 388 (1983).

71 474 U.S. 481 (1986).

religious schools as a result of thousands of individual decisions. Mr. Ball's handling of *Zobrest* thus crystallized the earlier decisions into the following axiom:

> Government may afford material aid to individuals exercising a choice to be served by religious educational institutions where the individual and not the institution is the primary beneficiary of that aid. The programs must provide benefits to a broad class of citizens and be religiously "neutral" (i.e., not be primarily religious in character, create no greater or broader benefits to recipients who apply their aid to religious education, and not limit the benefits in part or in whole to students at religious institutions).[72]

The axiom is helpful. It is not perfect. It still contains an unfortunate attachment to the spurious notion of neutrality, although at least that which is described as having to be neutral is the design of the government program, not the recipient religious institution that receives funding as a consequence of individual choice. As Mr. Ball opines, the axiom is enough to support a "well-drafted voucher act [against] federal constitutional challenge."[73]

But the voucher or school choice programs, well-drafted or not, have yet to materialize in any significant sense. Perhaps this is due to the politics of a well-entrenched union[74] associated with government schools. It may also be the consequence of selfishness. Some affluent suburbanites have "captured" their local public schools, and therefore, see little reason to evenhandedly apportion general education funds that would allow the less well-off access to "their" facilities. Most troublesome is Mr. Ball's speculation that after years of secular inundation and battle, a present generation of religious adherents, Catholics in particular, may simply have lost interest in careful instruction in religious doctrine.[75]

For the moment, I do not share Mr. Ball's pessimistic speculation. As he notes, there are signs of recognition, especially among Protestant evangelicals and orthodox Jews and Catholics, that the longstanding violation of distributive justice can, at last, be legally rectified. Most recognize that it is too late in the day to pretend that the public schools can return to some pre-1960s form of homogenized, Protestant moral instruction that may have then

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72 BALL, *supra* note 2, at 53-54.

73 *Id.* at 54.

74 The National Education Association.

75 BALL, *supra* note 2, at 55.

infused the school system. Nor would such a return be desirable, as multidenominational religious instruction is intellectually and spiritually confused. A few members of Congress have vainly sought to return down this path by suggesting laws that would mandate the teaching of generic values without religion. Besides being the equivalent of teaching flying without a plane, these proposals hit a snag the moment someone asks what values are to be taught or how they are to be defined, and why? Again, the self-evident truths of the Declaration, although critically important to sustain general national purpose, do not a comprehensive curriculum make.

Because of this, during recent years Congress has been unable to agree on whether to offer meager demonstration grants to promote honesty, responsibility, and even something insipidly labeled "caring." A few local communities have had better luck in getting past the definitional stage because the values of their local community were still sufficiently tangible and shared within these smaller geographical settings to be identified. However, for Congress to attempt this nationally raises all of the problems of using law as a substitute for morality,[76] including exacerbated cultural tension and ultimately vapid standards. As Congressman Richard Armey said in opposing one such national effort:

> I for one, would not tolerate anybody having the presumption to dare to think they should define who my children are, what their values are, what their ethics are and who in the hell they will be in this world. The fact is these people don't know my children and the fact is they don't love my children. And the fact is they don't care about my children and the further fact is they accept no responsibility for the outcome . . . and they ought, by God, leave my kids alone.[77]

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76 Murray writes:

> It is not the function of the legislator to forbid everything that the moral law forbids, or to enjoin everything that the moral law enjoins. The moral law governs the entire order of human conduct, personal and social; it extends even to motivations and interior acts. Law, on the other hand, looks only to the public order of human society; it touches only external acts . . . .
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> . . . It enforces only what is minimally acceptable, and in this sense socially necessary. Beyond this, society must look to other institutions for the elevation and maintenance of its moral standards—that is, to the church, the home, the school, and the whole network of voluntary associations that concern themselves with public morality in one or other aspect.

MURRAY, *supra* note 12, at 165-66.

77 Rochelle Sharpe, *Efforts to Promote Teaching of Values in Schools Are Sparking Heated*

Congressman Armey's words have great intensity, and in my judgment, underscore the reasons why parents must directly and freely choose their children's schools: Teachers come and go while parents love children always; parents must be free to manifest that love through one of the most important gifts they can supply—namely, their specific religious tradition.

It cannot be argued that the present state of public schools allows this. The very idea of a public school in the modern legal and cultural context of America is one separated from religion. This was Professor Freund's insight, and he was right, except that he and the Court drew the wrong conclusion. Theirs was that no entanglement leads to precluding religious schools (or, more accurately, individual parents choosing to send their children to such schools) from making rightful claim against the general education fund. In reality, no entanglement properly leads to a recognition that the public school can only half educate. At best (and there is considerable doubt that many public institutions are even up to this), public schools can pursue what classical scholars call the intellectual virtues, namely, competencies in art and science and mathematics and so forth. This instruction may produce a good car mechanic or a good accountant or a good lawyer; it is not at all aimed at yielding a good man or woman. Such goodness must be derived from serious study of the theological virtues of faith, hope and charity and the cardinal moral virtues of prudence, justice, temperance, and fortitude.[78] This simply cannot be done without sending a child to a school that can introduce these theological and moral virtues in ways that are integrated with the acquisition of basic skills and compatible with the family's religious preference.

It may be argued in response that all parents are presently free to send their children to a religious school; they merely must pay for it. The facetious nature of this asserted "freedom" was aptly rebutted by John Lyon, who writes:

> Just how "free" would we be to exercise our right to provide nourishing food for our children if the government taxed us to support a state chain of comprehensive supermarkets and required that there be one in every "food district" of the state?

Debate Among Lawmakers, WALL ST. J., May 10, 1994, at A20 (quoting Armey).

78 These observations are made more fully and practically for families in DOUGLAS W. KMIEC, CEASE-FIRE ON THE FAMILY: THE PURSUIT OF VIRTUE AND THE END OF AMERICA'S CULTURE WAR (forthcoming 1995).

> We might set up peoples' food co-ops until we were blue, but we could not really compete with the government's subsidized chain. The situation might be minimally tolerable if state stores offered quality goods. But if, in our suppositious case, the government decided to purvey largely junk food in its subsidized supermarkets, the situation would be intolerable.[79]

In his life of litigation and now in this book, Mr. Ball illustrates the lie that it is constitutionally permissible to tax all citizens to create a common fund for education, but to then exclude some citizens on the basis of religious belief. In *Lemon* and subsequent cases, an American Constitution severed from its base in the Declaration put Ball on the defensive, requiring that he justify funding as not constituting an establishment of religion. In actuality, as the person of Jimmy Zobrest exemplified, such funding denials are often a gross disregard of the free exercise of religion. This unjust and unequal treatment is no more sustainable than if the government set aside tax monies for cancer research, and then pronounced that Lutheran or Baptist physicians, or more broadly any person of faith, need not apply.

Again, it may be claimed that religionists are not excluded from public funds, the government is merely declining to subsidize the constitutional freedom to go to a religious school. There is some facial plausibility to this argument. It falls away, however, as Lyon points out above, when it is recognized that there are different ways to deny freedom, including the very practical one of making families pay twice to act on their religious convictions—once to the government in taxes and again to the private school.

Others may try to finesse the troublesome exclusion of believers from their own money in the public education fund by denying the premise—that is, that attendance at a public school prohibits or impedes religious belief or practice. This may be true for some families; they might be able to have their children attend the public school without formally transgressing church instruction within a particular denomination. For others, however, this is not the case, as readings or other class exercises directly contravene church teaching.[80] And as the title to Mr. Ball's book

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79 John Lyon, *Reclaiming The Schools: Reconciling Home and Education*, FAM. IN AM., June 1994, at 6.

80 *See* Mozert v. Hawkins County Pub. Schs., 827 F.2d 1058, 1060-62 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

reminds us, the Court has also confirmed the right of parents, not the state, to direct their children's education. It is thus insupportable to make parents choose between their religion and the only available public support for education in the form of the public school.

The solution for reuniting education and family in the pursuit of virtue is obvious: Tax monies for education must once again be brought under direct family control. Of course, so long as its requirements are reasonable ones not prohibiting religious belief or practice,[81] the state can mandate that parents have their children educated in certain uniform subject areas and through an appropriate age. A serious, well-presented course in the self-evident truths of the Declaration together with an understanding of the Constitution's text and structure would have my vote. But the state need not collect and control a family's resources to accomplish these supplementary regulatory interests. The easiest way to respect the parents' preeminent role in education would be to provide a tax credit to parents for reasonable amounts expended on tuition at the school of their choice. Vouchers are another possibility, but frankly, there is little administrative reason to have the government collect family money only to return it.

For every child, a family remains the best teacher. Families find meaning in religious faith, and education and educational agents outside the home must draw upon that faith, too, or a child becomes alienated from his or her best instructors and most influential moral sources. Separation of church and state properly does keep government out of the tenets of faith, and by the same token, particular religious dogma out of government policy. For

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81 As Mr. Ball demonstrates in later passages in his book, the regulation must not be indefinable grants of discretion to state authorities impeding the free exercise of religion. In recent years, Christian schools, in particular, have faced licensing battles with public authorities administering standards calling for "good education," but giving little additional guidance. BALL, *supra* note 2, at 85. One such school which Mr. Ball defended faced the following amorphous requirement: "Major safeguards for quality education are a well-designed master schedule, effective routines, adequate undisturbed classtime, and profusion for a high degree of self-direction on the part of students." *Id.* at 87. As Ball reveals, "[n]o witness was able to explain what the 'profusion' business was all about or to account for the State educators' lapse in English usage." *Id.* Mr. Ball defeated these particular regulations in Kentucky, but regrettably other similar efforts await if school choice becomes the predominant way of distributing the general education fund. These regulations are particularly pernicious when religious schools are limited to "state-approved" textbooks, curricula, or teachers, and where such approval cannot be shown to have any direct relationship to educational quality. *Id.* at 89.

too long, however, separation of church and state has been improperly used to separate family from education. America's religious freedom does not depend upon either diminishing the primary role of parents as the moral educators of their children or denying religious schools a proportionate part of the general education fund as a result of the free choice of parents.

Thanks to the perseverance and ingenuity of William Ball, the Court is closer to formally declaring that school choice programs offend no part of our Constitution. When individual parents are making the decisions about how to spend their own funds in the form of general public benefits, it cannot be seriously argued that the state is endorsing or establishing religion. This is pretty much what the trial judge said long ago in *Lemon*, when Mr. Ball first stepped forward as God's litigator. We should have listened then; it is not too late to pay attention now.

II.

It will be recalled that Mr. Ball posited two preconditions for the continuation of religious schools and the strengthening of parental authority: the first, economic freedom—or a fair distribution of the general education fund—has been discussed above; the second, freedom from undue governmental regulation is taken up now.[82] These two preconditions mirror in part the Establishment and Free Exercise Clauses of the First Amendment. For example, the first—economic freedom—is really an injunction not to establish a monopoly state school system that by prescription crowds out religious schools. The need to avoid unwarranted regulation is aimed at fulfilling the First Amendment's other promise—that no law will *prohibit* the free exercise of religion.

I have emphasized the word "prohibit" because the failure to adhere to its textual meaning gives rise to unnecessary conflict between church and state. Every state needs to preserve public order, and religious practices that threaten that order have always been outside the shelter of the Free Exercise Clause or state and colonial counterparts.[83] Thus, cults that jeopardize the health and safety of their members or surrounding neighbors a la David Koresh have no immunity from generally applicable criminal and police power prohibitions. There may be factual disagreement in a

82 *See id.* at 14.

83 *See* Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 599-603 (1991).

case over whether a given practice truly threatens public order,[84] but if the state bears a reasonably high burden of proof when conflict arises, most regulatory errors ought to be avoided.

Difficulties arise, however, when the claims of protected religious liberty are fatuous, either because idiosyncratic personal behavior is masquerading as religious practice or because the legal prohibition involved is not a de jure or de facto prohibition at all, even as it may be a burden. It is impossible, and generally inappropriate, for judges to assay whether a particular practice is genuinely religious. Some caution is required here, however, because just as the natural law of the Declaration allows judges to see libel as outside protected speech, so too, claimed religious practices antagonistic to the self-evident truths of the Republic ought to be seen as false claims of autonomy or self-actualization.[85] But placing those extreme practices to one side, most free exercise cases have concentrated upon either some measurement of the regulation's impact on religious belief or practice or the sufficiency of the government's justification for the regulation.

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84 For example, the animal sacrifice and disposal practices associated with the Santerian religion were of legitimate health concern to the City of Hialeah, Florida. Nevertheless, the Court invalidated a number of local ordinances which prohibited the practice on the theory that the religion had been improperly singled out for disfavor. Church of the Lukumi Babaluaye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993). As a matter of precedent, this is a debatable application of the holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), as it seemingly substitutes an "effect" standard for one asking for generally applicable, neutrally written ordinances. For example, Justice Kennedy wrote: "[I]t becomes evident that these ordinances target Santeria sacrifice when the ordinances' *operation* is considered. Apart from the text, the *effect* of a law in its real *operation* is strong evidence of its object." *Lukumi Babaluaye*, 113 S. Ct. at 2228 (emphasis supplied).

Had Justice Kennedy not been writing to soften the ill-wisdom of the *Smith* standard, it can be speculated that the Court might have been more sympathetic to the City's need to preserve public health. In other words, the focus of the Court should have been on whether animal sacrifice could be proven to be the health threat the City claimed. If it was, then presumably there was a compelling interest to prohibit it under *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As the case got decided, the Court was preoccupied with the side issue derived from *Smith* of whether the fact that Hialeah did not simultaneously ban pest extermination and hunting somehow meant that in *operation* a ban on animal sacrifice in people's living rooms did not pose a real problem.

85 *See* STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION 154-59 (1994) (arguing in support of Justice Scalia's opinion in *Smith*, which he argues is derived from Justice Frankfurter's dissent in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), and thus, in his judgment, well aimed at sustaining generally applicable laws supportive of general morality even when they conflict with religious practice). While properly concerned about strained claims of individual "self-actualization" described as religious practice, Presser's view does not adequately deal with religious practices like those in *Yoder* which not only do not threaten general morality, but strengthen it.

The case that scholars uniformly agree gives these considerations proper constitutional focus is *Wisconsin v. Yoder*,[86] and once again, William Bentley Ball handled the litigation. Mr. Ball's retelling of this court battle may be the most moving and poignant of the cases included in the book. The issue: Whether Wisconsin's mandatory high school attendance law could be constitutionally applied to the Old Order Amish, who as a matter of religious practice educate their children at home after 8th grade. On one side of this battle was a local school district that seemed more annoyed by the loss of revenue occasioned by having fewer students in the government school than anything else; on the other, were Jonas and Wallace Miller, whose peaceable Amish faith shunned "lawyering" as much as possible, but out of necessity, consented to be defended by Mr. Ball.

The case had national significance. Across the country, school officials were "physically herding Amish children into buses to force them into state-prescribed education."[87] As was Mr. Ball's practice in virtually every litigation described in the book, he made initial efforts to resolve the matter without trial. In *Yoder*, this was especially appropriate given Amish tenets, but as Ball puts it, the school superintendent's "reply was a stiff-arm. Only if the Amish children were enrolled in schools affording instruction 'substantially similar' to that of the public schools could they be exempted."[88] This, as a matter of scriptural conviction, they could not do, even to the point of feeling conscientiously bound not to pay the relatively small truancy fines that were imposed. "Hence they realized that the ugly business of new fines, jailing, liens, foreclosures, and being forced to sell out and move on was what now likely lay ahead for them, their families and, doubtless soon, for all Wisconsin Amish."[89]

This was not to be their fate. In part, this was due to Mr. Ball's fine lawyering, but it was also due to the resolute nature of the Amish faith. To the latter point, it is worth comparing the more equivocal or complacent Catholic reaction to what some might say is a comparable religious infringement—the denial of proportionate funding and mandatory attendance laws that force many Catholic families into public school settings greatly at odds

86 406 U.S. 205 (1972).
87 BALL, *supra* note 2, at 59-60.
88 *Id.* at 61.
89 *Id.* at 63.

with Catholic social teaching. As the stories of *Lemon*, *Meek*, *Tilton*, and similar cases unfolded, the Catholic reaction was often to accommodate religion to secular demand—that is, to try to find ways to separate religious belief from secular subject. By contrast, the Amish response was to state their faith plainly and accept the secular consequences. Mr. Ball brought into court Professor John Hostetler, a Temple University historian, to make the point: "[I]f the Amish youth are required to attend the value system of the [public] high school as we know it today, the church community cannot last long. It will be destroyed."[90]

The state made its presentation suggesting that if the Amish were exempted from the public high school, delinquency or unproductive lives would result. To these assertions, Mr. Ball applied a mastery of detail and trial craft. Calling the local constable, Mr. Ball went through a litany of potential offenses: murder, burglary, robbery, arson, assault, narcotics, vandalism, loitering, theft, reckless driving, and asked in regard to each how many Old Order Amish had ever been arrested on such charges. The sheriff's repeated answer: "None." Next was the county's director of social services. Again, the stable, upright character of the Amish emerged. No illegitimate births. No Amish in the county home. No increased welfare burden whatsoever. As for productivity, the picture of the Amish child that emerged from the testimony was that of a teenager "given great responsibility . . . driving horses, working in the fields, which the suburban child is not getting."[91] To the contrary, the adolescent in a public high school was shown to dwell within an "educational system [that] is detached from the real world, . . . talk[ing] about things that they don't become involved in, [and] for which they feel no sense of responsibility."[92]

And then, Mr. Ball recounts what he, himself, describes as one of those "occasional moments when the heat generated by the collision of counsel reach a point of explosion."[93] The nature of this explosion was an Amish witness' thoughtful posture in response to the persistent insistence of the prosecutor that attending public high school was necessary to allow a child to "make his or her place in the world." The question drew a prolonged silence,

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90 *Id.* at 68 (quoting the testimony of Professor John Hostetler).

91 *Id.*

92 *Id.* at 70 (quoting the testimony of Dr. Donald A. Erickson of the University of Chicago).

93 *Id.* at 69.

and then the telling answer: "It depends which world."[94] Indeed, it does. As Mr. Ball states, the answer went to the heart of the case. It goes to the heart of the book—children, mere creatures of the state? No, creatures of parents acting as co-creators with God. Creatures who, in the words of John Paul II, disappear when separated from their Creator.[95]

Nevertheless, the trial and appellate judges ruled against the Amish. The Wisconsin Supreme Court reversed, but the state persisted and following oral argument in the U.S. Supreme Court, Mr. Ball penned a note to his colleague: "We have lost."[96]

Mr. Ball was wrong, and instead, he and all who value religious freedom relished the opinion of Chief Justice Warren Burger that ruled in favor of the Amish and placed in law a constitutional analysis that required the state to have a compelling interest before it prohibited a religious practice. Burger wrote:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[97]

Every now and then, God allows us to see truth despite our human imperfection. The Court's opinion in *Yoder* was such an occasion; it grasped the essential self-evident truth of the Declaration, at least as it pertains to the relationship between parent and child, and the importance of that relationship to the "pursuit of happiness," and indeed, each person's transcendent end. Not surprisingly, those originalists, like Robert Bork, who fail to grasp the necessary nexus between Declaration and Constitution have criticized *Yoder*.[98] Even worse, a jurist of Catholic training, Antonin Scalia, effectively undid the importance of *Yoder* by byzan-

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94 *Id.*

95 "'Without its Creator the creature simply disappears . . . . If God is ignored the creature itself is impoverished.'" Pope John Paul II, THE SPLENDOR OF TRUTH (*VERITATIS SPLENDOR*) 55 (St. Paul ed. 1993) (paragraph 39) (quoting Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*, 36).

96 BALL, *supra* note 2, at 71.

97 Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

98 *See* BALL, *supra* note 2, at 74 (citing ROBERT H. BORK, THE TEMPTING OF AMERICA 49 (1990)).

tine distinction in the later case of *Employment Division v. Smith*,[99] and in so doing, the constitutional standard protecting religious liberty was lowered. Now, instead of needing a compelling interest to effectively prohibit a religious practice or belief, the government merely needed to have any hypothetical rational basis. In terms of governmental justification for regulatory action, religious liberty was thus put on par with the regulation of the sale of soap or any other commercial product. In Mr. Ball's blunt assessment, *Smith* "thrust the Free Exercise Clause to the back of the constitutional bus."[100]

In fairness, all the blame cannot be laid upon the opinion of Justice Scalia in *Smith*. In the intervening eighteen years between *Yoder* and *Smith*, the Court honored the *Yoder* standard more in name, than fact.[101] *Smith* also had the salutary benefit of keeping federal judges from making an impermissible inquiry into the centrality of particular religious beliefs.[102] So too, the *Smith* opinion may be understood as a reaction to claims of religious liberty that were premised more on burden, than prohibition. Denials of unemployment compensation benefits[103] or the insistence upon exemption from social security withholding[104] may not, in fact, be "prohibitions" of religious exercise. They hardly seem equivalent to hauling Amish children out of their homes to have them attend public high school. Nevertheless, the *Smith* opinion is especially problematic given the pervasive nature of the regulatory state which, under the terms of the opinion, has little reason to be concerned when generally phrased, prohibitory regulation suppresses religious practice.[105] As Mr. Ball observes:

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99 494 U.S. 872 (1990).

100 BALL, *supra* note 2, at 107.

101 *See* Kmiec, *supra* note 83, at 596-97. But compare Durham & Dushku, *supra* note 48, at 451, who note that while the Supreme Court did, in fact, sustain few free exercise claims after *Yoder*,

> [T]his argument fails to take into account the number of free exercise claims that have been vindicated in lower courts and, even more significantly, the incalculable number of instances in which lower level officials have been deterred from encroaching on religious liberty so long as the compelling state interest test could be invoked.

102 *Smith*, 494 U.S. at 886-87.

103 *See* Sherbert v. Verner, 374 U.S. 398 (1963).

104 *See* United States v. Lee, 455 U.S. 252 (1982).

105 Mr. Ball recounts how the NLRB sought to govern the employment relationship between Catholic school teachers and parish schools. Ultimately, this issue was resolved by

> [I]n our age, when government is expanding into every area of human existence, [] this newly invented *Smith* test is most threatening. The Congress, fifty state legislatures, and thousands of municipalities are consistently grinding out myriad statutes, ordinances and regulations. When, as too often happens, these impinge (intentionally or inadvertently) on religious interests, religion is [largely] without defenses [under *Smith*] . . . .[106]

On the analysis of some of these cases, Mr. Ball and I, or other students of the Constitution, may disagree. In particular, Mr. Ball thinks the problem with the pre-*Smith* cases is not so much the overbroad characterization of religious burden as prohibition, but "whether the Court made [the government] prove that a compelling state interest justified its actions and that no less drastic means were at its disposal to accomplish what it wanted to do."[107] Perhaps. More likely, it is a combination of factors. For the moment, the discussion may be moot, because even as Congress has purported to reverse *Smith* by statute,[108] there is genuine concern that such re-statement of judicial rule is beyond the legislative power,[109] and the restoration of *Yoder*—and with it reli-

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the Supreme Court finding that since coverage would raise "serious constitutional questions," the statutory ambiguity over coverage in the National Labor Relations Act should be resolved against coverage. BALL, *supra* note 2, at 98 (quoting NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)).

106 *Id.* at 107. Similar and even more devastating criticism has been aimed at *Smith* by a host of commentators. *See generally* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *God is Dead and We Have Killed Him! Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163.

107 BALL, *supra* note 2, at 105.

108 Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993).

109 BALL, *supra* note 2, at 108; *see also* PRESSER, *supra* note 85, at 241; Kmiec, *supra* note 83, at 591 n.5. *But see* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 64 (1994) (arguing that Congress' remedial power under § 5 of the Fourteenth Amendment is sufficient to sustain the Act). Professor Laycock also argues for the constitutionality of RFRA on similar grounds, stating "RFRA does not assert Fourteenth Amendment power where there is no plausible Fourteenth Amendment claim." Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 250. This argument is dubious. Arguably, Congress only has § 5 authority to remedy that which has been found by judicial interpretation to be a constitutional violation. Generally applicable, neutral statutes that prohibit religious practice were held in *Smith* not to be a constitutional violation. True, the Court invited state and federal legislatures to craft statutory religious exemptions from generally applicable laws as they saw fit. The Court, however, did not invite Congress or the states to indulge a different standard of what constitutes religious infringement to apply across the board—that is, contrary to Professor Laycock, not crafting exemption, but finding remedy

gious freedom—may well have to wait the Court's recognition of its own error.

If the Court is to find its way, it will likely need the luminous mind of William Bentley Ball. Having spent a professional lifetime in the role of God's litigator, can we ask him for more? I do not know. No accolade—however well deserved—will be sufficient enticement. At this juncture, William Ball is surely entitled to simply respond with a clever bit of doggerel reminding us that "Great Caeser's dead and on the shelf/And I don't feel so well myself!"[110] One suspects, however, that until God Himself directs the verdict, this very able and competent legal advisor will continue to stand upright at counsel table in defense of our need, and that of our children, to rely upon God freely.

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where the Court has found no violation. While the result in RFRA may be desirable, it is a dangerous and perverse matter to contemplate Congress overruling the Constitution and constitutional interpretation by statute. *See, e.g.*, Douglas W. Kmiec, Testimony before the Subcommittee on Civil and Constitutional Rights, U.S. House of Representatives (Mar. 4, 1992) (arguing that the Freedom of Choice Act exceeds Congress' § 5 authority insofar as the Act "codifies" an abortion claim more expansive than that specified by the Court in its abortion cases); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994). Recently, a district court found RFRA to be unconstitutional along similar reasoning. Flores v. City of Boerne, 1995 U.S. Dist. LEXIS 3675 (Mar. 15, 1995).

110 Arthur Gutterman, *On the Vanity of Earthly Greatness, in* THEMES IN LITERATURE 478 (Jan Anderson ed., 1979).