



1-1-2012

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Recommended Citation

Frederick M. Gedicks, *Some Political Implications of Religious Beliefs*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (1990).
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SOME POLITICAL IMPLICATIONS OF RELIGIOUS BELIEF

FREDERICK MARK GEDICKS*

"The Constitution," Peter Berger has observed, "might well have set up a wall of separation between church and state, but it most certainly did not set up a wall between religion and politics."¹ Nevertheless, the desirability of a secularized politics has assumed a prominent place in the pantheon of constitutional truths about church-state relations. "The idea is widely accepted," writes Richard Neuhaus,

that religion is something between an individual and his God. Each person is free to worship the god of her choice. Religion is the business of church and home and has no place in public space. Legally and politically, [this axiom is] supported by a notion of the "separation of church and state" that is understood to mean the separation of religion and religiously based morality from the public realm.²

This conventional wisdom significantly, if subtly, shapes American views on church-state relations. Because privatized religion and secularized politics are thought necessary for religious freedom and social and political stability, religious incursions into politics are uncritically assumed to present great social and political dangers.³ Threats originating from the *exclusion* of religion from politics are less often recognized. Thus, discussions of the appropriate role of religion in the political realm proceed on the implicit assumption that the status quo of secularized politics, while perhaps oppressive to believers, is nonetheless, "safe" (or, at least, "safer" than any alternative).

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1. Berger, *Religion in Post-Protestant America*, 81 COMMENTARY, May 1986, at 41-42.

2. R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 20 (2d ed. 1986).

3. See *infra* text accompanying notes 17, 24-25.

This necessarily imposes a heavy burden of persuasion on those who would risk the admission of the distinctive voice of religion into political dialogue. Discussions of church and state illustrate the "correspondence theory of truth," whereby a proposition is deemed erroneous solely because it does not conform to unquestioned and unquestionable assumptions about "external reality."⁴ With respect to religion and politics, this means that if a proposition is not consistent with the conventional wisdom of separationism, then for that reason it must be false.

I want to challenge those who, intentionally or not, work to maintain the assumption that the ruling constitutional metaphor of church-state relations—the "wall of separation"—is properly applied to the American polity. A secular politics is profoundly alienating to many religious people. By describing a person as "religious," I mean that religion assumes a central role in ordering that person's priorities and choices in life. Studies suggest that at least one-quarter, and perhaps as many as one-half, of all Americans are religious in this sense.⁵ The potential consequences of alienating such a large portion of the polity suggest what is often overlooked: While the unification of church and state threatens individual freedom and social sta-

4. M. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 8-9 (1985).

5. For example, polls indicate that 58% to 61% of Americans believe that religion can solve all or most of today's problems, 57% have high levels of confidence in organized religion, and 55% to 56% state that religion is "very important" in their lives. G. GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION* 1986 6, 9, 10, 15, 127, 272-73, 280 (1987); G. GALLUP, JR., *THE GALLUP POLL* 1985 120-21, 162, 291 (1986). Another study found that 49% of Americans can identify a specific time in their adult lives when they made a "personal commitment to Christ" which changed their lives, and that 73% of Americans frequently feel that God loves them, 57% frequently engage in prayer, 44% frequently attend religious services, 28% frequently read the Bible, 25% frequently participate in church socials, 23% frequently encourage others to be religious, 21% frequently listen to religious broadcasts, and 26% frequently engage in or experience at least five of these activities and feelings. *THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE '80'S: THE IMPACT OF BELIEF* 42, 43 (1981). According to one report:

Perhaps the most appropriate word to use to describe the religious character of the nation as a whole over the last half century is "stability." Basic religious beliefs, and even religious practice, differ relatively little from the levels recorded 50 years ago. In fact, the nation has in some respects remained remarkably orthodox—even fundamentalist—in its beliefs.

Gallup, *50 Years of Gallup Surveys on Religion*, in *THE GALLUP REPORT*, May 1985, at 5.

bility, the separation of religion from politics threatens this freedom and stability as well. Whether we choose to eliminate the source of this alienation or simply to endure its consequences has important implications for the relationship between religion and government.

I.

Before I proceed to the substance of my argument, I wish to clarify a definitional point and a factual premise. I emphasize that the religious participation in politics that I will argue for envisions religion in politics *qua religion*, and not *qua interest group*. Any person or group who convincingly demonstrates an ability to deliver large numbers of votes in an election will be listened to by political representatives. Churches and other religious groups have enjoyed considerable success in pursuit of their agenda through contemporary interest group politics. In this respect, however, they differ little from the hundreds of organizations which seek to shape state and federal legislation in ways that will benefit themselves.

By contrast, religion enters political dialogue as religion, and not as an interest group, when it seeks to provide a point of moral reference to public policy debates. One thinks here of the anti-slavery activism of northern Protestant abolitionists in the pre-Civil War era, or the anti-abortion activism of the Roman Catholic Church in contemporary politics. Religious groups do not enter these debates to protect an economic interest; rather, they seek to witness against a moral wrong by testifying to transcendent truth. The Catholic hierarchy opposes abortion because it believes abortion flouts a divine truth about the sanctity of life, and not because it undermines an "interest" of the church. However successful churches and other religious groups may be in gaining legislative recognition of their parochial concerns, their attempts to enter political dialogue as moral referents generally have not been welcomed.

As to the factual point, my substantive argument rests on the premise that there is in the United States a strong cultural assumption that religion should be private, and politics should be secular. Though the existence of this assumption may be "widely accepted," in Reverend Neuhaus's words, its accuracy is not always conceded, as the responses to this paper amply illustrate. Whether this characterization of what American public culture expects of religion and public life is fair and accurate, then, bears some examination.

The two-sided assumption of religious privatization and public secularization is cultural in the broadest sense; thus, the depth and extent of its influence are not always clear. One might observe that there are relatively few obvious instances in which religion has been affirmatively excluded from public life, though attempts to achieve this result are not uncommon.⁶ The truth of that statement depends on what counts as "obvious" or "exclusionary." For example, the Supreme Court's expansive interpretation of the establishment clause has led to the exclusion of religion from public schools, even as a subject of academic study or voluntary extracurricular activity.⁷ To those who are committed to a secular public culture, this is unremarkable. Indeed, it may not even be seen by such persons as an exclusion of religion from public life at all, because that would presuppose that religion can properly claim to belong in the public schools in the first place, which they would deny.⁸ To many religious parents and students, however, the Court's commitment to public school secularism seems both obvious and unfair. Accordingly, whether one is persuaded that there exists a cultural assumption that religion should remain private and public life should remain secular is likely to

6. Consider, for example, the litigation pursued by the Abortion Rights Mobilization, Inc. to revoke the tax exempt status of the National Conference of Catholic Bishops and the United States Catholic Conference on the theory that their pro-life activism constitutes partisan political activity. *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986), *aff'd sub nom. In re United States Catholic Conference*, 824 F.2d 156 (2d Cir. 1987), *rev'd sub nom. United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268 (1988); *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985), *aff'd sub nom. In re Baker*, 788 F.2d 3 (2d Cir.), *cert. denied sub nom. Baker v. Abortion Rights Mobilization, Inc.*, 479 U.S. 852 (1986); *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982); *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982). See also *McRae v. Califano*, 491 F. Supp. 630, 690-723 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980).

7. While this may not have been what the Court intended, it is in fact how lower courts and public school officials generally have read the cases. Compare *School Dist. v. Schempp*, 374 U.S. 203, 224, 225 (1963) (religion is an acceptable subject of academic study in public schools) (dictum) with *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984) (voluntary extra-curricular prayer group in public high school violates establishment clause), *vacated on other grounds*, 475 U.S. 534 (1986) and P. VITZ, *RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY* 21-22, 70 (1985) (showing that American public school textbooks omit most references to religion). See also *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

8. See Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 381.

depend on how she perceives the status quo of church-state relations.

There are many who believe that the status quo confirms the existence of this cultural assumption. Rex Lee has noted the common belief that religion does not belong in law school classrooms.⁹ More recently, Roger Cramton has bemoaned the absence of values-based teaching in legal education, and suggested that moral dialogue about the law be renewed in law schools by studying religious traditions.¹⁰ Commenting on Dean Cramton's essay, Peter Shane has suggested that the law school culture of values-skepticism criticized by Cramton is symptomatic of American public culture in general.¹¹ Stephen Carter has argued that the Court's insistence on secularized public education evidences a deep liberal hostility to any religious activity that is not confined to private life.¹² And Gerard Bradley has analyzed the Supreme Court's religion clause decisions as having constitutionalized a "privatization" theory of religion.¹³

In the specific context of politics, there are equally strong and widespread perceptions that American political culture seeks to exclude religion.¹⁴ Carl Esbeck has included strict separationists in his typology of attitudes on church-state relations, describing them as those who believe that "civic issues and affairs of state are to be debated and resolved in a wholly

9. Lee, *The Role of the Religious Law School*, 30 VILL. L. REV. 1175 (1985). See also K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 5 (1988) (noting the "pervasively secular" environment of the legal academy). This may partially be attributable to the continued vitality of skepticism among legal academics, notwithstanding its general rejection by philosophers. See M. PERRY, MORALITY, POLITICS & LAW 10, 211 n.10 (1988).

10. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509 (1987).

11. Shane, *Prophets and Provocateurs*, 37 J. LEGAL EDUC. 529 (1987).

12. Carter, *Evolution, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977.

13. Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275 (1986).

14. See K. GREENAWALT, *supra* note 9, at 5 ("a basic premise of common legal argument is that any reference to [a transcendent religious] perspective is out of bounds"); *id.* at 44 ("In part because they want to convince nonbelievers and in part because they have a vague sense that such arguments may be more acceptable in our political order, believers often cast public arguments for their positions in nonreligious language."); e.g., Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 999 ("[T]he liberal feels obliged to quarantine religious pronouncements, to confine them to contexts (the home, the Church) that present the least risk of general infection. He cannot allow them to enter into the general political conversation because he does not regard them, and could not regard them, as issuing from a respectable point of view . . .").

secularized medium Education, law, economics or military defense are declared to be secular and are to be publicly debated in such terms."¹⁵ Noting American liberalism's "long-standing and deeply felt attraction to strict separationist theories" of church-state relations, Mark Tushnet has suggested that strict separationism and liberalism are theoretically quite congenial, since the liberal tradition effectively excludes religion from public life by treating individual preferences as beyond the purview of political analysis.¹⁶ Professor Carter has gone so far as to argue that liberalism simply cannot accommodate religious voices in political dialogue and hope to survive, let alone remain theoretically coherent.¹⁷

Evidence of the cultural assumption of religious privatization and public secularization is easy to find. A recent study showed that national media reporters tend to "filter" religion out of their political reporting,¹⁸ a phenomenon that Reverend Neuhaus personally observed in his experience as an aide to Martin Luther King during the civil rights era.¹⁹ Many academics have flatly stated that religion has no place in law-making.²⁰ Kent Greenawalt has argued that the politics envisioned by Bruce Ackerman and John Rawls necessitate the exclusion of religion as a distinctive voice in the polity.²¹ Professor Carter has made the same argument about the work of Mark Yudof and David Richards.²² Though he strongly argues that both

15. Esbeck, *supra* note 8, at 381.

16. M. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 272 & n.99 (1988).

17. Carter, *supra* note 12, at 987-92.

18. P. BENSON & D. WILLIAMS, RELIGION ON CAPITAL HILL: MYTHS AND REALITIES 5, 72-84 (1986).

19. R. NEUHAUS, *supra* note 2, at 98 (describing how the television cameras always turned off when Dr. King began speaking about the religious justifications for racial equality).

20. See, e.g., D. LYONS, ETHICS AND THE RULE OF LAW 190-91 (1984); G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 229 (1966); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963); Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 538-40 (1980).

21. GREENAWALT, *supra* note 9, at 51-56 (discussing J. RAWLS, A THEORY OF JUSTICE (1971) and B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980)). See also Carter, *supra* note 12, at 986-87 (making same argument about Ackerman); Rorty, *Taking Philosophy Seriously* (Book Review), NEW REPUBLIC, Apr. 11, 1988 at 31, 33 (making similar observation about Rawls). Professor Ackerman, at least, appears to agree with this characterization of his work. See, e.g., B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 99 (1984); Ackerman, Remarks at the Meeting of Section on Law and Religion, AALS Annual Meeting (Jan. 6, 1989).

22. Carter, *supra* note 12, at 986-92 (discussing D. RICHARDS,

citizens and government officials should be able to rely on their personal religious convictions when making political decisions, Professor Greenawalt himself nevertheless insists that political discourse in a liberal democracy cannot include arguments from religious premises.²³

The Supreme Court itself has supplied plenty of grist for this mill. The Court periodically warns us—though always in dicta—about the unique dangers posed by religious activism in the political realm.²⁴ Indeed, religious involvement in government has occasionally evoked dark analogies to the inquisitorial persecution of medieval and post-Reformation Europe.²⁵

This deep suspicion of religion is implicit in many Supreme Court opinions. The Court has only equivocally endorsed religious participation in politics.²⁶ Religion for

TOLERATION AND THE CONSTITUTION (1986) and M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983)).

23. K. GREENAWALT, *supra* note 9, ch. 12.

24. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 416 (1985) (Powell, J., concurring); *Larson v. Valente*, 456 U.S. 228, 252-53 (1982) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (opinion of Harlan, J.)); *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *Engel v. Vitale*, 370 U.S. 421, 442-43 (1962) (Douglas, J., concurring). It is true, as Oliver Thomas has pointed out, *Comments on Papers by Milner Ball and Frederick Gedicks*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451 (1990), that many of these opinions speak of the danger in the context of government funding. Nevertheless, the Justices do not generally warn about political divisiveness stemming from appropriations fights in non-religious contexts, which suggests that they see something uniquely dangerous about religiously motivated politics.

25. See, e.g., *Board of Educ. v. Allen*, 392 U.S. 236, 254 (1968) (Black, J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 425-27 & 431-33 nn. 7-8 (1962); *Everson v. Board of Educ.*, 330 U.S. 1, 8-9 (1947).

26. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978). In *McDaniel*, the Court held unconstitutional a state statute which prohibited ministers from serving in the legislature. In contrast to Justice Brennan's concurring opinion, which analyzed the statute as an unconstitutional religious test for political office, *id.* at 642-43, Chief Justice Burger's plurality opinion for himself and three other Justices found that since the statute regulated conduct rather than belief, the state might justify the prohibition of ministers in the legislature by showing a compelling state interest, though he found that the state had not done so in this case. *Id.* at 626-29. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1202-04 (2d ed. 1988). In a similar vein, commentators have occasionally suggested that political control of a public forum or governmental body by members of the same religion might justify government regulation of the participation of the religion and its members in the political process. See, e.g., Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 884-88 (1984); Note, *The Supreme Court, Effect Inquiry, and Aid to Parochial Education*, 37 STAN. L. REV. 219, 224-25 & n.33 (1984). Other religion clause decisions attest that the compelling state interest test gives an individual less protection

some of the Justices is a private and dangerous matter that should be kept out of public space.²⁷ In establishment clause cases, for example, the Court conclusively presumes that public school students, because of their immaturity and lack of sophistication, are highly vulnerable to religious coercion. Yet, in abortion contexts, the assumptions about sophistication and maturity run in a different direction: Pregnant teenagers are generally presumed by the Court to be sufficiently sophisticated and mature to be able to make the complex decision about whether to undergo an abortion alone.²⁸ The missing piece to this puzzling contradiction is the supposition that religion is singularly threatening to children.²⁹

It can be argued that the assumption of religious privatization and public secularization emanates only from a relatively small number of social groups—public educators, judges, intellectuals, national media representatives—that even combined are numerically insignificant. This understates the cultural influence that these groups exert in the United States. These groups are all disproportionately influential in the formation, shaping, and maintenance of American public opinion. They contribute mightily to the cultural backdrop that informs the individual attitudes and decisions of each citizen. If it is true that these groups, consciously or unconsciously, act on an assumption that religion should be excluded from politics and public life generally, then one should not be surprised to find

under the free exercise clause than under, for example, the equal protection clause, where application of the test hardly ever results in justification of infringements on individual rights. See generally Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMM. 147 (1987).

27. See, e.g., *Lemon*, 403 U.S. at 625 (Douglas, J., concurring); *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting). See also *Wallace v. Jaffree*, 472 U.S. 38, 51-52 (1985); *Braunfeld v. Brown*, 366 U.S. 599, 610 (1961) (Brennan, J., concurring and dissenting). But see *Walz*, 397 U.S. at 670.

28. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See also *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (upholding parental consent statute because it provided an alternate means for child to obtain consent); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding parental notification statute against "as applied" attack because child was unemancipated and made no claim or showing of maturity).

29. Gedicks & Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1613-14 (1987). For an extended analysis of this point, see Comment, *Autonomous Adolescents, Sexual Responsibility, Religious Organizations, and Congress: An Illicit Church/State Relationship?*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 425 (1988).

this assumption replicated in various ways throughout American life.

Whether an assumption of religious privatization and public secularization undergirds American public culture ultimately is a question for social scientists. It is enough for my purposes that a belief in the truth of the assumption is plausible and widely held. It is, after all, a commonplace in post-modern thought that commitment to a particular conception of the world renders the conception "real" to the believer regardless of whether the conception can be said to have any objective or independent existence.³⁰ I take it to be true, then, that many Americans have the well-founded belief that religion is excluded from their political and public lives.

II.

My substantive argument begins with the nature of religious belief. I wish to make two points in this regard. First, religion is experienced by the believer as holistic. Second, religion also is experienced as compelling for the believer, on both the conscious and unconscious level. Both of these attributes of religious experience are in serious tension with the assumptions of privatized religion and secularized politics.

A.

In primitive cultures, people depended on certain natural processes and phenomena to sustain individual and communal life. Climatic conditions which made it possible to grow or capture food are a good example. An existence so completely dependent on nature is a perilous one, subject to being arbitrarily snuffed out. Vividly aware of the precariousness of their lives, primitives embedded nature in religious myth so as to confront, explain and subdue what was, in truth, uncontrollable.³¹ Thus, the religious beliefs of primitive cultures generally were integrated into and inseparable from every aspect of existence. "For religious man," wrote Mircea Eliade, "nature is

30. If one believes that in fact there is no cultural assumption of privatization and secularization, notwithstanding widespread belief in one, then a strategy for dealing with misplaced belief in the assumption is to demonstrate empirically that the assumption is false, in the hope that the mistaken belief will then correct itself.

31. Priest, *Myth and Dream in Hebrew Scripture*, in MYTHS, DREAMS, AND RELIGION 49-51 (J. Campbell ed. 1970).

never only natural. . . . The whole of life is capable of being sanctified."³²

Though humanity no longer sees itself as existing at the mercy of nature, its survival in the face of ubiquitous nuclear, technological, and environmental crises seems always in doubt. With respect to these and other modern existential crises, contemporary religion performs much the same task for moderns that it performed for primitives: It infuses temporal existence with meaning, and thereby helps one to deal with the precariousness of that existence. In the midst of the bewilderment and confusion of modern life, religion suggests to people a firmer, more stable reality free of the relative uncertainty of subjective experience.³³ Secure in the knowledge of what is, and was, and will be,³⁴ the religious person feels able to distinguish reality from illusion, truth from deception. Because sacrality unveils the deepest structure of the world, to paraphrase Eliade, the polarity between the sacred and the profane actually is an opposition between the *real* and the *unreal*.³⁵

The religious person feels able to confront and defeat the threats to her existence inherent in modern life, because she knows that this existence is not a complete reality. The religious person is able to withstand the apparent randomness, precariousness, and vacuity of modern life because she knows, or thinks she knows, its sacred, hidden meaning.³⁶ Conversely, removal of the sacred meaning that religion gives to the believer's world leaves her lost and confused by removing the most important referent by which she evaluates herself and her

32. M. ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 151, 167 (1959). See also *id.* at 14, 117-19, 148-50, 183.

33. *Id.* at 28; Bradley, *supra* note 13, at 277.

34. Cf. DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS [The Mormon Church] sec. 93:24 (1981) ("And truth is knowledge of things as they are, and as they were, and as they are to come.").

35. M. ELIADE, *supra* note 32, at 12-13.

36. See K. GREENAWALT, *supra* note 9, at 30-31 ("Like most major religions, Judaism and Christianity . . . try to make sense of the natural and social world, to offer a 'deep understanding' of the place of human beings, and to provide guidance about the 'most worthwhile way to live.'"). Greenawalt also notes:

[A thoughtful] person [who] accepts a religion . . . will have a deep sense that the religious perspective conforms with his own personal experience and his understanding of social experience. If one has not grown up within a tradition, the religion must have an initial appeal that "speaks to his condition." If he accepts the religion, there must be a continuing sense that it illuminates life's possibilities and meaning.

Id. at 73.

world.³⁷ It is by revealing the sacred in objects and events that religion and religious belief seek to uncover what is most real about human existence.³⁸

B.

Religion is consciously experienced by the believer as an inescapable reality. Moreover, religion may exert just as compelling an influence on human behavior at the level of the unconscious.

1.

The search for meaning in existence, the "will-to-meaning," is one of the strongest motivational drives of human life.³⁹ This is particularly true for the religious believer. Only in the context of the sacred does the religious person have authentic being.⁴⁰ Without that context, her place in the cosmos vanishes. Robert Bellah writes that "myth does not attempt to describe reality Myth seeks rather to transfigure reality so that it provides moral and spiritual meaning to individuals or societies."⁴¹ Men and women are drawn to religion because it purports to explain temporal life. Religion is deeply attractive because of its affirmation of being and its promise of salvation from the existential void. Thus, though in one sense people choose their beliefs, in another sense their beliefs choose them. Once a person acknowledges a significant place for religious belief in her life, the content of that belief challenges her, pulling her to conform her life—her *whole* life—to its demands.⁴² Paul Tillich wrote that religion "points to that which is ultimate, infinite, unconditional in man's spiritual life. Religion, in the largest and most basic sense of the word, is ultimate concern."⁴³

37. See *id.* at 180. See also M. PERRY, *supra* note 9, at 27-28 (discussing moral relativism).

38. M. ELIADE, *supra* note 32, at 11, 28, 96-97.

39. V. FRANKL, MAN'S SEARCH FOR MEANING 154 (1959); accord Jung, *The Spiritual Problem of Modern Man*, in THE PORTABLE JUNG 471 (J. Campbell ed. 1976).

40. M. ELIADE, *supra* note 32, at 168, 178.

41. R. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 3 (1975). See also J. CAMPBELL, THE POWER OF MYTH 53 (B. Flowers ed. 1988).

42. R. NEUHAUS, *supra* note 2, at 250.

43. P. TILlich, THEOLOGY OF CULTURE 7 (R. Kimball ed. 1959). See also *id.* at 182.

A religious believer's inability to live her life consistent with her ultimate concern—her deepest and most compelling reality—puts in question the meaning of her life, and undermines her very existence.

2.

Carl Jung postulated that the human psyche is composed of a "collective unconscious" as well as a personal one. Just as the human body is the result of millions of years of evolution, so also is the brain. "Our mind has a history," suggested Jung, just as our body has its history. Our unconscious mind, like our body, is a storehouse of relics and memories of the past. A study of the structure of the unconscious collective mind would reveal the same discoveries as you make in comparative anatomy.⁴⁴

The collective unconscious is inherited, just like the general characteristics of the body:⁴⁵ "As the body has its basic conformity," said Jung, "so has the mind its basic conformity."⁴⁶

Whereas the personal unconscious reveals individual psychic patterns, the collective unconscious reveals a psychic pattern common to all humans.⁴⁷ These common patterns Jung labelled "archetypes." They are the manifestation of general psychic forms that assert themselves in similar ways regardless of cultural or personal context.⁴⁸ Jung sometimes referred to them as the unconscious images of biological instincts.⁴⁹

Jung maintained throughout his life that the existence of the collective unconscious could be verified empirically, by analyzing the dreams, visions and other irruptions of the unconscious into the conscious, after controlling for personal and cultural variations. After excluding all motifs that might possibly be known to a dreamer, any remaining motifs that function consistently across individuals and cultures are manifestations

44. C. JUNG, *ANALYTICAL PSYCHOLOGY: ITS THEORY AND PRACTICE* 44, 45 (1968).

45. *Id.* at 60.

46. *Id.* at 46. See also E. ERICKSON, *CHILDHOOD AND SOCIETY* 23 (2d ed. 1963) ("we retain . . . the semantic assumption that the mind is a 'thing' separate from the body").

47. C. JUNG, *supra* note 44, at 40.

48. Jung, *The Concept of the Collective Unconscious*, in *THE PORTABLE JUNG*, *supra* note 39, at 60.

49. *Id.* at 61. See also J. CAMPBELL, *supra* note 41, at 37-51; E. ERICKSON, *supra* note 46, at 107-08.

of the collective unconscious—the archetypes.⁵⁰ Although the idea of the collective unconscious remains controversial, it has been highly influential, particularly among non-Freudians who interpret manifestations of the unconscious as reservoirs of personal meaning rather than pathological evidence of neurosis. One prominent American mythologist has gone so far as to proclaim that the “truth” of the existence of the collective unconscious is “beyond question” in the literature of psychology.⁵¹

It is important to understand that an archetype is not an unconscious idea; indeed, it is not defined by reference to its content.⁵² An archetype is infused with definition and content only after it manifests itself in the conscious mind and is filled up with cultural ballast.⁵³ Dreams, for example, are not archetypes, but merely their image.⁵⁴ An archetype is form that *attracts* substance, but is not itself substance; it invites meaning—is not itself intrinsically meaningful. One might call the archetypes “psychological imperatives.”

For example, the concept of the “second birth” is an archetypal image that is found in virtually every culture in the world.⁵⁵ It reassures “that death is not final, that it is always followed by new birth.”⁵⁶ The archetype is the universal human fear of non-existence; by contrast, its cultural image may take many forms, such as the Christian resurrection or the belief in reincarnation common to many Eastern religions.⁵⁷

50. See C. JUNG, *supra* note 44, at 44; see also Jung, *The Relations Between the Ego and the Unconscious*, in THE PORTABLE JUNG, *supra* note 39, at 69-83.

51. Campbell, *Mythological Themes in Creative Literature and Art*, in MYTHS, DREAMS, AND RELIGION, *supra* note 31, at 170.

52. Jung, *Psychology and Religion*, partially reprinted in THE ESSENTIAL JUNG 84 (A. Storr ed. 1983).

53. C. JUNG, *supra* note 44, at 50.

54. Campbell, *Mythological Themes in Creative Art and Literature* in MYTHS, DREAMS AND RELIGION, *supra* note 31, at 157; cf. M. ELIADE, *supra* note 32, at 209-10 (myth is “produced” by the collective unconscious in the same way that *Madame Bovary* was “produced” by adultery).

55. Jung, *The Concept of the Collective Unconscious*, in THE PORTABLE JUNG, *supra* note 39, at 63, 64.

56. M. ELIADE, *supra* note 32, at 156; see *id.* at 147-48. Cf. Eliot, *The Wasteland*, in T.S. ELIOT, *THE WASTELAND AND OTHER POEMS* 29 (1962). Eliot begins, “April is the cruelest month, breeding / Lilacs out of the dead land, mixing / Memory and desire, stirring / Dull roots with spring rain.” *Id.* at 29. He ends with three repetitions of “Shantih,” *id.* at 46, which he translates as “The Peace which passeth understanding,” *id.* at 54. I am indebted to John Robinson for suggesting this poem as a literary manifestation of the second birth archetype.

57. Other archetypal images include the divine king or good shepherd, THE ESSENTIAL JUNG, *supra* note 52, at 249; Wilder, *Myth and Dream in Christian*

It is not inevitable, of course, that archetypal images be religious, at least not in modern life.⁵⁸ In religious societies, however, archetypal images will typically be religious as well. In a country like the United States, then, where public culture has until recently been implicitly Protestant and where the vast majority of the people still profess both belief in God and religious affiliations,⁵⁹ it is not surprising that the most potent and frequently manifested cultural symbols, those that satisfy the demands of the collective unconscious, are religious. Because the power of religious symbols derives in part from their link to the archetypes in the unconscious mind, they are difficult, and perhaps impossible, to discard even when one wishes to.

III.

Religious experience is holistic and compelling. The imposition of secularism on religious people, then, carries with it the danger of deep alienation, threatening either to marginalize religious belief or to provoke religious revolt against any imposed secular order.

Originally, "secularization" meant merely the transfer of legal title to ecclesiastical property to individuals and the state for nonecclesiastical uses.⁶⁰ As I have discussed, however, secularization in many circles of contemporary American life has come to mean the total and mandatory exclusion of religious influence from large and important spheres of American life—from public education, government, law and politics.⁶¹ This is the effect of twin causes—the privatization of religious belief that forms part of the liberal tradition, and the abandonment of faith in favor of reason that is the legacy of the Enlightenment.⁶² In a truly secular society, policies, arguments and

Scripture in MYTHS, DREAMS, AND RELIGION, *supra* note 31 at 75; the ascent to a great height, M. ELIADE, *supra* note 32, at 128-29; the heroic figure, THE ESSENTIAL JUNG, *supra* note 52, at 84; and the narrow passage or bridge to another world, M. ELIADE, *supra* note 32, at 181-83.

58. For example, one explanation of the extraordinary influence of Marxist thought over the last century is that it depicted archetypal images that satisfy the needs of the collective unconscious in the same way that religion does. See M. ELIADE, *supra* note 32, at 204-10; Fitch, *Can There Be Morality Without Religion?*, in RELIGION, MORALITY, AND LAW 1, 3-4 (A. Harding ed. 1956).

59. See *supra* note 5.

60. See H. KÜNG, ON BEING A CHRISTIAN 26-27 (1976).

61. See *supra* Part I. See generally Gedicks & Hendrix, *supra* note 29, at 1581-85, 1612-13.

62. See generally A. LINDSAY, RELIGION, SCIENCE AND SOCIETY IN THE MODERN WORLD 30 (1943); R. NIEBUHR, CHRISTIAN REALISM AND POLITICAL

claims that refer to religious belief for their validity are thought inappropriate in public contexts, and are always subject to challenge solely because they are religiously based.⁶³ Accordingly, religious believers who wish to participate fully in secularized spheres of public life feel pressure to cover and disguise religious motivations for the political claims they make if they wish to be taken seriously.⁶⁴

The holism of religious belief, however, does not permit an easy bifurcation of life into the sacred and the profane. Consider Tillich's definition of "religion" as "ultimate concern," which I referred to earlier. This definition is familiar to constitutional scholars; even the Supreme Court has relied on it.⁶⁵ Tillich himself, however, articulated a role for religious belief that is not congenial to the separation of religion from politics:

An ultimate concern must express itself socially. It cannot leave out any sphere of human existence. Intended or not, it expresses itself in the most basic of cultural creations, in human language, and thence it permeates the whole of life in a society.⁶⁶

If religion is the state of being grasped by an ultimate concern, this state cannot be restricted to a special realm.

PROBLEMS 2 (1953); M. TUSHNET, *supra* note 16, at 270-73; R. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 179, 209 (1985); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1074-75 (1980).

63. See R. NEUHAUS, *supra* note 2, at 25; Gedicks & Hendrix, *supra* note 29, at 1597-98. One can understand the special disability that religion labors under in contemporary political life by imagining whether a state legislature constitutionally could prohibit a member of the Klu Klux Klan from holding office, in service to its compelling interest in eradicating racial discrimination. The possibility that such a prohibition would be upheld by the Court is remote. Yet, this is precisely what a plurality of the Court has suggested might be constitutional with respect to a similar prohibition on ministers. See *McDaniel v. Paty*, 435 U.S. 618, 626-29 (1978) (plurality opinion).

64. See R. NEUHAUS, *supra* note 2, at 78. Kent Greenawalt has criticized this phenomenon. K. GREENAWALT, *supra* note 9 (generally arguing that religious convictions are properly relied on in the political process whenever shared premises and publically accessible reasons do not yield determinate answers). See also R. NEUHAUS, *supra* note 2, at 125-26 (arguing that politics is an "inescapably moral enterprise" and political actors should not have to divest themselves of moral referents such as religious belief and experience). Even Professor Greenawalt, however, believes that public dialogue should be conducted in nonreligious terms. K. GREENAWALT, *supra* note 9, at ch. 12.

65. *Welsh v. United States*, 398 U.S. 333 (1970); *Seeger v. United States*, 380 U.S. 163 (1965). See also Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

66. P. TILlich, *supra* note 43, at 178.

The unconditional character of this concern implies that it refers to every moment of our life, to every space and every realm . . . Essentially the religious and the secular are not separated realms. Rather, they are within each other.⁶⁷

Public secularization, then, is oppressive to the believer. It requires that she divide and compartmentalize her life at the same time that her religious experiences testify that life is an indivisible and unified whole. For most religious people, this compartmentalization is not only undesirable, but impossible. Their religious beliefs and experiences are irretrievably entangled and interwoven with all of their "other" beliefs and experiences.⁶⁸ Compartmentalization essentially asks the religious believer to approach her life as if she were not herself.⁶⁹

Thus, the exclusion of religiously based arguments from politics excludes the most authentic part of a religious individual's personality from political life. The religious person cannot articulate as a basis for her public actions any of her religious beliefs and experiences.⁷⁰ Unless she succeeds in disguising her religious motivations with secular arguments, or abandons those motivations altogether, the political arena is, for all practical purposes, closed to her. The knowledge that conventional politics rejects an individual's religious beliefs and experiences as irrelevant and even threatening to its business makes her feel separated, illegitimate, and inferior.

Even when the religious person succeeds in compartmentalizing her religious beliefs and experiences by disguising or abandoning them in public contexts, to that extent she precipitates a new existential crisis. Religion constructs reality and creates cosmological meaning for the believer; it is the necessary prerequisite to her being.⁷¹ To the religious person, to

67. *Id.* at 41.

68. See, e.g., K. GREENAWALT, *supra* note 9, at 150-51, 157-58, 179-80, 189; *supra* Part II.A.

69. See K. GREENAWALT, *supra* note 9, at 155 ("To demand that many devout Catholics, Protestants, and Jews pluck out their religious convictions is to ask them how they would think about a critical moral problem if they started from scratch, disregarding what they presently take as basic premises of moral thought"); M. PERRY, *supra* note 9, at 182 ("To participate in politics and law . . . with [one's moral or religious] convictions bracketed is not to participate as the self that one is but as some one—or some thing—else.").

70. H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 16 (1974); R. NEUHAUS, *supra* note 2, at 81-82, 125; P. TILlich, *supra* note 43, at 41-42.

71. See *supra* Part II; cf. M. BALL, *supra* note 4, at 182 n.16 ("There can be no knowledge of God apart from his revelation of himself.") (paraphrasing Barth); S. HAUERWAS, *A COMMUNITY OF CHARACTER* 45 (1981) ("There is no

disguise one's religious beliefs is to disguise the meaning of one's existence; abandonment of the sacred means abandonment of being itself.⁷²

To the person whose religion demands integration of faith with life, whose religious belief creates her sense of place in the cosmos, abandoning the sacred in any portion of her life, even superficially, creates oppressive tensions. These can be relieved by abandoning one's faith, but this precipitates the existential crisis in its most potent form.⁷³ What one wants in this circumstance is elimination of the tension between the demands of secularism and those of religious belief, without the feeling that one has abandoned the cosmic structure of reality created by religious belief. One way to accomplish this is to avoid asserting religiously based claims in public contexts, and instead to conform to the demands of religious belief to the policy prescriptions of one or more secular—that is to say “legitimate”—public agenda. Thus, one publicly mutes her religion and agrees to a secular political agenda, not because one's religious beliefs demand the agenda or coincide with it, but because agreement reduces feelings of dissonance and alienation.⁷⁴ Reverend Neuhaus has accused the mainline Protestant churches of marginalizing themselves in precisely

way to talk about the social ethics of Christianity except as they are determined by the form of Jesus's life.”).

72. See M. PERRY, *supra* note 9, at 181-82 (“One's basic moral/religious convictions are (partly) self-constitutive and are therefore a principal ground—indeed, the principal ground—of political deliberation. To “bracket” such convictions is therefore to bracket—to annihilate—essential aspects of one's very self.”); see also *supra* Part II.

73. M. ELIADE, *supra* note 32, at 100-13.

74. Under the theory of cognitive dissonance, a decisionmaker experiences the cognitive effect of psychological pressure or dislocation—“dissonance”—in part as the result of having made a decision which contradicts reliable information. Cf. J. CAMPBELL, *supra* note 41, at 40-41 (visionaries, leaders, and heroes are always close to being neurotic, because they attempt to act out private myths that do not coincide with social norms and thereby live in a fearful world of uninterpreted “original experience”). Because most persons find it easier to maintain a self-image that is more or less consistent with their perception of the social environment in which they live, a common human response to dissonance is to seek to reduce or to eliminate it. Dissonance theory suggests that following a decision to become or to remain committed to a religious tradition, believers will experience dissonance stemming from the secularism that pervades American public life and contrasts sharply with their religious faith. The theory further suggests that believers will attempt to eliminate the dissonance—for example, by pursuing strategies such as those described in the text. For an overview of cognitive dissonance theory, see M. DEUTSCH & R. KRAUSS, *THEORIES IN SOCIAL PSYCHOLOGY* 62-76 (1965). For a creative and provocative application

this way by essentially aligning themselves with the left wing of the Democratic Party.⁷⁵ One might also characterize the religious right as having done the same thing with respect to the Republican Party, although it is probably more accurate to describe that party as having bent to the fundamentalists, rather than vice versa.⁷⁶

Eventually, acquiescing to its privatization and saying little to distinguish itself from secular interest groups, religion becomes tamed and domesticated.⁷⁷ Such religion is neutered. It does not pervade the lives of its believers, and is not likely to call them to action.⁷⁸ Ultimately, it is distinguishable from secularism only by decorative trimmings of prayer and piety at the edges of fundamentally secular public policy arguments.⁷⁹ Yet, domesticated religion preserves institutional forms of worship and belief, so that the existential crisis is avoided. As Professor Ball has eloquently described, this kind of religion is laced with irony, ministering to the spiritual needs of the suffering at the same time that it legitimates the exercises of power that cause the suffering.⁸⁰

Many religious Americans have chosen not to circumscribe and dilute their religious beliefs as the means of dealing with

of dissonance theory to constitutional interpretation, see Blumoff, *The Third Best Choice: An Essay in Law and History*, 40 HASTINGS L.J. 537 (1990).

75. See generally R. NEUHAUS, *supra* note 2, ch. 3.

76. Cf. *infra* note 89.

77. Cf. H. BERMAN, *supra* note 70, at 95-96 (privatized religion leaves Christianity with "little to say other than what the world wants to hear"); M. TUSHNET, *supra* note 16, at ch. 8 (Supreme Court doctrine protects the free exercise of religion only to the extent that (i) the religious practice in question can be reduced to a protected secular constitutional right, or (ii) such protection encroaches only marginally on the goals and interests of secular society).

78. Cf. R. BELLAH, *supra* note 41, at 45-49 (civil religion would have been ineffective in creating nineteenth century American consciousness of individual freedom and autonomy without parallel reinforcement by Protestant revivalism).

79. For example, compare the influential pastoral letters of the National Conference of Catholic Bishops on the arms race and economic injustice, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* (May 3, 1983); *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (Nov. 18, 1986), with the pious and ineffectual "God and country" rhetoric of Ronald Reagan. Cf. M. ELIADE, *supra* note 32, at 152-55 (describing how religion "can be rarefied and transformed until it becomes a purely human emotion."). Even the pastoral letters have been criticized for having been too cognizant of secular agenda. See, e.g., S. HAUERWAS, *AGAINST THE NATIONS* 15-16 (1985).

80. Ball, *Normal Religion in America*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 399 (1990).

the secularization of public life. On the contrary, many seem to defy that secularization, at least in certain spheres of public life. The *School Prayer Cases* remain controversial despite the passage of time.⁸¹ While most Americans support the general principle of church-state separation, large numbers dissent from the rigor with which the Supreme Court has applied the principle.⁸² The re-emergence of religious fundamentalism in politics has brought with it declarations of religious meaning not just for believers, but for *everybody*, believer or not.⁸³ Liberation theology places the religious left squarely in the middle of debates on American foreign policy in Central America and elsewhere. Roman Catholics, conservative Protestants, and Mormons continue to inject themselves individually and institutionally into abortion politics.

It is not enough that the Supreme Court in its wisdom has determined that secularism in certain areas of public life, such as public schools, is constitutionally required. Such unilateral declarations by the Court only heighten the potential for alienation by suggesting that secularism is being imposed by an unelected elite that is far from a political majority.⁸⁴ American

81. In 1983, more than 20 years after the Supreme Court held in successive cases that prayer in the public schools violated the establishment clause, one study found that 80% of the general population thought that prayer in the public schools should be permitted, and only 10% supported the Court's holdings. See H. MCCLOSKEY & A. BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS THINK ABOUT CIVIL LIBERTIES* 133 (1983).

82. *Id.* at 133-34.

83. A believer who is both faithful to her own tradition and sensitive to the diversity of belief in the United States might preface religiously based policy arguments with something like, "For Catholics . . ." or "If one is Christian . . ." The religious right articulates no such premise. Though it interprets history and current events by the idiosyncratic light of its own fundamentalist lamp, it nevertheless insists that its interpretations are valid and controlling for everyone. Cf. R. NEUHAUS, *supra* note 2, at 133 (religious new right is making public claims based on private truths).

84. It has been widely observed that secularism is an elite taste that seems to be shared by intellectuals in particular. The clearest description of this phenomenon belongs to James Boyd White:

[There is] a peculiar division between academic and religious thought in our culture. In the academic world, we tend to speak as though all participants in our conversation were purely rational actors engaged in rational debate; perhaps some people out there in the world are sufficiently benighted that they turn to religious beliefs or other superstitions, but that is not true of us or, if it is true, we hide it, and it ought not to be true of them. Ours is a secular academy and, we think, a secular state.

White, *Response to Roger Cramton's Article*, 37 J. LEGAL EDUC. 533, 533 (1987). See also K. GREENAWALT, *supra* note 9, at 6 ("A good many professors and other intellectuals display a hostility or skeptical indifference to religion that

democracy is critically dependent on the support of its people for the underlying political system. In large part, the stability of that system depends on the perception that it respects popular culture. Governments that do not respect culture are eventually forced into oppression to avoid their overthrow.⁸⁵ If the large number of Americans committed to religious belief and experience come to believe, as many of them already do, that the political system does not respect their way of life to the same extent it respects secular lifestyles, then they themselves will tend not to respect that system or the government and laws that it generates. When large numbers of religious Americans no longer feel that they have a stake in the political system, conditions will be ripe for revolution.

Thus, the secularization of public life, if it does not trivialize religion, may result in its rebellion. Jung has suggested that revolution under these conditions—that is, to preserve the meaning that is poured into the psychological demands of the collective unconscious—is especially violent and uncontrolled.⁸⁶ The last decade has vividly illustrated that, even in the absence of outright violence, large numbers of disaffected believers bring to politics a rigid and strident persecution com-

amounts to a thinly disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience.”); A. REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 360 (1985) (noting the continued private religiosity of Americans despite “recent incursions by civil humanism among cultural elites and relentless promotion of egoism by advertising and entertainment media”); Edmundson, *A Will to Cultural Power: Deconstructing the DeMan Scandal*, *HARPERS MAG.*, July 1988, at 67, 69-70 (observing that by the 1960s, English literature professors at elite universities believed that literature had supplanted religion as the principal source of moral values).

85. Cf. R. NEUHAUS, *supra* note 2, at 133 (“power that is exercised in contradiction to culture is very fragile. It depends overwhelmingly, sometimes exclusively, on coercion”); P. TILlich, *supra* note 43, at 138 (“External imposition is not sufficient for creation of a moral system. . . . Only a system which is internalized is safe”); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 369 (1986) (“a society can[not] maintain its ‘unifying ideology’ . . . unless the society’s system of beliefs is largely validated in most people’s minds by their own experience”). The activities of the Roman Catholic Church in the Philippines and Poland are examples of the ability of the church to challenge effectively the power of authoritarian and even totalitarian regimes. The rise to power of fundamentalist Islamic clerics in Iran may be an example of what happens when one attempts to suppress and secularize an indigenous religion, as the Shah attempted to do.

86. C. JUNG, *supra* note 44, at 50.

plex that destabilizes a system premised on accommodation and compromise.⁸⁷

IV.

I have argued that insisting on privatized religion and secularized politics tends toward desacralization, on the one hand, or revolution, on the other. Neither is a happy consequence. Though the elimination of religion would no doubt be celebrated by some, it would deprive a great many in the United States of the reference point by which they define themselves, at the same time that it would deprive society of the many socially valuable functions that religious institutions perform. Most important, with the elimination of such a large group of institutions that mediate between government and individuals would come increased vulnerability to state domination.⁸⁸

The alternatives of desacralization and revolution, are forced upon us by the metaphor of the "wall of separation" and the oppositional dualism of secular versus religious that frame analysis of the relation of religion and politics. One way to avoid these consequences, then, is to discard both the metaphor and the dualism.⁸⁹ Rather than talking about "religion and politics," as if they encompassed wholly separate realms, we should reemphasize that religion, together with other actors and influences, is *constitutive* of politics.

Argument, as Professor Ball has elsewhere written, is ultimately a communal act: "When we engage in argument, persuading and being persuaded, we practice mutual dignity. The other person must be convinced; the other deserves to be con-

87. Cf. R. NIEBUHR, *supra* note 62, at 23 ("we have seen how limited is the power of law whenever a portion of the community adheres to moral standards which differ from those of the total community," citing as examples dissenters from Prohibition and advocates for black civil rights).

88. I have explored these themes at length in Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99.

89. The abandonment of separationism in the United States may already be under way. Historically, American culture has blunted the force of revolutionary movements by co-opting their essential elements—witness the neutralization of socialism by Franklin Roosevelt and the New Deal. During the last decade, the Republican Party has embraced much of the agenda and virtually all of the rhetoric of the religious right, thereby diluting some of the fervor (and alienation) of that movement. The result, however, has been more religion and more power for religious people within the structure of the party. One might argue that the Democratic Party must make a similar move if it is ever to win another national election.

vinced."⁹⁰ The "wall of separation" must be breached at least to the extent of allowing religion *qua* religion to enter into the conversations about important issues that are carried on in political life. In this way religion is recognized as having something to say that other participants in public life should at least consider in their deliberations. The knowledge that their voice is being heard—acknowledged as worthy of being listened to, even if not agreed with—greatly reduces the alienation that the demand of a secularized politics otherwise threatens to produce. Knowing that the political system hears and values their views, religious people regain a stake in participating in that system.

The replacement metaphor I would propose in this area of church-state relations, then, is the metaphor of conversation.⁹¹ The ideal relation between religion and politics is one that ensures that all voices—religious and secular—are heard in a context of seriousness and respect. Perhaps, then, the metaphor is more accurately labelled "civil" or even "courteous" conversation.

There are at least two difficulties with a "civil conversation" metaphor for religion and politics: One is a problem of language, and the other a problem of trust.

A.

Let me take up first the language problem. Before the secular and the religious can converse, they require a common language, and this America does not have.⁹² Americans share a common tongue, more or less, but by "language" I mean more than that. Language is culture, and in translating from one culture to another, meaning is lost. As things stand now, religious concepts spoken in public contexts must be referenced to secular culture—that is, spoken in its language. Religious belief and experience, however, do not easily translate into secular language,⁹³ and often are simply alien to a humanistic world

90. M. BALL, *supra* note 4, at 42. See also *id.* at 45; R. NEUHAUS, *supra* note 2, at 112.

91. Cf. M. BALL, *supra* note 4 (arguing for a metaphorical conception of law as "medium" rather than "bulwark"). For an argument that moral dialogue in a morally pluralistic society is both possible and worthwhile, see M. PERRY *supra* note 9, ch. 2.

92. Some have suggested the quasi-religious language of civil religion. See, e.g., Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986). This I believe to be little better than the language of secularism. Cf. *supra* text accompanying notes 77-79.

93. What, for example, is the secular equivalent of "Christian faith?"

view that is highly influenced by perceptions of objectivity and reason.⁹⁴ What is needed is a language that is respectful of religious premises, but is still understandable by secular culture.⁹⁵

I have two suggestions on how this language might be developed. The first has been extensively treated by others and need not detain us long.⁹⁶ As a variety of organizations have suggested for many years,⁹⁷ religion should be reintro-

Cf. P. TILICH, *supra* note 43, at 56 (religious symbols "open up levels of reality that otherwise are hidden and cannot be grasped in any other way"); accord M. ELIADE, *supra* note 32, at 13. See also J. CAMPBELL, *supra* note 41, at 49 ("The best things can't be told because they transcend thought.").

94. M. ELIADE, *supra* note 32, at 8-9.

95. An interesting statement of the problem is contained in a passage from Nikos Kazantzakis's novel, *THE LAST TEMPTATION OF CHRIST*. The passage is based on the New Testament story of Jesus's healing of a Roman centurion's servant. This story recounts how the centurion sought out Jesus and asked him to heal a beloved and mortally afflicted servant. Jesus performed the miracle, and the servant recovered. In his novel, Kazantzakis portrays Jesus and the centurion as having had a subsequent encounter. After reiterating his sincere gratitude to Jesus, the centurion finds that he has little else to say. Like most Romans, he despises the Jews as uncultured and uncivilized; he is baffled that someone as powerful and intelligent as Jesus would spend time with them:

"How can you talk to this pack of dogs?" the centurion asked.

Jesus blushed. "They are not dogs," he said, "but souls, sparks of God. God is a conflagration, centurion, and each soul a spark to be revered by you."

"I am a Roman," answered [the centurion], "and my God is a Roman. He opens roads, builds barracks, brings water to cities, arms himself in bronze and goes to war. He leads, we follow. The body and soul you talk of are one and the same to us, and above them is the seal of Rome. When we die both soul and body die together—but our sons remain. That is what we mean by immortality. I'm sorry, but what you say about the kingdoms of heaven seems just a fairy tale to us."

After a pause, he continued: "We Romans are made to govern men, and men are not governed by love."

"Love is not unarmed," said Jesus. . . . "Love too makes war and runs to the assault."

"It isn't love, then," said the centurion.

Jesus lowered his head. I must find new wineskins, he reflected, if I'm to pour in new wine. New wineskins, new words . . .

N. KAZANTZAKIS, *THE LAST TEMPTATION OF CHRIST* 380 (1960).

96. See, e.g., Dent, *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864 (1988); Toscano, *A Dubious Neutrality: The Establishment of Secular Humanism in the Public Schools*, 1979 B.Y.U. L. REV. 177.

97. In the wake of Paul Vitz's important study demonstrating the determinedly secular, almost anti-religious bias of public school textbooks, P. VITZ, *supra* note 7, several non-sectarian groups, notably the Carnegie Institute (through what has become known as the Williamsburg Charter) and

duced into the public school curriculum as a subject of academic study. Religion has been one of the dominant influences in the development of Western civilization, and it continues to be important in American and world affairs. Failing to teach about religion both in history and in contemporary society is simply a failure of public education. Indeed, one of the reasons why the assertion of religious premises in public seems strange and inappropriate is that since World War II American public school students have stopped learning about religion as something relevant to things past or present.⁹⁸

A second suggestion is illustrated by the holding of a recent Supreme Court case, *Bowen v. Kendrick*.⁹⁹ In *Bowen*, the Court considered the constitutionality of the Adolescent Family Life Act, which permitted religious organizations, among other social service groups, to receive funds for services and research relating to adolescent pregnancy and sex. The Court held that the Act did not facially violate the establishment clause.

Pregnancy and sexual activity among teenagers are widely recognized as serious national problems, if not crises. If we are agreed that teen promiscuity in general and teen-aged parents

the California State Board of Education, as well as the American Association of School Administrators, the American Federation of Teachers, the Association for Supervision and Curriculum Development, the National Council for the Social Studies, the National Education Association, and the National School Boards Associations, have advocated that public schools begin explicitly to teach American and world religious history and sociology. See generally Anderson, *Coalition Produces Guidelines on Religion and Public Schools*, June 10, 1988 (UPI wire story filed on NEXIS).

98. Vitz's principal finding was that public school textbooks ignore religion. P. VITZ, *supra* note 7, at 21-22, 70. For example, the textbooks that he surveyed generally failed to discuss the Protestant Reformation, the founding and development of Mormonism, Christian Science, Seventh Day Adventism, or other distinctly American religions, the influence of conservative Protestantism in American history, or the positive contributions of Catholicism and Judaism to American social reform movements. *Id.* at 32, 42, 65. In certain books, Vitz found that the authors went to considerable effort to describe religious events in secular terms. See, e.g., *id.* at 24-25 (describing textbooks which discuss pilgrims as "people who make long trips" without reference to religious character or motivation); *id.* at 44 (describing textbooks which discuss Joan of Arc without any reference to God, revelation, Catholicism, or sainthood). Vitz also found evidence of cultural censorship. See, e.g., *id.* at 41-42 (describing textbooks which devote substantial discussion to Mohammed and the rise of Islam while giving little or no treatment to Jesus and Christianity). In fact, Vitz concluded that textbooks were most likely to discuss religions that were chronologically, culturally, or geographically remote from contemporary American life. *Id.* at 23-25, 33-36.

99. 108 S. Ct. 2562 (1988).

in particular are not good things, there are a variety of ways of attempting to help teenagers avoid the risks of early sexual activity and pregnancy—for example, by providing better sex education, wider distribution of contraceptives, and cheaper and more accessible abortion procedures.¹⁰⁰ There are also a variety of ways to dissuade teenagers from engaging in (at least) indiscriminate sex, primarily by teaching that they are unprepared in a variety of ways to undertake the psychological, social, financial and other difficulties and commitments that are normally associated with sexual activity, child-bearing, and parenting. Religious and secular approaches both can be effective in communicating this.

Nevertheless, these dissuasion techniques suffer from the infirmity common to all attempts to teach moral behavior without reference to a definitive moral standard: they appeal principally to self-interest. The hope is that teenagers will be persuaded that it is simply not prudent to have children or to be sexually active at their age. This approach is consistent with the liberal conception of the autonomous individual, which frames constitutional analysis even when the individuals are children.¹⁰¹ Under liberalism, an individual is assumed to have an interest in satisfying her preferences, wants, and desires, whatever they might be. As an autonomous individual, the teenager who is unpersuaded by prudential argument about abstinence has an interest—one that government is bound to respect—in being sexually active, and bearing and raising children.

Appeals to self-interest that run counter to one's preferences, wants, or desires are not always very effective in teaching morality, particularly when dealing with adolescents. It requires considerable wisdom and maturity to project the consequences of a decision about sexual activity or pregnancy into the future and forego immediate gratification of wants and desires, and adolescents are not well known for either quality.¹⁰² Indeed, a general assumption that interests and prefer-

100. A recent study, however, concluded that education alone is ineffective in deterring sexual activity among teenagers. See Coleman, *Classroom Sex Ed Alone Has Little Impact on Teen Sex Behavior*, Mar. 2, 1989 (Associated Press wire story filed on NEXIS).

101. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See also *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981).

102. For examples of adolescent naivete about sex, child-bearing, and parenting, see Marek, *The Lives of Teenage Mothers*, *HARPERS MAG.*, Apr. 1989, at 56. See also Note, *supra* note 29, at 453-59.

ences coincide gives the adolescent no reason to forego immediate gratification.

By contrast, under nonliberal premises merely to have a preference, want, or desire does not necessarily mean that one has an interest in satisfying it; under some "naturalist" approaches to moral knowledge, for example, one has an interest in satisfying only those preferences, wants, and desires that lead to one's "flourishing"—i.e., living the most satisfying life of which she is capable, given the religious or other moral narratives or traditions to which she subscribes.¹⁰³ Placing a moral principle within the context of a religious or other moral narrative enables one to teach more powerfully—to teach for example, that adolescent pregnancy is wrong,¹⁰⁴ not just ill-advised.

A recent panel discussion at the University of Michigan Law School on religion in public schools illustrates my point. One panelist stated his difficulty with a schoolteacher's identifying behavior as "immoral" rather than "inappropriate." A rabbi on the panel characterized this difficulty as "an inability to take a moral stand."¹⁰⁵ Placing a moral principle in a narrative context, religious or otherwise,¹⁰⁶ can give the principle a compellingness and force that dwarfs mere appeals to personal expediency.¹⁰⁷ At a minimum, such a context enriches and deepens the whole idea of self-interest by informing one's concepts of both self and morality.

The *Bowen* Court's rejection of the facial attack on the Adolescent Family Life Act, then, was wise, though not for the reasons it articulated. The Court reasoned that the establishment clause was not violated so long as the religious groups receiving aid under the Act are not "pervasively sectarian" and do not use the aid for "pervasively sectarian" purposes.¹⁰⁸ I think this is wrong-headed; the search should be for coercion and

103. See M. PERRY, *supra* note 9, at 10-20.

104. Moral judgment of this type can take either a foundationalist or a relativist form—i.e., judging conduct to be wrong for all adolescents, or wrong for particular adolescents, depending on their self-concept and other personal factors. See generally M. PERRY, *supra* note 9, at 25, 44.

105. *Tackling Difficult Issues: Panel Discusses Religion and the Public Schools*, LAW QUADRANGLE NOTES, Fall 1988, at 10-11.

106. Obviously, religious contexts and traditions are not the only ones available for effective or moral teaching. See, e.g., Hirshman, Bronte, Bloom, and Bork: *An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988). Moreover, a naturalist approach to moral knowledge need not be religious, though many are. See generally M. PERRY, *supra* note 9, at 21-22.

107. R. NEUHAUS, *supra* note 2, at 76. See also *Bowen v. Kendrick*, 108 S. Ct. 2562, 2567 (1988); M. PERRY, *supra* note 9, at 21-22.

108. 108 S. Ct. at 2560.

deception, not for religion, which is bound to be present in any effective program of teenage pregnancy counselling offered by a religious organization. The significance of the "sectarian" incidents recounted by the dissent¹⁰⁹ was not that they demonstrated the "pervasive" religiosity of certain sponsors, but rather that children who received services from these sponsors may have been pressured or deceived into taking an action contrary to their personal religious beliefs. Only Justices Kennedy and Scalia seemed to have any sense of this.¹¹⁰ Both the majority and the dissent asked and answered the wrong question.

Government, if it chooses, should be able financially to assist religious groups as part of a general program when their religious teachings are consistent with the policy goals of the program, so long as the religious groups that receive the aid do not use it to coerce anyone's religious beliefs, or deceive anyone about the groups' religious premises.¹¹¹ So long as coercion and deception are not present, it would seem that a child who is thought sufficiently mature by the law to choose to have sex, bear a child, and become a parent is similarly capable of voluntarily deciding that her interests are best served by seeking counselling about such matters from a religious—even "pervasively sectarian"—organization.¹¹² Moreover, the consistent interaction of government and religion in a public context like the Act will help to develop a public culture in which religion is acknowledged and respected as having a role to play in addressing and solving difficult issues of public policy.

B.

Although the Court refused to strike down the Adolescent Family Life Act on its face, it left open the possibility that it could be invalidated "as applied" by remanding the case for further development of the factual record on the question whether any recipients of aid under the Act are "pervasively sectarian."¹¹³ Regardless of how this particular inquiry turns out, it is probably safe to assume that some religious recipients

109. *Id.* at 2585-87.

110. *See id.* at 2582 (Kennedy, J., joined by Scalia, J., concurring) (arguing that once a spending statute has survived a facial challenge under the establishment clause, the issue is not whether a particular institution receiving funds is "pervasively sectarian," but rather whether the institution spends the funds to advance religion).

111. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

112. *See supra* text accompanying notes 28-29.

113. *Bowen*, 108 S. Ct. at 2579-81.

under the Act were not satisfied with receiving assistance to counsel only those who made an informed choice to listen to them. There is a real danger that some religious groups may use the wedge of recognition and assistance provided to them by the Act to proselytize and coerce religious belief among adolescents who do not share (and do not wish to consider) the groups' religious premises.

This brings me to the problem of trust. I have argued that it is oppressive and dangerous to seek to establish and maintain a purely secular polity in the United States. It would be at least as oppressive, and perhaps more dangerous, to establish and maintain a purely religious polity—a theocracy. If religious people and organizations ought to be able to participate fully in American public life without shedding their religious identity, then they ought also to exercise caution and sensitivity in positions of public influence so as not to use those positions to stifle and harass the voices of those who disagree with them, even when those voices belong (God forbid!) to “secular humanists”.

Unfortunately, many religious individuals and groups have shown little inclination to caution or sensitivity in public interactions with those of differing views. Many religious groups, especially fundamentalist ones, seem to have forgotten that contemporary models of institutional religion were significantly shaped by the humanistic influences of the Renaissance, the Reformation, and the Enlightenment.¹¹⁴ They are not troubled by the thought that public life should be dominated by a single world-view; they are troubled only that a view other than their own is doing the dominating. Apparently, they do not believe it is wrong for one construction of reality to force out all others, so long as the victorious reality is the particular one they espouse. Thus, they assent to the monistic model of public life assumed by strict separationists;¹¹⁵ they disagree only in asserting the sacred rather than the profane as the exclusive, participational prerequisite.

Consider the recent controversy over Martin Scorsese's film, *The Last Temptation of Christ*. Taking seriously the Christian belief that Jesus was man and God, Scorsese sought to portray the human as well as the divine Jesus. Given the traditional

114. See H. KÜNG, *supra* note 60, at 26-31. One might hope—perhaps in vain—that not even conservative churches wish to return to the medieval Roman church (or to Calvin or even Winthrop, for that matter) as the model for contemporary church polity.

115. See *supra* text accompanying note 15.

Christian emphasis on Jesus's divine nature, Scorsese chose to highlight his *human* nature. Against the backdrop of divine myth, the placement of human attributes like cowardice, vulgarity and lust in the life of Jesus—even though only as temptations—seemed jarring and blasphemous to many Christians.

The source of the controversy surrounding *The Last Temptation*, then, was the converse of that surrounding a secularized politics. In contrast to a secularized politics, which requires that religious people disguise or abandon their religious beliefs or experiences when making public arguments, Scorsese's movie was attacked by religious groups precisely because it abandoned, or at least radically reinterpreted, the conventional religious myth of Jesus. In the view of these groups, one must talk about Jesus in the traditional language of the sacred, or one cannot be permitted to talk about him at all.

If transcending the dualism of secular versus religious requires that religion *qua* religion be accorded a legitimate place in public life, one must also acknowledge the risk that this entails. With this kind of public recognition and legitimation, religion may not merely pluralize public life, but may attempt to sacralize it, by casting secularism out of the political temple and replacing it with sectarianism. In a time when the news remains filled with stories of religious leaders encouraging and committing violence to achieve religious goals,¹¹⁶ the risk that secular domination of the public square could be replaced with religious domination is not one lightly to be dismissed. On this issue, many religious groups simply are not worthy of trust.

V.

In a somewhat different context, Gerald Frug has suggested that the political choices we face are never clearly drawn. One can only attempt to determine which of many threats to liberty is the most likely and the most dangerous, and choose to resist that threat, knowing that the others still remain.¹¹⁷ In considering the question of religion in politics, I

116. I refer here not only to the threats on Salmon Rushdie's life by Islamic fundamentalists, see *A "Satanic" Fury*, NEWSWEEK, Feb. 27, 1989, at 34; *Hunted by An Angry Faith*, TIME, Feb. 27, 1989, at 28, but also to the periodic calls by fundamentalist American Protestants for God to "strike down" those Justices who continue to support abortion rights, see, e.g., *Don't Pray for Us*, NAT'L L.J., June 16, 1986, at 14, col. 1. See also Epstein, *Divided Supreme Court to Hear Crucial Case on Abortion*, Columbus Ledger-Enquirer, Apr. 22, 1989, at A-12, col. 1; *Roe v. Wade's Author Revered and Reviled*, PA. L. J.-REP., June 16, 1986, at 9, col. 1.

117. Frug writes:

believe that abandoning the religious-secular dualism and replacing the separation metaphor, and thereby seeking to eliminate the alternative threats of religious marginalism and revolt, are worth the risk that religion may co-opt the secular in public life. But I do not hold this belief with confidence. Perhaps our efforts are better directed at managing the alienation caused by a secular politics than at attempting to pluralize that politics. This suggests a third way in which religious people can react to public secularism, besides marginalizing their religion or rebelling against the secular order: they can simply "put up" with it as the best available alternative.¹¹⁸

Managing religious alienation as an unavoidable cost of maintaining the best possible alternative suggests an expansive and sensitive view of free exercise, so as to keep alienation to a minimum. The Court and many commentators, however, have lately relied on readings of the free exercise clause that are anything but expansive and sensitive. Decisions like *Lyng*,¹¹⁹ with its blithe judgment that desecration of a native American burial ground and destruction of tribal religious culture are acceptable costs of harvesting federal timber,¹²⁰ can only increase reli-

In supporting the need for decentralized power, one should not make the mistake of denying the force of the liberal attack against it. Independent corporate power of any kind does threaten individuals. . . . Our choice, then, whether or not to have strong intermediate bodies is not a choice between vulnerability and protection. The exercise of state power infringes individual rights protected by independent corporations, yet the exercise of corporate power infringes individual rights protected by the state. Every time we seek state help to protect us from a corporate invasion of our rights, we strengthen one threat to liberty at the expense of another; yet every time we prevent the state from protecting us against corporate power, we accomplish the same result. Our only option is to choose which danger to liberty seems more tolerable, more controllable, or more worth defending.

Frug, *supra* note 62, at 1123-24.

118. Cf. *Faith in the Republic: A Frances Lewis Law Center Conversation* (Colloquium), 45 WASH. & LEE L. REV. 467, 482 (1988) (remarks of Professor Tushnet) (suggesting that, within the liberal tradition, majoritarianism restrained by culture may be "the best we can do"); see also *id.* at 523 (exchange between Professor Tushnet and Sanford Levinson) (discussing whether the pro-slavery 1787 constitutional document may be morally defensible as the best that could have been written at that point in American history).

119. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988).

120. In *Lyng*, the Court rejected a free exercise challenge to a Forest Service road construction plan to facilitate timber harvests on federally owned land that included a traditional native American burial site. *Id.* at 1321-23. Although the Court acknowledged that implementation of the plan

gious alienation and the accompanying risks of religious marginalism or revolt.¹²¹ Similarly, eliminating religiously based exemptions under the free exercise clause, a position being argued by an increasing number of commentators,¹²² will build and strengthen religious alienation.

In any event, Americans ought to pause before claiming the separation of religion and politics as a success of American democracy. In a country that purports to value autonomy and freedom, the "wall of separation" is an ironic solution to the problem of religion in politics—a metaphor of political failure, not success.

"will have severe adverse effects on the practice of [the native American] religion" and "could have devastating effects on traditional Indian religious practices . . . intimately and inextricably bound up with the unique features" of the land subject to the plan, it nevertheless held that since the plan did not actually "coerce individuals into acting contrary to their beliefs," the government was under no obligation to present a compelling justification for building the road. *Id.* at 1324, 1326.

121. See also *Goldman v. Weinberger*, 475 U.S. 503 (1986) (refusing to create free exercise exemption for orthodox Jewish military officer to wear yarmulke in violation of military regulations).

122. See, e.g., Kamenshine, *supra* note 26; Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988); West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y — (1990); W. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption* (1989) (unpublished paper delivered at Georgetown University Law Center).

