Constitutional Jurisprudence of Law and Religion: Privacy v. Piety
- Has the Supreme Court Petered Out?

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CONSTITUTIONAL JURISPRUDENCE
OF LAW AND RELIGION: PRIVACY V.
PIETY—HAS THE SUPREME COURT
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INTRODUCTION

"Congress shall make no law respecting an establishment of
religion, or prohibiting the free exercise thereof..."²

As the story goes,³ He came gently and unobtrusively; but
everyone recognized Him. The people are drawn to Him and
follow Him about. An infinite compassion radiates from His
silent smile. He touches them, blesses them, and heals them.
The Grand Inquisitor passes by, watches a while, then has Him
arrested. After a lengthy tirade, the Inquisitor condemns Christ
for the dreadful freedom He granted humanity, which freedom
has been the cause of so much suffering, destruction, misery,
guilt, and hunger, because the "craving for universal unity is

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² U.S. CONST. amend. I.

³ Fyodor Dostoyevsky, The Grand Inquisitor, in The Brothers Karamazov
227, 229–44 (Manuel Komroff ed., Constance Garnett trans., Signet Classics
1957) (1881).
the... last anguish of men." To the Inquisitor’s remonstrations, He has listened attentively. The Inquisitor waits impatiently for His response, for an accounting, for an explanation, “however bitter and terrible.” At last, in answer, He approaches the Inquisitor in silence, and kisses him on his head. The Inquisitor trembles, then releases Him: “Go, and come no more.”

The civic arrest and subsequent banishment of religion from the public domain has provided our American culture with perhaps its governing ethical debate: is the moral fabric of secular society pulling apart at its religious seams? Over the course of the last two and a quarter centuries, religious matters have increasingly been relegated to the private domain—ostensibly to preserve the freedom of the individual for religion and to protect the freedom of society from religion in order to establish a common secular unity. The American history of the relationship between the civic and religious orders has informed, moreover, our Supreme Court’s jurisprudence on the separation of Church and State—most poignantly so in decisions regarding the inculcation of cultural values through the education of our children. In this privacy versus piety debate, the central jurisprudential issue now facing the Court is whether its dictated posture of secularity in matters religious itself comprises a religious stance. Properly addressing this issue, however, will involve not only an examination of the history of the Court’s

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4 Id. at 237.
5 Id. at 242.
6 Id. And for those who have thus managed to banish God, “everything is lawful.” Id. at 243.
7 See Douglas Laycock, Religious Liberty as Liberty, 7 J. CONTEMP. LEGAL ISSUES 313, 313 (1996) (“Religious liberty is first and foremost a guarantee of liberty.... But religion is not guaranteed, and neither is secularism—only liberty is guaranteed.”).
8 See Michael W. McConnell, Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberations, 1999 UTAH L. REV. 639, 656–57 (1999) (“This view, called the ‘principle of secular rationale,’ is put forward as a means of protecting the public sphere from divisive, absolutist, intolerant impulses and from arguments that cannot be supported on the basis of accessible public reasons.”).
9 See Stephen L. Carter, Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later, 27 SETON HALL L. REV. 1194, 1212 (1997) (“[I]f beginning the school day with a prayer is unconstitutional because it prefers religion over non-religion, then why is not a curriculum devoid of any religious observance unconstitutional because it prefers non-religion over religion?”).
separation of Church and State, but further inquiry into its governing presumptions, both jurisprudential and theological, on the nature and character of the relationship between law and religion. The Supreme Court is not wont to address itself to such inquiries; but where the brave of heart should fear to tread, there shall we fools go.

Part I of this paper addresses the originating intent of the separation of Church and State, then examines its nineteenth century incarnation, with particular attention to educational policy. It contends that the governing aim of this separation devolved not from any antagonism to religion, but from a constitutional anxiety to protect both religious and civil society from what historically happens to each when they become entangled. In this effort to preserve freedom, both civil freedom from religious oppression and religious freedom from civil oppression, however, the separation of Church and State covertly valorized a Protestant religiosity that became indoctrinated in the public schools and constitutionally protected as the appropriate religious posture.

Part II examines the twentieth century construal of the separation of Church and State under its governing logic of secularity. Constitutional secularity has yielded two distinct judicial stances toward religion: neutrality under the establishment clause and accommodation under the free exercise clause. The neutrality principle is driven by a constitutional anxiety against placing governmental authority behind religion, while the accommodation principle is driven by a constitutional tolerance for religion as long as it does not intrude upon an important governmental interest. Although complementary in design, these two principles collide when religious neutrality itself comprises the governmental interest to be protected against the accommodation of religion. The twentieth century separation of Church and State is thus sustained by a distinctly secular concern to excise religion as a purely private matter from the public domain—especially the public school domain—lest religious influences unduly intrude upon the governmental interest in religious neutrality. Initially construed to guarantee a freedom for religion, the Constitution has become interpreted to guarantee a freedom from religion. The exacerbated privatization of religion overtly valorizes a cultural secularism that has become indoctrinated in the public schools and
constitutionally protected as the appropriate posture in matters religious.

Part III reflects upon the hermeneutics of the secular effort to abstract a universal morality of egalitarian regard for all persons, attended by a heightened regard for privacy, from its historically religious context. It argues that by virtue of its abstraction from religion, the central moral conviction of our secularly civic society lacks any moral force beyond its mere social imposition. Secularism consequently construes religion as potentially subversive, whose transcendent moral authority may disoblige the religious adherent from the social imposition of civic authority. Secular neutrality would thus domesticate religion in order to neuter its transcendent moral force. Hence the “logic of secular liberty” has governed the twentieth century jurisprudence of the Supreme Court on matters religious—a logic anxious to privatize religion so as to excise its potentially coercive if not subversive influence from the public order. The ultimate irony of this logic is that it devolves, and devolves only, from a uniquely religious understanding of liberty.

Part IV demonstrates that the Judeo-Christian heritage continues to provide for the central moral conviction of our civic society. It further shows, however, that the secularization of this heritage has transposed an other-regarding religious ethic into a self-regarding secular ethic. Secular morality is thus a truncated inversion of religious morality. By virtue of secularizing the moral domain of religion, moreover, religion itself becomes secularly misconstrued as the residual system of beliefs and practices explicitly attendant to religion. Secularism therefore marginalizes religion, banishing it to the purely private sphere, from which private sphere it exerts no moral claim upon the public sphere and thus poses little subversive harm to the civic order. The judicial stance on prayer in school exemplifies this logic. Properly understood, however, prayer—and therefore religiosity itself—is a profoundly communal, and hence public matter.

The concluding remarks illustrate that our Supreme Court has indeed “pered out,” though impermissibly subscribing to a

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10 After rebuking Him, Jesus said to Peter: “You are a hindrance to me; for you are not on the side of God; but of men.” Matthew 16:23 (New Oxford Annotated Bible). Peter later thrice denied Him. Id. at 26:75.
secular disestablishment of religion by virtue of endorsing the secular misconstrual of the relationship between law and religion. In consequence, the Supreme Court valorizes a secular moral autonomy, but a moral autonomy which trades on a truncated inversion of a distinctly religious theonomy.

A postscript addresses the impact of these reflections on the constitutionality of student-initiated prayer in the public schools.

I. NON-SECTARIAN SEPARATION OF CHURCH AND STATE

"The religion of every man must be left to the conviction and confidence of every man. In matters of religion no man's right is to be abridged by the institution of civil society; religion is wholly exempt from its competence."11

When the founders of this nation drafted its constitution, they constructed a separation between civil and religious society. In doing so, they distinguished our nation quite dramatically from its heritage of British involvement with the Church of England. The governing aim of this separation, however, devolved not from an antagonism toward any particular religion or religion in general, but rather from a constitutional anxiety to protect both religious and civil society—not so much from each other, but from what invariably and inevitably happens to each when they entangle themselves. On the one hand, as James Madison observed:

Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the state.12

On the other hand, Thomas Jefferson reflected:

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either.

Aligned with religion, the State becomes sectarian; aligned with the government, the Church becomes coercive. In either event, freedom is sacrificed to oppression. The constitutional aim of the separation of Church and State, therefore, was to preserve freedom—both civil freedom from religious oppression and religious freedom from civil oppression. As Douglas Laycock rightly notes: “Religious liberty is first and foremost a guarantee of liberty. . . .” Consonant with the liberty aims of the balance of the First Amendment, the religion clauses proscribing the establishment of religion and prescribing the free exercise of religion are clauses that promote the liberty of all persons to fulfill their chosen duties to both Church and State without one infringing upon the other. The constitutional separation of

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14 “[I]n history that was recent to the American Founders, governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States.” Laycock, supra note 7, at 317.
15 “[E]ach person [must be] free to pursue the good life in the manner and season most agreeable to his or her conscience, which is the voice of God.” McConnell, supra note 13 at 1251-52.
16 Laycock, supra note 7, at 313. Laycock characterizes the twin liberty aims of the religion clauses in terms of the complementary difference between the establishment and free exercise clauses: “In general terms, the Free Exercise Clause prohibits government suppression of religion; the Establishment Clause forbids government support of religion.” Id. at 340.
17 See McConnell, supra note 13, at 1244.

Long before liberalism was conceived in theory or in practice, the division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of a civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas. These ideas came about not in rebellion against religion, but in defense of religion against the encroachment of the state.

Id.
Church and State, therefore, did not reflect cultural antagonism between law and religion. On the contrary, the reflections of our founders manifest rather a concomitance of civic virtue and religious piety, the latter generally taking precedence over the former.  

Although the United States of America was perhaps the first nation to constitute itself through a separation of Church and State, the idea is quite old. Indeed, Jesus himself remonstrated: "Render to Caesar the things that are Caesar's, and to God the things that are God's." As applied to governmental affairs, the idea was advanced in papal works of the fifth century, was developed as the "two kingdoms" theory of Protestant theology, and informed leading political thinkers of the eighteenth century, albeit not uncontrovertedly. The idea maintains its currency in the late twentieth century deliberations of the Supreme Court:

"The lesson of history that was and is the inspiration for the Establishment Clause [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that

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18 "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS § 1 (1785), quoted in McConnell, supra note 13, at 1246.


22 See McConnell, supra note 15, at 1248. John Locke, "esteem[ed] it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other." Id., (citing JOHN LOCKE, Essay on Toleration, in 6 THE WORKS OF JOHN LOCKE 1, 9 (1689)). McConnell also notes, however; "The two-kingsdoms view of competing authorities is at the heart of our First Amendment.," but noting that both Hobbes and Rousseau advocated instead a form of civil religion in order to quell religiously motivated disobedience to the state. Id., (citing THOMAS HOBBES, LEVIATHAN pt. III, ch. 42, at 567-71 (C.B. Macpherson ed., 1968) (1651); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 179-81 (Maurice Cranston trans., Penguin ed., 1968) (1762)).
freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.23

The separation of Church and State thus seeks to preserve freedom, both civil and religious.24 As conceived throughout the nineteenth century, this freedom was best expressed by James Madison: "The religion of every man must be left to the conviction and confidence of every man. In matters of religion no man's right is to be abridged by the institution of civil society; religion is wholly exempt from its competence."25 The separation of Church and State thus sought fundamentally to protect the religious liberty of each individual.

The ideological separation of civil and religious society, however, has remained problematic in its realization throughout the history of our nation, and nowhere more poignantly so than in the education of our children. Education is the sphere in which we seek to inculcate the values of our culture whereby the

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The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some. Only 'anguish, hardship and bitter strife' result 'when zealous religious groups struggle with one another to obtain the Government's stamp of approval.' Id. at 606–07 (Blackmun, J., concurring) (quoting Engel v. Vitale, 370 U.S. 421, 429 (1962)). On the other hand, "[I]n the same way, we have recognized that 'religion flourishes in greater purity, without than with the aid of Government.' " Id. at 608 (quoting Zorach v. Clauson, 343 U.S. 306, 309 (1952)). "To make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary,' the government must not align itself with any one of them." Id. (quoting Zorach, 343 U.S. at 313).

24 Arguing against those scholars who construe the religion clauses as manifesting an anti-religious stance on the part of the framers who sought only to protect civil freedoms from religious oppression due to an Enlightened rationalism, Douglas Laycock correctly observes that: "Of course the Enlightenment was an important intellectual influence in eighteenth century America . . . But the Great Awakening was an equally important intellectual influence." Laycock, supra note 7, at 344. The religion clauses thus protect both civil freedom (from religious oppression) and religious freedom (from civil oppression). "Religious liberty was the product of an alliance [between the Evangelicals and the Deists], and neither side in today's culture wars can claim it as exclusively their own." Id. at 347.

25 Madison, supra note 11.
culture may preserve itself as such. A core, "self-evident" value of our American culture is freedom—religious and civil.26 As Michael McConnell notes: "At the time of the American founding, churches were the primary institutions for the formation of democratic character and the transmission and affirmation of community values."27 This was not generally perceived as troublesome until the mid-nineteenth century advent of immigration by large numbers of European Catholics and Jews.28 Stephen Carter contends that the history of public education in our country exposes the underlying Protestantism endemic to our cultural ideologies.29

In the nineteenth century, "Roman Catholicism and, to a lesser extent, Judaism, were widely viewed as threats to America, which was self-consciously a Protestant country."30 This threat was the motivating factor in the Common School Movement to create "universal, free, public education", conceived initially by Horace Mann in the early nineteenth century, but not gaining cultural momentum until the post Civil War wave of European immigration.31 "[T]he Common School movement

26 As quintessentially expressed by Thomas Jefferson: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

27 McConnell, supra note 13, at 1253. "During the first century of the nation's history, such 'public' schools as existed were for all practical purposes Protestant parochial schools, supported by local communities." Stephen L. Carter, Religious Freedom as if Religion Matters: A Tribute to Justice Brennan, 87 CAL. L. REV. 1059, 1080 (1999).


29 Carter, supra note 9, at 1199. "[T]he immigration question has always been central to the question of state support for parochial schools: the project of denying public money to religious schools, and the larger project of discouraging private religious education, were born not of constitutional principle but of religious bigotry. The common school, which was sold to the public on expressly religious grounds, simply cannot be understood except as an effort to Protestantize the immigrant children."

Id. 30 Id. at 1197.

31 Carter, supra note 27, at 1079 (quoting HORACE MANN, THE IMPORTANCE OF UNIVERSAL, FREE, PUBLIC EDUCATION 151 n.5 (1998)).
believed that the states should provide common schools that would educate all children—rich and poor, Protestant and Catholic, native and immigrant—together, through a common ‘nonsectarian’ curriculum.” Although non-sectarian, the movement was nonetheless religious—in distinctly Protestant fashion. For nineteenth century America, “non-sectarian” education simply meant religiously informed moral education not peculiar to any particular Protestant sect, but inculcating a common patriotic Protestantism. The post Civil War Supreme Court followed this same cultural lead in 1878 when it effectively “allowed the country’s Protestant majority to use the power of government to impose its cultural values on a religious minority.” Against predictable Catholic and Jewish reaction, compulsory public education laws were passed in the late nineteenth century along with tandem legislation forbidding state funding of “private” (non-Protestant religious) schools, which had the effect of establishing and funding Protestant

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32 McConnell, supra note 13, at 1263.
33 Id. “[M]oral training, or the application of religious principles to the duties of life is the ‘inseparable accompaniment’ to education.” Id. (citing Horace Mann, Ninth Annual Report of the Secretary of the Board 157 (1846), quoted in CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL 165 (1987)). Bible reading (King James Version), prayer, and religious instruction remained as part of the educational curriculum. Id.
34 See McConnell, supra note 13, at 1263. “Mann explained that the schools should ‘draw the line between those views of religious truth and of Christian faith which are common to all, and may, therefore, with propriety be inculcated in school, and those which, being peculiar to individual sects, are therefore by law excluded.’” Id. (citing Horace Mann, Ninth Annual Report of the Secretary of the Board 157 (1846), quoted in CHARLES GLENN, THE MYTH OF THE COMMON SCHOOL 165 (1987)); see also CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860 76 (1983) (describing the “ideology” of the Common School movement as centering on “republicanism, Protestantism, and capitalism”); Carter, supra note 27, at 1079–80 (“The movement prevailed not under the banner of equality but under the banner of nationalism: The children of the immigrants would be ‘Americanized,’ supporters wrote, which included, very explicitly, an effort to Americanize—meaning, Protestantize—their religious beliefs.”).
35 Michal R. Belknap, God and the Warren Court: The Quest for “A Wholesome Neutrality”, 9 SETON HALL CONST. L.J. 401, 409 (1999) (citing Reynolds v. United States, 98 U.S. 145, 166 (1879)) (allowing the national prohibition of the Mormon practice of polygamy, even though part of their religion). Belknap further contends more generally that “[a]s it had been interpreted prior to 1953 . . . the First Amendment did little to prevent any sect, or combination of sects, which commanded a political majority, from utilizing governmental institutions to promote its values and even its dogma.” Id. During this time in our history, the political majority was dictated by Protestant voices.
“public” schools. 36

While the nineteenth century separation of Church and State, bearing a patriotic face, produced a covertly Protestant regime, it progressed into the next century under the distinctly non-religious, if not anti-religious, guise of “secular humanism.” Prompted by the religious antagonisms of an increasingly pluralistic society, 37 American culture became increasingly secular over the course of the twentieth century. 38 Under the pedagogical guidance of such reformers as John Dewey, 39 public

36 Carter, supra note 9, at 1197.
Compulsory education laws were designed in this era with the unapologetic goal of weaning the immigrant children away from their parents’ religions, to replace faith in a foreign God with faith in America—Protestantism masquerading as patriotism. Protestant clergy were quite explicit in their view that the schools were to be a tool for evangelization; support for public education became a virtual article of faith. Politicians and school officials agreed.

Id.; see also Carter, supra note 27, at 1081.
Supporters of compulsory education laws in the late nineteenth century were quite explicit about their goals. From politicians to schoolteachers (including the head of the fledgling National Education Association), they argued that it was the task of the schools to wean immigrant children from their foreign religions; and, under this banner, compulsory public education triumphed. At the same time, the nativists suddenly discovered—invented might be a better word—the principle that prohibits the use of state funds to support religious education, a mischievous idea that killed federal legislation that would have benefited the Catholic schools, while allowing local governments to continue to pay for their Protestant ‘public’ schools.

Id.

37 See Belknap, supra note 35, at 406 (“Religion was replacing nationality, language, and culture as America’s chief basis of social differentiation.”) (citing Richard Polenberg, One Nation Divisible: Class, Race, and Ethnicity in the United States since 1938 146–47 (1980) (citing Will Herberg, Protestant-Catholic-Jew (1955))).

38 See generally McConnell, supra note 13, at 1257 (addressing the question of how American culture underwent “this transformation, from a set of ideas rooted in Christian theology and congenial to religious institutions to an ideology hostile to or suspicious of religion, at least in its more common traditional forms”).

39 “John Dewey, for example, contended that the public schools have an ‘ethical responsibility’ to inculcate social values derived from scientific and democratic principles and to convert children away from the superstitions of their families.” Michael W. McConnell, “God is Dead and We Have Killed Him”: Freedom of Religion in the Post-modern Age, 1993 BYU L. REV. 163, 179 (1993) (quoting John Dewey, Moral Principles in Education 7–10 (1975)); see also Carter, supra note 9, at 1200 (“John Dewey, the twentieth century’s great apostle of educating for democracy, huffed that parents should not be allowed to
education followed suit. Constitutional law regarding religious education reacted accordingly.

II. SECULAR SEPARATION OF CHURCH AND STATE

The Constitution, as applied to matters religious, protects the “logic of secular liberty.”

During the first half of the twentieth century, the Supreme Court became embroiled in the antagonistic religious pluralism of the times, typically in regard to a religious majority using state power to suppress the activities of a religious minority (not uncommonly Jehovah’s Witnesses, but also Lutherans and their children with beliefs that they ‘happen to have found serviceable to themselves.”) (citing STEVEN C. ROCKEFELLER, JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM 250 (1991)); Laycock, supra note 7, at 328 (“John Dewey and the first Humanist Manifesto presented humanism as a new religion to supersede traditional religions thought to have become unconvincing.”) (citing JOHN DEWEY, A COMMON FAITH (1934) (proposing a religion based on faith in the accumulated values of human civilization)).


See Fowler v. Rhode Island, 345 U.S. 67 (1953) (holding unconstitutional a state prohibition on religious services in public parks); Saia v. New York, 334 U.S. 558 (1948) (holding unconstitutional a city prohibition on loudspeakers); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional a mandate that children in public schools salute the American flag); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding unconstitutional a state tax on Witness literature); Martin v. City of Struthers, 319 U.S. 141 (1943) (holding unconstitutional a city prohibition on door-to-door Witness solicitations); Cantwell v. Connecticut, 310 U.S. 296 (1940) (overturning the conviction of a Witness for breach of the peace in a Catholic neighborhood for disseminating anti-Catholic propaganda); Lovell v. City of Griffin, 303 U.S. 444 (1938) (holding unconstitutional an ordinance providing excessive discretion to city officials regarding religious solicitation); but see Poulos v. New Hampshire, 345 U.S. 395 (1953) (holding constitutional the application of a nondiscriminatory licensing requirement to persons conducting religious services in a public park); Kovacs v. Cooper, 336 U.S. 77 (1949) (permitting city restrictions on the volume of loudspeakers); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding the application of child labor laws against Witnesses who had their children distribute religious literature); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (affirming conviction of a Witness who had cursed a police officer, holding that his “fighting words” were not protected as free speech); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (holding that the Free Exercise Clause did not allow Witness students to refuse to salute the flag).

See Meyer v. Nebraska, 262 U.S. 390 (1923) (holding unconstitutional a state law forbidding primary instruction in a foreign language, thus overturning the conviction of a Lutheran parochial school teacher for conducting readings in German).
Catholics). As Michal Belknap notes, "[d]uring the quarter century after 1920, the Supreme Court had extended somewhat greater constitutional protection to disfavored religious minorities." The Court did not generally adjudicate these cases under the religion clauses, however, but chose rather to employ substantive due process, freedom of speech, or the fundamentality of parental rights. When it finally did address itself to the religion clauses, the Court assumed two distinct postures: "neutrality" under the establishment clause, and "accommodation" under the free exercise clause.

The first establishment clause decision came in 1947, when the Court erected a "wall of separation between church and state," which wall became "high and impregnable" a year later. This separation principle of governmental neutrality in religious matters was first applied to impugn the constitutionality of prayer in public school in 1962, when the Court stated that "the First Amendment was added to the Constitution to stand as a guarantee that neither the power

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43 See Pierce v. Soc'y of Sisters of Holy Names, 268 U.S. 510 (1925) (holding unconstitutional a state requirement that children attend public schools).

44 Belknap, supra note 35, at 409.


48 Although the Court does not quite so neatly distinguish its reasoning under the religion clauses in this systematic way, "neutrality" is most properly understood as an anti-establishment concept (as long as it does not unduly impinge upon the free exercise of religion), and "accommodation" is best understood as a free exercise concept (as long as it does not unduly impose an establishment of religion). For a compelling history of the Supreme Court's religion cases in the Warren Court era, see Belknap, supra note 35; Lee v. Weisman, 505 U.S. 577, 599–609 (1992) (Blackmun, J., concurring).

49 Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (allowing reimbursement for the costs of transporting children to private, even parochial schools, stating that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

50 McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (holding impermissible the practice of allowing religious teachers to enter the public schools during regular school hours to provide religious instruction to students who wanted such instruction).

51 Engel v. Vitale, 370 U.S. 421 (1962) (holding unconstitutional the New York school district's policy of requiring a prayer reading in class every day, despite the prayer being denominationally neutral and student observance being voluntary).
nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayers American people can say. . . .”52 A year later, the Court similarly invalidated bible-reading in the public schools,53 stating that neutrality thus stems from a recognition . . . that powerful sects or groups might bring about a fusion of governmental and religious functions . . . to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.54

The Court re-iterated its neutrality stance on religious activities in public school in 1968, submitting that the government “may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.”55 In 1971, the Court provided itself with a three pronged neutrality test,56 which, except for one instance,57 it used in each of the thirty one establishment clause cases decided over the next twenty years, dictating essentially that the government must be guided by secular aims, neither promote nor prohibit religion, and therefore not entangle itself with religion.58 In 1992, the Court addressed prayer at school graduation ceremonies,59 holding that although

52 Id. at 429.
53 Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (holding that because the schools’ opening exercises were government-sponsored religious ceremonies involving prayer and readings from the Bible, the primary effect was the advancement of religion and therefore violated the Establishment Clause).
54 Id. at 222.
55 Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (holding unconstitutional an Arkansas law preventing the teaching of evolution).
56 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (holding that for a statute to survive an Establishment Clause challenge: “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and] finally, the statute must not foster ‘an excessive government entanglement with religion’”) (citations omitted).
57 See Marsh v. Chambers, 463 U.S. 783 (1983) (holding that the practice of commencing legislative sessions with a prayer led by a chaplain appointed by the legislature does not violate the Establishment Clause because the Founding Fathers followed the same practice, even during the session when the Bill of Rights was enacted)
59 Id. at 599 (1992) (holding unconstitutional a Rhode Island school district’s policy of inviting members of the clergy to offer invocation/benediction prayers as part of the formal graduation ceremonies for middle and high
"[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution,"\textsuperscript{60} such prayers would unduly "persuade or compel a student to participate in a religious exercise"\textsuperscript{61} and thus violate "[the First Amendment's Religion Clauses [which dictate] that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."\textsuperscript{62} Most recently, the Court similarly frowned upon student-initiated prayer at school sporting events,\textsuperscript{63} averring that it "has the improper effect of coercing those present to participate in an act of religious worship."\textsuperscript{64} Under the establishment clause, the Court has thus consistently invalidated religious activity sponsored in, through, or by the public schools, holding finally that "the preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere."\textsuperscript{65}

Under the establishment clause, the Court thus structured a constitutional dichotomy between the public and the private, the former domain to be governed by secular interests and the latter permitted to be governed by religious interests, to prevent private religious interests from exerting public coercion upon the privacy of others.

Perhaps in response to acrimonious public outcry against the ostensibly anti-religious establishment clause decisions of the Court in the late forties,\textsuperscript{66} the first accommodationist decision under the free exercise clause was issued in 1952,\textsuperscript{67} stating that "[w]e are a religious people whose institutions presuppose a Supreme Being,"\textsuperscript{68} and further emphasizing that the Constitution

\begin{itemize}
  \item Id. at 598.
  \item Id. at 599.
  \item Id. at 589.
  \item Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315-16 (2000) (holding a Texas school district's policy of permitting student-led, student-initiated prayer prior to high school football games violated the establishment clause).
  \item Id. at 312.
  \item Id. at 310 (quoting Lee v. Weisman, 505 U.S. 577, 589 (1992).
  \item Belknap, supra note 35, at 412 (1999) (citing Melvin I. Urofsky, Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953 236-37 (1997)).
  \item Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a New York City plan that allowed students to leave school grounds during the school day to pursue religious activities at religious centers).
  \item Id. at 313.
\end{itemize}
requires neither "a callous indifference to religious groups [nor] . . . [for government to be hostile to religion]."

Absent intrusion upon a compelling state interest, the government must constitutionally accommodate religion and not ban its free exercise, either expressly or effectively. The subsequent history of the Court's accommodationist application of the free exercise clause, however, failed to manifest a favorable disposition toward religious groups seeking exemption from laws ranging from Sunday Blue Laws, prohibition of wearing of a yarmulke while in military uniform, requirement of obtaining a social security number for a child in contravention to religious conviction, U.S. Forest Service permits to timber lands and construct roadways in an area of national forest traditionally used for religious purposes, to state unemployment benefits construing as "misconduct" the religious use of peyote, the latter decision stating that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision," the free exercise clause has not been violated. Although the Congress sought to re-install a rigorous accommodationist stance with the Religious Freedom Restoration Act of 1993, the Court struck it down as unconstitutional four years later as exceeding Congress' enforcement powers under the

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69 Id. at 314.

70 See Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring and dissenting) ("[T]he Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means."); accord Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (stating that Government "would be 'prohibiting the free exercise [of religion]' if it sought to ban [acts or refusals to act] only when they are engaged in for religious reasons, or only because of the religious belief that they display.").


73 See Bowen, 476 U.S. at 708.


76 Id. at 878.

77 42 U.S.C. § 2000bb-1 (1994) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, [unless] . . . it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").
Fourteenth Amendment. As Michael McConnell observes, “free exercise cases were almost always losers: virtually any plausible public purpose was deemed sufficient to override the right of religious exercise.” This is hardly surprising inasmuch as under the Court’s establishment clause jurisprudence, compelling state interests are inevitably secular interests—interests seldom consonant with religious interests. Under the free exercise clause, the Court will thus accommodate private religious interests, but which private religious interests are almost invariably trumped by competing public secular interests.

On the one hand, then, the establishment clause principle of neutrality prevents governmental discrimination in favor of religion; on the other hand, the free exercise clause principle of accommodation prevents governmental discrimination against religion. The neutrality principle is driven by a constitutional anxiety against placing governmental authority behind any particular religious orthodoxy or religion in general; the accommodation principle is driven by a constitutional tolerance for any particular religious practice or religion in general as long as it does not intrude upon an important governmental interest.

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79 McConnell, supra note 39, at 176.
80 Stephen Carter rightly observes that “the immediate difficulty for the accommodationist is that it is the state that is doing the accommodating.” Carter, supra note 27, at 1070. Carter therefore identifies two fundamental problems with the Court’s jurisprudence of accommodation. “First, the accommodationist must define religion, which already narrows the universe of what counts.” Id.

Second, the accommodationist must indicate a limit beyond which no claim of religious freedom will be recognized—to resolve, for example, the problem of religiously mandated murder. Most accommodationists, along with the now-unconstitutional RFRA, place the limit at ‘compelling state interest;’ but even setting compellingness as the standard, and handling it correctly, the courts in the end will be centering their concern on the needs of the state, not the needs of the religionist.

Id. at 1071.
81 See Michael J. Perry, Freedom of Religion in the United States: Fin De Siecle Sketches, 75 IND. L.J. 295, 308 (2000) (“Whereas the free exercise norm forbids government to discriminate against religion, the nonestablishment norm forbids government to discriminate in favor of religion.”).
82 Id. “[G]overnment may not take any action based on the view that the preferred religion or religions are better along one or another dimension of value than one or more other religions or than no religion at all.” Id.
83 Id. at 298. “[T]he freedom of religious exercise] is . . . the freedom to practice—to ‘put into practice’—one’s religion (religious beliefs) to the extent
Although complementary in design, these two principles collide when religious neutrality itself comprises the governmental interest to be protected against the accommodation of religion. Invariably, this collision is in the name of secularity—the governing principle of the twentieth century separation of church and state.

The Court’s twin posturing of neutrality and accommodation under the establishment and free exercise clauses respectively presumes a common secular stance toward religion. The Constitution protects the free exercise of religion as a fundamental right, but such protection may not work on an establishment of religion. The twentieth century jurisprudence of the Supreme Court construes this to mean at best that religion is an entirely private affair that must not be allowed to impose itself upon the public domain,84 and at worst that religion is a suspect activity that must not be permitted to subvert the civic order.85 In either case, religion has effectively been marginalized doing so does not damage any interest government may legitimately protect, such as human life.” Id. at 298. Perry further cautions, however, that “[g]overnment may not discriminate against religion in the guise of protecting an interest it may legitimately protect,” which is to say that the protected governmental interest may not legitimately be used as a pretext for curtailing a disfavored religious exercise. Id. at 299. “[I]f government wants to ban conduct that is a religious practice for some who engage in it, the free exercise norm requires that government do so for some reason other than diminished respect and concern for, much less outright hostility to, the religious group for whom the conduct is a religious practice.” Id. at 301.

84 See, e.g., Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000) (“[T]he ‘preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.’”) (quoting Lee v. Weisman, 505 U.S. 577, 589 (1992)); id. at 592 (It is the State’s “duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.”); id. at 608–09 (Blackmun, J., concurring) (“Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to ‘flourish according to the zeal of its adherents and the appeal of its dogma.’”) (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)); Lee v. Weisman, 505 U.S. 577, 610–11 (1992) (Souter, J., concurring) (“Religious beliefs worthy of respect are the product of free and voluntary choice by the faithful.”) (quoting Wallace v. Jaffree, 472 U.S. 38, 53–54 (1985)); Lee, 505 U.S. at 645 (Scalia, J., dissenting) (“Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room.”); Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (Religion is “a private matter for the individual, the family, and the institutions of private choice.”).

85 See, e.g., Lee, 505 U.S. at 607 (Blackmun, J., concurring)

When the government arrogates to itself a role in religious affairs, it
by the Court so as not unduly to impinge upon an otherwise secular society, "ensuring that religious belief is irrelevant to every citizen's standing in the political community." The Constitution is thus construed fundamentally to protect the "logic of secular liberty"—a logic that would elide religious influences from the culture at large as something that should only be indulged privately.

This judicial stance toward religion is consistent, of course, with how the American culture has come to regard religion—at least, the American culture as defined by those who are professionally interested in regarding such matters. Michael McConnell provides a brief survey of the secularist attitude toward religion, ranging from indifference to hostility, exhibited by representatives of the legal, academic, and pedagogic

abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it "transforms rational debate into theological decree."

Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.

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

Lee, 505 U.S. at 627 (Souter, J., concurring)

County of Allegheny v. ACLU, 492 U.S. 573, 612 (1989) (Blackmun, J.) (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)); see McConnell, supra note 39, at 174 ("With such a change in perspective, freedom of religion came to be seen as less important than freedom from religion.").

See McConnell, supra note 39, at 165 (Under the Supreme Court's rulings, "[r]eligion in public is at best a breach of etiquette, at worst a violation of the law. Religion is privatized and marginalized. It has nothing to offer to the public sphere.").

"Today, it is not unusual to find law professors writing that religions 'undermine rather than mutually reinforce habits of mind necessary for democratic decision-making,' or that religion is 'fundamentally incompatible
culture, all of whom are disposed to remove religion from the political, legal and educational arena as an improper justification for social agenda. "More commonly, the principle of secular justification is expressed as an 'informal constraint' that 'religion and religious conviction are purely private matters that have no role or place in the nation's political process.'" 92 Even Michael Perry, an otherwise astute advocate of the continuing viability of religious insight, cautions against the use of religious argument absent independent secular justification.93


Bruce Ackerman argues that a goal of 'liberal education' is 'to provide the child with cultural materials' in her resistance to parental values so that she 'may forge the beginnings of an identity that deviates from parental norms' [so as to provide a] 'neutral' way to build liberal citizens who will think for themselves. McConnell, supra note 39, at 173–744, 749. (quoting BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 153 (1980).

90 "Influential voices in our culture have propagated the idea that democratic deliberation must be confined to secular arguments and justifications—arguments and justifications that do not depend on the existence of God or on divine commands, on theological considerations, including the interpretations of sacred texts, or on the pronouncements of religious authorities." McConnell, supra note 8, at 641 (citing Robert Audi, The Separation of Church and State and the Obligations of Citizenship, 18 PHIL. & PUB. AFF. 259, 278 (1989) (calling this the "principle of secular rationale")).

"Richard Rorty calls it 'bad taste to bring religion into discussions of public policy.'" McConnell, supra note 8, at 642 (quoting Richard Rorty, Religion as Conversation-Stopper, 3 COMMON KNOWLEDGE 1, 2 (1994)).

91 Michael W. McConnell notes:
Studies by the National Institute for Education, People for the American Way, Americans United for Separation Between Church and State, and the Association for Supervision and Curriculum Development have been surprisingly uniform in their finding that religion has been systematically excluded from the public school curriculum, including such subjects as history, social studies, and humanities, where it unquestionably plays a part. McConnell, supra note 39, at 180.

92 McConnell, supra note 8, at 641 (quoting William P. Marshall, The Other Side of Religion, 44 HASTINGS L.J. 843, 844 (1993)).

93 Michael J. Perry explains:
"In making a political choice about the morality of human conduct, legislators and other policymakers and even ordinary citizens should forgo reliance on a religious argument about human well-being—at least, they should be exceedingly wary about relying on such a
The separation maintained by the Supreme Court over the course of the twentieth century is thus a separation sustained by a distinctly secular concern to excise religion as a purely private matter from the public domain—especially the public school domain—lest religious influences unduly intrude upon the governmental interest in religious neutrality.94 Whereas the nineteenth century separation of Church and State sought fundamentally to protect religious liberty—the liberty of each individual to freely exercise religion uncoerced through state endorsement, the twentieth century separation of Church and State has sought fundamentally to protect secular liberty—the liberty of each individual to be free from religious influence.

Initially construed to guarantee a freedom for religion, the Constitution has become construed to guarantee a freedom from religion. Although profoundly distinct from the separation of Church and State in the nineteenth century, the twentieth century separation nonetheless manifests the same logic of privatizing religion and accordingly valorizing covertly a publically viable religious posture. In the nineteenth century, the privatization of religion expressed a non-sectarian Protestant religiosity, which religiosity therefore became constituted covertly as the accepted public form of religion, and was constitutionally protected as such. Over the course of the twentieth century, in the face of an increasingly antagonistic religious pluralism, a consequently exacerbated privatization of religion expressed a religiously neutral secularism, which secularism has become constituted covertly as the accepted public posture in matters religious, and remains constitutionally protected as such. Public education has thus become secular education—"in which children may assimilate a heritage... neither theistic nor atheistic, but simply civic and patriotic."95

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94 See McConnell, supra note 39, at 181 ("A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all.").

Religious freedom has become "freedom from conformity to religious dogma," and secularity is held forth as the only viable justificatory social posture—reflecting, in some strong sense, "the establishment of a religion of secularism" that "bristles with hostility to all things religious in public life."

At the end of the twentieth century, the central jurisprudential issue surrounding the religion clauses is whether the Court's posture of secular neutrality itself comprises a religious stance—reflecting, perhaps, the central religious issue confronting our culture. Michael McConnell insists that "[i]t is essential to recognize that secularism is not a neutral stance. It

More recently, twentieth century educational reformers have pursued the same 'Americanizing' project in a more secular hue, no less offensive to traditionalist Catholics, Protestants, and Jews but lacking the overt connection to liberal Protestantism. Now, the emphasis is more likely to be on egalitarianism, environmentalism, self-esteem, and other products of modern secular liberal thought. It is not evident, however, that education has become any less one-sided—any less sectarianism—than it used to be. The dominant ideology has changed, but the use of the schools to inculcate that dominant ideology is essentially the same.

McConnell, supra note 13, at 1264. Stephen L. Carter also stated:

Viewed in historical perspective, then, our war over epistemology continues to display all the characteristics that made it so bitter a century ago. The group in power believes that the purpose of schools is to persuade the children of the other side that the other side is wrong. The purpose is clothed in the gentle language of preparing young people to be adult citizens of the republic, but the clothing should not distract us from the argument underneath: good adults are, by definition, those who think the way the dominant group does, and this truth is the same whether the dominant group is nativist Protestants in the nineteenth century, progressive intellectuals at the beginning of the twentieth, anti-Communist populists in the middle of this century, or theorists of liberalism today. . . . [T]he effort to make sure that all children are educated in the same way is just as totalitarian now as it was in the nineteenth century when Protestant nativists were doing it.

Carter, supra note 9, at 1223–24.

99 "The most fundamental religious conflict in the United States today is between those who have abandoned theistic belief or accommodated their theism to contemporary secular values, and those who have not." Laycock, supra note 7, at 327.
is a partisan stance, no less 'sectarian,' in its way, than religion."\textsuperscript{100} To the question of what religion constitutionally means, Douglas Laycock responds that "[t]o avoid incoherence the answer must be that 'religion' is any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists."\textsuperscript{101} Stephen Carter observes that if "the inclusion of a prayer in the curriculum is an endorsement of religiosity, then the absence of one might well... serve as an endorsement of irreligiosity. That the state may do the second and not the first is, at best, a tortured reading of the First Amendment."\textsuperscript{102} Michael Perry contends in similar manner that "[t]here is no... relevant difference—no difference relevant... to legitimate public policy concerns... —between acts of conscience self—understood in... religious terms and... acts [of conscience] self—understood in [nonreligious] terms."\textsuperscript{103} Although Constitutional scholars thus evince widespread dissatisfaction with the freedom of religion jurisprudence of the Supreme Court (as having covertly valorized a quasi-religious secularism in the twentieth century in the same way it covertly valorized non-sectarian Protestantism in the nineteenth), it remains unclear how the Court can constitutionally right itself on matters religious.

III. THE LAW OF RELIGION

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."\textsuperscript{104} For over two centuries, our nation has sought constitutionally to negotiate a peaceful relationship between civic and religious obligation; for over fifty years, our highest court for the adjudication of constitutional disputes has repeatedly addressed itself to the perennial flashpoint of this relationship—the inculcation of civic and religious values in our children. These disputes have turned on whether the governmental regard

\textsuperscript{100} McConnell, supra note 13, at 1264.
\textsuperscript{101} Laycock, supra note 7, at 326.
\textsuperscript{102} Carter, supra note 9, at 1213.
\textsuperscript{103} Perry, supra note 81, at 315.
\textsuperscript{104} DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
for public religious activity unconstitutionally proscribes or prescribes religion. Although such disputes remain legally viable—and hotly contested—within the history of the Supreme Court's jurisprudence on the religion clauses, they fail to grapple with the more fundamental issue of the relationship between law and religion in a self-avowedly secular culture, and thus fail to address the underlying conceptions of law and religion that inform—if not obfuscate—these disputes. The Court may well be disinclined to speak on such matters—Justice Souter quipped that "I can hardly imagine a subject [comparative theology] less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible." Nonetheless, to remain self-evident, truths must be properly held, and to remain unalienable, endowments must be properly pursued.

The concept of the secular was originally a religious concept, referring to the transfer of ecclesiastical property to non-ecclesiastical use. Over the course of our nation's history, nearly all aspects of public life have undergone this transfer—become "secularized," such that the entire civic order no longer construes itself as informed religiously. The religious order has consequently devolved into an entirely private affair, the social utility of which—at best—is to provide personal justification for moral behavior. At the heart of the secular

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105 David Novak, *Law: Religious or Secular?*, 86 Va. L. Rev. 569, 571–74 (2000) (arguing that the constitutional issues concerning the practice of religious rituals in public do not adequately deal with the more fundamental question of the legitimization of secular polity, and querying whether secular legitimization would presuppose atheism on the one hand, or whether religious legitimization would require conversion on the other).


But today it seems that not only certain items of ecclesiastical property, but more or less all the important spheres of human life—learning, economy, politics, law, state, culture, education, medicine, social welfare—have been withdrawn from the influence of the Churches, of theology and religion, and placed under the direct responsibility and control of man, who has himself thus become "secular."

*Id.*

109 See DAVID TRACY, *BLESS'D RAGE FOR ORDER* 101 (1975) ("For the conventional wisdom in the secularist culture at large, it seems fair to observe, religion is widely considered a reasonably useful if somewhat primitive way of
order, however, and underlying its moral foundation, resides an assumption regarding the dignity intrinsic to human being as autonomously free from extrinsic authority, particularly religious authority.

The governing moral assumption of our nation's civic order is equality: that all human beings, by virtue only of being human, possess an inherent value that prevents their moral differentiation on the basis of any socially defining characteristic, whether religious, political, economic, racial, ethnic, sexual, etc. Such social differentiations are extrinsic to the essential nature of human beings. In essence, all human beings are equal by virtue of nothing—i.e., not by virtue of any some-thing in terms of which individuals may be socially differentiated. This equality is defined in our legal culture in terms of the universal

being moral."). Of course, much philosophical effort over the past several centuries of Western European intellectual history has been devoted to abstracting the moral value of religious traditions out of their shadowy religious caricature and into the light of reason. Within this intellectual tradition, however, religious belief has remained an acceptable, albeit obscure and therefore somewhat volatile moral scheme for those unsuited to such reflective enlightenment. Theology—academically disciplined religious thought—remains of value in this enlightened culture only if it ultimately serves the secular end of construing religious traditions accordingly. See Langdon Gilkey, Naming the Whirlwind: The Renewal of God-Language 250 (1969) (arguing that secularity "sets one unalterable requirement for any relevant theological language, namely that whatever religious faith or theological expression we advance must be related to this worldly life, evident within it, and creative for it.


111 Much ink has been spilled over the course of the past two centuries, particularly in American Jurisprudence, on trying rationally to determine how—in terms of what aspect of humanity—humans are equal. This effort, however, has been for naught, because it misunderstands the conceptual grammar of the Western notion of human equality. If there were anything in terms of which all humans were equal, then that very thing would become a means to differentiate one individual from another, providing a measure whereby one person may become "more equal" than another, hence not equal. In the West, humans are simply not equal by virtue of any socially defining characteristic, whether that be construed as having some religious, racial, ethnic, or political identity, possessing land, riches, beauty, or intelligence, or even sporting a penis. Humans are equal in terms of nothing. Our notion of equality demands this by conceptual necessity—but not by mere philosophical fiat; rather, this notion of equality devolves from a distinctive religious heritage.
possession of “rights” by all individuals—rights that articulate a singularly secular appreciation for the essential humanity universally intrinsic to all human beings and providing the programmatic basis for the claim of equality between them, regardless of social differentia, especially religious. This engenders an equally secular understanding of the human being: the abstract autonomous individual: rational, independent, self-sufficient, unencumbered and unconnected to others except by choice. Our nation’s laws function ultimately to protect and promote the rights of the abstract autonomous individual, and thus exhibit a heightened regard for privacy.


The essential being of human being is thus constituted as the pre-communal autonomy of the abstract individual. How this essential being is communally realized is a function of preserving its defining character of autonomy. The abstract individual becomes itself precisely by virtue of being itself, namely autonomous. The central and controlling issue for the abstract autonomous individual thus becomes: how to protect and promote one’s autonomy. For modernity, autonomy is preserved through two fundamental complementary rights: the right to privacy, and the right to self-development. The right to privacy dictates that the autonomy of the abstract individual is to be respected by the various communal involvements of the individual. Privacy generates a host of protective rights. The right to self-development dictates that the abstract individual be allowed autonomously to pursue whatever mode of self-realization the individual should choose. Self-development generates a host of promotive rights. The complementary rights of privacy/self-development programmatically inform all communal involvements of the abstract autonomous individual: political, economic, legal, religious, and even philosophical.

Id. (citations omitted); see also MARY ANN GLENDON, RIGHTS TALK 48 (1991).

114 KUNG, supra note 107, at 532. According to Kung, a cultural system constitutionally based on tolerance and freedom of conscious, thought, and religion is “built on the imperishable dignity and freedom of man as man and seeks to guarantee the human rights or democratic liberties involved in being a man.” Id.

These provisions however should not be ends in themselves, but only the institutional conditions for each man to claim his wholly personal freedom, free from compulsion by state or party, to aim at a suitable goal, at a life worth living, at values, norms and ideals, to pursue his
Historically, the justification for proclaiming a dignity equally inherent in every human being has been distinctly religious in nature. The theological claim of equality rests upon the proclaimed sanctity of all human life. Sanctity is a function of divine sanction. The contemporary jurisprudence of equality, however, assiduously avoids religious justifications. “We almost all accept... that human life in all its forms is sacred... For some of us, this is a matter of religious faith; for others, of secular but deep philosophical belief.” Several reasons contribute to the secular disaffection for a theological jurisprudence.

In the first place, various religions address themselves quite differently (if at all) to the value of being human. Because no religious criteria exist to adjudicate these differences, secular distress arises over the perceived religious pluralism. Each religion claims the categorical truth of its claims, as well the sole means for the recognition of their truth. Such truth claims are therefore religiously particular. The moral principle of equality is construed as universal. Because the universal may not properly be based upon the particular, universal regard for the dignity equally inherent in every individual human being can scarcely be justified by appeal to any particular religious perspective. Moreover, religion is not only understood as self-realization and complete humanization.

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117 Ronald Dworkin, Life is Sacred. That’s the Easy Part, N.Y. Times, May 16, 1993, at 36; see also Perry, supra note 92, at 22 (quoting James Griffin, Well-Being: Its Meaning, Measurement, and Moral Importance 239 (1986) (“[T]he proposition that every human being is sacred is axiomatic for so many secular moralities that many secular moral philosophers have come to speak of ‘the moral point of view’ as that view according to which ‘every person [has] some sort of equal status.’”).
118 See generally Ritter, supra note 110 (discussing the conceptual dissonance of the absolute and universal dignity attributed to human being under the Western notion of human rights with African, Islamic, Hindu, Confucian, Buddhist, Jewish, and Christian religiosity).

Political liberals are not essentially against religious plurality. Indeed, the very reason that some of them try to find a political
unhelpful for the determination of universal standards, it is generally perceived as historically antagonistic to their implementation. Religious conflict has perhaps contributed more to violation of human rights than to their universalization. Religion "is clearly seen by most analysts to be a part of the problem rather than the solution."120 Finally, the justification for civic morality has not historically been theologically disposed, but has rather been programmatically non-religious.121

The jurisprudence of civic morality would base itself not upon the extrinsically revealed truth of the divine, but upon the intrinsically known truth of the human.122 "Modern Enlightenment intellectuals, in their attempt to secularize the religious culture, were confident about their picture of a liberal society because they believed that this picture corresponds, at least better than the religious one does, to intrinsic human rationality that transcends the diverse religious doctrines is to assure that we have such a plurality. However, when a religious belief conflicts with political rationality, they insist that the former must be regarded as unreasonable, irrational, and mad. For political rationality is impersonal, impartial, and universal, while all religious beliefs are personal, partial, and particular.


Conventional accounts of law, human rights, and democracy afford little space to religious ideas and institutions. Laws are generally viewed as rules and statutes promulgated by the sovereign, not as temporal elaborations of a divine or natural law. Human rights norms are generally viewed as secular claims to a good life, not as corollaries to divine duties for right living. Political rulers are generally viewed as representatives of public opinion and vindicators of human rights, not as vice-regents of God or champions of divine justice. To be sure, most writers today would agree that religious believers must be guaranteed liberty of conscience and free exercise of religion and that religious institutions must be guaranteed collective worship and corporate organization. But religion, according to conventional accounts, is fundamentally a private matter with little constructive role to play in the drama of law, human rights, and democracy.

Id.; see also GAETE, supra note 116, at 106.

122 "Human rights are not given to man by God..." Jack Donnelly, Human Rights, Individual Rights and Collective Rights, in HUMAN RIGHTS IN A PLURALISTIC WORLD 39, 42 (Jan Berting et al. eds., 1990).
dignity (or human rights or human nature)." Toward establishing justification for its civic morality, then, a secular jurisprudence eschews any particular religious revelation of being human in favor of its intrinsic universal rationality.

Jurisprudence has consequently employed one of two strategies to establish a rational basis for the egalitarian regard properly granted all individuals: a "definitional strategy" and a "self-regarding strategy." The definitional strategy dictates that having equal regard for others is what morality means. The definitional strategy is itself definitionally unable to provide a reason for being moral beyond a mere categorical imperative. What is categorically imperative for one, however, is arbitrarily dogmatic to another. It amounts to a rational justification for neither. The self-regarding strategy provides that one's self-interest is best advanced through advancing the interests of others. Having regard for others is thus motivated by regard for self. Accord for self is prudently achieved by exercising regard for others. At best, the self-regarding strategy generates a

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123 Huang, supra note 119, at 501.
124 See Willem F. Heinemeijer, Islam and the Ideals of the Enlightenment, in HUMAN RIGHTS IN A PLURALISTIC WORLD 145, 146 (Jan Berting et al. eds., 1990). "Out of respect for the truth the humanist asks for the credentials of the revealed Truth." Id.
126 Id. at 1068-69.
127 Dworkin contends, for example, that equality is a fundamental postulate of political morality. Ronald Dworkin, TAKING RIGHTS SERIOUSLY 272 (Harvard Univ. Press 1978). As such, it requires no justification, but is rather self-justifying. The recognition of human rights therefore derives its justification from the primordial demand that "government must not only treat people with concern and respect, but with equal concern and respect." Id. Speaking in the imperative voice, the demand requires no justification beyond itself. It is axiomatic: a principle that is justifying, not justified. "The ... argument for political rights [is] the derivation of particular rights from the abstract right to concern and respect taken to be fundamental and axiomatic." Id. at xv. Equality is therefore simply not subject to justification.
128 Appeal to the self-evidency of a moral principle "is always a signal that something has gone badly wrong with an argument." Alasdair MacIntyre, AFTER VIRTUE 67 (2d ed. 1981). Defining the principle of equality as axiomatic merely sidesteps the problem of its rational justification. Through semantic sleight of hand, the problem of justification is made to disappear by reflecting it in a self-justifying mirror.
contractual ethic of mutual regard whereby one promises to regard another if the other similarly promises, but can marshal no reasons against breach beyond that of expediency. At worst, the self-regarding strategy generates merely an ethic of non-aggression, which ethic need have regard only for those others whose aggression is cause for concern. In neither case does the self-regarding strategy provide justification for a universal recognition of a dignity equally inherent in all human beings. It provides justification neither for the universality of equal regard for others, nor for sustaining this regard when it becomes inexpedient to do so.

On this disconcerting inability to provide rational justification for fundamental moral convictions, Friedrich Nietzsche remarked: “Naivete: as if morality could survive when the God who sanctions it is missing! The ‘beyond’ absolutely necessary if faith in morality is to be maintained.”

Perhaps more poignantly than any other thinker of the Western world to date, Nietzsche realized the futility of basing nonreligious moral claims on anything other than the will to do so. Absent God, moral claims are a function of will, not reason. For Nietzsche, rationally to justify moral claims, in particular the idea of equality, is to avoid taking responsibility for them. The principle of equality, the notion of a dignity equally inherent in each human being, is not an idea that corresponds to any kind of

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130 Nietzsche himself had little patience for the idea of equality. He perceived it as morally debilitating, the product of the mass egoism of the weak:

> [T]he concept of the “equal value of men before God” is extraordinarily harmful; one forbade actions and attitudes that were in themselves among the prerogatives of the strongly constituted—as if they were in themselves unworthy of men. One brought the entire tendency of the strong into disrepute when one erected the protective measures of the weakest (those who were weakest also when confronting themselves) as a norm of value . . . . If one reflects with some consistency, and moreover with a deepened insight into what a “great man” is, no doubt remains that the church sends all “great men” to hell—it fights against all “greatness of man.” . . . When lesser men begin to doubt whether higher men exist, then the danger is great! And one ends by discovering that there is virtue also among the lowly and subjugated, the poor in spirit, and that before God men are equal—which has so far been the non plus ultra of nonsense on earth.

Id. at 466–68.
moral reality. There simply is no reality which morality is therefore obliged to recognize—no truth to which morality must rationally conform.

Presupposition of this hypothesis: that there is no truth, that there is no absolute nature of things nor a “thing-in-itself.” This, too, is merely nihilism—even the most extreme nihilism. It places the value of things precisely in the lack of any reality corresponding to these values and in their being merely a symptom of strength on the part of the value-positers, a simplification for the sake of life.131

For Nietzsche, the truth of reality is precisely false: a fiction imposed upon existence for purposes other than truthful.

This is the greatest error that has ever been committed, the essential fatality of error on earth: one believed one possessed a criterion of reality in the forms of reason—while in fact one possessed them in order to become master of reality, in order to misunderstand reality in a shrewd manner.132

“Truth” is therefore not something there, that might be found or discovered, but something that must be created and that gives a name to a process, or rather to a will to overcome that has in itself no end—introducing truth, as a processus in infinitum, an active determining—not a becoming conscious of something that is in itself firm and determined. It is a word for the “will to power.”133

Without God, morality cannot viably be based on any kind of moral truth provided by rationality. Morality is not a function of reason. To believe so is profoundly to misconstrue what morality is. Rational justification does not, and cannot supplant God—neither philosophically nor historically.134

Lacking divine

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131 Id. at 14.
132 Id. at 315.
133 Id. at 298.

[T]here is discontent verging on despair whenever some theorist tries to develop a system in which ‘found’ ethical or legal propositions are to be treated as binding, but for which there is no supernatural grounding. God’s will is binding because it is His will that it be. Under what other circumstances can the unexamined will of anyone else withstand the cosmic ‘says who’ and come out similarly dispositive? There are no such circumstances. We are never going to get anywhere (assuming for the moment that there is somewhere to get) in ethical or legal theory unless we finally face the fact that, in
authorization, the final authority for the principle of equality can therefore rest upon nothing other than its human authorization. "The result of that realization is what might be called an exhilarated vertigo, a simultaneous combination of an exultant 'We're free of God' and a despairing 'Oh God, we're free.'" If justified by human words only, the moral proclamation of equality and inalienable rights speaks only with the authority of how loudly it is shouted. The central moral conviction of our secularly civic society thus lacks any moral force beyond its mere social imposition.

Noting this conceptual irony resident at the heart of secularity, theologian Hans Kung remarked that:

[An ideologically neutral constitutional state] cannot justify in terms of a philosophy or religion the very thing which it must unconditionally assume: man's dignity and freedom. Does it not therefore leave man completely without bearings? Is there not a danger of an arbitrary pluralism which easily ends in nihilism and disorder, where just about everything is permitted?136

In actuality, it has lead to an arbitrary pluralism in which just about everything is permitted privately, but where just about nothing religious is permitted publically. Stephen Carter, citing the American theologian, David Tracy, rightly contends this is due to the ostensibly subversive character of religion, whose transcendent moral authority may disoblige the religious adherent from the social imposition of civic authority.137 "But

the Psalmist's words, there is no one like unto the Lord.

Id. at 1233.

136 KUNG, supra note 107, at 532.

137 Carter, supra note 27, at 1060.

Postmodern theologians see religion as subversive to the culture it inhabits. As long as religion avoids the temptation to join its authority to the authority of the state, it can indeed play a subversive role, because it focuses the attention of the believer on a source of moral understanding that transcends both the authority of positive law and the authority of human moral systems. Quite simply, religion in its subversive mode provides the believer with a transcendent reason to question the power of the state. That is the reason that the state will always try to domesticate religion: to avoid being subverted.

Id. (referring to DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 1075 (1987)).
Peter and the apostles answered, 'we must obey God rather than men.' Secular neutrality would thus domesticate religion in order to neuter its transcendent moral force. Hence the "logic of secular liberty" that has governed the twentieth century jurisprudence of the Supreme Court on matters religious—a logic anxious to privatize religion so as to excise its potentially coercive if not subversive influence from the public order. The ultimate irony of this logic is that it devolves, and devolves only, from a uniquely religious understanding of liberty.

IV. THE RELIGION OF LAW

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Although the text of the Constitution does not reference God, the presumptive moral tenet underlying its aspiration to...

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139 See McConnell, supra note 39, at 173. "A liberalism based on individualism, independence, and rationalism thus has a tendency to see traditional religion as authoritarian, irrational, and divisive—as a potential threat to our democratic institutions rather than as one of their sturdiest pillars, as was typically thought at the Founding." Id.
140 U.S. CONST. preamble.

While most of the Founding Fathers were men of profound religious faith, they expressly declined to include the name of God in the Constitution. They sought to create a secular, or neutral state, one which excluded civil authority from religious affairs. Indeed, the ancient requirement of bringing government under divine authority was perspicuously absent in the Constitution, but this was no oversight; it was the Founders' clear intention after lengthy deliberations on the subject. Their clear aim was to make the federal government incompetent and without authority in religious matters. This in no way indicates, of course, that the document was hostile toward religion. . . . The framers chose to omit the name of God from the Constitution because in their minds, government derived not from God but from the people. Because the nation was not founded on religious truth, it would act to protect the right of all citizens to believe and act upon divergent religious views, or even to live without any religious beliefs.
justice and liberty for all—albeit inconsistently for some (most notably women and persons "other than free")—devolves from its Judeo-Christian heritage. This religious heritage continues to provide for the central moral conviction of our civic society despite its secularization.\textsuperscript{142}

The primordially controlling religious concept for the Judeo-Christian understanding of human being is its creation in the image of God: "So God created man in his own image, in the image of God he created him; male and female he created them."\textsuperscript{143} By virtue of reflecting the divine image, absolute worth is accorded human being.\textsuperscript{144} Judaism ascribes this absolute value of humanity to every person.\textsuperscript{145} Within Judaism, however, the absolute value of human being is not intrinsic to the being of human being, but is divinely granted. Such divine regard may be withheld or withdrawn depending upon fulfillment of God's will through obedience to the revealed Law of God (Torah).\textsuperscript{146} Although absolute, Jewish moral regard for human beings is not

\textsuperscript{142} See Ritter, \textit{supra} note 110, at 84--88.

\textsuperscript{143} \textit{Genesis} 1:27 (New Oxford Annotated Bible).

\textsuperscript{144} "For at the core of the biblical system is the perception that the person is of absolute and inviolable worth: created in the divine image." Michael Fishbane, \textit{The Image of the Human and the Rights of the Individual in Jewish Tradition}, in \textit{HUMAN RIGHTS AND THE WORLD'S RELIGIONS} 17, 18 (Leroy S. Rouner ed., 1988). Fishbane notes that the biblical attribution of absolute worth to human being distinguished early Judaism from other Near Eastern religions. Among the Babylonians, Assyrians, and Hittites, human life could be measured economically in terms of the value of property or possessions: "[L]ife and property are commensurable values, used interchangeably in this legal system, there being presupposed an exchange rate between persons and things." \textit{Id.} The Bible allows no such economic valuation of human being, and therefore permits no legal substitution of property for human life: "Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." \textit{Genesis} 9:6 (New Oxford Annotated Bible).

\textsuperscript{145} See Fishbane, \textit{supra} note 144, at 17.

The fundamental presupposition of the rights of the person in Judaism is a belief in the absolute and uncompromisable worth of human life. This belief is grounded in the unique value of the individual in the divine scheme of creation and is variously articulated in both biblical literature and rabbinic tradition.

\textit{Id.}

\textsuperscript{146} Judaism has generally confined its absolute regard for human life to those of the Jewish faith who, moreover, properly fulfill their religious duties as such. \textit{Id.} at 25.
universal.147

Within its Christian heritage, however, divine regard for human being is fulfilled by the Son of God in the person of Jesus Christ. Through Christ, humanity is freed from sin, redeemed before God, and exists in a state of grace.148 Divine regard is therefore realized not through obedience (to the law), but through faith (in Christ): "If you continue in my word, you are truly my disciples, and you will know the truth, and the truth will make you free."149 Christian freedom from Jewish law is therefore "granted by God and received in faith."150 The Christian is free from the burden of the law by virtue of living in Grace. "For the law was given through Moses; grace and truth came through Jesus Christ."151 This is the Christian faith.152 Karl Barth

147 Not only has Jewish regard for the absolute value of human life been historically confined to those of the Jewish faith who fulfill their religious duties as such, but certain categories of persons were not historically accorded full human status to begin with (e.g., idiots, minors, women, androgenes, etc.). Id. at 26.

148 As the incarnation of divinity in humanity, the person of Jesus Christ rectified the relationship between God and humankind—a rectification achieved not by human fulfillment of the law, but by the Grace of God. Romans 8:3–4 (New Oxford Annotated Bible).

For the law of the Spirit of life in Christ Jesus has set me free from the law of sin and death. For God has done what the law, weakened by the flesh, could not do: sending his own Son in the likeness of sinful flesh and for sin, he condemned sin in the flesh, in order that the just requirement of the law might be fulfilled in us, who walk not according to the flesh but according to the Spirit.

Id. at 8:2-5. Rectification between God and humankind is thus entirely God's doing. Through Christ, therefore, humankind is freed from the logic (or word) of law, and lives in the logic (or word) of Spirit whereby divine Grace may be enjoyed fully and eternally: "For the wages of sin is death, but the free gift of God is eternal life in Christ Jesus our Lord." Romans 6:23 (New Oxford Annotated Bible). In essence, the law of God is fulfilled in the person of Jesus Christ, which fulfillment is accorded by the Grace of God to all of humankind.

149 John 8:31–32 (New Oxford Annotated Bible). The freedom referred to here is freedom from the burden of having to fulfill the divine will through obedience to God's law: "For freedom, Christ has set us free; stand fast therefore, and do not submit again to the yoke of slavery." Galations 5:1 (New Oxford Annotated Bible).


151 John 1:17 (New Oxford Annotated Bible).

152 See generally Matthew A. Ritter, God and Truth: A Conceptual Analysis of Religious Commitment; Subversion of the Subject (1989) (discussing the
properly construes the Christian faith accordingly:

To believe means to believe in Jesus Christ. But this means to keep wholly and utterly to the fact that our temporal existence receives and has and again receives its truth, not from itself, but exclusively from its relationship to what Jesus Christ is and does as our Advocate and Mediator in God himself. In faith we abandon whatever we might otherwise regard as our standing, namely, our standing upon ourselves for the real standing in which we no longer stand on ourselves but on the ground of the truth of God and therefore on the ground of the reconciliation which has taken place in Jesus Christ and is confirmed by him to all eternity.153

The Christian understanding of being human is entirely a function of the extraordinary value divinely granted to human


153 II KARL BARTH, CHURCH DOGMATICS, THE DOCTRINE OF GOD Pt.1, at 159 (T. H. L. Parker et al. trans., G. W. Bromiley & T. F. Torrance eds., 1957). The truth of Jesus Christ is the truth of the reconciliation between the divine and the human. For the Christian faith, Jesus Christ reveals this truth by virtue of embodying this reconciliation. The truth that we humans are constitutionally unable to realize is realized in the constitution of Jesus Christ. See Ritter, supra note 152, at 158. "Jesus Christ is the atonement. But that means that He is the maintaining and accomplishing and fulfilling of the divine covenant as executed by God Himself." IV KARL BARTH, CHURCH DOGMATICS, THE DOCTRINE OF GOD Pt. 4, at 34–35 (G. W. Bromiley trans., G. W. Bromiley & T. F. Torrance eds., 1956). The person of Jesus Christ thus renders/reveals full accord between divinity and humanity, and accordingly between God and all persons. Although this accord is realized by Christ alone, it is revealed to humanity, the only proper response to which is faith: "Believers 'are' the elect... so far as they bear witness to the truth, that is, to the elect man, Jesus Christ, and manifest and reproduce and reflect the life of this one Elect." II KARL BARTH, CHURCH DOGMATICS, THE DOCTRINE OF GOD Pt.2, at 347 (G. W. Bromiley et al. trans., G. W. Bromiley & T. F. Torrance eds., 1957). Constitutionally unable to realize the truth of the divine-human accord itself, truth is realized for humanity by Jesus Christ. Humanity thus receives truth vicariously. Only through faith in its revelation may this truth be acknowledged and received. "[T]he truth of man's being... can consist in nothing other than in man's response with a corresponding faithfulness to the way and work of God [in Jesus Christ], to God's faithfulness." II KARL BARTH, CHURCH DOGMATICS, THE DOCTRINE OF GOD Pt.1, at 207 (T. H. L. Parker et al. trans., G. W. Bromiley & T. F. Torrance eds., 1957). Reconciliation between divinity and humanity is therefore accomplished by God, through the person of Jesus Christ, but for the salvific benefit of all human kind.
being through the person of Jesus Christ. This value is not only absolute; it is *fait accompli*. Through Christ, all persons exist in the state of Grace by virtue of being human. Christ rectified divine regard for human being. All humans participate in this rectification. Divine regard for the individual is thus utterly independent of anything the individual is or does. Grace is prevenient; achieved not by human, but by divine effort in the person of Christ. The absolute value of a person therefore pre-exists any social differentia, and is consequently universal. All persons are accordingly equal by virtue of no-thing—not by virtue of anything a person is or does. Pre-established through Christ, divine regard for humanity is absolute, universal, and egalitarian.

Universal egalitarian regard for the absolute value of the individual devolves from this radical freedom from the law provided by Grace in the person of Jesus Christ. The Christian community of faith proclaims this freedom:

But now the righteousness of God has been manifested apart from the law, although the law and the prophets bear witness to it, the righteousness of God through faith in Jesus Christ for all who believe. For there is no distinction; since all have sinned and fall short of the glory of God, they are justified by his grace as a gift, through the redemption which is in Jesus Christ, whom God put forward as an expiation by his blood, to be received in faith.  

The Christian community of faith is itself the communal incarnation of Christ as proclaiming redemption through Christ. As the communal incarnation of Christ, Christian ethics is accordingly governed by the single moral dictate of Christ as the Word of God: “A new commandment I give to you that you love one another; even as I have loved you, that you also love one another.” The law—whereby the human is reconciled with the divine—becomes through Christ the singular commandment to be toward all others as Christ was: to love—unconditionally, without regard to anything a person is or

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155 “For where two or three are gathered in my name, there I am in the midst of them.” *Matthew* 18:20 (New Oxford Annotated Bible).
Christian love is granted through divine grace—a function not of human achievement; Christian love is received in gratitude—as profoundly undeserved.

Christian freedom from the law, however, does not mean unlawfulness. On the contrary, Christian ethics merely deprives the law of its soteriological significance—i.e., one may not acquire redemption before God through acting lawfully. Religious freedom from the law permits moral freedom for the law. Obedience to the law serves not religiously to rectify oneself with God, but morally to manifest one’s rectitude with God. Having been rectified with God through Christ, one is free to act accordingly. Acting lawfully thus remains a primordially religious activity; it is performed, however, not out of religiously self-interested motives to right oneself with God, but out of moral interest to act rightly in accordance with the divine will as revealed through the law. Hence the biblical remonstration against religious hypocrisy: “Woe to you... hypocrites! For you tithe mint and dill and cummin, and have neglected the weightier matters of the law, justice and mercy and faith...”

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157 See Matthew 22: 35–40 (New Oxford Annotated Bible) (“And one of [the Pharisees], a lawyer, asked him [Jesus] a question, to test him [on Jewish law]. Teacher, which is the greatest commandment in the law?” And he said to him, “You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it, You shall love your neighbor as yourself. On these two commandments depend all the law and the prophets.”). When asked to clarify who one’s neighbor is, Jesus responds with the Good Samaritan parable, making it clear that neighbor encompasses all others, no matter how detestable. Luke 10:29–37 (New Oxford Annotated Bible).

158 “Did not your father eat and drink and do justice and righteousness? Then it was well with him. He judged the cause of the poor and needy; then it was well. Is not this to know me?” says the Lord.” Jeremiah 22: 15–16 (New Oxford Annotated Bible).

159 “Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me...’ “Truly I say to you, as you did it not to one of the least of these, you did it not to me.” Matthew 25: 40, 45 (New Oxford Annotated Bible).

160 Matthew 23:23 (New Oxford Annotated Bible). The Jewish prophetic books are also replete with the same disaffection for self-serving religious ceremony over moral rectitude with the divine will. Isaiah 1:10–17 (New Oxford Annotated Bible) (“Hear the word of the Lord, ... ‘What to me is the multitude of your sacrifices?’ says the Lord; ... ‘Wash yourselves; make yourselves clean; remove the evil of your doings from before my eyes; cease to do evil, learn to do
The Judeo-Christian religious heritage thus dictates an ethics of unconditional love for all persons as practiced through just and merciful observance of the law. Judeo-Christian regard for persons is requisitely absolute, universal, and egalitarian. It is absolute by virtue of humanity's creation in the image of God—by according divine worth to humankind; universal by virtue of the reconciliation between God and humanity realized by the person of Jesus Christ—vicariously fulfilling the law for all persons; egalitarian by virtue of its just and lawful application to all individuals—esteeming all individuals equally on the basis of nothing a person otherwise is or does. Absolute, universal, and egalitarian, Judeo-Christian regard for others—for all others—is therefore a function of nothing—of no social differentia whatsoever. At its root, the Judeo-Christian regard for persons is not a human regard at all, but is a function rather of the divine regard for humankind. In the Judeo-Christian heritage, this divine regard for humanity is graciously absolute, universal, and egalitarian.

The religious heritage of the Judeo-Christian tradition therefore accords absolute, universal, and egalitarian value to all individuals—simply and only by virtue of their being human. The Judeo-Christian tradition accordingly provides the governing religious ethic whereby inalienable rights are uniquely construed to inhere absolutely, universally, and equally in all persons on the basis of the inherent dignity of every individual human being simply by virtue of being human and not by virtue of any other defining social characteristic whatsoever. As our Declaration of Independence succinctly iterates, unalienable rights are endowed rights—endowed by the Creator.

Following the philosophical lead of Enlightenment thinkers—most notably Immanuel Kant,161 and continuing through theological efforts in the twentieth century—most

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notably by Paul Tillich, \textsuperscript{162} secularism has persistently sought to abstract moral principles from their religious trappings and therefore provide them a properly rational basis, hence non-contingent upon adherence to any particular sectarian dogma.\textsuperscript{163} Contemporary jurisprudence accordingly proclaims as its fundamental moral principle an absolute, universal, and egalitarian regard for the value of each human being, but which regard refrains from reliance upon religious belief. In its enthusiasm to elide religion from civic morality, secular esteem for the inherent value of human being turns not on divine regard for the human, but on human self-regard. Such human self-regard consequently truncates the value of human being into its abstract autonomous individuality: rational, independent, self-sufficient, unencumbered and unconnected to others except by choice. For secularism, the value of being human thus becomes intrinsic to its humanity—therefore not a function of its endowment by divinity.

Absent its religious foundation, however, this secular egalitarian regard for all persons profoundly re-construes the worth of the individual, and consequently yields an ethic that inverts the Judeo-Christian regard for others into the protection of privacy. The Judeo-Christian tradition construes the absolute worth of the individual as a function of divine regard. The truncation of this divine regard into human self-regard consequently transforms an ethics driven by unconditional love of others into an ethics driven by unconditional self-interest. When worth is granted, it is received graciously; when owned, it is demanded indignantly. In its secular anxiety to abstract the human worth of the individual from all differentia, particularly religious, civic morality collapses a uniquely Judeo-Christian understanding of the absolute, universal and equal value of all persons into the being of the individual. Secular morality is thus a truncated inversion of religious morality.\textsuperscript{164} It transfers an

\textsuperscript{162} See generally, PAUL TILLICH, SYSTEMATIC THEOLOGY (1951).
\textsuperscript{163} See, e.g., Rendtorff, supra note 150, at 43 (discussing of the Christian content to modern “human rights”: “Secularization as rationalization means to express the Christian concept of freedom and responsibility in nontheological language, thus giving human freedom a universal form.”).
\textsuperscript{164} See KUNG, supra note 107, at 27.

The different spheres of life were seen less and less from the standpoint of a higher world. They came to be understood in themselves and explained in terms
other-regarding religious ethic into a self-regarding secular ethic. Where the religious ethic of Judeo-Christianity pre-occupies itself with conforming to the divine will, the secular ethic of American culture pre-occupies itself with protecting and promoting the private will of the abstract autonomous individual.

This secularly inverted truncation of religious morality consequently relegates religion to the marginal realm of adherence to religious dogma and ritual. By virtue of secularizing the moral domain of religion, religion itself becomes secularly construed as the residual system of beliefs and practices explicitly attendant to religion. As our Supreme Court has most recently and repeatedly averred: "the 'preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.'" Secularism thus marginalizes religion, banishing it to the purely private sphere, from which private sphere it exerts no moral claim upon the public sphere and thus poses little subversive harm to the civic order.

of their own immanent laws. Man's decisions and plans came to be based more and more on these intrinsic laws and not on the supposed will of supramundane powers. Id.

"Pray then like this: Our father who art in heaven, Hallowed be thy name. Thy kingdom come. Thy will be done, On earth as it is in heaven. Give us this day our daily bread; And forgive us our debts, As we also have forgiven our debtors; And lead us not into temptation, But deliver us from evil." Matthew 6:9–13 (New Oxford Annotated Bible).

"The lessons of the First Amendment are as urgent in the modern world as in the 18th Century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State[s] duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." Lee v. Weisman, 505 U.S. 577, 592 (1992).


David Novak explains:

Unlike the right to openly practice one's own religious rites, which can easily be tolerated as part of one's right to an individual 'lifestyle,' basing one's public moral stance on religious grounds seems to make a claim on everyone in the society. When the question of religion reaches this necessarily public level, even many secularists who are usually tolerant of religion become quite fearful because religion seems to be making a requirement of them, and without their consent.

Novak, supra note 105, at 574.

Liberalism was born as a solution to the problem of religious
Nowhere is this marginalization more evident than in the Court's misconstrual of the meaning of prayer, especially in regard to our children, where "[a]s we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."169 For over half a century, the Supreme Court has explicitly addressed itself to the issue of religious activities in the public schools, perennially worried whether "the State has crossed the line from permissible accommodation to unconstitutional establishment."170 In each of its decisions, however, the Court conceives of religious activity in terms only of adherence to expressly religious dogma (from refusal to grant deference to the flag171 to creationism172) or performance of an expressly religious ritual (from a moment of silence173 to an invocation174). The conceptual grammar within which the Court addresses religious matters itself relegates religion to its dogmas and rituals, which grammar therefore dictates the Court's facile understanding of religion as a merely private affair that ought not have public consequence. Indeed, in a recent decision concerning prayer, the highest court in our land for the constitutional adjudication of matters religious relies upon the profound theological insights of an English Dictionary for its explanation of prayer.175

Religion, however, has not primarily to do with its express dogma and ritual. Religion has primarily to do with how properly to live—within the Judeo-Christian heritage, in

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170 Lee, 505 U.S. at 629 (Souter, J., concurring).
conformity to the divine will. As “the great religious act,”\textsuperscript{176} prayer encompasses the entire life of the religious person and may scarcely be confined to its ritualized utterance. Indeed, the Bible is replete with remonstrations against such a ritualization of religiosity as demonstrating a profound misconstrual of how properly to lead a religious life\textsuperscript{177}—namely, a life of “justice and

\textsuperscript{176} Karl Rahner, \textit{Prayer}, in \textit{ENCYCLOPEDIA OF THEOLOGY: THE CONCISE SACRAMENTUM MUNDI} 1268, 1272 (Karl Rahner ed. 1975). Karl Rahner, perhaps the leading Catholic theologian of the twentieth century, further observes that “the most basic fulfilment of an explicit relationship of man to God is prayer . . . .” \textit{KARL RAHNER, THE RELIGIOUS LIFE TODAY} 47 (V. Green trans., 1975). Prayer is thus not the merely ritualized activity whereby the religious person ostensibly seeks to conform divine will to human will in petitioning for this or that, but is rather the means whereby the human will seeks to conform itself to the divine will in all matters of life. \textit{See JOHN MACQUARRIE, PRINCIPLES OF CHRISTIAN THEOLOGY} 494, 496 (2d ed. 1977) (“In prayer as in worship, the divine initiative is always to be recognized, so that what we do or say has the character of response; and prayer, again like worship, is not some special department of life, but continuous with all our activities.”). Divine guidance in all matters of life is thus definitive of the nature and character of prayer in all its various forms: “from almost disrespectful argument (\textit{Genesis} 18:23ff.; \textit{Jeremiah} 14ff.) to peaceful confidence in God's providence (\textit{Psalms} 127), from ardent supplication to despairing protest (\textit{Psalms} 74:1ff.; \textit{Job} 31), from adoration, praise and thanksgiving (I \textit{Chronicles} 29:31) to humble repentance (I \textit{Chronicles} 21:17; \textit{Psalms} 51).” Karl Rahner, \textit{Prayer}, in \textit{ENCYCLOPEDIA OF THEOLOGY: THE CONCISE SACRAMENTUM MUNDI} 1268, 1269 (Karl Rahner ed. 1975). Prayer therefore manifests an “all-pervasive attitude, which may be roughly described as confidence in the divine goodness, and at the same time a sense of awe before the divine majesty.” \textit{Id.}

\textsuperscript{177} \textit{Isaiah} 1:10-17 (New Oxford Annotated Bible).

Hear the word of the Lord, . . . What to me is the multitude of your sacrifices? says the Lord; . . . Wash yourselves; make yourselves clean; remove the evil of your doings from before my eyes; cease to do evil, learn to do good; seek justice, correct oppression; defend the fatherless, plead for the widow.’

\textit{Id.}

I hate, I despise your feasts, and I take no delight in your solemn assemblies. . . . Take away from me the noise of your songs; to the melody of your harps I will not listen. But let justice roll down like waters, and righteousness like an ever-flowing stream.

\textit{Amos} 5: 21-24 (New Oxford Annotated Bible).

And in his teaching he said, “Beware of the scribes, who like to go about in long robes, and to have salutations in the market places and the best seats in the synagogues and the places of honor at feasts, who devour widows' houses and for a pretense make long prayers. They will receive the greater condemnation.

\textit{Mark} 13: 38-40 (New Oxford Annotated Bible). (New Oxford Annotated Bible); \textit{Matthew} 23:23 (New Oxford Annotated Bible) (“Woe to you, scribes and
righteousness"178 as obedient to the will of God in all matters.179 Properly understood, prayer, and therefore religiosity itself, is profoundly communal, hence public.180

Pharisees, hypocrites! For you tithe mint and dill and cummin, and have neglected the weightier matters of the law, justice and mercy and faith . . . .

178 "Did not your father eat and drink and do justice and righteousness? Then it was well with him. He judged the cause of the poor and needy; then it was well. Is not this to know me? says the Lord." Jeremiah 22: 15-16 (New Oxford Annotated Bible).

179 "And in praying do not heap up empty phrases as the Gentiles do; for they think that they will be heard for their many words. . . . Pray then like this: Our father who art in heaven, Hallowed be thy name. Thy kingdom come. Thy will be done, On earth as it is in heaven. Give us this day our daily bread; And forgive us our debts, As we also have forgiven our debtors; And lead us not into temptation, But deliver us from evil." Matthew 6:7-13 (New Oxford Annotated Bible).

180 Although the Court has steadfastly resisted this proper construal of religiosity, various Justices have from time to time acknowledged the intrinsically communal character of religion. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341-42 (1987) (Brennan, J., concurring) (“Religion includes important communal elements for most believers. . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.” (citing Karl Barth, The Christian Community and the Civil Community, in COMMUNITY, STATE AND CHURCH 149 (1960)). As Justice Scalia stated in Lee v. Weisman, 505 U.S. 577 (1992):

Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the 'protection of divine Providence,' as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the 'Great Lord and Ruler of Nations.'

Id. at 645 (Scalia, J., dissenting). Stephen Carter points out that the Court's better jurisprudence on matters religious has consequently arisen not in the context of its addressing the religion clauses, where it invariably misconstrues the nature and character of religion as a merely private matter, but rather in those cases involving the constitutionally fundamental right of parents to inculcate religious values in their children through their education, where it therefore observes the familial, if not thoroughly public nature and character of religion. Carter, supra note 9, at 1203-06 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (using substantive due process to hold that parents had a fundamental constitutional right to send their children to a parochial school));
Although the Judeo-Christian religious heritage of our American culture provides for its governing moral conviction—a just and righteous regard for the absolute and universal value equally attributed to all persons, the logic of secular liberty employed by the Court effects a truncated inversion of that religious ethic, which superordinates individuated privacy and consequently subordinates religious piety. The civic order would thus domesticate the religious order to preserve secular society.

CONCLUSION

"Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room."\footnote{Lee, 505 U.S. at 645 (Scalia, J., dissenting).}

What is most disconcerting about the jurisprudence of our highest court on matters religious is that it misconstrues not only the nature and character of religion, but accordingly misconstrues the nature and character of the legal presumptions on the basis of which it adjudicates the relationship between law and religion. During the course of the nineteenth century, in its non-sectarian effort to distinguish the civic from the religious order, the Court covertly valorized Protestant religiosity as the constitutionally protected religious posture. During the course of the twentieth century, in its secular effort to elide religious influences from the civic order, the Court covertly valorized secularity as the constitutionally protected posture on religion. An exacerbated constitutional concern for the privacy of the individual affronted with an increasingly pluralistic religious order has finally relegated religion to the margins of the civic order under a logic of secular liberty whereby egalitarian regard for moral autonomy protects the public domain against a potentially coercive theonomy. The Court’s egalitarian regard for the moral autonomy of the individual ironically devolves, however, from its distinctive religious heritage, but which devolution has effected a truncated inversion of an other-regarding Judeo-Christian ethic into a self-regarding secular ethic. A distressing lack of moral force, moreover, attaches to

\footnote{Carter, supra note 27, at 1077-78 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children from compulsory secondary education)).}
this secular ethic by virtue of its inability rationally to justify its governing moral presumption of equality. Hence the accelerated secular concern to neuter the transcendent moral authority of religion by relegating piety to its dogma and ritual. The Court thus misunderstands not only what religion is, but misunderstands as well the theological etiology of the law whereby it adjudicates religious matters.\textsuperscript{182}

Two competing yet critical questions arise from these considerations: first, whether the secular disregard for religion effectively establishes a religion of secularity;\textsuperscript{183} and second, whether the religious heritage of the law effectively establishes religion through the law.\textsuperscript{184}

The secular disregard for religion has ostensibly yielded a constitutionally protected stance on matters religious. If so, the constitutional valorization of non-religion over religion becomes highly problematic as the effective establishment of a "religion" of secularity.\textsuperscript{185} Although secularity is not properly conceived as a religious posture, it is nonetheless a posture on religious matters. Secularism is the attempt to abstract universal moral values from their historically religious context and displace them onto a humanistic rather than divinistic foundation—as a function of reason rather than revelation. Secularity is thus a truncated inversion of religiosity; it is not itself a form of religiosity. Inasmuch, however, as secularism's consequent superordinated regard for individuated privacy and accordant

\textsuperscript{182} See McConnell, supra note 8, at 656–57 ("[T]he ‘principle of secular rationale’ . . . rests on inaccurate stereotypes and questionable epistemological premises, and it would disenfranchise religious persons as full participating members of the political community.").

\textsuperscript{183} See McConnell, supra note 13, at 1264 ("The peculiar hostility of secular liberalism toward religion cannot be defended on liberal grounds—at least not without converting liberalism into a prescription for conformity to a particular way of life."); McConnell, supra note 39, at 172 ("[L]iberalism, understood as . . . an ideology—the advocacy of a particular way of life . . . requires liberal citizens. Liberal citizens are those with liberal virtues . . . individualism, independence, and rationality.").

\textsuperscript{184} See Novak, supra note 105, at 572 ("Can one have religious reasons for the legitimacy of the secular polity that do not presuppose conversion to (or reconfirmation of) a traditional religious community?").

\textsuperscript{185} Laycock, supra note 7, at 339 ("Shrinking the meaning of ‘exercise’ and refusing to recognize [secular] . . . views as ‘religion’ abandons both the liberty and neutrality policies of the clauses and permits the government to take sides in a core religious conflict.").
subordinated regard for religious piety disdains, if not "bristles with hostility"186 toward religiosity in the public domain, it relegates religion to the private domain as a function only of personal adherence to dogma and practice of ritual. Secularity would thus publicly neuter the transcendent moral force of theonomy in order to preserve the private moral autonomy of the individual. Secularity therefore elevates its secular stance on religion as the only appropriate public posture toward matters religious and consequently inculcates this posture in its citizenry, most notably through the secular public education of our children.187 The hermeneutics of this secular (dis)regard for religion, however, manifests a profound misunderstanding of the nature and character of religion, which misunderstanding reflects a misconstrual of the relationship between the public and the private. The valorization of public secularity over private religiosity trades on an ill-conceived dichotomy between the public and the private.188 “Public” behavior is motivated by “private” conviction. Covert constitutional protection of secularity as the only suitable public posture on private

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187 “We domesticate the religions through the simple device of taking their children.” Carter, supra note 27, at 1084.
188 For a suggestive reflection on the “post-modern” critique of the constitutional jurisprudence of law and religion, see McConnell, supra note 39, at 182–188. “[T]he central insight of post-modernism is the exposure of [secularity] . . . as just another ideology.” Id. at 182. Inasmuch as secularity is not a “neutral” stance, its valorization as the only suitable public posture becomes an effective endorsement of secularism. “If this post-modern insight is correct, then secularism has no exclusive claim as the language of American public life. Public religious discourse was discredited as arbitrary subjectivity by a secular critique that pretends to be neutral and objective, but which beneath that pretense is itself arbitrary and subjective.” Id. at 183 (citing Frederick M. Gedricks, The Religious, the Secular, and the Antithetical, 20 CAP. U. L. REV. 113, 137 (1991). Secularity’s valorization of public neutrality over private religiosity turns on a presumptive dichotomy between the public and the private: “Post-modernism tells us that the very distinction between the public and the private is incoherent and destructive.” McConnell, supra note 39, at 183. McConnell ostensibly despairs of any viable constitutional guidance provided by such post-modern insights: “Once the public-private distinction is obliterated—once private power and public power are treated as equally threatening and once the government is understood to act whenever it refrains from interfering with the acts of private individuals—religious freedom cases become hopelessly indeterminate.” Id. at 185.
matters religious, which protects the free private exercise of religion only when it does not publicly matter, therefore works not so much to establish a religion of secularity as to dis-establish religion. This secular dis-establishment of religion evidences an enlightened ignorance regarding the religious heritage of the law whereby it adjudicates matters religious. Acknowledgment of the theological justification for the governing moral tenets of our nation’s law, however, would certainly not require the religious conversion of those who subscribe to these tenets for non-religious reasons. On the one hand, religiosity is not primarily a function of dogmatic theology; on the other hand, neither lawful nor moral behavior necessarily presupposes religious conviction. Such acknowledgment, however, does entail recognizing that the moral force of our law is not intrinsic to itself—that law is authorized, ultimately, not by reason, but by revelation. Secularity has not freed the law from religion; it has served rather to truncate the moral authority of law into its mere social imposition and thus invert an ethics of piety into an ethics of privacy that marginalizes religion and neuters its transcendent authority. Recognition of the law’s religious legitimation preserves the transcendent moral force of law and serves therefore to obviate the mere force of law. Hans Kung rightly observes: “Theo-nomy is the condition of the possibility of the moral auto-nomy of man in secular society.”

The rationality of law thus remains properly accountable to the religiosity of its authorization. Theological justification for law works not an establishment of religion; it works an establishment of law—law freed from the tyranny of those who enforce the law. Only thus may the “Blessings of Liberty” remain secure.

**POSTSCRIPT**

And when you pray, you must not be like the hypocrites; for they love to stand and pray in the synagogues and at the street corners, that they may be seen by men. Truly, I say to you, they have received their reward. But when you pray, go into your room and shut the door and pray

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189 KUNG, *supra* note 107, at 536.

190 U.S. CONST. preamble. The religion clauses, properly construed, are thus consonant with the balance of the Constitution vis-a-vis its governing concern to delimit the power of the State.
to our Father who is in secret; and your Father who sees in secret will reward you.\footnote{Matthew 6:5–6 (New Oxford Annotated Bible).}

As the Grand Inquisitor sought to arrest and banish Christ, so has secularity sought to elide religious influences from the public domain. The Inquisitor feared the dreadful freedom Christ provided; secularity similarly fears the transcendent exertion of theonomy over moral autonomy. The Inquisitor wished instead through the imposition of law to satisfy human anxiety for a universal unity; secularity seeks as well to establish through the imposition of law a common secularist ideology by neutering divisive religious influences. Our Supreme Court, however, ought not endorse the secular misconstrual of the relationship between law and religion; under constitutional dictate, moreover, our Supreme Court may not subscribe to the consequent secular effort to disestablish religion. The Constitution proscribes the establishment of religion; it prescribes the free exercise thereof. Although the government may not mandate any particular religion or religion in general, all things religious must nevertheless be permitted constitutionally—a constitutional permission that operates, however, within the Judeo-Christian heritage of egalitarian regard for the absolute value of all persons.\footnote{This theonomous moral restraint on the constitutional protection of religious autonomy obviates jurisprudential distress over such things as religious human sacrifice.}

Contrary, then, to the judicial disinclination to allow religious activity in the public schools for fear of its coercive effects, such activity must be constitutionally permitted. The upshot of these reflections on the issue of student-initiated religious activities in the public schools is that such activity must be allowed its free exercise. Religiosity is simply not a merely private affair; it is profoundly public. The exercise of religion may therefore not be constitutionally circumscribed out of the public domain. Although a public school may not itself, as a governmental institution, endorse any particular religion or religion in general, it may also not endorse no religion at all. To the extent that public schools endorse a secular ideology of disestablishing religion, they are themselves unconstitutional.\footnote{See Laycock, supra note 7, at 348 (“Religious speakers are free to use public forums and to speak in places where they have a right to be. They are}
The religious proscription against the public prayers of the hypocrite must remain a religious proscription; under our Constitution, it may not be a legal proscription.