The New Religionists' Newest Social Gospel:
On the Rhetoric and Reality of Religions' "Marginalization" in Public Life

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"Why is a raven like a writing-desk?"
"Come, we shall have some fun now!" thought Alice. "I'm glad

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they've begun asking riddles—I believe I can guess that," she added aloud.

"Do you mean you think you can find out the answer to it?" said the March Hare.

"Exactly so," said Alice.

"Then you should say what you mean," the March Hare went on.

"I do," Alice hastily replied; "at least—I mean what I say—that's the same thing, you know."


### I. Introduction: Of Pervasive Secularity

The twentieth century has witnessed unimaginable cruelties: "The [enlightenment's] cult of Reason . . . replaced transcendence that was worshiped and experienced in a religious manner." The replacement—secularism—permitted the rise of a liberalism shorn of the humility demanded by a belief in God. As a result, secularism could degenerate into Nazism and Stalinism. "It is clear that the crisis of Reason leads either to a temporary nihilism or a permanent need for transcendence."

The theologian David Novak agrees, adding a grim twist that transports his fear to the sacred scroll on my front door: "[I]t can and should be argued that modern secularism, with its explicit denial of any normative transcendence, is a far more immediate condition making for the emergence of Nazi nihilism than is traditional Christian ambivalence about Jews." Others sound a correlative warning: "[I]n the aftermath of the holocaust, one cannot simply speak; that discourse has been shattered by the irruption of the holocaust into modern consciousness; that language has been ruptured by the in-breaking of the holocaust into common speech."

It is at best difficult for some of us to maintain a belief in a personal God without accepting God's occasional injustices. To entertain the notion of a purely loving God without acknowledging this trait is to deny the Holocaust. This we dare not do. To the contrary, the twentieth century's periodic denials of a publicly and consensually acknowledged transcendence reflect our understanding of God's mysterious ways and

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2. *Id.*
5. See *id.* passim.
this doleful history. When we append to these God-forsaken tendencies the inclination of liberal societies to place an unjustified faith in the potential of pure reason, we appreciate both the nearly universal perception that contemporary American society is itself out of kilter, and the incommensurability of our many views on what to do about this loss of balance. For even as we commemorate the liberation of the Nazi death camps a half century ago, we despair our own spiritual malaise, reflected in roughly equal parts of lost religion, morality and virtue, lost notions of personal responsibility, and lost family and shared community values. All such losses undermine our ability to oversee the proper upbringing of future generations and thus risk the long term unity and stability of our nation.6 Public education fails us, crime riddles and prevention eludes us.7 Liberals demean our self-reliance, conservatives disparage our interdependence, greed defines us, and poverty surrounds us. In circumstances so understood, one should register little surprise when members of the legal academy find this spiritual decline traceable to the demise of public religiosity and, in particular, to the one institution that stands as the overseer of the legal profession: the United States Supreme Court.

The rhetoric of imminent ruin has a familiar ring: Post-modern American culture—including, not least, the Supreme Court—has privatized and marginalized religious discussion in the "public square."8 Even commentators who find the supposed privatization of our religious life consistent with the demands of a pluralistic, liberal democratic society find it necessary to justify the marginalization based on the nature of religion,9 rather than the demands of heterodoxy. Proving the thesis that

6. I distinguish here between unity, which supposes some conceptual agreement about the goods to which our society is committed, and stability, which comes ultimately at the end of a bayonet.


a statement made often enough takes on a reality of its own, the received wisdom posits a simple equation that explains our demise: “privatized, ergo marginalized.” But the reality of the calculation is questionable and, in fact, belied by the religious character of the major public movements in American history and certainly since World War II. Many observers have mistaken their own rhetoric—and their own feelings of alienation—with what in fact occurs in public life.

Privatization, properly understood, doubtless has occurred, but that phenomenon, absolutely essential to the well being of a richly pluralistic liberal democracy, has not now and never has been synonymous with marginalization. The problem is that the causal relationship between privatization and marginalization is more assumed than studied, resting on oversimplified and unexamined premises that presume a definitional equivalence between that which is necessarily and appropriately private, and that which exists outside the margins of cultural and political importance. In the public arena itself, however, one hears multiple (and at times cacophonous) voices that challenge the accuracy of the equation.

A moment’s thought should make one wonder how striking it is, from practical, theoretical and historical vantage points, that this nearly formalistic equation ever took hold. That it holds sway within a substantial part of the academy—in light of the phenomenal rise, first, of the Moral Majority and politico-televangelizers and, later, of the Christian Coalition and the patently enhanced authority, visibility and power of advertently religious public figures—says far more about our isolation in law schools¹⁰ than it does about the status of religion in the American public life. Religious leaders in the last two decades have bathed in the luster of the political limelight, advising Presidents and legislatures, expanding for the foreseeable future the accepted range of public responses to emotionally charged moral/religious issues, tugging the entire political spectrum far to the right during the 1980s and 1990s, and defining party platforms and politics.¹¹ Even our current (liberal?) Democratic President has reached out to mend fences with the armies of politically organized “reli-gi-cos.”¹² It is as if those who decry this supposed marginalization missed the practices of the last three decades.¹³

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¹⁰. For the same reaction in a different context, see Mary Ann Glendon, What’s Wrong With the Elite Law Schools, WALL ST. J., June 8, 1993, at A16.

¹¹. This was of course especially true during the Houston Convention of the Republican Party in 1992. See CARTER, supra note 8, at 20, 23-24, 45-51.


¹³. My former colleague and close friend Professor Fred Gedicks first brought this inattention to my notice. He has not yet explained it to my satisfaction. See generally Frederick Mark Gedicks, Some Political Implications of Religious Belief, 4 NOTRE DAME J.L. ETHICS & PUB. POLICY 419, 421 (1990) [hereinafter Gedicks, Political Implications] (contrasting religion in
From the viewpoint of liberal theory, the equation denies our origins. Going back at least as far as Mill, among the hallmarks of liberal theories has been the tendency to relegate *that which is most important* to the private sphere.\textsuperscript{14} Many feminists, for example, deplore the (admittedly contingent) border between private and public in domestic relations precisely because it prevents state action in the area of domestic violence, thereby shielding an important relationship from public scrutiny.\textsuperscript{15} Procreative rights—the decisions we make in and about conduct in our bedrooms—still retain a measure of instrumental "privacy"\textsuperscript{16} because of their importance. Even the most threatening political speech evades state condemnation unless the dangers it presents are grave and imminent.\textsuperscript{17} The scope of government has expanded exponentially in the intervening century since Mill wrote, but still today American culture relegates many of its most important features to the home, family, church and community, largely free from state regulation.

Apart from the practices and theories that raise serious questions about the "New Religionists" critiques, there is countervailing history. Religion has always played a pivotal and defining role in American politics, despite the long prevailing "post-Modern" liberal ethos.\textsuperscript{18} It will continue to do so. But the call for more advertently religious talk in the public discourse, as an antidote to this assumed marginalization, contin-

\textsuperscript{14.} See John Stuart Mill, *On Liberty*, in *Utilitarianism On Liberty Essay On Bentham* 126 (Mary Warnock ed., World Publishing Co. 1962) (1859). Mill takes a view of the private that is self-regarding and largely free from state jurisdiction: "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." *Id.* at 135. Even when protection may be warranted, conditions for imposing force on the private realm must be met: "As soon as any part of a person's conduct affects prejudicially their interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion." *Id.* at 205.

\textsuperscript{15.} These views are carefully surveyed by Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 Stan. L. Rev. 1, 35 (1992).

\textsuperscript{16.} "Instrumental," as used in the text, has two meanings: First, it reflects the view that privacy partakes of decisionmaking and, second, that the conduct or acts with respect to which such decisions are made are, if we deem them private, presumptively entitled to remain free from regulation. Consequently, the government bears a substantial burden of demonstrating why the conduct or acts should not remain private. See *id.* at 7-9.


\textsuperscript{18.} Castigating the liberal bogey for the "privatization of religious convictions," Professor Perry asserts that liberals privatize "even . . . prophetic convictions of the sort that have helped inspire some of our most cherished movements for social change." *Perry, Love and Power*, supra note 8, at 81. That certain liberal theorists have tried to minimize religion in politics surely will not change our society; and the evidence for that conclusion is implicit in Professor Perry's own quote.
ues. If, as this Commentary will argue, “God-talk” enjoys a robust and seeming omnipresence in our public life, we must inquire with some precision what it is that the critics lament. The answer this essay provides is two-fold: (1) They demand a greater presence for the right—appropriate—kind of religion, which for them is not, at least generally, the religion of the contemporary, political-fundamentalist right; and (2) they desire a greater share of power for that appropriate religion. Beneath these goals lies an unstated and unexamined premise: Following the Social Gospel strand of Protestantism that late nineteenth/early twentieth century theologians wove into the American cultural fabric, New Religionists of all political stripes simply assume that religion is and must be allied fully with, and not against, the state. It is with that premise that I take exception; in fact, it is with the over-abundance of public religiosity that I forcefully take issue, for this overabundance threatens true religion.

The Commentary that follows begins in Part II by examining the claim of marginalization in three of its facets: (A) that religion has been detrimentally “privatized” in contemporary American culture; (B) that the “public square” has been cleansed—stripped “naked”—of religiosity in our culture; and (C) that this has occurred because of the erroneous supposition of epistemological superiority of secular reasoning over religious knowledge. The first two facets reflect hyperbole on their face; we virtually swim in a sea of public religiosity. The latter claim, in contrast, breaks down only upon close examination. Part III then offers an alternative interpretation to what one might describe as the archetypal case that underscores the supposed evil of privatization, Employment Division, Department of Human Resources v. Smith, an opinion that has drawn the New Religionists’ wrath. What is curious is that Smith is as fully corrupt as the mountains of scorn heaped upon it would indicate, but its corruption comes from its theological politics, which over-public-izes” religion. For this reason the decision gives the New Religionists a large measure of what they purport to want, but at a price which they are unwilling to pay because it undermines the heart of their critique.

The Commentary concludes in Part IV with a discussion of the ever-present but unacknowledged theological politics that runs through the writing of these new critics. The New Religionists of the political left and right comprise the latest chorus for the songs of the Social Gospel, threatening to realize the worst fear of the fundamentalist critics of the original Social Gospelers: the absolute substitution of a public gospel for the genuine article. Additionally, the section suggests that there are alternatives, that there is today, as has there been since the founding

of the Republic, a powerful role for religion outside, or at least along-
side, the public square.

As Alice’s tea party with the Mad Hatter continues, the Hatter
responds to Alice’s apparent tendency to conflate “saying what you
mean,” and “meaning what you say.”

“Not the same thing a bit!” the Hatter said. “Why you might just
as well say that ‘I see what I eat’ is the same thing as ‘I eat what I
see’!”

The New Religionists suffer in much the same way as Alice: They all
mean what they say—that religion has been “marginalized;” there is lit-
tle disjunction between their intended articulation and the articulation
we receive. There is at least the hint of disjunction, however, between
their purpose and their articulation, for they fail to own what they
mean—that the marginalization they lament is largely theirs alone. As a
result, they pursue terribly worthy goals with less than worthy strategies;
for many remain hostage to the unavoidably opaque lenses that filter
through all of our respective religious traditions.

II. THE CLAIM OF MARGINALIZATION

Of the major moral debates that take place within our society, one
of the leading New Religionists, Professor Michael McConnell, asserts
that only religion is omitted. This phenomenon occurs, he laments,
because since Lemon v. Kurtzman mandated legislative secularity, reli-
gion has been “privatized and [therefore] marginalized.” Another
member of the group, Professor Stephen Carter, concurs and goes far-
ther, describing religion as a “hobby”: “The message of contemporary
culture seems to be that it is perfectly all right to believe that stuff—we
have freedom of conscience . . . —but you really ought to keep it to
yourself.” Professor Michael Perry, in a forthcoming work, begins
with the unexamined premise that citizens in a democracy “have been
led to believe, or half believe, that they should keep their religion ‘pri-
ivate’, that they should keep it not merely out of politics but out of public

20. LEWIS CARROLL, Alice’s Adventures in Wonderland, in THE COMPLETE WORKS OF LEWIS
21. See Michael W. McConnell, “God is Dead and We Have Killed Him!”: Freedom of
22. 403 U.S. 602, 612 (1971) (holding, among other things, that a statute violates the
Establishment Clause, U.S. CONST. amend. I, unless it has a “secular legislative purpose . . . [and]
its principal or primary effect . . . neither advances nor inhibit religion”).
23. McConnell, supra note 21, at 165.
24. CARTER, supra note 8, at 25. See also Kathleen M. Sullivan, God as a Lobby, 61 U. Chi.
AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993)) (describing the thesis of
Carter’s work as the belief that “religion is excessively marginalized in American public life”).
Others raise the stakes even higher, tracing to the Enlightenment’s ethos the idea that “some of the principal actors in American public life systematically marginalize religious viewpoints.”

Under a Lockean political regime, the reach of permissible government action (public life) depends on the boundaries of the inviolable sphere of individual rights (private life).

Conceptually, the presence or absence of individual free will marks the boundary between the public and private spheres. The division of society into public and private spheres thus mirrors the fundamental division in Western thought between subject and object. In private life, subjectivity and passion hold sway. Individuals are free to do whatever they please for any reason (or no reason) as long as they do not harm anyone else.

Public life, on the other hand, is the realm of objectivity and reason. In this realm, government and individuals must serve the collective “public interest” rather than the idiosyncratic tastes and preferences of any individual. Value choices must be rationally defended in public life, for unlike private actions, public actions cannot be justified by mere appeal to an individual’s tastes or preferences.

The themes identified, the liberal triumph of public over private, and of secular (objective/rational) over religious (subjective/passion), bleed into—and partially restate—others: the consequent privileging of secular discourse in the “public square,” a result which flows from the supposed epistemic superiority of secular as opposed to religious discourse. Together these themes form the basis of the New Religionists’ reaction to and critique of contemporary American culture.

A. The Triumph of Public Over Private

Among the New Religionists’ most forcefully stated critiques of public culture is concern over the status of religion in American culture: to a person they deplore the supposed fact that our culture has “privatized” religion. Privatization has occurred, but the role of the Supreme

25. Michael J. Perry, Speaking Theologically in Public (forthcoming) (at ch. 2 at 7, on file with the author) [hereinafter Perry, Speaking Theologically].

26. Gedicks, Hostility, supra note 8 at 672. See also Durham & Dushku, supra note 8, at 442 (opining that influential sectors of American society “suppress the voices of religious traditionalism in subtle but powerful ways”).

27. Gedicks, Hostility, supra note 8, at 674-75 (citations omitted). Professor Gedicks makes essentially the same point in FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 29-30 (1995) [hereinafter Gedicks, Rhetoric]. See also Durham & Dushku, supra note 8, at 443, who agree, claiming that our nation’s cultural leaders have also “progressively narrowed the range of permitted religious contributions to public life by shifting the line between public and private spheres so as to enlarge the former at the expense of the latter.”
Court may be considered highly significant only among we law professors who view the world through very narrow slits. Doubtless, the Court has, at times, demanded that legislatures defend their enactments with a secular purpose and effect, and it has attempted—with little success, at least in some areas—to remove prayer from public schools. The New Religionists, imbuing the Court with a far greater generative role in the shaping of public views on religion than its confusing jurisprudence deserves, have interpreted these decisions syllogistically:

"Secular" equals "non-religious";
"nonreligious" equals hostile;

Therefore, to require secular legislative purpose is to purge public life of religious content.

Under this view, “privatization” is unequivocally pernicious. Professor Carter encapsulates this position in the second chapter of his widely-acclaimed work, The Culture of Disbelief. The chapter, titled “God as Hobby,” is devoted to and conveys the notion that “privatization” has consigned religion to unimportance. Others claim that to require one to “privatize” religious views is to reject them, thereby likening privacy to unacceptability. For Professor Gedicks, privatizing religion produces both of these results and more. To privatize, he argues, is to dismiss religiously informed viewpoints as not only unimportant and unacceptable but as irrational as well. Thus, all critics

28. See Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (holding, among other things, that a statute violates the Establishment Clause unless it has a “secular legislative purpose . . . [and] its principal or primary effect . . . neither advances nor inhibit religion”).
30. As one commentator notes: “Mocking the . . . the Court’s [Establishment Clause] results has become a common (and easy) sport.” Michael S. Paulsen, Lemon is Dead, 43 CASE W. RES. L. REV. 795, 804 n.31 (1993).
32. See supra text accompanying note 27. See also CARTER, supra note 8, at 6 (arguing that there is a trend in “our political and legal cultures toward treating religious beliefs as arbitrary and unimportant, a trend supported by a rhetoric that implies that there is something wrong with religious devotion”).

Carter carries this point to an indefensible conclusion. He discusses a book by two therapists, Stephen Arterburn and Jack Felton, one of whom is an ordained minister. Id. at 8 (discussing STEPHEN ARTERBURN & JACK FELTON, TOXIC FAITH: UNDERSTANDING AND OVERCOMING
conclude that to privatize religion in our liberal culture is to place religion outside the periphery of acceptable public discourse, especially as that discourse turns to politically coercive proposals.

The New Religionist critique of religious privatization raises a number of dark and unsettling issues. The first is that "privatization," as defined by the critics, exists only in theory; not a shred of empirical evidence supports the claim that religion has in fact been marginalized. Although statistics do not make the case against the critics, (and it should be acknowledged that public opinion polls do not require professed believers to commit to living a religious life), it is nonetheless worth mentioning that the American public does not seem to adhere to the critics' beliefs. For example, the Gallup organization records that over 94% of Americans declare their belief in God. Nearly 60% of Americans state that religion occupies a "very important" position in their lives. Hardly a day goes by without some notice taken of a religious organization, often on the Christian Right, by the national and local press. A quick glance at the news rack of any neighborhood supermarket reveals copies of the Catholic catechism in paperback. Clearly someone believes religion is flourishing in American culture.

REUGIOUS ADDICTION (1991)). The two authors suggest that a person who would ignore the needs of family to serve religion suffers "toxic faith," which reflects the belief, according to Carter, that "no normal person, evidently, would sacrifice the things that most of us hold dear just because of a belief that God so intended it." Id. Carter concludes: "One wonders how the authors would have judged the toxicity of the Faith of Jesus, Moses, or Mohammed." Id.

Whatever one may think of the authors' views, surely Professor Carter has permitted his argument to get the best of him. On the one hand, he simple begs the question of what is "normal." But more crucially, Professor Carter cannot mean that Jesus, Moses, and Mohammed were "normal," by whatever non-pejorative definition we choose. Isn't it precisely their non-normality—even supernality—that makes them special or non-normal, although not (necessarily) in the sense of psychopathological? Jesus was, according to Christian tradition, the Christ, son of God. Is that "normal" by any definition?


34. See Kosmin & Lachman, supra note 33, at 9.


36. Professor Carter, recognizing this prevalence, argues that the fact that there is religious rhetoric in public life does not mean that citizens to whom that rhetoric is precious are accorded the respect they deserve. "In truth, the seeming ubiquity of religious language in our public debates can itself be a form of trivialization," especially when politicians usurp religious language to proffer "meaningless religious incantations." CARTER, supra note 8, at 45. Later in the book he
A second disturbing point is the New Religionists’ negative conception of “privatization.” In ordinary parlance the words “public” and “private” do not connote disapproval. Especially in an era of pervasive government regulation, the terms “public-ness” and “private-ness” are indisputably social constructions; and so they make sense “only . . . by reference to norms of behavior.” Moreover, the terms are multi-sensed, partaking as much of ideology as logic. But when the terms “private” and “public” are used in everyday discourse they ordinarily refer to one of three non-exclusive ideas: (1) to questions of control over “access”—to territory, to activities, to information about oneself, or to resources; (2) to shorthand implications of “agency” relationships: Is someone acting for or on one’s own behalf (private), or for a community (public)?; and (3) to indicators of “interest”—for whose gain or loss is something said or done, for an individual’s or small group’s interest or the public’s? None of these three common uses is inherently negative or evil.

Most unsettling about the New Religionists’ public/private critique is its unstated (or perhaps unintended) theological implications. Any one of the three ordinary uses of the public-private duality could account for the supposed detrimental privatization the critics deplore. For example, we no longer live in an Augustinian world in which the temporal/eternal dualism prevails. One can consequently refer accurately to the “privatization” of an individual’s relationship with God as one reflected in many Protestant denominations in which a corporate body is no longer necessary for individual salvation. This same Augustinian duality, projected ahead several centuries, accounts for the Medieval convention of selling and purchasing indulgences, a long gone practice that loses all coherence, if it ever had any, when sects are exclusively

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39. See id. See also Charles Fried, Privacy, 77 YALE L.J. 475, 477 (1968) (arguing that “privacy” is more than an instrumental value, it is necessary for love, respect, friendship and trust “without privacy [these relations] are simply inconceivable”). Gavison, supra note 15, at 6 adds that private, as in “individual” or “small group,” is self-regarding.
concerned with individually achieved salvation.\textsuperscript{42} In our contemporary context, to refer to religion today as a "private" matter could embrace all three ordinary references. In a world where salvation purports to occur with neither church nor congregation, we could lament (1) the denial of "access" to those who would mediate between the individual and salvation; (2) an understanding of "agency" as conduct undertaken in pursuit of individual salvation; and (3) a pursuit of salvation that is undertaken solely in one's own interest.

On this understanding of "privatizing" religion, a critic could publicly grieve the Gnosticism of contemporary life, the loss of a necessary and sufficient corporate entity—a Church, congregation or minion—that either mediates between the individual and God, as in the Catholic Church, or that informs and sustains that relationship, as with Judaism. One could surely sympathize with a religiously-grounded, skeptical position that reflects non-hostile doubt about individual epistemic claims of knowledge of God, when that knowledge is entirely egoistic. The very claim of personal, individual salvation—"My Boss Was a Jewish Carpenter" or "I found It!"—stuck on the bumper of a '93 Lumina—raises a number of troubling questions which need not reflect any hostility to religion generally: Has the believer truly communed with God, or only with himself or herself? How do we know? How can any of us know when the Supreme Being with whom communication is claimed purports to be known in the absence of a defining corporate entity or a collectively drawn and understood, traditional identity? Put otherwise, if Kierkegaard's individualistic conception of faith were taken as truth, one might well ask the ontological question: "[W]hat prevents this private commandment from being in truth a projection onto God of one’s own autonomous will?"\textsuperscript{43}

This conception of privatization plays no obvious or acknowledged role in the New Religionists critique. For them, at least, the distress they articulate over the "privatization" phenomenon refers to something other than the problematic of egoistic versions of salvation. Their implicit rejection of this concern makes an ironic statement about the relationship between church and government: Religion must be of—and not against—prevailing secular orthodoxy. There is more irony—if not outright contradiction—in the fact that the critics recognize the profound practical effect religion has had in American political life, even as they call for an end to religions' marginalization. For example, Professor

\textsuperscript{42} See Norman F. Cantor, The Civilization of the Middle Ages 292-93, 504-05 (Harper Collins rev. ed. 1993).

\textsuperscript{43} Novak, supra note 3, at 90 ("Only a commandment perpetually binding on others as well as on oneself in community—that is, one taken as law—transcends one’s private isolation in time and space.").
McConnell implores not that religion receive public "aid, but only that it not be driven to the margins of public life." McConnell also acknowledges, however, that "on many—maybe most—moral questions the church is aligned with the culture," that is, that religious values often influence public values. Is it simple coincidence that accounts for this alignment? Professor Carter presents an equally difficult set of apparent contradictions. He detects, on the one hand, trends within "our political and legal culture toward treating religious beliefs as arbitrary and unimportant" and discerns that "[e]ven within acceptable mainline [religions], we often seem most comfortable with people . . . [who] treat religion as a hobby: one does not talk about one's faith." He notes unexceptionably, on the other hand, that religious rhetoric is already a staple in public discussion, and that "society imposes moral judgments all the time . . . [that are] informed by religious belief." Well, which is it—marginalization or religiously-informed political judgments? Can it possibly be both?

McConnell and Carter are not alone. Professor Michael Perry has spent nearly a decade urging us to introduce more religious language in public discourse as the antidote to a culture that has led religious individuals "to believe, or to half-believe, that they should keep their religion 'private,' that they should keep it not merely out of politics but out of public too." As one of Perry's reviewers notes, and as Professor Perry well knows, "the claim that religious arguments are in reality excluded from the public square is distinctly hyperbolic." Quoting a prominent Jesuit theologian and sociologist, Perry approves the conviction that "our tradition of religious ethics seems . . . to enjoy a more obvious public vigor and availability as a resource for renewal" than do competing, secular theories. Is there a logic that permits a religious

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46. CARTER, supra note 8, at 6, 29.

47. See id. at 101.

48. Id. at 256-57 (emphasis added). He notes earlier in the work that: "Despite repeated proclamations that religion has lost its importance, most Americans insist that their religion is a compelling force in making moral decisions." Id. at 20.

49. Perry, Speaking Theologically supra note 25, ch. 2 at 7.


51. Perry, Speaking Theologically, supra note 25, at ch. 2 at 24 (quoting JOHN A. COLEMAN, AN AMERICAN STRATEGIC THEOLOGY 192-95 (1982)).
ethic to be concurrently "marginalized" and to "enjoy . . . obvious public vigor and availability"?

The list of critics holding contradictory views of the relationship between religion and politics does not end here, but little advantage is gained by further stressing a point that is now clear: The call for more religion and religious language in public discourse cannot—and, as the New Religionists expressly recognize, does not—rest on an historical or contemporaneous foundation lacking religious expression and religiously-inspired political decision-making. As an empirical matter there is indisputable evidence of both the prevalence and influence of religious organizations on public policy. As one researcher notes:

What is striking about the contemporary era, . . . is the extent to which religious engagement, across the theological and ideological spectrum, is institutionalized into national lobbying organizations. In 1950 there were only sixteen major religious lobbies in Washington representing fairly narrow concerns. By 1985 there were at least eighty and the list is growing.\(^\text{52}\) A 1994 publication of the Institute on Religion and Democracy identifies "15 [Christian] Public Policy Pulpits" in Washington D.C. whose task it is "to make their voices echo in Washington's corridors of political power."\(^\text{53}\) Another observer notes that ten percent of the nation's radio stations are owned and operated by Christian agencies.\(^\text{54}\) The Christian Coalition alone has become a fixture in Washington in the past several years. Clearly, the notion that religion is missing from these public squares is at least questionably overstated.

The undeniable prevalence and influence, however, is precisely what many of the New Religionists deplore. As the next section illustrates, the call for more public religion—and the simultaneous condemnation of religious marginalization—reflect a desire to wrest both the authority and the power to control the national socio-political agenda from purveyors of the "wrong" kind of religion—the religion of the fundamentalist right. Note, too, that under the analysis offered here, the "privatization" the New Religionists so fervently abhor turns on an understanding of that term which is radically discordant with the norm. They do not seek to regulate access to religious devotion generally, or to define the agency for religious beliefs or practices, or to re-indicate on


\(^{54}\) See Michael Weisskopf, Energized by Pulpit or Passion, the Public is Calling: 'Gospel Grapevine' Displays Strength in Controversy Over Military Gay Ban, WASH. POST, Feb. 1, 1993, at A1, A10.
whose behalf spiritual activities are undertaken—in short, they are unconcerned with the norms of traditional liberal theory. Rather, they wish to relinquish or recast the normal attributes of privateness—their own perceived “marginalization”—in favor of another form of public religiosity that presumably holds out kinder and worthier attributes. The claims of privatization are, in the end, unsupported; religion and religious rhetoric plainly resound through the “public square.”

B. The “Public” in the “Public Square”

If, as an empirical matter, religion and religious voices are in fact heard in public life, the first question must be: what is this “public square” from which many very intelligent people believe religion is banished? The metaphor of the public square harkens back to Alexander Meiklejohn’s classic justification for and defense of free speech in the setting of the traditional New England town meeting. Never far from the surface of First Amendment discourse, the metaphor began to control the recent debate in 1984, with Richard J. Neuhaus’s influential book, The Naked Public Square. Neuhaus locates the public square not so much in the political arena, although he is clear that “government impinges upon all public squares.” The public square he is most concerned about resides within “the ‘mediating structures’ of our personal and communal existence [including] family, neighborhood, church [and] voluntary association . . . the people-sized, face-to-face institutions” of our daily lives. In short, what in ordinary parlance we refer to as “private” organizations, those over which we generally control access, define interest and assume agency. As with other New Religionists, though, Neuhaus also blames the Supreme Court for the nakedness of civil rhetoric. Over time, he declares, the Court minimized its references to the communal nature of religious values, arguing that the Court came to use the term “religion” as a “radically individualized and privatized” phenomenon: “Religion became a synonym for conscience.” He adds

56. Neuhaus, supra note 8.
57. Id. at 28.
58. Id.
59. Id. at 80. Neuhaus’ particular bete noire is Welsh v. United States, 398 U.S. 333 (1970), where the Court held that conscientious objector status must be granted when dictated by a “registrant’s moral, ethical, or religious beliefs about what is right and wrong . . . [provided those] beliefs be held with the strength of traditional religious convictions.” Welsh, 398 U.S. at 340. Of this language Neuhaus writes: “[R]eligion [after Welsh] is no longer a matter of content but of sincerity. It is no longer a matter of communal values but of individual conviction. In short, it is no longer a public reality and therefore cannot interfere with public business.” Neuhaus, supra note 8, at 80.

The most polite response one could make to this claim is that it represents a substantial
to privatization other dangers of "Naked-ness": American public culture is simultaneously hostile to religion in its insistence on secular discourse and conducive to captivity by the wrong kind of religion, namely, the Christian far right.60

Most of the contemporary critics of American public culture have followed Neuhaus's language; and while not all have adopted his particular understanding of the metaphor, all lay a greater or lesser share of the onus of secularization at the feet of the Supreme Court. Professor Carter notes, for example, that the public square can be a "cold, suspicious, and hostile place" from the viewpoint of "religiously devout people whose consciences and visions of reality are influenced by faith."61 More troubling still, especially for lawyers generally and legal academics and judges in particular, Carter identifies our "legal culture" as the hostile "guards [of] the public square," a result which comes as "an awkward [truth] . . . for the guardians of the public square . . . [where] tens of millions of Americans rely on their religious traditions for the moral knowledge that tells them how to conduct their lives, including their political lives."62 On this understanding, the "public square" looks much like the courthouse square.

Under the critical eye of a group of scholars whose job requires over-focusing on the judiciary, the Supreme Court and litigation that challenges religious exemptions naturally come under fire as the greatest menaces to religion in the public square:

Maybe [these challenges are] just another effort to ensure that intermediate institutions, such as the religions, do not get in the way of the government's will. Perhaps, in short, it is a way of ensuring that only

60. See Neuhaus supra note 8, at 7 (stating that in the United States, the "constellation of [Christian] engagement models . . . is being moved dramatically by the emergence of the religious new right").
61. Carter, supra note 8, at 53.
62. Id. at 54, 67.
one vision of the meaning of reality—that of the powerful group of individuals called the state—is allowed a political role. Back in Tocqueville’s day, this was called tyranny. Nowadays, all too often, but quite mistakenly, this is called the separation of church and state.63

Professor Perry returns to something closer to the Neuhaus definition, locating the public square primarily outside political chambers, in what he and others refer to as the “cultural” sphere.64 Quoting David Hollenbach, Perry argues that “the domains of government and policy-formation are not generally the [most] appropriate ones . . . to argue controverted theological and philosophical issues.”65 Rather, such issues are better discussed “in those components of society that are the primary bearers of cultural meaning and value—universities, religious communities, the world of arts and serious journalism.”66 Hollenbach’s rejection of the political sphere as the locus of serious discussion about the theological, epistemological, and religious bases of the good life rests on three principal points: the widespread perception that the political spheres are incapable of such an engagement;67 the sense that legislative and judicial decisions should reflect a preexisting cultural consensus; and the fear that settling religious and philosophical differences in public “would border dangerously close to a form of political absolutism, even totalitarianism.”68

Hollenbach’s reasons for rejecting the political sphere, in part, blink reality. First, as the current political scene amply demonstrates, the political sphere is the ever-present, final battleground for precisely the kind of debate he and Perry seek. Moreover, it borders on naive to suppose that the judicial system reflects—or could reflect—only a pre-existing cultural consensus. In fact, the conventional (and equally naive) wisdom on the existence of judicial independence posits freedom from that popular consensus. One might wonder when, if ever, the free speech first amendment guarantees, for example, would be protected were the judiciary’s job to impose a preexisting public consensus.69

63. Id. at 123.
64. Perry, Speaking Theologically, supra note 25, at ch. 2 at 2-61, 83 n.166 (quoting David Hollenbach, Contexts of the Political Role of Religion: Civil Society and Culture, 30 SAN DIEGO L. REV. 877, 900 (1993)).
65. Id. at ch. 2 at 23 (quoting Hollenbach).
66. Id. (quoting David Hollenbach, Civil Society: Beyond the Public-Private Dichotomy, 5 THE RESPONSIVE COMMUNITY 15, 22 (Winter 1994/95)).
67. David Hollenbach, Contexts of the Political Role of Religion: Civil Society and Culture, 30 SAN DIEGO L. REV. 877, 890 (1993) (stating that “interest-group politics is frequently incapable of even naming the social bonds that increasingly destine us to sharing either a common good or a ‘common bad’”) (citing E.J. DIIONNE, JR., WHY AMERICANS HATE POLITICS (1991)).
68. Hollenbach, supra note 67, at 900.
69. One could make the Borkian claim that the pre-existing consensus is embodied in the first
Finally, the danger of political absolutism is the precise danger the prohibition against establishments is intended to address, and fully justifies wariness of settling religious disputes in public. For that very reason we are usually well served to follow Professor Cass Sunstein's counsel, and maintain "a reluctance to attack one another's most basic or defining commitments, at least if it is not necessary to do so in order to decide particular controversies." Participants in public discourse generally fare well by following this advice. As he notes, "participants in liberal political culture often seek agreement on what to do rather than exactly how to think." Incompletely theorized agreements—majority understandings on cultural and societal goals achieved without consensus on the comprehensive theories of the good that move us toward these goals—"promote a major goal of a heterogenous society: to make it possible to obtain agreement where agreement is necessary, and to make it unnecessary to obtain agreement where agreement is impossible."

In the end, Professor Perry also finds Caesar's misguided intellectual purveyors in the nation's most prestigious academies. Chapter 1 of Love and Power attacks liberal theorists for elevating so-called secular "neutrality" above religious claims to truth, thereby privileging the status quo and denying to him use of his most powerful arguments in public ecumenical dialogue. Thus, for Professor Perry the "public" in the public square is primarily composed of the agencies of culture wherein genuine, respectful dialogue can occur.

But he insists, as well, that legislative bodies occupy a portion of the square. A compelling social function of Perry's ecumenical discourse is "the mediation of dissensus." Even when the premises for potential legislation are indeterminate, the continuing discussion of and search for common religious, spiritual or secular grounds may conduce to mediating ambiguity. Given cultural pluralism as a fact in most legis-

amendment itself. That conclusion, however, simply moves us one step further from the difficult interpretive and normative questions involved in hard constitutional cases.

70. See Blumoff, Holocaust, supra note 8, at 615-17, 623-26.


72. Id. at 1736 n.8 (discussing the distinctive feature of his largely descriptive account of incompletely theorized agreements and the Rawlsian strategy). Elsewhere Sunstein notes that his "argument . . . has a great deal to do with the problem of collective choice" generally. Id. at 1745.

73. Id. at 1743; see also Stephen Holmes, Gag Rules or the Politics of Omission, in CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE 19, 19 (Jon Elster & Rune Slagstad eds., 1988) (stating that "[t]o avoid destructive conflicts, we suppress controversial themes").

74. See Perry, Love and Power, supra note 8 at 10, 14-15.

75. Id. at 95.
lative assemblies, the ability of shared language\textsuperscript{76} to provide a common bond permits legislation to go forward, to overcome parochial interests and achieve "meanings that transcend whatever univocal determinations we have achieved at any given moment."\textsuperscript{77} In a word, he claims, dialogue "makes modern politics possible."\textsuperscript{78}

C. Privileging the Secular

This presumed loss of public religiosity has occurred, according to virtually all the New Religionists, at a profoundly elevated level of abstraction: to wit, an arrogant post-enlightenment epistemological presumptuousness, or the tendency of our liberal democratic society to privilege secular at the expense of religious discourse. This privileging, they claim, is based on an erroneous view of religion as "irrational" or "subjective"—"private"—when compared to secular language, which is supposedly "rational" and "objective"—or "public."\textsuperscript{79}

But the question the critics ask is misdirected. Our concern is not


\textsuperscript{77} \textit{Perry, Love and Power}, supra note 8, at 95 (quoting Donald N. Levine, \textit{The Flight from Ambiguity} 43 (1985)).

\textsuperscript{78} \textit{Id.} Whether Perry is right in this assertion partakes more of an empirical matter than a theoretical one; and as an empirical matter, one has cause to wonder whether any dialogue takes place within our political institutions.

\textsuperscript{79} \textit{See} Gedicks, \textit{Hostility}, supra note 8, at 686. Even traditional liberals have bought into this argument. Professor William Marshall, for example, a traditional liberal who fears the expansion of advertently religious language in public discourse, nonetheless concurs in the current fashion that finds unconvincing any epistemological distinction between secular and religious knowledge:

First, [the distinction] is descriptively inaccurate. Just as not all non-religious postulates and mores depend on reason, not all religious principles derive from faith. Second, the epistemology of the reason versus religion dichotomy is not sound. Reason may be subject to the same sort of epistemological attack as faith. The belief that reason inspires moral or political truths is just that—a belief. The acceptance of reason, in short, depends upon the acceptance of assertions as to the epistemological superiority of reason that are ultimately unverifiable. Third, even if faith can be epistemologically distinguished from reason, the conclusion that mores produced by rational discourse are superior to those derived by faith seems arbitrary at best. Dialogue and accessibility do not assure beneficial results.

\textit{Marshall, The Other Side}, supra note 9, at 846-47 (concluding that special restraints on religion
about the supremacy of non-religiously-based ideas or about reason trumping religiously grounded knowledge. It is, at least in part, about whether we can and must maintain a defensible—if unavoidably contingent—boundary between the public and private, thereby insuring the continuing health of a liberal democracy.

The epistemological issue is generally articulated by Professor Larry Alexander, a commentator who is freely cited by his fellow New Religionists.\(^{80}\) Alexander approaches the issue by asking whether we come to our individual understanding of religious belief and secular—liberal—knowledge in different ways. Alexander’s largely barren answer follows from asking an infertile question.

The argument begins by noting that any comprehensive normative theory of the good must address the question of how it deals with those whose competing theories reject the prevailing theory, that is, “how [should] a theory . . . treat its own rejection[?]”\(^{81}\) Liberalism tries to minimize this issue by limiting the range of questions it addresses, namely, by placing religious issues out of bounds. But liberalism can invoke this jurisdictional limitation “only if . . . its treatment of matters within the realm of its concern are not just one sectarian position vying with other versions of the Good.”\(^{82}\) In turn, liberalism can make this claim only if it “occup[ies] a different theoretical [epistemological] level from that occupied by comprehensive religious views and views of the morally good life and morally virtuous person.”\(^{83}\) Thus we come to the fundamental question of whether liberalism—which includes within its basic tenets a commitment to (more or less) religious tolerance—is true as a normative theory, in the same way that a fundamentalist—and intolerant—theory (that of hypothetical religion X or religion Y) is true as a religious belief. How does liberalism treat comprehensive normative theories that reject its basic tenets and, specifically, its regime of tolerance?


\(^{81}\) Alexander, supra note 31, at 763.

\(^{82}\) Id. at 764.

\(^{83}\) Id.
Alexander creates a typical member of a hypothetical sect, one that regards the saving of individual souls as an absolute, that is, as a religiously-grounded, civic obligation, in the same way that liberalism enforces an individual's "right" not to be saved. He contends that the liberal comes to an understanding of liberal beliefs in much the same way as the hypothetical believer comes to her religious beliefs. Both the liberal and the sect member are schooled in their respective beliefs early in their lives, both read and study as they mature, both find more knowledgeable instructors whom they trust, and both ask, if only intuitively, whether the scientific—"reason[ed]" beliefs—or the religious—"faith"-based—beliefs they contemplate cohere with the rest of their belief system.84 The conclusion is that both come to reason and faith in the same way, via the same learning and reasoning processes.

But this conclusion beggars discussion, because it is not at all clear that its assumptions withstand rigorous analysis. In the first place, religious commitment is likely to precede cognition.85 "If one learns Torah in his youth," the Rabbis liked to say, "the words of Torah are absorbed into his blood and issue clear from the mouth. If he learns Torah in his old age, the words of Torah are not absorbed into his blood and do not issue clear from his mouth."86 The religious education of Hasidic Jewish children starts with rituals at age two; the children begin to attend day long classes in religious training at age three. "At first fulfilling his ritual obligations by rote, the child learns to include almost all of his activities in the realm of the sacrosanct."87 I have no reason to believe that the religious education of any seriously committed orthodox individual of any other religion varies greatly.

But even if we concede the extraordinary commitment of orthodox Hasidic Jews or orthodox Catholics or Amish or anything else, one could still find telling a description of religious education that likens spiritual learning to an organic process. It is a process that one takes into one's body still pure, beginning with precognitive reverence for authority and long hours of pure memorization—of ritual, of sacred text—which antedates justification or warrant. Religion, Paul Tillich wrote, "is at home everywhere, namely, in the depth of all functions of man's spiritual life. Religion is the dimension of depth in all of them.

84. See id. at 768-70.
85. I am fortunate to have had the patient questioning and commitment of Robert Audi, who has helped me appreciate some of the very difficult epistemological issues raised by these and related questions.
86. ABRAHAM COHEN, EVERYMAN'S TALMUD 175 (1975) (emphasis added).
Religion is the aspect of depth in the totality of the human spirit." It is, in short, "a feeling" that accompanies and is one with the cognitive function. It often precedes and remains in being with and shapes liberal education.

Nor is it to just any authority that the child becomes committed: the authority the child appeals to is transcendent, comforting and protective. It is a God softened by a white beard and friendly eyes set in gently wrinkled sockets. This is the God whose presence and countenance first carries the resting child through the night. Only with effort and deliberate study does the God of the child's night reveal the majesty and overwhelming mystery of the mature adult's God. Maimonides, the Medieval Jewish philosopher best known for his work, *The Guide for the Perplexed*, cautioned against this deeper contemplation before one could "purify his character thoroughly and carefully . . .

But he must not, at the very outset of understanding, make a decisive judgment, or give full rein to his ideas by attributing to his thoughts the power to understand God. Instead, he must exercise hesitancy and restraint and wait until the truths little by little disclose themselves to him. It is in the light of such behavior that we must understand the verse: 'And Moses hid his face, for he was afraid to look upon God.' (Exodus 3:6).

To urge Maimonides' caution as one contemplates a liberal, non-religious, non-faith-based notion—to equate political liberalism and religious education—seems almost viscerally incoherent. Nothing remotely similar in the realm of the profane requires this spiritual purification before belief. It is religion's precognitive psychological role that gives to Maimonides' statement its clarity and poignancy. We are, in short, conditioned to religious faith long before "liberal" education and warranted justification of faith or reason occurs.

Nor is there anything remotely similar between the domain of reason and personal religious experience as a source of knowledge. In a chapter titled "The Reality of the Unseen" in his classic, *The Varieties of Religious Experience*, William James catalogues religious perception: "There was not a mere consciousness of something there, but fused in the central happiness of it, a startling awareness of some ineffable good;" "[I]t was not the consciousness of a live person, but of a spiritual presence;" "I remember the night, and almost the very spot on the

89. See id.
92. Id. at 64.
hilltop, where my soul opened out . . . into the Infinite;"93 "To this day . . . I cannot understand dallying with religion and the commands of God. The very instant I heard my Father's cry calling unto me, my heart bounded in recognition."94 As James remarks, something is at work in these experiences "more deep and more general than any of the special and particular 'senses' by which the current psychology supposes existent realities normally to be originally revealed."95 The experiences, he notes, are "something more like a sensation than an intellectual operation properly so-called."96 We are here dealing not with reasoned understanding, but "the revelation of a reality other than that in which [the actor] participates through . . . ordinary daily life."97 This is the "feeling" to which Dr. Tillich refers. To presume that we come to this other reality as we come to an understanding of Marx's *Economic and Philosophical Manuscripts of 1844*, for example, is just wrong.

But even were we to put religious experience aside and cede to Professor Alexander his epistemological point, we would be required to examine the unstated and unexamined premise on which it rests. He writes:

> If liberalism is true as a normative theory, then it follows that any religious views that deny liberalism's tenets are false. If religion X teaches that government should punish those who refuse to accept the truth of religion X, then, if liberalism is true, that tenet of religion X is false. If religion Y teaches that government should tax citizens to support religion Y, then, if liberalism rejects government support of religion, and is correct in doing so, religion Y's teaching is false.98

There are at least three ways to respond to the assumption that the "truth" claims of liberalism and religion are measurable by the same criteria. First, one can question any non-comparative methodological approach to the notion of "jurisdictional limitations"; that is, one can ask whether there is any value in identifying liberalism's self-preservation urge without comparing that urge with similar urges in different ideological frameworks. Second, one can examine closely the premise that "truth," with respect to a partially comprehensive political theory, is the same as "truth" with respect to a religious belief. Third, even if we could deconstruct this idea of truth, we can question where that leaves

93. *Id.* at 67.
94. *Id.* at 69.
95. *Id.* at 61.
96. *Id.* at 66.
the inquiry. In any event, we have reason to doubt the value of Alexander's contention.

1. Non-Comparative Methodology—The first response to Alexander's argument starts by recalling his assertion that liberalism's claim to "partial" comprehensiveness—its ability to limit its jurisdictional range to politics—is valid only to the extent that it is "not just one sectarian position vying with others versions of the Good."99 On this view, liberalism can evade the question of how it "treat[s] it own rejection" only by comparing its epistemological approach with that of an intolerant religion.100 Fair enough, one could respond, but so what? That a political theory—any political theory—will create and retain for itself the means of its own survival—and may do so through familiar tropes of one sort or another—is a universal constant. That liberalism rejects conduct101—and even speech102—which would undermine one of its basic tenets must be regarded as a given. Moreover, it is a constant with respect to all political theories. Thus, to expect that a liberal political regime would not embrace the power of self-defense is unreasonable. Moreover, it is largely irrelevant.103

It is irrelevant, although not without interest, if we concede that we do not wish to live in a theocracy. What makes the issue intriguing is not that liberalism would react to potential threats to its existence as would any other hegemonic political philosophy, but that the particular content of liberalism's ideology seems almost radically inclusive of opposing ideologies. One would hardly blink an eye, for example, at reports that a governing entity espousing Maoist or Leninist philosophies (or a radical religious theory) would use ruthless terror to quell perceived enemies of its state-supported ideology. Tiananmen Square and the Iran Hostage Crisis remain vivid memories. Only because liberalism embraces the tenets of tolerance do we find any disconnectedness—so-called "non-neutrality"—when we come to analyze liberalism's unavoidable aim of self-preservation. We should not, however, compare liberalism's tolerance for visions of the good with religions that reject tolerant regimes. We should, instead, compare liberalism's "non-neutrality" with other political theories reflective of the good. In fact, when we make the comparison Alexander asks for, we ultimately confront incoherence.

This incoherence is implicit in Alexander's truth equivalence.

100. Id. at 763.
103. I am addressing this issue in the final essay in this four part work, tentatively titled The Tenacity of Liberal Ideal. (manuscript on file with author).
Recall the initial proposition: “If liberalism is true as a normative theory.” That simple conditional expression asks us to assume that “truth,” in reference to a political theory, and “truth,” as a description of religious belief, are equivalent. The first point is that this equation lacks relevance with respect to political ideologies that advertently reject religion or with respect to religiously intolerant political regimes. It can be taken seriously in the context of liberalism only because the variety of definitions of liberalism include some measure of tolerance for competing visions of the good.

2. Measuring Truth and Falsity—The question this premise raises, therefore, is whether its implicit assumption of equivalence make sense? Or is there an epistemological asymmetry that undermines the coherence of the question itself, even as applied to liberalism, which is perhaps the only political ideology to which one could even consider applying it?

At the outset, we confront the dilemma of the term “truth”: Does the premise speak to a religion’s theology? Psychology? Its source for the deduction of principles of morality? A metaphysics, if it has one? Its eschatology? These are not mere quibbles, but deep questions that one cannot gloss over. On the one hand, liberalism can be said to entertain an ethic of toleration, but does it have a theology? A peculiar psychology? An eschatology? For example, when we ask if a religious belief is “true” or “false,” we might be making four disjunctive inquiries into the nature of religious eschatological “authenticity”: (1) whether this is the one particular set of beliefs that leads to ultimate truth and salvation; and, if not, (2) whether there is another particular religion that reflects the set of beliefs that leads to this ultimate truth; (3) whether there is more than one set of beliefs that leads to universal truth; or (4) whether “ultimate truth” matters at all, that is, whether we cannot simply live a genuinely righteous life within the tension of the unknown. On this last version religion has a peculiar sociology, but its members may care little about eschatology. But purely eschatological considerations aside, Alexander’s equation begs deeply problematic questions, apparently assuming that religion X or Y, but not both, represents God’s one and only pathway to truth, as if this were the major question that religion seeks to answer.

But these notions of “truth,” be they eschatological or otherwise, are meaningless in a non-religious context, (and perhaps not congenial to any religious traditions\textsuperscript{104}). If we ask “is liberalism ‘true’?”—

\textsuperscript{104} Franz Rosenzweig, an influential early twentieth century German Jewish theologian, wrote that Jews and Christians experienced what are, in effect, mutually dependent revelations which, if lived out faithfully, were necessary for mutual redemption. \textit{See Franz Rosenzweig,}
whatever "true" means—we are not concerned with eschatology or a life lived with religious fidelity. We could, in theory, be questioning whether liberalism reflects the way God wants society ordered. Given the history of liberalism as a partially comprehensive political theory, however, we certainly need not ask this question at all. What our current conditions require us to ask is a very different, essentially historical, sociological and political question that has to do with the coexistence of, and relative toleration for, competing visions of ultimate good and competing teachings of Revelation.

Liberalism arose in a climate within which the answer to the question about competing pathways to religious truths assumed, as Alexander implicitly does, a particularist road to ultimate truth, all the while murderously denying the virtue of toleration to anyone who denied the "truth" of another's religion. Over time, liberalism ended (much of) the murder. To the extent that liberalism requires toleration, it permits the question above—Is God's way to truth particular or universal?—to be asked and answered. If any denomination claiming to represent the only way to God is correct, liberalism generally permits that group to reach the kingdom. In other words, liberalism is advertently agnostic as to the very assumption Alexander makes. It does not deny the truth of that denomination's or sect's beliefs. It permits—but does not require—others to face eternal damnation or seek truth in their own way.

Liberalism, ironically, makes lesser claims to truth than do religions generally. That is, even if a particularist denomination correctly

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105. See Jeffrey Stout, Ethics After Babel: The Language of Morals and Their Discontents 212 (1988):

What made the creation of liberal institutions necessary, in large part, was the manifest failure of religious groups of various sorts to establish rational agreement on their competing detailed visions of the good. It was partly because people recognized putting an end to religious warfare and intolerance as morally good—as rationally preferable to continued attempts at imposing a more nearly complete vision of the good by force—that liberal institutions have been able to get a foothold here and there around the globe.

In other words, certain features of our society can be seen as justified by a self-limiting consensus on the good—an agreement consisting partly in the realization that it would be a bad thing, that it would make life worse for us all, to press too hard or too far for agreement on all details in a given vision of the good.

106. Liberalism undoubtedly does put some restrictions on the way a sect or denomination reaches salvation. For example, Jonestown tended to be rebuked on grounds of "informed consent." See Stanley Hauerwas, On Taking Religion Seriously: The Challenge of Jonestown, in Against the Nation: War and Survival in a Liberal Society 91 (Harper & Row 1985). Similarly, the defense of Jim Bakker on charges of criminal fraud was rejected, despite the repeated assertions of many of his followers that they had no regrets about how their money was spent. See Frances Fitzgerald, Jim and Tammy, The New Yorker, Apr. 23, 1990, at 45, 46-47.
reflects eschatological truth, liberalism's eschatological innocence forces upon a pluralistic society the second question: How would we know? Eugene Borowitz, a liberal Jewish theologian, frames the issue slightly differently: "Logically, one cannot deny that if there is but one God in the universe then there can be but one truth. But we must now ask, 'Who among us is intelligent enough to know that truth fully?'" Framed differently, two fundamental questions remain unacknowledged: Who will surrender his or her denomination's determination of what is revealed and who makes this determination? Who indeed?

Liberalism undeniably exacts a cost: Religion X may not enlist state aid to punish members of society who belong to religion non-X (or to no religion at all) for failing to heed religion X's teachings and admonitions. Religion X is denied the opportunity to act in a coercively intolerant way, to force conversion on other groups, even were it God's will that religion X's evangelizers do so, or even to exact physical punishment on its own. Liberalism, as a political ideology, does put limits on religious conduct. In this sense liberalism does place its "non-neutral" thumb on the side of the scales of all non-religion Xs', that is to say, in favor of (or against) all religions. But even here, two more basic questions arise, and as to the first we must borrow modestly from the Utilitarians. If one stipulates that no one can know God's will fully, one places limitations on all religion Xs' claims to eschatological, moral, sociological or psychological truth. Liberalism simply accepts—and is premised upon—that stipulation. Thus, liberalism makes the search for the variety of religious realities possible for a large group of people, in fact, everyone. It, however, makes no claim of access to God's truth or truths. It is, fundamentally and at bottom, procedural, consisting itself of nothing or everything, depending upon one's point of view. It is grounded in the historically warranted premise that civil society make possible the search for ultimate reality by virtually all religious or spiri-

107. Eugene B. Borowitz, Liberal Judaism 4 (1984). Note that the logic of this question is exceptionable in exactly the same way as is Alexander's. Why if there is but one God could not that God make the truth accessible in many ways? Why should we suppose that God conceived humans so narrowly? The difficult issue the universalist faces is maintaining that belief without engaging in theological relativism. See supra note 104.


110. See generally Blumoff, History, supra note 76.
tual individuals and groups. Hence the question—"Is liberalism true in the way that religion X or Y is true?"—asks not simply the wrong question, but one that links incommensurables. Religion X may believe that liberalism fails to reflect or even impedes God's truth, by refusing to foist it on others through state compulsion. The symmetry, however, is lacking, because liberalism takes no epistemic position as to religion X's various claims of revealed truth, disabled by its premises from either affirming or denying it.113

One objection to this analysis suggests that I've loaded the dice. The notion of "stipulating" to an inability to know God's will might be viewed as substituting one religious understanding of truth with another liberal understanding of truth. To this objection at least two sufficient responses exist. First, I know of no Western theism that claims to have full access to God's will. To make such a claim would, from a Christian perspective, deny the relevance of original sin and masquerade arrogance as theology. It would claim for mere mortals the omniscience that Western religions of every sort universally accord to God alone. Second, and more importantly in this context, such a criticism assumes epi-

111. Clearly there are some limits; sincerity of belief is not a license for pedophilia or fraud or other perverse conduct, for example.

112. Of course, there are liberals notorious for their hostility towards those who, like many fundamentalists, are unable to embrace the open-minded, ever-questioning stance that many liberals embrace. See Mill, supra note 14, at 141-83 ("of the liberty of thought and discussion"). But liberalism must be honestly broad enough to embrace an individual's freedom to give himself or herself over to a comprehensive religious vision of the good. See Michael Walzer, A Note on Positive Freedom in Jewish Thought, 1 S'VARA 7, 7-8 (1990) (describing the rational choice to limit one's own freedom); Theodore Y. Blumoff, Some Moral Implications of Finding No State Action, 70 NOTRE DAME L. REV. 95, 112-13 (1994) (noting that such freedom is mandated by the privacy inherent in the religion clauses).

113. There is a response to Professor Alexander's specific examples, in supra text accompanying notes 80-85. First, liberalism does not deny that religion X's teachings about punishing infidels may be true. It does insist that under the compromise worked out in the Establishment Clause, civil society will not permit religion X to act upon those beliefs. Liberalism's denial may be wrong, but its leaders have no way of knowing and do not, as liberals, pretend to know if religion X's—or non-X's opposing—teachings are correct. Additionally, there are many citizens who think religion X is wrong. Thus, in the absence of complete knowledge, liberalism prefers to maintain peace. Religion Y's claim for support meets the same fate and is premised on the same lack of epistemic symmetry. Religion Y's interpretation of God's will may reflect ultimate truth; God may want Caesar to support religion Y's congregants with tax money. But how do we know that? If we cannot know God's will, and that will is radically contestable and contested, what course of conduct should we follow? If this position is proto-Utilitarian, so be it.

114. This objection was voiced to me directly by Professor William Marshall, who is involved in a similar project. See generally, William P. Marshall, In Defense of the Search for Truth as a First Amendment Justification, 30 GA. L. REV. 1 (1995).

115. Here I am not thinking of this concept in its early, moralistic sense, but more as the notion of "estrangement from oneself, from the other man, from the ground out of which we come and to which we go." TILICH, supra note 88, at 210. Such estrangement a priori entails imperfect, if not completely absent, understanding of God's will.
stemic correspondence between the very strong truth claim to full knowledge of a transcendent Being, and the weaker—and verifiable—truth claim that men and women are imperfect beings, both as individuals and as groups of religious individuals. The equation of such truth claims leads to an analogous ontological equation which fails to distinguish between the strong claim of internal realism—the existence of Kantian “things-in-themselves”—and the lesser claims of external realism that recognizes truth when the epistemological conditions sufficient for the assumption of its presence permit people to agree, for example, that I am sitting in a “real” chair as I type this sentence. The strong claim is incoherent; the latter reflects common sense. While the strong truth claims of religion are not incoherent, they are generally accessible to a privileged few within each denomination, and are radically contestable. In contrast, every sentient being should recognize the truth of individual fallibility, as easily as they recognize the chair I sit on. Thus, the criticism that my analysis substitutes a secular-religious truth for a purely religious one equates what is verifiable only to a privileged few with what is universally verifiable.

3. Deconstructing “Truth”—If one were to rewrite the conditional sentence of the Alexander equation, it might read:

If liberalism is an appropriate normative theory in a pluralistic democracy, then it follows that any religious views that deny liberalism’s tenet of toleration are inappropriate.

This sentence has the virtue of commensurability; it states that a religion believing in universal, transcendent norms must reject the tolerance and openness—the “robust, wide-open” conversation New York Times demands. Two reactions immediately arise to this response.

First, the claim that religion requires intolerance is by no means universally accepted. For example, Richard John Neuhaus, responding to an essay by Stanley Fish, in which Fish argues that the truly religious person wants to smash the liberal system, writes: “Christianity does propose a unified conception of life, but that unified conception of life comprehends and makes possible the pluralistic character of life as we experience it.” It thereby requires tolerance. Similarly, the Babylo-
nian Talmud tells of a dispute between two schools of Hebrew learning, both proclaiming that its interpretation of Halakha (the law) was correct. According to legend, God proclaimed that both teachings were correct, but that Hillel’s school best reflected the law, because its teaching was more “kindly and humble”, and because Hillel’s school taught the other school’s interpretation. Tolerance of other views, as a self-corrective ideal, created greater access to truth.

Second, the recast, commensurable statement of Alexander’s epistemic equation is unacceptable to most New Religionists. It has the tendency to situate religion in a place where many of them would take umbrage—namely, completely outside the mainstream. A religion committed to such transcendence could stand wholly apart from the corruption of liberalism. Robust debate is the last thing many genuine religions seek. Religion X’s revelatory story is all there is; liberal open-mindedness is heresy. Alternatively, and in recognition that the Enlightenment really is over, religion X could attempt to create a theocracy; or it could make the best of a bad lot—liberal democracy—and make secular matters better or worse and thereby advance the Coming.

In contrast with the non-mainstream options awaiting religion X, the New Religionists’ writings assume a place in the mainstream. The fundamental questions that concern them are not about epistemology, or the ethics, sociology, metaphysics of religion, or the millennial conditions most likely to catalyze the Coming of the Kingdom; they are about power. Recall Professor Gedicks’ division of public/private as mirroring the division of rationality and passion:

The division of society into public and private spheres thus mirrors the fundamental division in Western thought between subject and object. In private life, subjectivity and passion hold sway. Individuals are free to do whatever they please for any reason (or for no reason) as long as they do not harm anyone else.

Public life, on the other hand, is the realm of objectivity and reason. In this realm, government and individuals must serve the collective “public interest” rather than the idiosyncratic tastes and preferences of any individual. Value choices must be rationally defended in public life, for unlike private actions, public actions cannot be justified by mere appeal to an individual’s tastes or preferences.

We do not kill one another over our disagreements about the will of God because it is the will of God that we not kill one another over our disagreements about the will of God.”

120. Id. at 71.
122. Gedicks, Hostility, supra note 8, at 674-75 (citations omitted); see also Gedicks,
This argument leads one to believe that liberalism itself creates the need for a public/private division, and that the liberal tradition provides the understanding of rationality upon which the division depends. But that cannot be correct. The secular is only possible because there is a religious realm. In fact, the public-private division is a contingent act of power whose theological dimensions, as the current political climate amply demonstrates, cannot be denied. Among the great socio-political battles going on in American political culture today is an essentially theological battle over rationality.

In sum, blaming the Enlightenment for America’s current social problems denies responsibility for our own dilemma. American society will continue to permit abortion or not, continue to prohibit the teaching of “creation science” or not, begin to raise the level of civility or not, depending upon how these essentially theological battles are waged. Professor Midge Decter marks the starting point for any meaningful effort to restore, recreate or create ab initio a society committed to the transcendent: “[L]et us just in all simplemindedness agree to recognize that our deepest troubles are of our very own making. They do not stem from enlightenment or from humanism; they are troubles of our very own, very contemporary, self-generated atheism.”

III. THE NEW JURISPRUDENTIAL REGIME OF SMITH/AMOS

The refusal to take responsibility for our decisions and their unintended consequences explains part of the New Religionists’ reaction to the most important case in the jurisprudence of our religion clauses in recent years, Employment Division, Department of Human Resources v. Smith. Reading the word “prohibit” in the First Amendment to include only those acts that deliberately impair the exercise of religious faith, Smith declared that generally applicable legislative (or executive) acts having the effect—but not the intent—of making free exercise impossible create no constitutionally impermissible burden. This new...
understanding of religious freedom broke the long-standing Free Exercise Clause tradition which held formally that only governmental interests of the highest order could trump our most sincerely-held religious beliefs.\textsuperscript{127} After \textit{Smith}, unless the faithful receive a non-judicial exemption, they must abide by the dictates of generally applicable laws.

The New Religionists at least partially undermine their clarion call for more religion in our public discourse by viewing \textit{Smith} as yet another case in which the Court privatizes and therefore trivializes religion.\textsuperscript{128} Stephen Carter writes that “Native Americans, having once been hounded from their lands, are now hounded from their religions, with the complicity of a Supreme Court untroubled . . . when Native Americans under a bona fide religious compulsion to use peyote in their rituals are punished under state antidrug regulations.”\textsuperscript{129} In his review of \textit{Smith}, Michael McConnell rightly excoriates the Court as profoundly wrong.\textsuperscript{130} Professor Steven Smith, noting that before \textit{Smith} commentators had declared that prevailing doctrine was “useless in explaining or predicting decisions,”\textsuperscript{131} nevertheless condemns the Court’s opinion in \textit{Smith}. He argues that from pre- to post-\textit{Smith} the Court’s free exercise “jurisprudence exhibits a shift from a discourse of tolerance to a discourse that goes under the benign heading of ‘neutrality,’ but in fact amounts to a rhetoric of distortion, disrespect,\textsuperscript{132} and \textit{ad hominem} argumentation.”\textsuperscript{133} Frederick Mark Gedicks characterizes the \textit{Smith} Court’s declared “fear of political chaos” as part and parcel of its liberal understanding that “religion is a taste or preference that people will affect in order to take advantage of an exemption from general law.”\textsuperscript{134}

\begin{thebibliography}{99}
\bibitem{127} See, e.g., \textit{Wisconsin v. Yoder}, 406 U.S. 205 (1972); \textit{Sherbert v. Verner}, 374 U.S. 398 (1963). It is undeniable that one would not exhaust the fingers on one hand in tallying the instances in which the Supreme Court sustained a Free Exercise challenge. That point, however, understates the test’s value as a prophylaxis. As Professor McConnell suggests, without the test in place, legislative and executive bodies have no duty whatever to consider the effect of their work on religious minorities. Michael W. McConnell, \textit{Free Exercise Revisionism and the Smith Decision}, 57 U. Chi. L. Rev. 1109, 1116-20 (1990) [hereinafter McConnell, \textit{Free Exercise}].
\bibitem{129} Carter, supra note 8, at 9 (citation omitted). There is some irony here because while critical of \textit{Smith}, Carter understands that religions stand outside the Constitution and “should not depend on [our] courts as the sole or even the most important protectors of religious autonomy.” \textit{Id.} at 38.
\bibitem{130} See generally McConnell, \textit{Free Exercise}, supra note 127.
\bibitem{132} I essentially agree with Professor Smith on this score.
\bibitem{133} Smith, \textit{Free Exercise Doctrine}, supra note 131, at 521.
\bibitem{134} Gedicks, \textit{Hostility}, supra note 8, at 689. Surely that conclusion is permissible, although
But why such criticism? On any defensible reading of the Court’s opinion, Smith serves directly the goal of “public-izing” religion. As explanation for their decision, the Court said the following: The free exercise of religious belief does not require judicial oversight and the guaranty of free exercise, always theretofore understood as the source of protection for minorities, would find ample protection in legislative assemblies. Justice Scalia, writing for the majority, issued an open and unambiguous invitation to religious groups to lobby in America’s political forums and, given the richness of our beliefs and the depth of our commitment to religion, there the faithful will find succor: “Values that are protected against government interference . . . in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.”

One is hard-pressed to imagine a more enthusiastic welcoming into the public square. (I can think of no common sense definition of the phrase “public square” that would exclude legislative bodies.) As long as those legislatures do not engage in totally irrational acts, either by targeting a specific religion for a special burden or picking them out for a special benefit based on nothing more than political clout, the Court will steer clear of religious business. Thus it is in the most public of all public forums, legislative assemblies, that religion will find maximum political protection and fulfillment. As if to prove the Smith Court’s point, not only did Oregon amend its statute to provide for the sacramental use of peyote after Smith, but Congress went all the way to the constitutional edge (and perhaps beyond) by passing legislation mandating courts to use the compelling interest test before denying a

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free exercise exemption from a generally applicable law. 141

On this interpretation of Smith, an earlier decision, Corporation of
the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints
v. Amos, 142 assumes a central role in the new religion clause jurispru-
dence. Amos directed courts to uphold, against Establishment Clause
attack, legislative accommodations that are "rationally related to the
legitimate purpose of alleviating" a government burden on religious
exercise. 143 In light of Smith, Amos provides a necessary counterpoise.
An invitation to lobby has value just to the extent that legislative accom-
modations are permitted without great expense or argumentation.
Beyond this essential attribute of the new theological politics, at a
deeper level, Smith and Amos, give the ideal of "religious communitari-
anism" a major boost. 144 Thus, religious groups—be they lobbying
groups or otherwise—are recognized players in the public square. As
long as Amos remains good law, a result which must continue during the
Smith regime, it is hard to imagine how the ideal of religious association
and institutional religious rights can be compromised. On the view
offered here, Smith and Amos undermine the long standing lament that
the Court only occasionally recognizes religious group rights, and sub-
stantially co-opts the view that stresses insufficient protection for reli-
gious expression in the public square. 145

If the interpretation offered here is even approximately on target,
one needs to find an explanation for nearly universal condemnation of
Smith that emphasizes something other than marginalization. Certainly
one driving force is the fear that minorities, lacking the clout necessary
to move state legislatures, will suffer the unreviewability that follows
when an accommodation is denied. As Professor McConnell points out,
the absence of a constitutional mandate for accommodation, combined
with the demise of the compelling interest test, will alone change the
landscape of legislative debates. 146 Put simply, non-mainstream reli-
gions are ignorable at a very small price. On the other hand, if it is a

141. The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to -I (Supp. V 1994). See Sullivan, supra note 24, at 1667 (noting that on an assimilationist view, Smith was decided correctly because the Religious Freedom Restoration Act "paradoxically illustrates that the Smith Court’s premises were correct").
143. Id. at 339.
144. Id. at 342 (Brennan, J., concurring) (emphasizing importance of religious community).
145. The Court recently reinforced this point in the Establishment Clause context as well. See Rosenberger v. Rector and Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995) (striking down a prohibition on funding religious—evangelical—activities by a student organization at a state university); Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (requiring the state to permit the Ohio Knights of the Ku Klux Klan to place a Latin cross on the statehouse square).
146. See McConnell, Free Exercise, supra note 127, at 1132 (noting that the failure to obtain
place at the table the New Religionists seek, Smith delivers a fully upholstered chair, along with note pads and water pitchers. Religious groups have a place which, according to the Christian Coalition’s Director Ralph Reed, they have no intention of abandoning. And there, of course, is the proverbial rub!

IV. The New Religionists’ Theological Politics

In the New Religionists’ ideal polis, the public square, although lacking uniform definition, is not the place for crass political horse-trading, nor is it the exclusive—or even proper—domain of the new Christian Right. In at least one sense, then, there is a resounding plausible objection to everything I have said in this commentary to this point: “You’ve missed the point! Sure, religiously-inspired groups can lobby just like any other group. So what? For religion to play a role in reconstituting the sacredness embedded in American culture, religion must participate as religion, and not as just one more interest group among many.”

This section examines the “So what?” issue. It begins with an examination of the putative distinction between the undeniably sullying demands of religious lobbying and something deemed more authentic—“religion qua religion.” It then attempts to place the New Religionist movement in historical context, concluding that these latter day Social Gospelers are at war with other Social Gospelers. For both the New Religionists and their fundamentalist doppelgangers threaten to fulfill the worst nightmares of the late nineteenth century revivalists: many mistake the “Social Gospel” for the Gospel itself.

A. Church Apart from People

The New Religionists uniformly distinguish between religious participation in normal politics and something they label “religion as religion.” The case for this notion of “religion qua religion” was made several years ago. These views are summarized in the following:

Any person or group who convincingly demonstrates an ability to deliver large number of votes in an election will be listened to by political representatives. Churches and other religious groups have enjoyed considerable success . . . through interest group politics. . . .

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By contrast, religion enters political dialogue as a religion, and not as an interest group, when it seek to provide a point of moral reference to public policy debates. One thinks here of the anti-slavery activism of northern Protestant abolitionists in the pre-Civil War era, or the anti-abortion activism of the Roman Catholic Church in contemporary politics. Religious groups do not enter these debates to protect an economic interest; rather, they seek to witness against a moral wrong by testifying to transcendent truth. 148

This distinction lacks both experiential and historical support. In the first place, treating “interest group politics” and “economic interests” as synonymous is too narrow. Many interest groups, including churches, seek a political voice on non-economic issues. Moreover, this understanding of the role of religion in our political culture is unnecessarily thin. It is certainly not the case that all religious lobbying—or even much of it—has anything to do with individual or corporate economic gain. For example, in its handbook The Institute on Religion and Democracy reports that a large majority of issues identified by each of the fifteen groups as a “top priority” have little to do with economic aggrandizement. 149 These are not trade association gun-slingers. The Catholic Church and its lobby have actively solicited political support in Washington for thirty years. 150 And those issues that one might identify as having an economic component—child nutrition and hunger, universal health care, hopelessness, strengthened emission controls, reauthorizing toxic waste cleanup—partake not of individual profits and losses, but of income redistribution on behalf of the poorest among us. 151 (By the same token, even political lobbying is not limited to economic issues. Certainly Mothers Against Drunk Driving and reproductive rights advocates of every persuasion stripes do not petition government for a larger, self-aggrandizing slice of the economic pie.)

Second, the examples used to demonstrate a different kind of public religion are historically underexamined and at least partially misleading. As a general matter, it is virtually impossible to identify any period—or any issue in any period—in American history in which churches could occupy only the moral high ground, without delving into the dirty work of grass roots politics. For example, Professor Lee Benson, in his seminal, prize winning work on Jacksonian Democracy, concludes that “it

148. Gedicks, Political Implications, supra note 13, at 421.
149. See, Beck, Prophets & Politics, supra note 53, at 155-68. One would be hard-pressed, for example, to view today’s uproar over, and lobbying about, so-called “partial birth abortions” as somehow tainted or undignified, whatever one’s position on this issue may be.
151. See id.
seems reasonably certain that few, if any, [political abolitionists] were not intensely religious;” but that “[a]ll political abolitionists were not religious ultraists.”

Put otherwise, the moral fervor that eventually led to a civil war was, as a matter of social and cultural history, not separately religious and political, as the examples above suggest, but inextricably religious and political. Perhaps the most telling proof of this proposition is the fact that the evangelical leaders who stepped to the forefront of the abolitionist crusade were not only the “mainstay of Republicanism,” but suffered from severe internal political strife that frequently spilled into the public eye, belying at least somewhat the more spiritual and encyclical quality implied by the quote above. Politics and religion were merged, as they always are and forever will be.

While the Catholic Church, for example, does issue periodic encyclicals ex cathedra on such topics as the abortion issue, it also maintains a lobbying office in Washington which in 1991 had a staff of 24 and a lobbying budget that reached nearly two and one-half million dollars. It is a mistake to assume that the two activities are unrelated. In addition, there are at least thirty lobbying groups within and aligned with the United States Catholic Conference. Among the reasons cited for the rise of the Catholic lobby in the past twenty five years is the “theology of Vatican II, which stresses increased lay participation within the Church . . . [and] added impetus to persons outside of the hierarchical structure . . . to organize as Catholics concerned about particular policy issues.” In short, the distinction between religious lobbies and religious voices in the public square is, perhaps unfortunately, more wishful than descriptive. One separates the motives of the church from those of its faithful congregants only at some risk. There is no church or church position apart from the politically minded partisans who are its constituents.

In Professor Michael Perry’s 1991 text, Love and Power, he too advocated a place for religion as religion—including some circum-

154. See id. at 178-203.
155. Whether this marriage of the profane and sacred is as it should be, either in early history or contemporary social policy, is a matter I will take up at a later time.
156. See Beck, Prophets & Politics, supra note 53, at 41-43 (The total building budget was $30,000,000 for approximately 300 occupants. Id. at 42.).
158. Id. at 155 (emphasis added).
159. Perry, Love and Power, supra note 8.
scribed use of religious language— in public policy discussions. He also required of religions, as the cost of entering into “ecumenical political dialogue,” that their policy justifications for proposed courses of political action, and especially coercive directives, be publicly “intelligible” and “accessible.” As defined, these terms prohibited the use of any sect-specific justification to the extent “it relies on experiences or premises that have little if any authority beyond the confines of one’s own moral or religious community.” Perry’s two conditions for participation were necessary inferences from his understanding of religious belief, which he described as one that comprehends “an unutterable spiritual reality” incapable of secularization. Unutterability, of course, literally precludes interfaith conversation. He thus rejected any reliance upon “epistemically privileged insight: religious revelation to, or infallible communication with, the will of God.”

In one of his more recent efforts, Professor Perry reexamines the notion of religion qua religion. In his forthcoming Religion in Politics: Constitutional and Moral Perspectives, he opines that government should not “base” its decision making on religious conceptions of morality: “[G]overnment should never make any . . . political choice if but for a religious argument it would not [make] the choice” at all. At the same time, however, he finds no convincing reasons for preventing government officials from relying on religiously based arguments in making a choice. This articulation of the “religion as religion” leaves a basic question unanswered: What is “religion qua religion”? One can agree completely with Professor Perry’s prescriptions without requiring any special status for, or argument on behalf of, “religion as religion” in public political discourse, whatever that phrase may mean.

160. See Perry, Love and Power, supra note 8, at 88-91.
161. See Perry, Love and Power supra note 8, at 105-06. It is only fair to note at the outset that, regrettably, Professor Perry has altered this view in subsequent works. See infra text accompanying notes 163-65.
162. Id. at 106. See generally Edward McGlynn Gaffney, Jr., Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality, 64 Tul. L. Rev. 1143 (1990) (concluding that introducing more religion into public life can be done with language accessible to all). It is clear that Professor Perry has changed some of his views about accessibility in later works. See supra note 160. It is not altogether clear, however, if he has removed the ambiguity about religious language as language, or if he still abides by a limited use of language in public discourse.
163. Perry, Love and Power, supra note 8, at 73 (quoting Abraham Heschel, Man is Not Alone (1951) (publisher and cite omitted)).
164. Perry, Love and Power, supra note 8, at 120.
165. Michael J. Perry, Religion in Politics: Constitutional and Moral Perspectives (forthcoming) (manuscript on file with author).
166. See id. at ch. 2 at 6.
167. In his recent work, Professor Perry unfortunately took to heart some of the misdirected criticism his requirements of intelligibility and accessibility suffered, and backed away from his
So the question remains: Can the church meaningfully speak *qua* church, using languages and symbols that are inaccessible to the non-
adherent, in a secular society? I have concluded elsewhere that "[u]nless we present our religiously-inspired motives in a common linguistic cur-
rency or demonstrate our good faith if failed effort to do so, at best we run the risk of being ignored." To speak in a "common linguistic currency," however, is to take the parochial church out of itself and put it into a secular setting where, if it pleases, it might attempt to influence policy. The bottom line is that to address the religious outsider with some hope of justifying or even explaining successfully religiously-
based political options, be it on issues related to reproductive rights, poverty or sending American-led, NATO troops to Bosnia-Herzegovina, demands precisely the kind of lobbying many New Religionists deplore.

Professor Carter also contends that religion and religious language have vital roles to play in public discussion. He defends this point with several arguments. His first point partakes of fairness. Carter writes that it is simply impossible for some individuals and/or groups "to split off vital components of their personalities" or "remake themselves before they are allowed to press policy arguments" in the public square. Thus, he agrees with Michael Perry who maintains that a per-

views. Perry now concludes that his earlier work was too "exclusivist." He explains: "Americans should not accept any exclusivist ideal, either of public political argument or of political choice.... Instead, we should accept . . . any controversial moral belief—including . . . any supporting religious belief." Perry, *Religious Morality*, supra note 76, at 709. I would suggest however, that some exclusivity is simply the price all religions pay when theological incommensurability or faithful translation renders conversation either meaningless or useless.

For example, as a Jew I will not engage in dialogue with a conservative Protestant who lauds her support for Israel, when that "support is based on an end-time theological scenario according to which the return of the Jews to the Holy Land is a prelude to the Battle of Armageddon, the Second Coming, and the subsequent conversion of Jews to Christ." Harvey Cox, *The Warring Visions of the Religious Right*, *Atlantic Monthly*, Nov. 1995, at 59, 64. See *Galston*, supra note 106, at 279. In this context, Professor Carter notes that "[i]t is hard to be happy if one’s religious choice is tolerated only in order to hasten its destruction." *Carter*, supra note 8, at 94. Thus, what Professor Perry fully recognized in his earlier work, that it is simply not "exclusivist" to forgo dialogue when translation is neither possible nor wanted or both, he has now unnecessarily forsaken.


169. I am not endorsing religious lobbying as a normative matter. It is sullying and I suspect it does not advance the cause of saving souls, if that happens to be the goal of some religions. I am simply stating that it is unavoidable and that efforts to disentangle lobbying from religions’ more lofty goals are hopeless.

170. *Carter*, supra note 8, at 230. At various points throughout the work, Carter reiterates his understanding that the fervently religious individual whose politics and religion are hopelessly intertwined is “sincere: she truly believed that she had identified God’s command” when she supported the struggle of the Central Americans who opposed right-wing regimes the US supported. *Id.* at 69.
son who would bracket her religious convictions annihilates “‘herself . . . [a]nd doing that would preclude her—the particular person she is—from engaging in moral discourse with other members of society.’”

In a related vein, Professor Carter notes that the way the critic of public “God-Talk” ought to register displeasure with a religiously-grounded message is to challenge the cause rather than the language in which it is presented. Accordingly, he criticizes the critics, the National Council of Churches, which had reacted negatively to the 1992 Republican National Convention’s exclusivist religiosity. The Council had labelled blasphemous efforts at the GOP gathering “to invoke the infinite and holy God to assert the moral superiority of one people over another, of one political party over another.”

The Council opined that “[a]ny partisan use of God’s name tends to breed intolerance and to divide.” In Carter’s view it was wrong [for the Council] to suggest that any partisan use of God’s name tends to [breed intolerance and to divide]. It is quite enough for the council to criticize the positions espoused by those who invoked God’s name . . . without disputing the idea that one party might in fact stand for values that are closer than the other’s to the will of God.

Carter’s disapproval is both curious and troubling. First, it ignores the fact that the Council’s critique of the political use of God’s name, labelling it “blasphemous,” might itself reflect an important, religiously-inspired position. Therefore, his criticism easily turns upon itself. But it is remains curious for an additional reason. The criticism is in tension with a comment he made several pages earlier, where he quoted approvingly from The New York Times columnist William Safire. Safire, Carter noted, “hit the proverbial nail on its head” when he wrote reproachfully that the GOP convention was invoking God’s name “‘as a symbol for the other side’s immorality, much as the American flag was used in previous campaigns as a symbol for the other side’s lack of patriotism.’” This approving statement mirrors Carter’s unambiguous condemnation of those politicians who usurp religious language and

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171. Id. at 56 (quoting Michael J. Perry, Morality, Politics and Law: A Bicentennial Essay 72-73 (1988)). Whether this assertion is empirically correct and applies to those who wish to speak in public are not self-evident. Neither is it obvious that anyone accurately so described is prevented from public discourse nor is it obvious exactly what they want to say that requires another language.
172. Id. at 50.
173. Id.
174. Id.
175. See supra note 118.
symbols; Carter argues that “the seeming ubiquity of religious language in our public debates can itself be a form of trivialization.” 177 Note the contradiction: if it is impossible for many of the faithful “to split off vital components of their personalities” 178 or to “remake themselves before they are allowed to press policy arguments” 179 in the public square, then the approval of Safire and the denunciation of politicos who commandeer religious symbols suggest that the Republican patriots who impugned the patriotism of the non-believers were themselves outside the description of “true believers.”

That this conclusion would puzzle and trouble the Reverend Pat Robertson seems undeniable, whatever one may think of his particular brand of theo-politics. The conclusion is also at odds with Carter’s observation that “[f]or the religiously devout citizen, faith may be so intertwined with personality that it is impossible to tell when one is acting, or not acting, from religious motive—and this is certainly true for legislators.” 180 At an even more fundamental level this criticism does Carter in. As Stanley Fish notes, to condemn Patrick Buchanan’s views apart from their religious grounding accomplishes “exactly what [Carter] inveighs against: he asks the religious persons to ‘remake themselves before they can legitimately be involved in secular political argument.’” 181 The point is that one cannot separate the true-blue pro-lifer from her message or the creationist from his beliefs because “this religious conviction is not incidental to his position; it is his position, and determines its features in all their detail.” 182

Elsewhere I have addressed other issues arising from the asserted inability of the faithful to separate their religious and secular selves, contending that the difficulty is often overstated and more theoretical than real. 183 It is sufficient for present purposes to note, first, that those who press the argument are themselves capable of making the separation, being among the loudest members of the God-talk conversation. The bracketing dilemma, second, is self-limiting. Those who can speak truly only in sacred language will have few to speak with and are not likely to have a great effect on those who do not share their faith. As I noted above, if one wishes some success in presenting religiously-inspired argument, a widely-shared, secular language is indispensable.

But Professor Carter’s confusion is in other respects equally troub-

177. Id. at 45.
178. Id. at 230.
179. Id. at 56.
180. Id. at 111.
181. Fish, supra note 117, at 24.
182. Id.
183. Blumoff, Holocaust, supra note 8, at 607-12.
ling. He concludes that a genuine concern ought to arise among the faithful "when one's theology always ends up squaring precisely with one's politics . . . [because then] there is reason to suspect that far from trying to discern God's will and follow it in the world, the political preacher is first deciding what path to take in the world and then looking for evidence that God agrees."184 He makes this point while acknowledging the power of—but wisely rejecting—the hermeneutic critique, which he finds "far too nihilistic a theology."185 Political preachers, he notes, understand that most Americans believe in an external reality called God, but that such preachers are too self-effacing to admit, on the one hand, that discovering the content of God's message is sometimes very difficult and, on the other, that they are just making it up.186 This conclusion begets a troubling response: if Professors Perry and Carter are correct, if one cannot discern—or at least cannot always discern—whether one's motives are religious or secular, one cannot always determine when politics is driving religion or vice versa. The point seems to be that using God's name in a partisan political fashion is acceptable and immune from criticism, if, but only if, the partisans who do so really believe they are doing so genuinely and not simply usurping symbols. But who are the honest partisans? Who determines the content of God's will? Lastly, who makes these determinations and by what authority? The conclusions Perry and Carter reach bespeak an unintended Triumphalism wholly at odds with any inclusivist approach to religious discourse. This conclusion raises still another question: What is the view of public theology that drives the New Religionists?

B. The Under-acknowledged Theology of the New Religionists

1. THE SOCIAL GOSPEL

"Since the turn of the century, one of the dominant themes in Christian social ethics has been the Christian's responsibility for societial affairs."187 For the most part—although a visitor from another land would find it hard to believe today—that sense of responsibility was felt most strongly by "liberal Christians." In fact, from the Civil War until roughly the turn of the century fundamentalist evangelicals subscribed to a theology that was compatible with the general notion of promoting the

184. CARTER, supra note 8, at 70.
185. Id. at 73. The critique would hold that "God is not discerned by the faithful but created by them." Id.
186. See id.
THE NEWEST SOCIAL GOSPEL

public weal. "The Christian Church," Charles Finney, a leading "Revivalist of 1870" and President of Oberlin College, wrote

was designed to make aggressive movements in every direction—to lift up her voice and put forth her energies against iniquity in high and low places—to reform individuals, communities, and government, and never rest until the kingdom . . . shall be given to the people . . .—until every form of iniquity shall be driven from the earth.\textsuperscript{188}

Jonathan Blanchard, a leading abolitionist, agreed, describing the "perfect society" as one in which "the Law of God" and "the Law of the Land" were one and the same.\textsuperscript{189}

Sometime beginning around 1900, a vocal minority\textsuperscript{190} of Protestant clergymen came to view the United States as God's instrument for bringing the Kingdom. Christianity's central aim was the coming of the Kingdom of God, defined as both "the realm of love" and "the commonwealth of labor." The Social Gospel's faithful pursuit of the Kingdom was seminal, fully equal in church history, according to its most ardent spokesman, Walter Rauschenbusch, to "the incarnation . . . [of] Athanasius, justification by faith alone [of] Martin Luther, and the sovereignty of God [of] Jonathan Edwards."\textsuperscript{191} The Kingdom was reachable, moreover, in the here and now due to their central belief in the primacy of nurturance: "because 'the permanent vices and crimes of adults are not transmitted by heredity, but by being socialized.'"\textsuperscript{192} Overhauling the environment would in time deliver the Kingdom. This theme was echoed in the writing of Washington Gladden, the influential centrist Pastor of the First Congregational Church of Columbus, Ohio. Gladden emphasized "an immanent God, working through society as well as man . . . with confidence [in] the steady improvement of both human nature and social relations."\textsuperscript{193}

Although the movement began as a reaction to the harsh, largely urban conditions reflective of the prevailing laissez-faire infrastructure of the Gospel of Wealth, Sidney Fine notes that the Social Gospelers

\textsuperscript{188} Charles Finney, \textit{Letters on Revival} - No. 23, \textit{The Oberlin Evangelist}, at 21 (no date) \textit{quoted in} George M. Marsden, \textit{Fundamentalism and American Culture: The Shaping of Twentieth-Century Evangelicalism: 1870-1925} 86 (1980).

\textsuperscript{189} Quoted in id.

\textsuperscript{190} Marsden notes that these old line evangelicals remained outward-looking, progressive minded preachers seeking a unity with the state. Not until a liberal social gospel movement took hold in the first decade after 1900 did the fundamentalists begin to react negatively and pull out of secular society. \textit{See id.} at 88-90.

\textsuperscript{191} Reichley, \textit{supra} note 150, at 208 (quoting Walter Rauschenbusch, \textit{A Theology for the Social Gospel} (1917)) (page cite omitted).

\textsuperscript{192} Id.

\textsuperscript{193} Paul F. Boller, Jr., \textit{American Thought in Transition: The Impact of Evolutionary Naturalism}, 1865-1900 120 (1969).
began their crusade to regenerate society with an eye toward self-help, not government assistance. Only when the enormity of the task revealed itself did some come to realize that the "exhortation to follow the Golden Rule was in itself an insufficient means of bringing about needed changes and that state action might serve as an important ancillary to Christian ethics in effecting the regeneration of society." Thus Gladden and others of his ilk supported the progressive reform movements of the day: the nascent union movement, maximum hour legislation, occupational safety regulation, and control of monopolies.

Nor was the crusade carried on by clerics alone. Influential lay leaders like the economists Richard T. Ely and John R. Commons urged the church to set the goals for the state and parishioners, to become active in a new progressive Christian politics. Wrote Ely, "God works through the State in carrying out His purposes more universally than through any other institution." Commons concurred, urging fellow Christian Social Gospelers to occupy "the strategic position ... [of] government [which would serve] as the key to all social reforms and the Christianization of society." The founding membership of the American Economic Association, formed in 1885, included Ely and Gladden and reflected the new synthesis of economics and religion. All subscribed in large measure to the dictum promulgated by Iowa (now Grinnell) College's Christian Socialist Professor of Applied Christianity, George D. Herron: "The worst charge that can be made against a Christian is that he attempts to justify the existing order."

Part of the appeal of the Social Gospel reflected an "authentic reflection of some of the values of theist-humanism, in part on natural sympathy for the socially downtrodden, and in part on the attraction of a doctrine that seemed to return the church to the role of social umpire that it had largely lost since disestablishment." It was only when the Social Gospelers' theology seemed no longer to distinguish the realms of God and Caesar that most of the old line evangelicalists went their separate way, for the theological stance of the old liners placed no obsta-

195. Id.
196. RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 107 (1955). Hofstadter, describes Ely and Commons as two who along with "churchmen and other professional economists" had become disenchanted with individualism.
197. FINE, supra note 194, at 180.
198. Id. at 181 (quoting JOHN R. COMMONS, SOCIAL REFORM AND THE CHURCH (1894)).
199. FINE, supra note 194, at 201.
200. Id. at 194 (quoting from GEORGE D. HERRON, THE NEW REDEMPTION: A CALL TO RECONSTRUCT SOCIETY ACCORDING TO THE GOSPEL OF CHRIST 143 (1893)).
201. REICHLEY, supra note 150, at 209.
icles in the way of social action. "It was absolutely essential to the earlier evangelical support of public or private social programs that they be understood as complementary outgrowths of the regenerating work of Christ which saved souls for all eternity." Only when the liberal Social Gospelers put themselves too fully into the public arena at the expense of salvation through Christ, did their fundamentalist brethren rebel.

The fundamentalists' rebellion began when the "truth" of "philosophical pragmatism" was seen as replacing the truth of the gospel, which could be known directly, and need not be tested by action. This hostile position they ascribed to Walter Rauschenbusch. The Social Gospelers' view that religious morality was important only as a determinant of human conduct ("works") did battle with the notion of salvation through trust in Christ ("faith"). By the early 1900s, the battle was no longer one of balancing religious and social concerns. Professor Marsden writes: "Traditional Christian belief seemed to be at stake. The Social Gospel was presented, or was thought to be presented, as equivalent to the Gospel itself." From the fundamentalist perspective, the genuine Gospel of Jesus had become disposable!

By the time of the New Deal, the Social Gospel had fallen into disfavor with most liberal Protestants. Its legacy, however, weighed immensely more than the actual numerical support it had enjoyed in its heyday.

Through sermons, lectures, articles, books (like Charles M. Sheldon's In His Steps, a best-selling novel about what Jesus would do in the modern age, published in 1897), and various reform organizations, Protestant clerical reformers, though a distinct minority in the Gilded Age, were in time to have considerable influence on middle class America. Under their tutelage the Protestant church began moving . . . toward the Social Gospel . . . [which would] become strongly oriented toward progressive reform in the twentieth century.

Henry F. May, a leading social historian, broadened the same conclusion: "The social gospel [movement] made it possible for Progressives to 'justify social change in terms of Christian doctrine' and thus gave to their cause 'authority, power and a link with tradition.'"
The tradition of political activism continued among liberal theologians. Although he eschewed the pie-in-the-sky liberalism of the early Social Gospelers in favor of a “realistic liberalism” that sought intervention but retained individual responsibility for failings, Reinhold Niebuhr carried on the tradition of liberal Christianity in the 1930s. Describing as “vicious” Niebuhr’s critique of the Social Gospelers’ theology and social optimism in the service of democracy, Professor Hauerwas nonetheless notes that Niebuhr “never questioned the assumption that democracy was the most appropriate form of society . . . for Christians. . . . In effect, from Rauschenbusch to the present, Christian social ethics has had one agenda—to show why American democracy possesses distinctive religious status. The primary subject of Christian ethics in America has been America.”

2. (MOSTLY) LIBERAL AND THEORETICAL POLITICS

“Behind the barbed wire, in the shadow of the gas chambers, all answers sound like mockery.” Thus chastened by the unspeakable horrors of the twentieth century, the New Religionists can no longer preach with the enthusiasm of Rauschenbusch or the certainty underlying Gladden’s social salvation. Yet the model to which most of these New Social Gospelers subscribe assumes without question a political leadership role for heretofore liberal Christianity. Country and church, church and country—neither Caesar nor God, politics nor theology, can survive without the other; and none can survive with the wrong [necessarily “Right”] theo-political agenda.

John Neuhaus has described the broad outlines of the theo-political model for the liberal and conservative New Religionists’ Newest Social Gospel:

There is a venerable Christian tradition of choosing the “sectarian” rather than the “churchy” model of discipleship. The churchy model is inclusive, catholic, eager to influence the social order. The sectarian model defines itself against that order. It speaks truth to power from outside the circle of power, and is frankly skeptical about influencing that power for good. In the sectarian view, there can be no legitimate commerce between Christ and Caesar. Sectarianism for the sake of the integrity of the gospel has at times been an honorable

208. Reichley, supra note 150, at 227.
209. Hauerwas, supra note 187, at 117.
211. Neuhaus, writing with the same breath in which he mentions “Hitler, Stalin, and Mao,” concludes the lesson with the following: “When [public] religious transcendence is excluded, . . . the space is opened to seven demons aspiring to transcendent authority,” Neuhaus, supra note 8, at 8-9. See also Carter, supra note 8, at 89, 94.
and indeed necessary choice.212

But the leadership of the mainline churches, Neuhaus concludes, is not sectarian.213 It must be involved with the aims of mammon. "The main line of the mainline story," Neuhaus writes, "was confidence and hope regarding the Americanizing of Christianity and the Christianizing of America."214

Professor Carter never addresses directly the propriety of the churchly paradigm he embraces, but his theo-politics shine through clearly in his discussion of the Supreme Court’s religion clause jurisprudence—and it is “mainline.” As we shall soon discover, however, it is unclear whether his view of public religion conforms with his articulation of the nature of religion.

The more that the [Establishment] Clause is used to disable religious groups from active involvement in the programs of the welfare state, or, for that matter, from active involvement in the public square that is the crucible of public policy, the less the religions will be able to play their proper democratic role of mediating between the individual and the state and the less they will be able to play their proper theological role of protecting the people of God.215

The first point is that the role of religion is publicly participatory. Without active participation in politics, Carter believes, religion is unable to mediate between state and individual. This conclusion begs the normative question of the essential role of the church in culture. Is it so obviously the case that religions can protect the children of God only by immersion in Caesar’s realm? Surely the assertion requires some proof, because its status as truth is not self-evident. The theologian Stanley Hauerwas has enjoyed a rich and influential career by pressing with great conviction for what Neuhaus dismisses as the “sectarian” model.216 Carter’s own understanding of religion also betrays tension in his thought. Under the view of religion as “mediator,” the church could logically stand as a bulwark against the state; it could create and fortify the individuals’ values sans secular politics. It is enough to understand

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212. NEUHAUS, supra note 8, at 57. Others have labelled this essentialism polarity “Calvinistic” and “pietistic,” the latter mostly existing “in essential tension with the culture.” MARSDEN, supra note 188, at 252 n.4.

213. NEUHAUS, supra note 8, at 57.

214. Id. at 219.

215. CARTER, supra note 8, at 123. Much of the remainder of the book is dedicated to the argument in favor of greater accommodation of religion, that is, legislative exemptions from generally applicable law for religious people.

that if we are all created in God's image, we have laid the foundation for
an all-encompassing moral structure that does not require the participa-
tion of "religion qua religion" in the political scheme.\textsuperscript{217}

In fact, Professor Carter argues convincingly that religion's source
of power in our everyday lives is primarily epistemological: It provides
the faithful with the ability to "see many things differently from the way
their fellow citizens do."\textsuperscript{218} And he contends that "religions can make a
difference . . . only if they remain independent from the world."\textsuperscript{219}
Although acknowledging that no religion "always" conflicts with the
goals of the state, still he concludes that religions should provide "alter-
native meanings of the world . . . that are in competition with those
imposed by the state."\textsuperscript{220} They should move away from the center of
secular power—but not influence—to retain their role of "external moral
critic."\textsuperscript{221} In other words, Carter's understanding of religion, and it is
one with which I agree, seems to demand that religion be "privatized,"
as that term is customarily used. Thus, the stance of religion is opposi-
tional; it must contest the way of the world, as perceived by the secular
state. Accordingly, religion must not only occupy a position outside the
secular; it must also protect its sacred churches, synagogues and
mosques from public—state—access: our sacred places and sacral
thoughts are private; we pray for ourselves and on our own behalf. We
must stand apart from the state and concomitantly exclude it because the
church cannot logically or practically stand apart from the state and per-
form its mediating function if the state has access to and control over the
sacred. On this understanding it is at best unclear why we should bring
our religion qua religion into the public political conversation. For noth-
ing in the public realm is free.\textsuperscript{222}

Professor Michael Perry's work, subscribing substantially to the
work of Catholic theologian John Courtney Murray, places him squarely
and Power}, is an heroic if failed effort to justify "ecumenical political

\textsuperscript{217} See generally, \textit{Cohen}, supra note 86, at 210-16.
\textsuperscript{218} \textit{Carter}, supra note 8, at 37.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 272-73.
\textsuperscript{221} Id. at 273.
\textsuperscript{222} See, e.g., \textit{Hauerwas & Baxter}, supra note 216, at 120 (arguing that as American
Catholicism sought accommodation in America society "lost (or is losing) its strong sense of the
inherently social character of Christianity"); Sullivan, \textit{supra} note 24, at 1667-68 (arguing religious
participation in politics "would diminish religion's capacity to serve as an autonomous source of
values"); Mark V. Tushnet, \textit{Desegregating "Church" and "Culture,"} 42 DePaul L. Rev. 235,
241 (1992) ("When [political] culture grants such accommodations [to churches], it lowers the
price we have to pay for our beliefs.").
dialogue." Borrowing from the proto-liberal Williamsburg Charter, Perry writes the following:

The aim of ecumenical politics is . . . "neither a naked public square where all religion is excluded, nor a sacred public square with any religion established or semi-established." The aim, rather, "is a civil public square in which citizens of all religious faiths, or none, engage one another in continuing democratic discourse." As noted earlier, although Professor Perry would prefer that the dialogue occur in our institutions of culture rather than politics, he does not—and cannot—rule political halls out of bounds. His aim, therefore, is to "lay down," in Murray’s words, "some set of principles [that] must motivate the participation of all religious groups, despite their disensions, in the oneness of the community."

The ideals the New Religionists proselytize can no more escape the gravitational norms that bend their vision than can anyone else. Those norms, it turns out, are mostly, but not exclusively, liberal and Democratic (small “l,” big “D”). Professor Perry reveals his bias on the dedication page of Love and Power. The work honors the memory of “the six Jesuit Priests, their cook and her daughter, all liberal clerics killed in the cause of revolution in El Salvador on November 16, 1989. Although his more recent work has broadened the tent over the public square to include many participants who no doubt subscribe to conservative, even fundamentalist, political agendas, he has done so notwithstanding his knowledge that with some of these faithful, dialogue may be impossible. His theology, which embraces “fallibilism” and “pluralism,” is anathema to fundamentalists of all stripes, the former being a tool of the devil himself. Even for liberal Christian theologians, “pluralism may be a fact of history, but it is against the will of God.”

Carter too subscribes to a political agenda that is unmistakably lib-

223. Perry, Love and Power supra note 8, at 45 (quoting The Williamsburg Charter: A National Celebration and Reaffirmation of the First Amendment Religious Liberty Clauses 19 (1988)).
224. See supra note 167 and accompanying text.
225. Perry, Love and Power supra note 8, at 5 (quoting John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition X (1960); see also Neuhaus, supra note 8, at 144-45 (quoting a rabbi friend who told him "When I hear the term 'Christian America,' I see barbed wire.").
226. Perry, Love and Power, supra note 8, at dedication page.
227. See notes 165-67 and accompanying text.
228. Perry, Love and Power supra note 8, at 100-01.
229. See Marsden, supra note 188, at 106 (describing an “intensely anti-rationalistic” strain of fundamentalists who equated any criticism of Scripture as the work of the Devil).
230. Carter, supra note 8, at 293 n.9 (quoting Jesuit theologian John Courtney Murray who is quoted in Betty Mensch & Alan Freeman, Losing Faith in Public Schools, 7 Tikkun 31, 36 (1992)).
eral, notwithstanding some misunderstanding that followed in the wake of his earlier work.\textsuperscript{231} Thus he rebukes (mostly conservative fundamentalist) religious preachers for “trivializing” religion in public.\textsuperscript{232} He argues in a similar vein that the fact that a number of mostly conservative fundamentalist clergy have become politically prominent “may be a symptom of the problem, not evidence of . . . [the] existence” of religious freedom in public discourse.\textsuperscript{233} On a personal level Carter finds the New Religious Right mostly insufferable,\textsuperscript{234} supports the ordination of women within his own church,\textsuperscript{235} describes himself as “moderately pro-choice,”\textsuperscript{236} and (accurately) describes those who desire equal time for “creation science” as pursuing bad science.\textsuperscript{237}

3. COMING FULL CIRCLE: THE NEW “KINGDOM OF POLITICS”

By the end of the last century, the battle between old line evangelicals and the new Social Gospel seemed to put “[t]raditional Christian belief[s] . . . at stake.”\textsuperscript{238} The concern that turned the old line fundamentalists away from social causes was their sense that “[t]he Social Gospel was presented . . . as equivalent to the Gospel itself.”\textsuperscript{239} Near the end of our own century and the coming millennium, both sides in the culture wars, the New Religionist and the New Religious Right, preach a social gospel that comes very close to the equivalent of the Gospel itself; both pursue social causes in the name of a religion that seeks all the power Caesar has to offer. Yet whereas the largely left-leaning New Religionists mostly critique the Supreme Court and proffer theologically undernourished theories for ideal discourse, the true blue right-leaning New Social Gospelers are willing to smudge themselves at the political feeding troughs, seeking to make changes the old fashioned way, one representative, one vote at a time.

The Christian right recognizes otherwise contingent public/private boundaries only when they believe that the God with whom they com-

\textsuperscript{231} When Confessions of an Affirmative Action Baby, Carter’s first major popular work appeared, many early commentators mistook Carter’s honesty about the costs of affirmative action for a conservative political agenda. See, e.g., David Walsh, Choosing Up Sides in the Debate over Property Versus Race, BOSTON GLOBE, Apr. 26, 1992, at 81.
\textsuperscript{232} CARTER, supra note 8, at 44.
\textsuperscript{233} Id. at 54, 80. See Sullivan, supra note 24, at 1655-56 (characterizing Carter’s description of right-wing religious language and the politicians’ use of it as “dysfunctional God talk”).
\textsuperscript{234} Carter’s inhospitableness towards fundamentalist religions aligned with the political right is clear. See Stephen Carter, Let us Pray, THE NEW YORKER, Dec. 5, 1994, at 60.
\textsuperscript{235} CARTER, supra note 8, at 39-40.
\textsuperscript{236} Id. at 234.
\textsuperscript{237} Id. at 175-76.
\textsuperscript{238} See supra notes 202-03 and accompanying text.
\textsuperscript{239} MARSDEN, supra note 188 at 92.
mune sets them. They have, in fact, donned the political mantle—if not the causes—of the old Social Gospelers.

Computers, direct mail, phone banks, faxes: Through these techniques and others of state-of-the-art politics, the Christian Coalition has built its list of donors and subscribers and rally-attendees from 57,000 in 1990 to a projected 1.5 million by the end of the year. Reed's [Ralph Reed, executive director] budget has more than doubled since 1992, to $20 million this year, and in the past 12 months, he said, his groups has dispersed 40 million pieces of mail.240

Subscribing to a postmillennial eschatology, the Christian Coalition beats the doors of any member of congress who might advance the Second Coming by improving the conditions in the here and now.241 They too have, ironically, adopted the call of Professor George D. Herron, Grinnell College's Christian Socialist Professor of Applied Christianity: "The worst charge that can be made against a Christian is that he attempts to justify the existing order."242

In today's world of fundamentalist theo-politics, no public issue escapes the margins of religious counsel. One observer records that when the leaders of the Republican party sought to

water down a big tax break for families with children . . . it was the Christian Coalition that turned up the heat. . . . A day later the plan vanished.

Born of evangelical fervor on issues such as school prayer and abortion, the Christian Coalition has set off on a broader, more ambitious path: It now seeks to influence the national agenda on key budget items, including basic provisions of tax policy that affect millions of households.243

Notes another commentator of the Coalition's goals: "They intend to throw the Democrats out of the White House, to expand the Republican majority in Congress and to see passage of the ambitious Contract With the American Family legislation."244

Nor are presidential politics out of bounds. To the contrary, the 1996 presidential election was seen as a crusade. Reed, while addressing a crowd of the faithful at the Fall, 1995 Coalition convention, made clear his organization's agenda: "Who [i.e., which Republican candi-

241. See Cox, supra note 167, at 66.
242. See Fine, supra note 194, at 194 (quoting Herron, supra note 197).
244. Sara Diamond, God Stuffs the Ballot Box: Christian Coalition "Road to Victory" Convention, The Nation, Oct. 9, 1995, at 386.
date] will stand for safer neighborhoods, schools that work, strong families, protection of innocent human life, religious liberty . . . and [withstand] the threat from within?" To the denial that the Coalition seeks to be a "wholly owned subsidiary of the Republican Party," one Coalition critic, the Reverend Barry Lynn, quipped, "[n]o, they want the Republican Party to be a wholly owned subsidiary of the Christian Coalition." Surely the Social Gospelers, who had asked their followers to occupy "the strategic positions . . . of Government [which would serve] as the key to all social reforms and the Christianization of society" would applaud these efforts, if not the goals.

In contrast, the (mostly) liberal New Religionists hope to make global political change by tweaking the Supreme Court’s religious jurisprudence and engaging in dialogue. To the extent, however, that the critics seek post-Smith doctrinal modifications they want to have their cake—accommodations—and eat it too, without interest-group politics. Moreover, they want the courts to step in and reverse legislators and executives who refuse to grant permissible exemptions from general laws. Thus, Professor Gedicks, failing to acknowledge fully the necessary relationship between Smith and Amos, lauds the latter decision—which accommodated the Mormon Church’s desire to hire only the faithful, even for janitorial services in a recreation center—and condemns the former. Similarly, Professor Carter welcomes the separate opinion of Justice Brennan in Amos, which recognized a constitutional right to religious institutional self-identification, stating that Justice Brennan "got the point right." By contrast, in the context of critiquing Professor Sullivan’s distinction between Amos and Smith, he denounces the latter for its insufficient understanding of religious autonomy. Had the Court come to such an understanding, it would yield a legal principle similar to the following:

[C]entral acts of faith of a religious community—the aspects that do the most to produce shared meaning within the corporate body of worship—are entitled to the highest solicitude by the courts, and, therefore, when infringing on those central acts, the state must offer a very convincing reason. As the acts of faith that the state seeks to

246. Id.
247. See FINE, supra note 194, at 181 (quoting JOHN R. COMMONS, SOCIAL REFORM AND THE CHURCH (1894)).
249. See supra text accompanying note 134.
250. CARTER, supra note 8, at 141.
251. Id. at 141-45.
regulate or forbid become less central, the state's burden of justification grows less.\textsuperscript{252}

At the same time, the courts should not dismiss out of hand an argument from a church "that considers the repair of the sink God's work."\textsuperscript{253}

One need not characterize \textit{Smith} as reflecting the belief that "religion is a taste or preference that people will affect in order to take advantage of an exemption from general law"\textsuperscript{254} to find fault with either the \textit{Smith} decision or Professor Carter's reaction to it. First, the fault with \textit{Smith} is not with its invitation to lobby. Rather, its problems are two-fold: At the deepest level, the Court (a) evinced a distressingly thin understanding of the nature of the religion clauses and, in so doing, (b) reflected profound insensitivity to minority religions.

The debate over the meaning of the religion clauses is far too vast a subject for this essay, but commentators should agree that one of their purposes is clear: to maintain varying religious traditions, or no tradition at all.\textsuperscript{255} All of the framers of the religion clauses must have subscribed to at least one unstated premise underlying both the interdiction against establishments and the prohibition on interference with free exercise, and that is the value of and need to preserve individual differences. Without this premise, the language of the clauses makes no sense. The anti-establishment provision, for example, becomes incoherent if its proponents either desired, or were disposed to permit, a single-minded national (and later state-supported) religious regime. Although this observation partakes of tautology, it is not thereby rendered meaningless. It does emphasize the unstated presupposition of difference. Similarly, the provision demanding the dominion of free exercise forfeits some of its logic unless the drafters recognized and desired to retain and encourage individual religious difference; a prohibition on free exercise loses a great deal of its meaning in a nation dedicated to universal establishment. Thus, at the most profound level \textit{Smith} disobeys the constitutional commandment of religious difference.\textsuperscript{256}

\textsuperscript{252} Id. at 143.
\textsuperscript{253} Id. On this reading, it is difficult to determine if \textit{Amos} was correctly or incorrectly decided.
\textsuperscript{254} See supra note 134.
\textsuperscript{255} McConnell, \textit{Free Exercise}, supra note 127, at 1140 n.3 (suggesting that the \textit{Smith} Court, instead of requiring intent akin to that applied equal protection race-based claims, which begin with the recognition of racial difference and move to similarity, should have analogized to the Americans with Disabilities Act, which begins with the recognition of differences and seeks to accommodate them).
\textsuperscript{256} What makes this observation all the more interesting (and distressing) is that the opinion is written by Justice Scalia, an ardent proponent of "plain meaning." See generally Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989)(advocating "plain meaning" approach as method of arriving at a "general rule of law"). Scalia blithely dismisses the interpretive issue in \textit{Smith}, concluding without analysis that "we do not think the words . . .
In its disobedience Smith projects a fundamental insensitivity to non-mainstream religious groups. For one who purports to rely on history and tradition, as well as precedent, to resolve constitutional disputes, Justice Scalia's concluding remarks in Smith are dumbfounding: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but [this is an] unavoidable consequence of democratic government. . . ." That conclusion would be relatively unexceptionable under two circumstances: (a) if the Constitution contained no First Amendment, or (b) we were a direct democracy. Under such circumstances, all accommodations of any sort would reside with legislative grace and executive willingness to enforce the law. But precedent and history tell us something very different, instructing that when the government puts individuals to the unthinkable choice of following religious scruple or following the law, it must demonstrate a compelling reason for so doing. The Court told us nearly fifty years ago with unanimity that government "can pass [no] laws which aid one religion, aid all religions, or prefer one religion over another." This position was adopted for reasons that persist: to "secure[ ] religious liberty from invasion of the civil authority."

This historic understanding does not require the judiciary to measure the "centrality" of the infringed upon act of faith, as Professor Carter recommends. On the one hand, it is difficult to imagine any litigation practice more unseemly than qualifying theologians as experts under the Federal Rules of Evidence, thereby rendering them "competent" to opine on religious centrality. But worse than unseemliness is either the misguided allocation of the burden of proof that the proposal requires, or the extent to which such a practice would demean religion if

257. See, e.g., Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia J., dissenting) (arguing that the majority rejected "the historic practices of our people").


259. Smith, 494 U.S. at 889.


the burden were retained by the state. Further, if the religious conduct at
issue were not "central," the courts would be left adrift to determine the
inverse relationship between conduct centrality and state justification.
On this score—and only this score—would Justice Scalia triumph:
"What principle of law or logic can be brought to bear to contradict a
believer's assertion that a particular act is 'central' to his personal
faith?" Moreover, what judge or jury can determine which set of
competing expert theological testimony is to be followed? The problem
with the compelling interest test that reigned prior to Smith is not with
the test, but with the Court's unwillingness to apply it faithfully.

V. In Conclusion: A Very Brief and Tentative Excursus on
Dialogue Without Triumphalism or Theological Relativism

An ancient Hasidic tale tells of an elderly Eastern European Rabbi
who, shortly after one of the emperor's periodic pogroms had wiped out
hundreds of Jews in the area, addressed his congregation during a High
Holy Day Shabbat service. Standing before the congregation, he raised
his head and arms toward Adonai and cried out in pain:

Adonai, what have we done to make you so angry? How have
we broken your covenant? Why have so many of us been taken?
Please, Adonai, if it will help, if it will stop our suffering and bleed-
ing, speak to us now, tell us what to do, for the pain we now feel will
bear no further losses. Please, Adonai, if I have made you angry, take
my life that others of our people might be spared.

Of course, the story goes, God made no response: Ours is to do and not
to know, to pray and not to lead. As the theologian Michael Goldberg
points out, the climax of the Exodus narrative "is not a Declaration of
Independence at Philadelphia, but a binding covenant at Sinai. In this
narrative, . . . the Israelites go from being the servants of the Egyptians
to being the servants of God." This is where I come from.

The cultural battles we now witness are not about the marginaliza-
tion of religion in American politics. As Stanley Fish points out, the
Enlightenment is over "and religion lost." Contrary to traditional lib-
eral tenets, which consign many of our most cherished concerns to the
private sphere, we are today in danger of being overwhelmed by public
religiosity, even though for many of the New Religionists, the type of

263. Smith, 494 U.S. at 887.
264. I am thankful to my friend and former Rabbi, Uri Goren, Temple Beth Israel, Macon,
Georgia for this story.
265. MICHAEL GOLDBERG, JEWS AND CHRISTIANS: GETTING OUR STORIES STRAIGHT 31 (985).
266. Fish, supra note 117, at 26.
religion that now dominates public life is simply wrong. From this perspective, the issue is about politics and power, plain and simple. The new Battle of Armageddon is about control: it pits the liberal agenda of most New Religionists against the conservative agenda of the New Right; both proclaim a "New Social Gospel," although only the latter is willing to undertake the public work this gospel requires.

From a different perspective, however, one might ask why we should engage in an ecumenical political dialogue at all? In a nation where private activity is still the predominant form, it cannot be that the only itinerary which leads to transcendence runs through public political discourse. Why should we not engage one another in ecumenical theological discourse? Would we not all be better served if we found common theological grounds for finding a national transcendent norm and perhaps a common source of humility? Would we not be richer as a political culture if we at least begin the journey to transcendence by heeding Professor Hauerwas' counsel: "[W]hat more important public service can we render than to pray that the emperor recognize his or her status as a creature of God[?]"

Whether such a dialogue is—or ever was—possible is an open question. It is hard to imagine a theological synthesis that accords full respect for the variety of revelations, without collapsing into a theological relativism which undermines the importance of revelation generally. For if one revelation is equal to another, none has any unique value. And if we cannot create such a synthesis, there arises the necessity to combat the wholly paternalistic brand of tolerance known as Triumphalism. In the end, we may be too far removed from genuine religion to overcome the essential gnosticism that pervades American Religion.

But between the two poles of relativism and Triumphalism lies tension. If we are to create the national transcendence necessary to restore or recreate a sense of ourselves as a moral people, we must find a way to embrace the tension and use its energy creatively. Clearly, that will be no mean feat.

267. HAUERWAS, supra note 187, at 126.
268. NOVAK, supra note 3, at 17.
269. Jesus is not so much an event in history for the American Religionists as he is a knower of the secrets of God who in return can be known by the individual. Hidden in this process is a sense that depravity is only a lack of saving knowledge. Salvation, through knowing the knowing Jesus, is a reversal wholly experiential in nature, an internalization of a self already internalized.