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LAW AND RELIGION: IS RECONCILIATION STILL POSSIBLE?

R. Randall Rainey, S.J.*

I. INTRODUCTION

In this Article I explore the relation of law and religion from an interdisciplinary perspective. In considering this general topic, it is clear that fruitful exchanges between these two aspects of human experience have been characteristic of the American experiment in democratic governance. Legislators, jurists, and legal scholars have drawn upon the intellectual and moral resources of various religious traditions in addressing the problems of constitutional interpretation,¹ the definition of religion,² and questions of justice.³

Theologians, philosophers, and religious leaders from diverse religious traditions contribute regularly to the legal structure of church-state

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1. For an earlier appeal to the philosophical and religious foundations of constitutional law, see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); see also MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* 139 (1988) (stating that "the activity of interpreting [a sacred text] in the life of a religious community" is similar in function to interpretation of Constitution in American political community); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984). In the context of constitutional adjudication, religious organizations regularly submit amicus curiae briefs in cases having substantive moral or religious significance.

2. See Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 249-67 (1989) (detailing Court's various attempts to define religion and its periodic reliance upon theological definitions); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Jesse H. Choper, *Defining Religion in the First Amendment*, 1982 ILL. L. REV. 579; Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

3. The influence of St. Thomas Aquinas upon Western jurisprudence is extraordinarily deep. For an excellent recent translation and commentary on the writings of St. Thomas relevant to the law, see ST. THOMAS AQUINAS, *TREATISE ON LAW* (R.J. Henle, S.J. ed. & trans., Notre Dame Press 1993). For an illuminating historical examination of the ecclesiastical and theological origins of the rule of law in Western civilization, see HAROLD J. BERMAN, *LAW AND REVOLUTION* 273-94 (1982).

relations,⁴ to an exposition of the moral issues bearing upon the foundations and limits of law regarding complex social problems,⁵ and to the development of public policies, both foreign and domestic, that advance social justice and world peace.⁶

The metaphysical and anthropological suppositions of this dynamic intellectual, moral, and political dialogue are that the life of the spirit is real, that religious experience is intelligible, and that authentic religious insights into the human condition are of great value to the political community.⁷ This tradition also assumes that the practice of true religion is essential to the moral well-being of individuals, of families, and of society at large;⁸ that religious-ethical discourse is relevant to the formation of

4. See, e.g., JOHN A. COLEMAN, S.J., *AN AMERICAN STRATEGIC THEOLOGY* (1982) (illustrating American-Catholic contribution to development of democratic character and civic virtue); J. Bryan Hehir, *The Right and Competence of the Church*, in *ONE HUNDRED YEARS OF CATHOLIC SOCIAL THOUGHT* 55 (John Coleman ed., 1991) (discussing development of Roman Catholic Church's claim of its "right and competence . . . to address political, legal, social and economic issues" in modern society). The work of John Courtney Murray, S.J., shaped the essential contours of American Catholic church-state theory. See JOHN C. MURRAY, S.J., *WE HOLD THESE TRUTHS* (1960) (arguing that Catholicism is fully compatible with democracy, especially given its natural law tradition); see also REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (1944) (advancing critical and yet generally sympathetic Protestant account of democratic aspirations). In addition to his defense of Catholicism as a legitimate partner in the American democratic experiment, Father Murray's work as a political scientist and as a theologian is widely recognized as bearing its greatest fruit in the recognition of religious liberty by the Second Vatican Council. See *Declaration on Religious Liberty (Dignitatis Humanae)*, in *VATICAN II: THE CONCILIAL AND POST CONCILIAL DOCUMENTS* 800 (Austin Flannery ed., 1981).

5. A partial catalogue includes the moral and legal controversies surrounding religious liberty, immigration, slavery, abolition, suffrage, prohibition, desegregation, economic justice issues, nuclear war, contraception, abortion, homosexuality, euthanasia, and the death penalty. See, e.g., DAVID HOLLENBACH, S.J., *JUSTICE, PEACE AND HUMAN RIGHTS: AMERICAN CATHOLIC SOCIAL ETHICS IN A PLURALISTIC WORLD* (1988); DAVID HOLLENBACH, S.J., *CLAIMS IN CONFLICT* (1979) (both works presenting account of development of Roman Catholic human rights theory and various approaches within that tradition for engaging in and helping to resolve social-ethical controversies).

6. For examples of contemporary efforts of the Roman Catholic episcopacy in the United States to express its judgment concerning important questions of social justice, see NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: CATHOLIC SOCIAL TEACHING AND THE UNITED STATES ECONOMY* (1986), and NATIONAL CONFERENCE ON CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* (1983).

7. The notion of religious authenticity I have in mind is not merely a sincerely held religious belief, which, although it may reveal a certain measure of moral integrity in an individual, renders meaningless the objective denotation of "religion" as such. What I mean by religious authenticity is that which is recognized as such in a particular religious tradition, and which is confirmed through its reception by a religiously plural political community.

8. See JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 46 (James H. Tully ed., Hackett Publishing Co. 1983) (1689) ("A Good Life, in which consists not the least part of

public policy and law,⁹ and that both the rule of law and democratic governance depend upon the moral and religious foundations of ordered liberty.¹⁰ These were the presuppositions of the founders of this republic and of the framers of the Bill of Rights, who, in the religion clauses of the First Amendment,¹¹ gave constitutional form and preferential legal status to religious liberty under the rule of law.¹²

Notwithstanding the strength of this tradition, I found myself troubled by what seems to be a rather serious impediment to its future efficacy. While the form of the tradition remains visible and meaningful exchanges still occur,¹³ I believe that the potential contribution of the dialogue between law and religion to democratic governance is threatened because the conceptual foundations of the dialogue have been undermined during the better part of this century. I will argue that an estrangement has arisen between law and religion that impedes beneficial

Religion and true piety, concerns also the civil government; and in it lies the safety of Men's Souls and of the Commonwealth").

9. Alexis de Tocqueville recognized the depth of the republican respect for the political function of religion. He wrote:

Religion in America takes no direct part in the government of society, but it must nevertheless be regarded as the foremost of [its] political institutions; for if it does not impart a taste for freedom, it facilitates the use of free institutions. . . . I do not know whether all Americans have a sincere faith in their religion. . . . But I am certain that they hold it to be indispensable to the maintenance of republican institutions.

ALEXIS DE TOCQUEVILLE, *ON DEMOCRACY, REVOLUTION AND SOCIETY: SELECTED WRITINGS* 93 (John Stone & Stephen Menell eds., 1980).

10. Even the Virginia Declaration of Rights, noted for its revolutionary commitment to the principle of disestablishment and to religious liberty, recognized the necessary dependence of democratic governance upon moral and religious virtue. In pertinent part, the document reads:

Section 15. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.

JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 191-92* (1991).

11. U.S. CONST. amend. I.

12. See ANSON P. STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 3-103 (1964) (detailing formative influence of religion on founders); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 426-29 (1969) (noting importance of religion to republican theory).

13. See, e.g., *Church of the Lukumi Babaluaye v. City of Hialeah*, 113 S. Ct. 2217 (1993) (considering testimony of religious anthropologists and theologians to establish religious function of animal sacrifice, which had been prohibited by series of municipal ordinances); *Influencing Legislation by Public Charities: Hearings Before the House Ways and Means Comm.*, 94th Cong., 2d Sess. 63-90 (1976) (receiving testimony from religious organizations).

interdisciplinary exchange and seriously threatens the rule of law and democratic governance.¹⁴

In its starkest form, this estrangement manifests itself in the virtual banishment of religious belief and practice from the public life of the political community. I have in mind not simply the Establishment Clause¹⁵ controversies regarding church-state relations or those concerning religious liberty. To be sure, some of those disputes, as I argue later, reject the versatile and religiously plural constitutional form of the 1791 church-state settlement. That constitutional approach to religion held religious liberty in high regard, permitted a wide variety of reasonable accommodations of religious life, and guided federal and state government from the founding of the nation until the middle of this century.¹⁶ What I have in mind is a more troubling source of alienation—an antireligious bias that is deeply wary of religion and that tends to tolerate, if not advocate, its public marginalization.¹⁷

This negative disposition toward the presence of religion in civic life and toward an active role for religious associations in the formation of public policy seems to be rather widespread among intellectuals, media elites, and law school faculties. Given their power and influence in American culture, this antireligious bias has been widely disseminated and has had a deep—if subtle—influence upon the general public's understanding of the role of religion in our democracy and especially upon its place in public discourse. This bias also has been periodically expressed in the opinions of the United States Supreme Court such that its attitude toward religion and reasonable church-state relations has all too

14. Every weakness in the foundation of the dialogue between law and religion regarding controverted matters will likely be manifested in recurring public controversies and will undoubtedly make the resolution of such matters much more difficult. Current disputes regarding abortion, sex education in public schools, and homosexuality are illustrative. *See infra* parts II-III.

15. U.S. CONST. amend. I.

16. *See infra* part V.

17. In commenting upon the "secularization" of modern society, Professor Charles Taylor has noted:

[The term] describes a process which is undeniable: the regression of belief in God, and even more, the decline in the practice of religion, to the point where from being central to whole life of Western societies, public and private, [belief in God and the practice of religion] has become sub-cultural, one of the many private forms of involvement which some people indulge in.

CHARLES TAYLOR, *SOURCES OF THE SELF* 309 (1989); *see also* HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 46 (1974) (noting modern disillusionment with law and religion and urging commitment to renewal of "these two dialectically interdependent dimensions . . . of the social life of man"); RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 20-37 (1984) (observing exclusion of religion from public discourse).

often been one of deep distrust and studied indifference—if not antipathy. Even more troubling is the Court's extreme disregard for the constitutional dignity of religious beliefs and practices.¹⁸

Although a comprehensive investigation of this problem is beyond the scope of the Article, I will examine what appear to be the principal causes, signs, and primary consequences of this estrangement. In doing so, I will give special attention to how this alienation bears upon the rule of law generally, and more particularly upon public deliberation and decision making concerning controverted moral issues. While the disaffection is quite deep, the breach may be repaired. However, in the absence of this much needed rapprochement, there is little hope of a flourishing academic or political exchange between these two aspects of civil society. Accordingly, I will make several modest suggestions regarding how law and religion might be reconciled and will identify those areas of interdisciplinary cooperation which even now seem to offer the most promise.

II. THE PRINCIPAL CAUSES OF THE ESTRANGEMENT

A. *An Intellectual Bias Against All Things Religious*

In American universities and law schools, it is not difficult to discover a palpable distrust of, and sometimes deep-seated animosity toward, religious belief and practice.¹⁹ Professor Kent Greenawalt has identified and described this animus quite candidly: "A good many professors and other intellectuals display a hostility or skeptical indifference to religion that amounts to a thinly disguised contempt for the belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience."²⁰ This antireligious prejudice, which print and elec-

18. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992). Having criticized the Court's past hostility or indifference toward religion and the recent turn of the Rehnquist Court toward religious majoritarianism as equally misguided, Professor McConnell argues for a "regime of religious pluralism, as distinguished from both majoritarianism and secularism." *Id.* at 117; see *infra* part V.

19. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 215 (1987) (describing negative Enlightenment view in higher education toward religion as based upon "scientific contempt in universities for the uncleanness of religion" because "religion vs. science equal to prejudice vs. truth"); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE* 13 (1991) (noting "characteristic liberal incapacity to understand religion"); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1031 (1990). Kronman notes that "Religion . . . whether it be quietly pietistic or mystical in character, at some point *always demands an 'intellectual sacrifice'* that is incompatible with the uncompromising rationalism of philosophy." *Id.* (emphasis added) (quoting Max Weber, *Science as a Vocation*, in FROM MAX WEBER 129, 155 (H. Gerth & C. Mills eds., 1946)).

20. KENT GREENAWALT, *RELIGIOUS CONVICTION AND POLITICAL CHOICE* 6 (1988).

tronic media elites share and frequently manifest,²¹ originates in the more skeptical strands of the eighteenth-century Enlightenment.²² In some respects it culminates in a Nietzschean disdain for organized religion and especially for Christianity.²³ This bias was clearly present among intellectuals who, describing themselves in the mid-1930s as "religious humanists,"²⁴ explicitly denied the supernatural or transcendental horizon of traditional religions and sought to recast the social function of such religions.²⁵ While the work of John Dewey is representative of the antireligious stance of some American academics during this period,²⁶

21. See GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS 15-25* (1990) (noting discontent with and general disregard for religion exhibited by members of national media).

22. See DAVID HUME, *DIALOGUES CONCERNING NATURAL RELIGION* (Richard H. Popkin ed., Hackett Publishing Co. 1980).

23. Contempt for religion, which openly reveals itself only rarely, draws from a range of philosophical traditions but finds especially congenial the nihilism of Frederick Nietzsche. See FREDERICK NIETZSCHE, *Thus Spoke Zarathustra*, in *THE PORTABLE NIETZSCHE* (Walter Kaufmann ed. & trans., Viking Press 1954) (Circa. 1890) (announcing death of God and all religions because religious belief in God is no longer possible and declaring necessary collapse of all transcendental horizons because all such structures are mere human constructs).

24. This term was the self-description used by intellectuals like John Dewey who signed the *Humanist Manifesto I* in 1933. *HUMANIST MANIFESTOS I AND II*, at 7 (Paul Kurtz ed., Prometheus Books 1984) (1933).

25. The propositional beliefs disclosed in *Humanist Manifesto I*, see *id.*, illustrate a pervasive antireligious bias. Having defined "religion" as the "quest for abiding values [and] an inseparable feature of human life," these reformers were convinced that "the time has passed for theism, deism, [and] modernism," *id.* at 7, and therefore concluded that, "[t]he distinction between the sacred and the secular can no longer be maintained" and that "*religious institutions, their ritualistic forms, ecclesiastical methods, and communal activities must be reconstituted as rapidly as experience allows, in order to function effectively in the modern world,*" *id.* at 8-10 (emphasis added).

Forty years later, the signers of *Humanist Manifesto II* affirmed the rejection of "traditional theism, especially in the prayer-hearing God, assumed to love and care for persons, to hear and understand their prayers and to be able to do something about them [as] an unproved and outmoded faith." *Id.* at 13. As the successor of "the old religions," humanism embraced a universal naturalism, proclaimed its faith in human progress, and revealed "a set of common principles that can serve as a basis for united action" and that provide "a design for a secular society on a planetary scale." *Id.* at 13-15.

26. See, e.g., JOHN DEWEY, *A COMMON FAITH* (1934). As religion had "little knowledge and no secure method of knowing," Dewey revealed his opinion of religion when he asked: "How could the course of religion in its entire sweep not be marked by practices that are shameful in their cruelty and lustfulness, and by beliefs that are degraded and intellectually incredible?" *Id.* at 5-6. Proclaiming the liberation of modern intellectuals from the distortions of supernatural religion, Dewey declared that:

[n]othing less than a revolution in "the seat of intellectual authority" has taken place The mind of man is being habituated to a new method and ideal: There is but one sure road of access to truth—the road of patient, cooperative inquiry operating by means of observation, experiment, record and controlled reflection.

today strands of the prejudice still emanate in varying degrees from the works of prominent intellectuals.²⁷

The conceptual foundations of this bias range from the complete metaphysical denial of spiritual reality, usually accompanied by atheist and materialist philosophies,²⁸ to interpretations of rationalism expressed in logical positivism²⁹ and psychological determinism.³⁰ In no small measure this antipathy toward religion, especially in its most diffuse forms, developed in response to bruising confrontations with religions like Calvinism and Roman Catholicism, which at times stifled intellectual inquiry and freedom of conscience, and which sought to dominate both the formation of public law and the coercive powers of the modern nation state for religious purposes. Equally important is the protracted history of encounters with anti-intellectual evangelical sects whose members hold faith and reason in bitter opposition and who occasionally initi-

Id. at 32-33. See also EDWARD A. PURCELL, *THE CRISIS IN DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973) for a critical examination of the tendency of some liberals to exclude religious discourse from public debate and decision making.

27. See Richard Rorty, *Pragmatism and Philosophy*, in *AFTER PHILOSOPHY: END OR TRANSFORMATION?* 26 (Kenneth Baynes et al. eds., 1993). Rorty notes that the Enlightenment rightly concluded that "when religious intuitions were weeded out from among the intellectually respectable candidates for Philosophical articulation[,] . . . what would succeed religion would be *better*." *Id.* at 55; see also BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 368 (1980) (asserting liberal skepticism and denying knowledge of transcendental meaning); Quentin Skinner, *Who are 'We,' Ambiguities of the Modern Self*, 34 *INQUIRY* 133, 147-50 (1991) (reviewing Charles Taylor's book *Sources of the Self* and attacking Taylor's theism).

28. See generally MICHAEL J. BUCKLEY, *AT THE ORIGINS OF MODERN ATHEISM* (1987) (detailing philosophical foundations of modern atheism).

29. The moral philosopher A.J. Ayer put the matter in rather stark terms when he declared that the beliefs of the theist "cannot possibly be valid, but they cannot be invalid either. As he says nothing at all about the world, he cannot justly be accused of saying anything false, or anything for which he has insufficient grounds." A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* 116 (1952).

30. The works of Sigmund Freud, for example, reveal a highly critical account of the phenomenon of religious experience. See Sigmund Freud, *Civilization and Its Discontents*, in *THE MAJOR WORKS OF SIGMUND FREUD* 776 (Robert M. Hutchins et al. eds. & Joan Reviere trans., 1952) (describing religion as contrived means of avoiding neurosis achieved at high cost of submitting to "the forcible imposition of mental infantilism and [to the] induc[tion] of a mass-delusion . . ."). The contempt for religion is unambiguous in psychologist George Vetter's work, *Magic and Religion*. There he writes that "[o]ne glance at any of the current anthropomorphic deities is sufficient to demonstrate to all but those hopelessly indoctrinated during their helpless infancy, that these gods were created by man when he was not too well informed." GEORGE VETTER, *MAGIC AND RELIGION* 509 (1958). Regarding the value of religious-ethical insight to the formation of public policy, one can readily conclude Vetter's view from his assertion that "[t]he reason that organized religions have been almost completely impotent in providing intelligent and effective moral leadership is simply that they have had none to give." *Id.* at 520; see also DAVID M. WULFF, *PSYCHOLOGY OF RELIGION* (1991).

ate vigorous theocratic campaigns.³¹ Furthermore, the influence of legal positivism and its principal thesis—that the concept of law is not dependent upon any particular moral theory, conception of good, or theory of justice³²—in combination with various forms of moral relativism,³³ gives aid and comfort to the antireligionist account of law.

In this Article, I will refer to those who share this animating prejudice as “Enlightenment or liberal fundamentalists.” While this term suffers all the defects of any stylized construct, I employ it as a general term to describe the tendency of a certain strand of liberal thought to oppose the nontheocratic presence of religion in the political life of the community.³⁴ This designation is not meant as an *ad hominem* against classical or modern liberalism or against any particular person. Rather, the term is intended to describe that variant of liberalism that reveals, with varying degrees of intensity,³⁵ an *antireligious* “stance” or “disposition.”

31. In this respect one might fairly say that this secular bias is a reaction to these battles with ecclesiological and biblical fundamentalism. In criticizing the “religious right,” Richard Neuhaus has observed:

A dilemma, both political and theological, facing the religious new right is simply this: *it wants to enter the political arena making public claims on the basis of private truth.* The integrity of politics itself requires that such a proposal be resisted. Public decisions must be made by arguments that are public in character. . . . It is not derived from sources of revelation or disposition that are essentially private and arbitrary. The perplexity of fundamentalism in public is that its self-understanding is premised upon a view of religion that is emphatically not public in character.

NEUHAUS, *supra* note 17, at 36. Accordingly, by insisting upon this separation of religious conviction and public reason, Neuhaus correctly noted that “fundamentalist religion ratifies and reinforces the conclusions of militant secularism.” *Id.* at 37.

32. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (I. Berlin et al. eds., Noonday Press 1954) (1832); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (explaining his account of independence of law from moral foundations). *But see* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958) (criticizing Hart for failing to account for “internal morality of law,” which is essential to concept of law in first instance).

33. See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS* (1983) (detailing origins of ethical relativism and epistemological skepticism and offering solutions for modern crisis regarding limits of knowledge); PERRY, *supra* note 1, at 38-54 (distinguishing and critiquing various forms of moral and epistemological relativism).

34. As is the case with virtually all contemporary Catholic intellectuals, I oppose theocracy on moral, theological, and constitutional grounds. However, I believe that religious liberty fully justifies the political action of religious organizations and the admissibility of religious-ethical argumentation in public debate for the purposes of increased mutual understanding and personal deliberation. See *infra* part II.C.

35. See ACKERMAN, *supra* note 27, at 11 (requiring neutral dialogue in liberal state such that “no reason is a good reason [admissible in public discourse] if it requires [the assertion] . . . that [a citizen’s] conception of the good is better than that asserted by any of his fellow citizens”); Stephen Macedo, *The Politics of Justification*, 18 POL. THEORY 280, 281 (1990) (arguing against legitimacy of certain forms of religious argumentation in public discourse).

While this stance may not be cast as a full position, it may readily be discerned as an “undercurrent” in the treatment of religion in a variety of disciplines, including law.³⁶ Furthermore, I do not mean to denigrate the otherwise admirable work of those scholars who exhibit the bias. My purpose here is to bring to the surface an antireligious mood and prejudice, which is elusive because it is illiberal to be intolerant, and which inhibits the meaningful participation of “religious” intellectuals in the academy and in the formation of public law.³⁷

According to this fundamentalist account, religious belief tends to be viewed, if not ridiculed, as anachronistic.³⁸ In its more extreme forms, traditional religions such as Christianity and Judaism are thought to be essentially unintelligible either because their transcendentalism is wholly

36. I do not mean to imply that the opposition of liberals to the presence of religion in public life is *always* rooted in an antireligious bias. Clearly that is not the case. There are classical liberals and many moderns, for example, who were and are deeply religious men and women or who were and are sincere religious agnostics. Such persons are not antireligious even when they oppose an active political or governmental presence of religion. For example, some liberals are convinced that it is extremely unwise for *any* religious tradition to attempt to shape the moral content of the law and public policy regarding controverted matters in a nation that is increasingly heterogenous with regard to religious and moral beliefs. Thus, to preserve the public peace, modern liberals would argue that religious factionalism should be avoided whenever possible. To that end, the better governmental policy will minimize substantive alliances between church and state on controverted matters, avoid even the appearance of an endorsement of a religious stance, and resist any concerted attempt by religious factions to achieve a deeper correlation between their moral/religious codes and public law. In addition, to minimize the occasion of such conflict, one of the most important lessons for citizens to learn is that religion is a private matter which, in the interest of public peace, mutual respect, and civility, should remain a private matter. See Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 274-77 (1989) (suggesting churches should voluntarily adopt “an institutional principle of political neutrality” because “[the] protection of religious liberty and [the maintenance] of governmental neutrality toward religious institutions is [thereby] better served”). While I disagree with this rationale for the exclusion of religious faith and praxis from the political and governmental spheres, I want to make clear that my use of the term “Enlightenment fundamentalism” does not include that line of argument, except insofar as it masks an antireligious bigotry.

37. In the context of public philosophy, some of those who have embraced this prejudice to a greater degree would deny that religious belief and religious-ethical discourse have much bearing, if any, upon rational public discussion, debate, and deliberation concerning public affairs, and therefore no place in law. The conclusion of Jerome Frank concerning the proper relation of religion to law is sympathetic with and representative of this view: “[A]s men have learned to separate religion and science, leaving the latter to its own devices, so they must learn not to let religion interfere with law . . .” JEROME FRANK, *LAW AND THE MODERN MIND* 198 (1935).

38. See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 978 (arguing liberal neutrality toward religion, which claims to be necessary to protect religion as cherished form of private conscience, has actual effect of “derogating religious belief in favor of other more ‘rational’ methods of understanding” and consequently puts religious belief at risk of becoming “a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes”).

lacking in rational foundation or because the doctrinal claims of such religions are not subject to empirical proof. In the first case, religion is nonsense; in the second, religious belief is neither empirically verifiable nor falsifiable. If religion is either nonsense or unprovable, then it cannot be a credible source of knowledge. Consequently, having little or no claim upon rational minds, religious beliefs should have little or no influence upon the development of public policy and law.³⁹ A liberal fundamentalist would also conclude that religiously based or religious-ethical argumentation should be precluded from public discourse on the same grounds. As I demonstrate below, this antireligious animosity violates the best insights of liberalism when it compels Enlightenment fundamentalists, even if rhetorically, to deny religious expression and religious-ethical discourse in the public forum.

B. *The Crisis in Knowledge*

The intended result of the animating prejudice of liberal fundamentalism—to mute the religious voice in the public sphere—is made more likely when, as appears to be the case today, antireligious prejudice draws strength from the crisis in knowledge signified in the prevalence of epistemological skepticism and moral relativism in most academic settings.⁴⁰ While most prominent liberals have not yielded to the skeptic's pessimism,⁴¹ the liberal fundamentalist—as an ideal type—is more inclined to do so.⁴² In the absence of an objective criterion to guide a comparative judgment, no conception of the good has any greater validity than any

39. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198 (1992) (advocating "establishment of the secular public moral order" given primacy of liberalism over religious ideas in public sphere).

40. See BERNSTEIN, *supra* note 33, at 1-49. Bernstein correctly notes "the universalistic and reductivistic claims made in the name of the sciences" such that "[e]very defender of hermeneutics, and more generally the humanistic traditions, has had to confront the persistent claim that science and science alone is the measure of reality, knowledge and truth." *Id.* at 46. In no small measure this confrontation sublates the estrangement of law and religion as well as the separation of law and morality.

41. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); William Galston, *Defending Liberalism*, 76 AM. POL. SCI. REV. 621 (1982); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

42. This tendency may be partially understood by considering Professor Michael Sandel's identification of the following different grounds for the neutrality of the state regarding competing moral theories:

(1) [T]he *relativist* view says law should not affirm a particular moral conception because all morality is relative, and so there are no moral truths to affirm; (2) the *utilitarian* view that argues that government neutrality will, for various reasons, promote the general welfare in the long run; (3) the *voluntarist* view holds that government should be neutral . . . in order to respect the capacity of persons as free citizens or autonomous agents to choose their conceptions for themselves; and (4) the *minimalist*, or pragmatic view says that, because people inevitably disagree about moral-

other. For those thus disposed, the aggregate effect of this skepticism is to render suspect almost any theory of the good, moral truth-claim, and certainly any religious account of the good life. On this view, even modest claims regarding an objective plurality of incommensurable, premoral goods—such as life, knowledge, play, aesthetic experience, friendship, and religion⁴³—are doubtful as “knowledge” of anything except one’s subjective preferences.⁴⁴

If epistemological skepticism yields such uncertainty in the foundations and plausible content of rational ethics, it is hardly surprising that the insights and judgments of religious traditions are similarly reduced to mere opinion. The entire realm of religious knowledge and a large portion of the moral sphere are thus privatized. While the effect of this subjectivist “inward turn” upon public discourse is explored more fully below, it is important to note that this “agnosticism of the good”—caused at least by a belief in the *incommensurability* of differing conceptions of the good if not by varying degrees of epistemological skepticism—has seriously weakened the rule of law.⁴⁵ Moreover, if the

ity and religion, government should bracket these controversies for the sake of political agreement and social cooperation.

Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 522 (1989). As an ideal type, the liberal fundamentalist would seem to be most disposed toward relativist or minimalist theories of state neutrality.

43. Professor John Finnis has identified these aspects of human experience as self-evident “basic forms of human good” which shape the matrix of our experience of goodness in all its countless variety. With respect to each category, Finnis provides as comprehensive a definition as possible and makes clear that these forms of the good are to be distinguished from that which is “morally good.” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 85-90 (1980); see JOHN RAWLS, *A THEORY OF JUSTICE* 433 (1980) (arguing that “liberty and opportunity, income and wealth, and above all self-respect are *primary goods* . . . [which are] necessary for the framing and the execution of a rational plan of life” (emphasis added)).

44. It may be helpful here to differentiate the epistemological doubt that is generally characteristic of liberal philosophy from the modern praxis of liberals. Liberal skepticism would lead most moderns to resist, as a matter of liberal doctrine, almost every metaethical defense of any given conception of the good. However, as a matter of practical agreement and especially regarding an accurate description of the contemporary moral horizon, most modern liberals would very likely agree with Finnis and Rawls that certain basic goods do command nearly universal acceptance. Nevertheless, the phenomenon I am describing as Enlightenment fundamentalism tends to exaggerate the epistemological controversy, especially when confronted with religious belief and religious-ethical argument.

45. By “the rule of law” I do not simply mean to describe the rational ordering of society by means of public law or the jurisprudential requirement of the stability of legal rules or even the political and juridical institutions necessary for democratic governance. Certainly, the rule of law in a democracy comprehends such concepts and instruments. See LON L. FULLER, *THE MORALITY OF LAW* (1964). Neil MacCormick has summarized Fuller’s account of the essential feature of the rule of law:

For there to be law at all, there have to be rules of a reasonable degree of generality and clarity; they must be published to the addressees and be prospective in effect; there should be reasonable constancy in the rules over time, and they must set stan-

substantive content of the law is not morally binding, even mainstream liberal accounts of the justification of law are subject to charges of ideology and arbitrariness. Unmasking such constructs is a strategic objective shared by disparate legal reform movements in American law during the twentieth century.⁴⁶

Given the influence of subjectivism, epistemological doubt, and moral relativism in the legal culture, and to an increasing degree in the culture at large, it is no wonder that many courts, legislatures, and legal commentators embrace a jurisprudence dominated by legal positivism and by an almost doctrinal disposition toward moral agnosticism.⁴⁷ Consequently, a critical examination of the relation of morality to the formation, execution, and revision of law is rarely the explicit focus of legal education and even less so of public affairs discussions of controversial matters. Not surprisingly, the relationship of religious belief and practice to the development of moral agency is largely unexplored in those modes of legal discourse as well.

I do not mean to imply that there is *no* discussion of moral issues in legal education or in public debate. Obviously that is not the case. However, I believe that most of the discussion is largely descriptive—of the fact of differing conceptions of the good life, of pluralism, of multiculturalism, and the like—and does not engage in a critical analysis of the content of differing moral claims or their rational justification. This situation is understandable and tolerable *only* if one believes that no conception of the good is distinguishable from another in principle. However, because I believe that I do *know*, and do not simply have an opinion, that some conceptions of the good are false—for example, that racial supremacy arguments are false—and that I can *justify* that conclusion according to rationally defensible moral and religious premises, the ab-

dards with which it is possible to comply; and finally, given that there are rules which have such characteristics in some reasonable balance, the conduct of legal officials should be substantially congruent with the announced rules.

Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in *NATURAL LAW THEORY* 105, 122 (Robert P. George ed., 1992). What I have in mind is not simply this “inner morality of law,” *id.*, but the more fundamental psychological and sociopolitical aspects of the rule of law: the civic habit of mind and heart that is expressed in the virtue of law-observance, and which depends almost entirely upon a genuine respect for the authoritative moral and religious foundations of public law, *see infra* part III.B.

46. *See, e.g.*, DERRICK BELL, *AND WE ARE NOT SAVED* (1987) (discussing critical race theory); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (offering feminist critique of law, politics, and sexuality); ROBERTO M. UNGER, *KNOWLEDGE & POLITICS* (1975) (discussing critical legal studies).

47. *But see* Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 *HARV. L. REV.* 1350, 1364-71 (1991) (rejecting notion that liberalism always requires substantive neutrality toward all conceptions of good).

sence of a more rigorous critical scrutiny of the moral issues of the day is a disturbing trend. This is especially troubling in law schools where those skilled in the art of controverted moral discourse ought to be guided not only by principles of rhetoric and forensic debate but also by sophisticated moral philosophy and by appeals to wisdom and good judgment as well.⁴⁸ For those of us who seek a communal life mediated by the rule of law⁴⁹ and a host of subsidiary structures based upon something more stable than subjectivism or naked power factionalism, this aspect of legal education is very troubling.⁵⁰

C. *Disregarding Liberal Premises*

A third characteristic of liberal fundamentalism is its readiness to push religion out of the public square and to privatize religious belief and practice.⁵¹ This inclination violates some of the best insights and core principles of liberalism. Accordingly, several objections on liberal grounds may be made to this apparent willingness to repudiate liberal premises and to chill if not repress religious liberty in the public domain.

First, this hostility toward religious belief, practice, and religious-ethical discourse violates one of the most important premises of classical liberalism: that no conception of the good life is binding upon the conscience of the individual. At the heart of the liberal position is the indi-

48. See CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 18 (1991) (describing effect of radical individualism, subjectivism, and relativism—epistemological and moral—as “banish[ing] discussions about the good life to the margins of political debate,” which in turn has caused “an extraordinary inarticulacy” concerning the “constitutive ideals of modern culture”).

49. For criticism of the failure of certain forms of liberalism to take seriously human sociality, see Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986), and Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). See also Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989) for an insightful account of communitarian theories.

50. *But see* Stephen A. Gardbaum, *Law, Politics and the Claims of Community*, 90 MICH. L. REV. 685, 689 (1992) (reviewing various communitarian critiques of modern liberalism and defending thesis that antiliberal attacks have had entirely positive result of forcing “both liberals and antiliberals . . . [to] argue directly for the merits of their substantive moral visions”); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988) (finding civic republicanism congenial with modern liberal constitutionalism).

51. Secularization of our educational institutions is one of the more effective means of privatizing religious belief. In most public schools religion is a “nonsubject,” notwithstanding its enormous influence in the development of Western culture. In addition, those who shape public opinion through the electronic media often demonstrate a studied indifference to religion and very often a lightly cloaked contempt for religious values. With respect to the legal culture, the principal means chosen are doubtful interpretations of the religion clauses and a strict separationist public policy. See *infra* part IV.

vidual's prerogative to resist the claims of every human authority and even those of the church.⁵² Each person is thus "the measure of all things"⁵³ concerning the rational plan of one's life including one's moral and religious beliefs. In its more radical individualist form, the only normative moral or religious values that bind liberal thought and action are self-generated and self-authenticated.⁵⁴ That being the case, one would think that religious belief would be respected as a liberally chosen good. However, the converse is true. Liberal fundamentalism, contrary to liberal dogma, asserts the lexical priority of its secular heuristic and *claims the authority to define the canonical grounds of public discourse in accord with that secular criterion*. On that account, reliance upon religious experience, insight, or religious-ethical knowledge is illegitimate for the purposes of public discourse and decision making.⁵⁵ This is an egregiously illiberal act. It is decidedly *unliberal* to claim knowledge of a universal normative criterion and decidedly *antiliberal* to attempt to claim the authority to impose that standard on a free society.⁵⁶ On liberal grounds,

52. John Rawls has recently argued that the origin of liberal thought is rooted in the Reformation, which, by "introducing into people's conceptions of their good a transcendent element not admitting of compromise," made moral and religious pluralism a permanent feature of modern political society. RAWLS, *supra* note 41, at xxvi. Consequently, "[t]his element forces either moral conflict moderated only by circumstance or exhaustion, or equal liberty of conscience and freedom of thought." *Id.*

53. This proposition was defended by Protagoras in his dialogue with Socrates in advancing one of the earliest arguments defending skepticism and moral relativism. See PLATO, *Protagoras*, in THE DIALOGUES OF PLATO (Benjamin Jowett trans., 1952).

54. The liberal account of the good was heavily influenced by Kantian epistemology and Humean skepticism. See DAVID HUME, TREATISE OF HUMAN NATURE bk III.i.I (Oxford, Clarendon 1896) (arguing that moral distinctions cannot be derived from reason); IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis W. Beck trans., MacMillan 1989) (1785); IMMANUEL KANT, A CRITIQUE OF PURE REASON (J.M.D. Meiklejohn trans., Great Books of the W. World 1952) (1781). While Kant's primary intention was to demonstrate the existence and rationality of a universal, objective moral law, his rigorous critique of the attempt to ground morality on experience and his emphasis upon the chasm between the Is and the Ought worked an unintended result. As one commentator put it, although Kant's purpose "was to show us that the only possible way of grounding the moral law" was in his transcendental theory, his critics' attacks upon the categorical imperative had the lasting effect of creating the "specter" of moral relativism in modern philosophy. See BERNSTEIN, *supra* note 33, at 14.

55. Traditional liberals allow recourse to such experiences and beliefs but only on the condition that they are legitimate in the formation of *private* opinions. Although these opinions are "prepublic," they may still guide the active participation of the religious citizen in public debate and decision making. This public-private dichotomy is an essential element in the modern liberal treatment of religion. Enlightenment fundamentalism presses this distinction to its logical extreme by denying that religious discourse has *any* relevance to "public reason."

56. A similar violation of liberalism's first principles may be found in the censorship of speech reflected in the so-called hate-speech codes adopted recently by prominent universities. This alarming assault upon freedom of thought and speech has been repeatedly denounced by the press. See, e.g., Charles Krauthammer, *Spineless at Penn*, WASH. POST, June 25, 1993, at

no one has the power to declare that he or she knows the truth about religious faith or about the legitimate grounds of public decision making. By attempting to do so, the liberal fundamentalist apparently hopes to marginalize if not completely suppress the exercise of religious liberty in the political sphere.⁵⁷

Second, implicit in this argument against religion in the public square is the *assumption* that faith cannot be reconciled with reason. That being the case, religious experience is *alien to*, as opposed to being differentiated from, rational experience. Given the absence of its capacity to contribute anything to public reason, religious faith and its ethical canons must be considered an entirely private matter. Thus, on this account, even if the spiritual dimension of humanity is conceded, religiously premised public discourse would still remain illegitimate for liberal fundamentalists.

This line of argument violates liberal dogma in several important respects. The relation of faith and reason is very much disputed as a matter of theological doctrine.⁵⁸ For certain Protestant evangelical sects, the antinomy between faith and reason is a central doctrinal belief and is often constitutive of their ecclesial identity; but for Roman Catholics and Jews there is no such opposition.⁵⁹ Consequently, as the major premise of this argument to exclude religious discourse from the public square is

A25 (denouncing Sheldon Hackney's defense of University of Pennsylvania's speech codes "as increasing the freedom of expression for all" by removing chilling effect of offensive speech as "Orwellian").

57. Given the ubiquity of religious faith in the United States, this strategy cannot possibly succeed in its attempt to exile religion or to silence religious-ethical discourse. However, insofar as this bias against religion is pervasive in American educational institutions and is widely disseminated through print and electronic mass communications, the alienation of law and religion is likely to deepen.

58. While this dispute among Western Christians has complex origins and has not yet been fully resolved, it will be sufficient for our purposes here to note that the issue turns upon the effect of *original sin* upon human nature and upon the effect of grace upon humanity. According to Reform theologians, human nature, including rationality, is totally corrupt because of original sin. Reason is therefore utterly useless as a means of gaining knowledge of the good. The truth about God and knowledge of what is genuinely good is known only by those who are saved by faith in Christ. Such knowledge is the exclusive province of faith, not reason.

The Catholic theory is very different. Although human nature was wounded by original sin, we hold that human nature was not utterly destroyed. Having been made in the image and likeness of God, each person has an essential dignity and an intrinsic goodness that accompanies being "an act of God." Neither original sin nor the whole range of sinfulness of which humanity is capable has destroyed the God-wardness of human nature or the God-wardness of every individual human life. Knowledge of God and of moral goodness is thus available through several sources: human reason, divine revelation, and the apostolic tradition.

59. For Roman Catholics and for most Jews, Faith and Reason are not enemies; both are God-given, one by way of grace and one by way of created human nature. However, for many Protestant Christian denominations, especially those who believe that human nature is totally

both a much-disputed theological issue and an essential doctrinal tenet of some churches, the argument embraces at least two illiberal positions.

On the one hand, in assuming that faith and reason cannot be reconciled, liberal fundamentalism has arrogated to itself not only the *competency* to resolve a theological controversy, but also the *power* to decide the matter. Even the suggestion that it enjoys that capacity and authority cannot be reconciled with the formal religious agnosticism of classical liberalism. Moreover, by implication, it is also asserting the competency and power of the state to do so as well. In this respect, another cardinal principle of liberalism is disregarded: that the state is without power to settle religious controversies because it is *not competent* to construe religious dogma.⁶⁰ On the other hand, by assuming the very ground in controversy and by declaring, albeit implicitly, the antinomy between faith and reason, liberal fundamentalism not only begs a question it cannot answer but also thereby encourages the state to adopt a Protestant evangelical doctrine even though its argument is cast as a secular thesis. Thus, regardless of its intention, to the extent that the liberal state embraces the privatization of religion and the secular heuristic of Enlightenment fundamentalism, it establishes a sectarian ecclesiology.⁶¹

Enlightenment fundamentalism thus repudiates the liberal recognition of the freedom of *every* religious community to be faithful to its self-determined religious identity, which includes its doctrinal resolution of the relation of faith and reason and its strategy for engaging or not engaging in public affairs discourse. Furthermore, on liberal tolerance and

corrupt because of original sin, Christian faith and *unregenerate* reason are by doctrinal definition *always* in complete opposition.

60. See *Serbian E. Orthodox Church v. Milivojevich*, 426 U.S. 696, 713 (1976) (reversing Illinois Supreme Court decision that found church arbitrarily disregarded its own laws and procedures, on grounds that inquiry violated First Amendment and "would undermine the general rule that religious controversies are not the proper subject of civil court inquiry"); *Gonzales v. Archbishop*, 280 U.S. 1, 16 (1929) (noting that "[i]n the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before secular courts as conclusive"). Similarly, see *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872), in which the Court stated that

the rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest . . . church judicatories to which the matter has been carried, [courts] must accept such decisions as final and as binding upon them, in their application to the case before them.

61. The admission of the Catholic-Jewish thesis in the public sphere *along with* the Protestant Reform thesis and the religious-moral skepticism of Enlightenment fundamentalism would not establish the Catholic-Jewish thesis over its opponents. To the contrary, it would simply achieve a liberal state of affairs: free and open discussion, debate, and deliberation about public policy and law.

free exercise grounds, those religious traditions that hold reason and faith in a positive dialectic should not be required to discard that doctrinal belief in exchange for full political equality in public discourse.⁶²

Finally, if religious thought and argument are wholly without rational foundation or intellectual appeal, as Enlightenment fundamentalists contend, then public scrutiny will make its rational deficiencies abundantly clear. On long-standing liberal premises, the state should not attempt to resolve the much disputed theological and philosophical question concerning the relation of faith and reason. Furthermore, instead of confronting religious argument in the marketplace of ideas with the arsenal of reason, the liberal fundamentalist apparently would have the state act as a censor of public discourse through a kind of prior restraint on religious speakers. In this respect, the antireligious bias again renders such persons blind to the contradiction of the most admirable characteristic of the liberal tradition: the vigorous defense of freedom of thought and discourse.

III. GIVING FORM TO THE ESTRANGEMENT

It requires no argument to demonstrate that substantive moral disagreement exists regarding competing public policies restraining or permitting abortion, euthanasia, homosexual marriage, and pornography, as well as on larger questions of racial justice, the role of women in society, and the distribution of wealth and power. Considering the moral and religious pluralism that characterizes our republic, the resolution of such controversies is exceedingly problematic. Accordingly, we must depend upon various democratic concepts and procedures to establish political if not moral consensus, while preserving individual liberty and constraining

62. The characterization of "religious activists" by the mass media as "fundamentalists," "right-wing Christians" or "religious extremists" is an attempt to reinforce the liberal fundamentalist stereotype of religion as "nonrational" and to propagate the notion that faith and reason cannot be reconciled and that religion is idiosyncratic. While it is true that the moral dimensions of issues like abortion and homosexuality tend to be opposed by biblical fundamentalists solely on the grounds of *biblical revelation*, Roman Catholic teaching on such matters is not so constrained. Appeals to reason, to the data of science and to evidences drawn from human moral experience all figure prominently in Catholic religious-ethical moral teaching. I believe the same to be true of the Anglican and Lutheran traditions as well. Moreover, when Christian churches question the legitimacy of capital punishment, argue against the use of nuclear armaments, or advocate racial justice, they are not described by the media as "religious fanatics." Nevertheless, the mass media continue to paint "the extremist Religion" montage with a very broad brush. One can only wonder why gross generalizations about "religious people"—primarily Christians and Muslims—go unchallenged when even the slightest conceptual distortion regarding people of color, women, and Jews are vigorously, and rightly, denounced.

governmental power.⁶³ Among these devices liberalism has embraced the practice of privatizing certain moral controversies, which has had a direct and adverse impact upon the participation of religion in public life. Here I will argue that this practice has caused the marginalization of religion in society and has thereby played a significant role in the estrangement of law and religion.⁶⁴

A. *The Principle of Preclusion*

The liberal practice of privatizing moral controversy is premised upon the classical liberal doctrine that government must be neutral toward competing conceptions of the good⁶⁵ because there is no principled basis upon which we can resolve moral or religious-ethical conflicts.⁶⁶ Accordingly, the only sensible public strategy is to “preclude state action on the issue, and leave each citizen free to act on the basis of his or her own morality (to the extent possible without state action).”⁶⁷ On this view, the characteristic liberal resolution of some controverted moral issues has been to employ “principles of preclusion, which serve the more familiar purpose of determining which policies . . . [are] legitimate subject[s] for legislation. *These principles preclude fundamental moral conflict by denying certain reasons moral standing in the policy-making*

63. To achieve public peace and civil order, liberal democracies generally rely upon majority rule, judicial deference to legislative choices—subject to substantive and yet malleable notions of due process, equal protection, and fundamental rights—governmental neutrality toward most conceptions of the good and especially those advanced by religion, the privatization of certain moral issues, and the development of the intellectual virtues of open-mindedness and tolerance.

64. Government neutrality toward competing conceptions of the good is a presupposition of the liberal technique of removing certain controverted issues from public deliberation and legislative decision making. That sense of neutrality is related to—but should be distinguished from—the neutrality required of government by the Establishment Clause. See *infra* part V for a discussion of that aspect of neutrality.

65. See Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339 (1990) (presenting insightful account of liberal justification of state neutrality as commitment to substantive moral principle); Sandel, *supra* note 42, at 522 (defending thesis that “[t]he cure for liberalism is not majoritarianism, but a keener appreciation of the role of substantive moral discourse in political and constitutional argument”).

66. Although religious ethics and exclusively rational morality often focus on similar objects, as in the duty not to kill or the obligation to speak the truth, these forms of discourse are not identical. They are distinguishable in the source and nature of obligation and in the kind of circumstances that give rise to ethical considerations. Scriptural warrants, religious custom, the notions of sin and forgiveness, public and private revelation, and the like are elements that distinguish religious-ethical discourse from rational ethics.

67. Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, in LIBERALISM AND THE GOOD 121, 125 (R. Bruce Douglas et al. eds., 1990).

process."⁶⁸ Although liberals apply such principles differently,⁶⁹ liberal theory inevitably privatizes certain moral controversies by excluding some matters from legislative or judicial resolution. This "issue-preclusion" thesis is at the heart of the negative liberties claimed under the substantive due process "right to privacy" cases. Accordingly, decisions concerning reproductive liberty,⁷⁰ the refusal of medical treatment,⁷¹ and consensual adult sexual relations⁷² are presented as essentially private matters over which the state has minimal jurisdiction. In addition, given either its skepticism or its agnosticism toward religious truth, this account of liberalism requires the liberal state to remain neutral toward such matters and further prohibits almost all state action regarding religion.⁷³ Thus, as religious claims are not capable of rational settlement, those issues are almost entirely matters of private belief.

68. *Id.* (emphasis added).

69. For example, Professors Gutmann and Thompson are critical of the scope of the issues removed from the political agenda by the more skeptical strands of liberalism and the general requirement that the state must always remain neutral both *toward* religion and *between* religion and irreligion. On that account, religious argument is generally excluded from public discourse, and the state is required to abstain from all but a very few religious claims.

In contrast, recovering a Lockean account of religious tolerance, the authors would permit much more interaction than "traditional" liberals. Those religions, for example, that "accept the voluntary nature of faith," and which would not seek to coerce religious belief through law would be allowed to participate fully in public discourse and rational deliberation. *Id.* at 128. Following such deliberations, the state would not be prohibited from acting in accord even with religious positions; for example, prohibiting racism, restricting abortion, and advancing poverty programs would be permitted state actions even though they are consonant with the religious-ethical positions of various religions.

70. *See Roe v. Wade*, 410 U.S. 113 (1973) (holding that elective abortion is entirely private decision in first trimester of pregnancy); *see also Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that individual's right to privacy encompassed use of contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that married couple's right to privacy encompassed use of contraceptives).

71. *See Cruzan v. Director of Mo. Dep't of Health*, 497 U.S. 261 (1990) (assuming but not deciding right of mentally competent adult to refuse medical treatment included within meaning of liberty and privacy).

72. *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting petitioner's argument that right to privacy protects consensual adult homosexual sodomy).

73. This solution is necessary regarding *doctrinal* disputes because the state is *not competent* to make such judgments. As previously noted, no legislature or court is competent to resolve the disagreement between Roman Catholic and reform theologians regarding the effect of original sin upon human nature. This incapacity is premised upon the principle that the state does not have the power to compel belief because faith is voluntary and a matter of free conscience. However, there is a difference between a neutrality that forbids state mediation of ecclesiastical disputes or state coercion of religious belief and one that requires a broad exclusion of religion from the public square. In the former case, the state is incompetent to judge the matter and without power to demand assent. In the latter case, the rationale for the preclusion of religious discourse is itself a disputed matter.

B. *The Problem with Preclusion*

While this aspect of classical liberalism undoubtedly appeals to moral and religious agnostics, and most certainly to Enlightenment fundamentalists, the privatization of moral controversy is nevertheless seriously flawed for three important reasons. First, those who would categorically exclude religious discourse from the public square fail to distinguish the multiple functions of such discourse in relation to "public reason" and lawmaking.⁷⁴ One function, and perhaps the most controversial, occurs when the operative public reason for enacting a law is *explicitly* religious, as was the case during colonial establishment and even after the ratification of the Constitution and the Bill of Rights when a variety of religious practices and moral codes were codified and enforced by coercive state sanctions.⁷⁵ Another function of religious discourse is to increase mutual understanding among all citizens regarding the religious-ethical perspectives of religious citizens. A final purpose is the relevance of religious discourse among citizen-believers engaged in personal and associational deliberation concerning public decision making. Such exchanges among believers within the same religious tradition, followers of other religious faiths, agnostics, and atheists are undeniably relevant to the democratic decision-making process.

Convinced of the *irrationality* of religious belief, a liberal fundamentalist might object to each of these categories.⁷⁶ Given the liberal dogma that political choices must be based upon publicly accessible reasons, some liberals would exclude all religious argument from the domain of public choice since by hypothesis religious convictions are based upon premises that are not generally shared. However, that objection can be levelled against all conceptions of the good life, which, also by hypothe-

74. For a thoughtful discussion of this relation, see Macedo, *supra* note 35, at 280; GREENAWALT, *supra* note 20; and MICHAEL J. PERRY, *LOVE AND POWER* (1991).

75. See AMERICAN STATE PAPERS (William A. Blakely ed., 1943). For example, in 1610 the Virginia colony enforced the death penalty for speaking "impiously or maliciously, against the holy and blessed Trinity . . . or against the known articles of the Christian faith." *Id.* at 18. Virginia also enforced church attendance, required baptism of all children, and prohibited travel on Sunday upon pain of substantial fines. *Id.* at 18-20. Similarly, the Massachusetts colony had laws that imposed the death penalty for the repeated denial of the infallibility of the King James version of the Bible. *Id.* at 26. Catholic priests and Jesuits in particular were banished from the colony in 1647 and, except in cases of shipwreck, were to be executed if found within the colony. *Id.* at 31.

76. I have especially in mind those intellectuals who are either atheists or radical agnostics and perhaps even those who are members of minority religious communities who fear the alliance of majoritarian religion with majoritarian legislative power. As I show *infra* part V, the problem of religious-legislative tyranny is better met by a vigorous *public* religious pluralism and not by the privatization of religion.

sis, are exceedingly plural in character and often essentially incompatible.⁷⁷ While it is clear that given the range of competing conceptions of the good, what ought to constitute "a legitimate public reason" presents a difficult definitional problem. It is also clear that an a priori exclusion of religious argumentation cannot be justified simply on the grounds of protecting the integrity of public discourse from "premises not generally shared" or from "controversial issues."⁷⁸ This mistake is most apparent when religious discourse is designed to increase mutual understanding and reflective decision making.⁷⁹ Furthermore, as religious liberty commands a privileged constitutional status, that liberty includes the citizen's prerogative to act for express religious purposes, conditioned only by the constitutional principle of nonestablishment. Thus, religious argument directed toward any public issue ought to be admissible in public discourse as well. That is especially the case with the debate about reasonable church-state accommodations. The failure to distinguish appropriate from arguably inappropriate uses of religious argument relative to public deliberation seriously undermines the credibility of certain strands of liberalism and, with respect to Enlightenment fundamentalism, illustrates just how far off the mark that variant is in its approach to religion.

Second, the principle of preclusion on the basis of controversy alone is selectively applied and indeterminant. Although racism, sexism, and more recently, heterosexism are surely controverted moral issues, liberals

77. John Rawls has put the matter thus: "Now the serious problem is this. A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these doctrines is affirmed by citizens generally." RAWLS, *supra* note 41, at xvi. The task of political theory is to construct a society that can respond to "the fact of reasonable pluralism," which is "the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime." *Id.* at xvi-xvii.

78. In criticizing Kent Greenawalt's general exclusion of religious argument, Michael Perry makes a similar point in asking the following question:

Why should one person be asked to forgo "public advocacy" of her position on the ground that her advocacy would appeal to controversial *religious* premises about human good, when another person is invited to engage in public advocacy of his position because his advocacy appeals merely to controversial *secular* premises about human good?

PERRY, *supra* note 74, at 20 (emphasis added).

79. Professor Greenawalt has admitted the difficulty, especially when the exclusion rule is sometimes construed to grant legitimacy to "personal perception, intuitions, feelings, commitments and deference to the judgments of others" but to deny legitimacy to religious convictions even in making political choices. In most circumstances this would indicate nothing more than a naked hostility to religion: "Unless a society was actually hostile to religion or riven by religious strife, how could it be thought preferable for people to rely on nonreligious personal judgments rather than upon religious convictions?" GREENAWALT, *supra* note 20, at 156-57.

would be hard-pressed to explain why *those* categories are not precluded from public debate and coercive legislation while controversies over the legal protection of human life,⁸⁰ the regulation of human sexuality, and the nature of marriage⁸¹ are frequently said to be matters of “private choice.”⁸² Just as it is not clear why some but not all disputed matters remain subject to public decision and regulation, it is also not clear just *how much* controversy is required to remove an issue from the political agenda. For example, at what point, if ever, would the civil disobedience of citizens protesting against the prohibition of physician-assisted suicide render euthanasia a matter of private choice? Furthermore, the justification for the principle of preclusion is not at all apparent. Rational dissent alone does not require the community to retreat from moral deliberation unless one accepts as “truth” the circular conclusion that there is no principled ground for deciding the issue *ipse dixit*. Furthermore, this feature of neutrality—that the state must remain indifferent to any conception of the good—renders liberalism open to the charge of moral vacuity.⁸³ In addition, while religious-ethical argumentation may

80. For a critical review of the privacy arguments advanced with respect to the act of abortion, see JOHN T. NOONAN, JR., *A PRIVATE CHOICE* (1979). Privacy arguments, expressed in the form of a special negative freedom—such as the notion that individual liberty regarding certain matters ought to be free from substantive government intrusion—have been advanced in a number of extremely controversial settings. For example, it has been argued that the concept of privacy includes the right to destroy at will frozen human embryos, to participate in fetal tissue research, to engage in the sale of human organs, to contract for surrogate motherhood, to procure an abortion even for purposes of sex-selection, to refuse food and hydration during surrogate motherhood and hence, to choose death for unconscious persons in certain circumstances, and to elect and participate in euthanasia. Insofar as such issues are contemporary moral problems, they raise substantive anthropological issues in the sense that differing conceptions of the human person are often in conflict in such settings. Although those conflicts are not necessarily compelled by liberal thought, they certainly cannot be reconciled by liberalism in the absence of a consensual anthropology, which guides public and private decision making.

81. The increasingly confrontational gay rights movement is attempting to gain full public acceptance and legalization of homosexuality under the rubric of private choice in matters of consensual adult sexuality, while simultaneously demanding public antidiscrimination laws be amended to include sexual orientation. The United States Supreme Court frustrated this strategy in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding right to engage in consensual homosexual sodomy not protected by any notion of substantive due process).

82. The claim I make here presumes that in this “age of epistemological doubt,” in which polemical factions having rationally irreconcilable moral positions are increasing in number, there no longer exists a substantive and commonly accepted “ideal anthropology” according to which “public wrongs” may be identified and adjudicated. In addition, because of the effect of skepticism, ideas—such as Immanuel Kant’s principle of universalizability or John Stuart Mill’s duty to do no harm principle—are not readily available to establish customary norms or to “adjudicate” transgressions against such rules rooted in a common anthropology.

83. See Gardbaum, *supra* note 50 (challenging assumptions that have lead liberalism to cede this ground to antiliberal critics).

be unpersuasive for some traditional liberals for a variety of reasons—for example, the interest of public peace and religious harmony—and for all liberal fundamentalists because of its putative absence of empirical foundation or rational appeal, the preclusion rationale as applied to that class of argumentation is “not proven.” The preclusion rationale knowingly begs the ground of its conclusion that religion cannot advance a legitimate public reason. Regrettably, this aspect of liberalism seems to have mistaken circularity and a heckler’s veto for rational arguments. Accordingly, the decision to deny religious-ethical discourse “moral standing in the policy-making process”⁸⁴ is simply not justified.

Third, and of great importance, the privatization of rationally controverted moral conflict robs the political community of the opportunity to become schooled in and skilled at public moral reasoning, deliberation, and decision making. The communal process of recognizing moral issues, defining the meaning and significance of ordinary moral language, refining that meaning through concrete application, creating and justifying appropriate exceptions, and confronting and resolving new difficulties for which moral precedent is either inadequate or inapplicable because prior cases did not face a distinguishing element in the present case are denied *publicity* when moral controversy is privatized.

Admittedly, this process is most effective within a culture that shares a common ideal regarding conceptions of human personhood and a largely homogeneous moral tradition. Because those foundations have been seriously eroded if not balkanized in our culture, the social and political consequences of this lack of cohesion are extremely worrisome. Nevertheless, every democratic political community presumes and expresses some minimal moral unity, even if lightly tethered, and accordingly must act to preserve that unity. To that end, its citizens must have the capacity to engage in public discourse to resolve civic controversies that refine or modify that political-moral self-understanding. In a heterodox polity such as ours, that discursive and decisional faculty is imperative unless one is willing to accept widespread descensus and civil unrest.

In addition to closing this free school of public moral philosophy, the repression of religious argumentation on ideological grounds renders the process of deliberation less credible and deprives the rule of decision—that by hypothesis will be controversial to the losing factions—of at least two important benefits. On the one hand, the exclusion of religious argument diminishes the community’s opportunity to achieve at least a broader understanding of the disputed matter, if not a consensus.

84. See Gutmann & Thompson, *supra* note 67, at 125.

On the other hand, the acceptance of an adverse decision by an excluded faction is made more difficult by the denial of full participation rights, even if only rhetorical, and an opportunity for a substantive exchange of views. Thus, the liberal account of the preclusion of controverted issues, especially in its more extreme form, has paid too little attention to elementary due process considerations and fairness issues, and to the foreseeable adverse effects on the integrity of public debate, conflict resolution, and public peace.⁸⁵

IV. CONSEQUENCES OF THE ESTRANGEMENT

A. *The Loss of Moral and Religious Fluency*

The outcome of this shifting public-private boundary is a community life based upon a very thin theory of the good—if that at all—with maximum liberty residing in the individual regarding matters that are morally or religiously disputed. By entrusting the resolution of certain moral and religious-ethical issues to the discrete and isolated judgment of each citizen, liberal fundamentalism undermines important elements of the social democratic state and, in effect, transforms us from a morally substantive political community into a nation of sovereign treaty makers. In this respect what I have called Enlightenment fundamentalism betrays the classical liberal confidence in the power of rational public discourse to achieve substantive moral agreement. What is needed is not statism, in which the state defines the conception of the good for us and coerces our obedience if necessary. Nor do we need a minimalist state that has a conception of the good that is so diffuse as to be nonoperational. But what we do need is a political community whose members are capable of engaging one another in substantive discourse both *about* the common

85. In their article, Professors Gutmann and Thompson also addressed the importance of deploying “principles of accommodation which govern the conduct of the moral disagreement on issues that should reach the political agenda.” *Id.* at 126. The principal object of such rules is civility in public discourse, so that the manner in which public deliberation is conducted should foster the democratic virtues of openness, tolerance, and mutual respect. To that end, one set of such principles would require demonstrating the integrity of one’s considered moral judgment: “political sincerity” as opposed to expediency, “consistency between speech and action” as evidence of one’s moral integrity, and “accepting the broader implications of the principles presupposed by their moral positions.” *Id.* at 136-37. A second set of accommodation principles is based upon the democratic virtue of “magnanimity”: recognizing the status of an opponent’s position as a “moral one,” cultivating “a disposition toward openness” in the sense of being ready to reexamine, revise, and change past decisions and policies, and finally, “seeking the rationale which minimizes rejection of the [opposing] position.” *Id.* at 137-39. Any assessment of the negative impact that privatizing moral controversy has upon these features of political society is noticeably absent from the liberal fundamentalist’s strategy of preclusion.

good and *for* the common good. In contrast to this admirable ideal of liberal democracy, instead of having to engage in the difficult work of forming a consensus through an unrestricted moral and religious-ethical discourse, Enlightenment fundamentalists tell us to go home, decide privately a certain number of discrete questions, and act accordingly.

One of the most serious consequences of this tendency toward solipsism—that is, the liberal move toward a radical subjectivism and isolation of self from all others—has been identified and very thoughtfully described by Professor Charles Taylor as rendering the community morally inarticulate.⁸⁶ The gravity of this impediment to moral discourse in our society should not be underestimated. First, our political institutions, which are broader than government institutions as such, are instrumental expressions of our collective moral selves. In that regard they also play a crucial socialization function. In the absence of moral fluency, those institutions may lose the capacity for renewal and restatement, which is necessary from time to time. Second, in the absence of such fluency, mutual respect, understanding, and civility must be sought not by appeals to established public values and customs but through “speech codes” and other types of coercive legislation. The third and perhaps most important aspect of moral articulacy is that it is generated by an existing moral consensus and is a necessary condition for building the political consensus needed to resolve current and future conflicts. In a democratic society such as ours, which is increasingly heterodox in matters of religion and morality, it is imperative that we develop and maintain the civic capacity and institutional structures necessary for resolving moral and religious-ethical controversies. To that end moral and religious fluency are essential to mutual understanding, mutual respect, and conflict resolution. Without that social regard and fellow-feeling, no society—and certainly not one as heterogeneous as ours—that aspires to democratic governance and public peace is likely to achieve ordered liberty through public discourse. If the privatization of moral and religious belief continues, not only may the estrangement of law and religion deepen, but divisiveness and factionalism may very well intensify. Consequently, there will be less common ground and political compromise. On this view, the necessary elements of democratic life—such as a desire for the common good, open public debate and deliberation, the ability to compromise, and the capacity to reconcile factions after a

86. See TAYLOR, *supra* note 17, at 91-107 (describing how modern moral philosophy has undermined our sense of good and has caused inarticulacy regarding those constitutive goods, which serve as moral sources according to which we live, and from which we derive much of our identity); TAYLOR, *supra* note 48, at 13-23 (making similar argument).

dispute achieves a certain measure of legal finality—seem to have been utterly disregarded by Enlightenment fundamentalism.

B. The Adverse Effects of the Estrangement on the Rule of Law

Thus far, I have tried to establish that the estrangement between law and religion is an extremely grave matter because it undermines meaningful public discussion, debate, and political decision making. This phenomenon has been caused in no small measure by a strand of liberalism that tends to marginalize and oppress religious liberty in the public square, and that achieves that end by disregarding the cardinal principles of the liberal tradition. But this state of affairs also threatens an even deeper democratic structure. Unless reconciled, the estrangement of law and religion may very well subvert the rule of law and democratic governance.

Democratic governance assumes the interiorization of the rule of law as *the habit of law observance* whereby the citizen accepts and respects the authority of the law partly because of its rationality and nonarbitrariness and partly because of the manner of its democratic formation. However, more importantly, the very possibility of the rule of law as law observance exists primarily if not necessarily because the substantive content of the law corresponds to the considered moral judgments and religious sensibilities of the governed.⁸⁷ Laws permitting slavery, denying the franchise to women, and prohibiting the sale of alcohol were abrogated precisely because the content of those laws trespassed upon the deeply held moral or religious beliefs of large segments of the political community. I submit, for example, that increasingly restrictive abortion laws and resistance to the legalization of homosexuality will continue unless the moral insights and religious beliefs of the political community radically change. The rule of law in this sense depends upon the moral and religious resonances of the public law.⁸⁸ It is *that* foundation that, in addition to gaining the general intellectual and moral consent of the governed, cultivates the habit of law-observance.

87. The correspondence of the content of law with the substantive moral and religious horizons of the community tells us nothing about the moral quality of any such regime. As in the case of fascist or totalitarian regimes, there is no guarantee that "that which is legal" is "moral." In this respect, the positivist thesis could not be more correct in distinguishing law and morality.

88. For a contemporary effort to recover a natural law foundation for positive law, see FINNIS, *supra* note 43, and NATURAL LAW THEORY (Robert P. George ed., 1992), for an excellent collection of critical essays examining the revival of interest in natural law theory in jurisprudence and ethics.

While respect for the authoritative foundations of law is an essential condition for the efficacy of the rule of law, "the law" as such cannot provide that condition. The sources of law I have in mind are found in the subsidiary communities of family, ethnicity, circle of friends, neighborhood, religion, school, work, play, and the like, which, in the aggregate, compose the local, state, and federal *political* communities—as distinguished from the institutions of *government*—and which help shape the character of its members. Accordingly, the rule of law should thus eagerly welcome the moral and religious insights of those individuals and communities who are asked to obey the laws of our complex society as well as those who make, enforce, and adjudicate them. As an expression of the moral character and spirit of the governed, those insights disclose and invite further refinement of the civic, moral stance that each citizen must take regarding his or her neighbor in almost every setting. On this account the religious and moral aspects of communal life are the primary civilizing and socializing horizons within which the democratic state finds its being.⁸⁹ To disregard the religious dimensions of human experience and a large portion of the moral sphere, and categorically to exclude those sources of knowledge about the human condition from the formation of public policy regarding controverted matters, is certainly possible; we have done so, to a large degree in the name of liberalism, for the last half-century. But this is a dangerous social strategy.⁹⁰

The recognition of an authoritative moral obligation in public law is, I submit, a necessary condition in a democratic society for the ordered well-being of self, of family, of neighbor, and of the various civic, moral, and religious communities that comprise the political community.⁹¹ The practice of religion and religious-ethical discourse have traditionally played significant roles in cultivating the habit of that recognition. The estrangement of law and religion places that habit and the stability of that essential sociopolitical condition in some doubt, if not in serious

89. By the term "horizon" I mean the structure or framework of meaning that orients and guides the development of self and society. See TAYLOR, *supra* note 17, at 14-19 (identifying and discussing significance of "loss of horizon" in modern culture).

90. Signs of the degradation of the rule of law are as varied as they are abundant. Consider, for example, the anarchy expressed in the 1992 Los Angeles riots, the rise of gang violence and organized crime among marginalized racial and ethnic minorities, or the occurrence of homosexual marriages contrary to public law.

91. This notion of ordered liberty in society requires a conception of the human person that is rational, responsible, capable of self-rule, and having the desire and discursive capacity to participate in deliberative, democratic governance. One might call this a democratic ideal-anthropology. Implicit in this description of the ideal democratic self are other characteristics such as intelligence, imagination, freedom of the will, sociality, and moral and religious sensibilities.

jeopardy. In light of the foregoing, democratic governance is itself threatened. Because the rule of law presupposes a positive relation between law and religion, the debasement of this form of human self-transcendence⁹²—the love of self and neighbor expressed in the rule of law, which Enlightenment fundamentalism seems to ignore⁹³—is accordingly a manifestation of an extremely serious intellectual, moral, and religious crisis.

V. SIGNS OF THE ESTRANGEMENT IN SUPREME COURT JURISPRUDENCE

While Congress is expressly prohibited by the First Amendment from making any law "respecting the establishment of religion or prohibiting the free exercise thereof,"⁹⁴ these interdependent prohibitions were not construed by the framers of the Bill of Rights, or by any branch of the federal government, until the middle of the twentieth century, as requiring the government to separate itself entirely or even substantially from the religious faith and practices of its citizens. Although the permissible scope of church-state relations intended by the framers of the First Amendment is controverted by constitutional scholars and histori-

92. As Professor Harold Berman has shown, religion and law share common elements, such as the use of ritual, tradition, authority, and universality. See BERMAN, *supra* note 17, at 31-39. By his account, law is a kindred spirit of religion in that both are activities that "communicate[] transrational values" and comprehend "man's whole being, including his dreams, his passions, his ultimate concerns." *Id.* at 31. While it is clear that law as an activity engages the whole person, the limited scope of law should be distinguished from the comprehensiveness of religious belief and practice according to their respective teleologies. The *telos* of law is the fulfillment of the human desire for ordered liberty and basic justice. The *telos* of religion is the comprehensive truth about God and the relation of humanity to God. Religion intersects the teleology of law insofar as it seeks the religious and moral meaning of the exercise of liberty under law and the obligations of justice. On that account, the culture of law cannot disregard the moral and religious foundations upon which the civic virtue of law-observance is based. Furthermore, the culture of religion, even in a pluralistic society, will not remain silent if such foundations are ignored.

93. I am thinking here of the deep respect and mutual regard we have for ourselves and for others when we desire and will the very best good for ourselves and our neighbors and seek to express that will in public law. This love of goodness and its relation to law in general gives rise to the habit of desiring the best particular good, as opposed to aggregate good, in every situation for myself, my family and friends, my neighbors, and the respective communities that shape and give meaning to my life. Furthermore, this desire expressed in a law-abiding and other-regarding disposition is an absolutely necessary condition for the civilizing and humanizing efficacy of individual and associational liberty under law.

94. The First Amendment reads in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

ans,⁹⁵ it is at least clear that the religion clauses⁹⁶ have never been understood to prohibit official expressions of theism,⁹⁷ nor were they construed for more than 150 years to disable the federal government and the several states from enacting a variety of laws "respecting religion."⁹⁸

Until the religion clauses of the First Amendment were applied to the states through the Due Process Clause of the Fourteenth Amendment,⁹⁹ the Supreme Court's construction of the Establishment¹⁰⁰ and Free Exercise Clauses¹⁰¹ had been rare but had generally followed liber-

95. Compare LEO PFEFFER, *CHURCH, STATE AND FREEDOM* 149-55 (rev. ed. 1967) (advancing thesis that intent of First Amendment is to render government and religion completely independent) with ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* 15 (1982) (defending narrow construction of religion clauses and denying presence of any credible historical evidence that "the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state [since] [t]he actions of the early Congresses and Presidents, in fact, suggest quite the opposite").

96. U.S. CONST. amend. I.

97. Neither the First Congress nor any successive one has concluded that the First Amendment prohibited it from employing federal chaplains whose prayers to God for the deliberations of the members of Congress have begun each working day during the legislative sessions of the House of Representatives and the Senate since Congress first assembled. Even the Supreme Court, which begins its proceedings by invoking God's mercy—"God save the United States and this Honorable Court"—does not seem to have a constitutional scruple about that judicial prayer nor does it seem to be concerned about the religious message likely to be drawn from the depiction of Moses with the Ten Commandments, which adorns the Court's public chambers.

98. Thus, when Congress establishes and maintains a prayer chapel in the Capitol Building, when the President commissions Jewish rabbis, Roman Catholic priests, and Protestant ministers as military officers to serve as chaplains in the armed forces and in the military service academies, and when Presidents Washington, Jefferson, Monroe, and others negotiated treaty provisions with various Indian nations, later ratified by the Senate, that expressly provided for *the direct federal support of religion*, the federal government is and was passing and executing laws "respecting religion" but not thereby "establishing" it. See CORD, *supra* note 95, at 49-82; GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 97-99 (1987) (reviewing historical record of acts of First Congress and its successors and finding overwhelming evidence for conclusion that "government aid, support and encouragement of religion [was] perfectly consistent with the religion clauses"). In the Northwest Ordinance of 1789, ch. 8, 1 Stat. 50 (obsolete), Congress expressly endorsed the notion that "religion, morality and knowledge, being necessary for good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

99. See *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (applying Establishment Clause to uphold New Jersey statute authorizing local school districts to provide reimbursement for transportation costs of children attending parochial schools even though children attending private for-profit schools were not eligible for state subsidy); *Cantwell v. Connecticut*, 310 U.S. 296, 303-05 (1940) (applying religion clauses of First Amendment to states and holding unconstitutional, on free exercise grounds, statute requiring discretionary licensing of bona fide religious solicitations).

100. U.S. CONST. amend. I.

101. *Id.*

ally construed accommodationist principles.¹⁰² However, the modern Court, particularly under Chief Justices Earl Warren and Warren Burger, largely abandoned that historically warranted church-state settlement and embraced a rather strict separationist policy. Accordingly, some of the most telling examples of the estrangement of law and religion—and of liberal fundamentalism at times—may be found in the opinions of the Supreme Court construing the religion clauses during the last half-century. In a great many cases, the Court has disclosed a deep and abiding suspicion, if not a certain measure of hostility, toward religion in a variety of public settings. While some of the decisions of the Rehnquist Court indicate that it may be returning to a more traditional interpretation of the religion clauses,¹⁰³ it will be helpful to review, even if briefly, the Court's modern approach to religion, with special attention given to its Establishment Clause cases, to illustrate how the Court has mirrored and contributed to the estrangement of law and religion.

102. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872) (adopting rule of deference for civil courts regarding internal matters of faith and church polity in hierarchial ecclesial associations because inquiring into such matters would result in "the total subversion of such religious bodies"); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465, 471 (1892) (refusing to apply immigration statute to Episcopal minister on grounds that Congress could not have intended to prohibit emigration of "ministers of the Gospel," and because "this is a Christian nation"); *Reuben Quick Bear v. Leupp*, 210 U.S. 50 (1908) (finding no Establishment Clause issue in Commissioner of Indian Affairs's decision to provide for Catholic education of certain members of Sioux nation through tuition payments to Bureau of Catholic Missions with monies drawn from federal trust funds and annual treaty obligation appropriations); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding congressional power to appropriate monies for construction and operation of hospital in District of Columbia on property owned by Roman Catholic religious order that would also operate federally funded facility). *But see* *Davis v. Beason*, 133 U.S. 333 (1890) (sustaining Idaho franchise condition that, in requiring sworn denunciation of bigamy and polygamy, effectively denied vote to all orthodox Mormons); *Reynolds v. United States*, 98 U.S. 145 (1878) (sustaining Congress's power to prohibit polygamy even though it thereby criminalized essential Mormon religious practice).

103. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993) (holding that exclusion of church group from use of public school facilities that were otherwise open to wide variety of individuals and associations simply because church wanted to present film series on nature of family from religious viewpoint violated Free Speech Clause, and that school district would not violate Establishment Clause by opening its facilities to such groups); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (sustaining Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified as amended at 20 U.S.C. §§ 4071-4074 (1988)), which required public schools to permit student groups formed for religious purposes to meet on school premises under same access conditions extended to all other noncurricular student clubs and groups); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (permitting religious organizations to participate in delivery of counseling services to adolescents, including pregnancy counseling and sexual abstinence); *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327 (1987) (holding that although Free Exercise Clause did not require exemption, government does not violate Establishment Clause by exempting church from operation of antidiscrimination statutes so that it might follow its own sense of religious mission).

From *Everson v. Board of Education*¹⁰⁴ to *Lemon v. Kurtzman*,¹⁰⁵ and more recently in *Lee v. Weisman*,¹⁰⁶ the modern Court has constructed an Establishment Clause jurisprudence composed of decisions that many commentators have found difficult to reconcile.¹⁰⁷ Furthermore, some members of the Court have described this body of law as confused if not unprincipled¹⁰⁸ and based upon a flawed reading of the history of the First Amendment.¹⁰⁹ All too often, the Court has announced a rule of decision in one setting and then abandoned it in a factually similar case.¹¹⁰ While the Court has expressly rejected the no-

104. 330 U.S. 1 (1947) (upholding school district reimbursement of transportation costs of parochial school children while simultaneously declaring that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another”).

105. 403 U.S. 602, 612-13 (1971) (announcing that, for Establishment Clause purposes, a statute respecting religion must “[f]irst, . . . have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and third, it must not] foster ‘an excessive government entanglement with religion.’” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970))).

106. 112 S. Ct. 2649 (1992) (holding that middle school policy permitting clergyman to offer nonsectarian prayer during graduation ceremony violated Establishment Clause).

107. See Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987); William P. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); McConnell, *supra* note 18.

108. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that Louisiana statute requiring teaching of creationism if evolution is taught in public schools was facially unconstitutional). In dissent Justice Scalia expressed his dismay over the Court’s Establishment Clause cases. He explained:

Our cases interpreting and applying the [Establishment Clause] have made such a maze . . . that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.

Id. at 636 (Scalia, J., dissenting).

109. See *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (offering extensive review of historical record in effort to correct “mistaken understanding of constitutional history” upon which Court’s Establishment Clause cases have been based since *Everson*).

110. For example, as applied to religious exhibits, compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding no Establishment Clause violation in municipality’s annual display of nativity scene during Christmas season) with *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding unconstitutional nativity display that had been donated and set up by Roman Catholic organization, on staircase of county courthouse, but permitting 18-foot menorah that, though owned by Jewish organization, was erected by city next to 40-foot Christmas tree and accompanied by sign that read “Salute to Liberty”). As to tuition reimbursement, compare *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (holding unconstitutional tuition reimbursement and tax credit program for costs of nonpublic education)

tion that the Establishment Clause requires the complete separation of church and state,¹¹¹ the Court seems to have put into practice what it has denied in theory. This pattern has been particularly noticeable in the context of public education where the Court has broadly construed the Establishment Clause and held unconstitutional a great variety of state accommodations of religion.¹¹²

Prior to the mid-twentieth century, the Court also considered religious liberty rather infrequently. The distinction between religious belief and practice that developed in the Mormon cases¹¹³ is an essential analytical element of that jurisprudence. While neither religious belief nor practice may be coerced,¹¹⁴ religious practices, even if required by church dogma, may be regulated and even penalized in certain circumstances.¹¹⁵

with *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state income tax deduction for tuition, textbook, and transportation expenses incurred by parents of children attending public or non-public primary and secondary schools). Finally, in the context of public school release time programs, compare *Illinois ex. rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (holding unconstitutional public school program that permitted sectarian students, on voluntary basis, to be released from class during school day in order to attend privately financed and staffed religious education classes on school premises) with *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding similar "release time" program for sectarian students when religious instruction was not provided on school premises).

111. *Lynch*, 465 U.S. at 673 ("[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *Nyquist*, 413 U.S. at 760 ("It has never been thought either possible or desirable to enforce a regime of total separation.")

112. See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (holding unconstitutional remedial instructional program for parochial school children staffed by public school specialists on parochial school's premises); *Meek v. Pittenger*, 421 U.S. 349 (1975) (holding program lending secular instructional materials to nonpublic schools and providing variety of auxiliary educational services staffed by public employees unconstitutionally aided religious mission of sectarian schools); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (holding that state subsidy of mandatory testing in all primary and secondary schools impermissibly subsidized religious activities in parochial schools); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down Maryland and Pennsylvania statutes permitting morning Bible readings in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding unconstitutional New York statute requiring public school teachers to lead classes in vocal prayer).

113. See *Davis v. Beason*, 133 U.S. 333 (1890); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

114. See *Torcaso v. Watkins*, 367 U.S. 488 (1961). The government is also prohibited from imposing civil disabilities because of religious status. See *McDaniel v. Paty*, 435 U.S. 618 (1978); *United States v. Ballard*, 322 U.S. 78 (1944), *rev'd on other grounds*, 329 U.S. 187 (1946).

115. While the Mormon cases were premised upon the belief/practice distinction, the conclusion is unavoidable that the United States Congress sought to suppress the Mormon *belief* in religious polygamy as much as its practice, given Congress's decision to revoke the Church's charter in 1887 and to confiscate most of its assets in response to Mormon civil disobedience. See *Late Corp.*, 136 U.S. 1.

In applying this distinction to various aspects of the modern administrative state, the Court has carved out a number of free exercise exemptions from laws of general applicability. However, outside of the unemployment compensation context, the Court's protection of free exercise has been largely rhetorical. Even though the Court made clear in *Sherbert v. Verner*¹¹⁶ and its progeny that neutral laws of general applicability that substantially burdened the free exercise of religion must pass strict scrutiny, the Court, in applying that purportedly rigorous test prior to its 1992-1993 term, decided to protect religious liberty in nonunemployment compensation cases only once,¹¹⁷ did not apply the test at all in a variety of "special circumstances,"¹¹⁸ and abandoned that standard entirely in the criminal law context in *Employment Division v. Smith*.¹¹⁹

The Court's view of religion during this period reveals a general secular bias. This was clearly Justice Hugo Black's view who, although writing for the majority in *Everson*, argued that the Establishment Clause prohibited federal and state legislatures from passing laws that "aid one religion, aid all religions, or prefer one religion over another," and fur-

116. 374 U.S. 398, 402-09 (1963) (requiring compelling state interest analysis for denial of unemployment compensation to Seventh Day Adventist who refused to work on her sabbath day); see also *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (protecting sincerely held belief of unchurched person that Sunday work was contrary to his religion); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (requiring unemployment compensation benefits for employee whose religious conversion after employment began created religious conflict); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (declaring Jehovah's Witness who refused to work in armament factory on religious grounds eligible for benefits).

117. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In applying the *Sherbert* rule elsewhere, the Court found either that the government's action was not sufficiently burdensome to a religious practice or belief or that there existed a compelling justification. See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391-92 (1990) (finding no burden); *Bowen v. Roy*, 476 U.S. 693, 709 (1986) (finding no burden); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (finding compelling federal interest); *United States v. Lee*, 455 U.S. 252, 258-59 (1982) (finding compelling federal interest).

118. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (refusing to apply strict scrutiny in case involving use of federal lands); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (refusing to apply strict scrutiny in case involving worship services in prison); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (refusing to apply strict scrutiny in case involving military dress code).

119. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (refusing to apply *Sherbert* rule to denial of unemployment benefits to persons discharged from their jobs because of religious use of peyote). In his opinion for the Court, Justice Scalia—following the rule of *Reynolds v. United States*, 98 U.S. 145 (1878), which permitted the criminalization of religious practices without compelling justification—held that Oregon's decision not to exempt the religious use of peyote from its general criminal law prohibiting the possession and ingestion of the drug did not violate the Free Exercise Clause. But he also made it clear that Oregon could grant an exemption, as had several other states. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-3402(b)(1)-(3) (1989); COLO. REV. STAT. § 12-22-317(3) (1985); N.M. STAT. ANN. § 30-31-6(d) (Michie 1989).

ther required that "[n]o tax in any amount, large or small, [should] be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."¹²⁰ Justice John Rutledge, writing in dissent, advanced an even more rigorous interpretation. According to him, the purpose of the nonestablishment principle was:

to create a *complete and permanent separation* of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.¹²¹

On this account, government is constitutionally required to pursue only secular purposes, and may not take actions that favor religion over non-religion or endorse any religious faith.¹²²

Consistent with a secular bias, members of the Court have expressed the belief that religion, especially in the context of primary and secondary public education, is a form of propaganda, which must employ various means of indoctrination to gain acceptance.¹²³ This was certainly Justice Black's disposition whose anti-Catholic bigotry was only lightly cloaked when he referred to Catholics as "powerful sectarian religious propagandists" who were intent upon achieving the "complete domination and supremacy of their particular brand of religion."¹²⁴ Justice Douglas also seemed to share a negative view of Catholicism.¹²⁵ Even Justice Sandra Day O'Connor, concurring in *Wallace v. Jaffree*,¹²⁶ made clear her view that the evil to be avoided in the school prayer cases was

120. *Everson*, 330 U.S. at 15-16.

121. *Id.* at 31-33 (Rutledge, J., dissenting) (emphasis added).

122. However, this view has not gone unchallenged. For example, in *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963), Justice Goldberg objected that this secular bias proceeded from an untutored devotion to the concept of neutrality which can lead to invocation or approval of results which partake . . . of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but . . . are prohibited by it.

Id. at 306 (Goldberg, J., concurring).

123. *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.20 (1971) (Douglas, J., concurring) (quoting L. BOETTNER, *ROMAN CATHOLICISM* 360 (1962)).

124. *See Board of Educ. v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting).

125. *See Lemon*, 403 U.S. at 635 n.20 (quoting with apparent approval vicious anti-Catholic polemicist).

126. 472 U.S. 38 (1985) (declaring unconstitutional Alabama statute that authorized public school teachers to hold one-minute period of silence for purpose of meditation or voluntary prayer).

not simply “the coercion implicit in the statutory schemes.”¹²⁷ The more serious danger of “government-sponsored religious exercises” is that such programs “are directed at *impressionable* children.”¹²⁸ In addition to perceiving religion as coercive propaganda that is harmful to impressionable children, the Court has also indicated that religion is largely subjective¹²⁹ and that it is characteristically “divisive”¹³⁰ and need not be rationally comprehensible to warrant First Amendment protection.¹³¹ In light of such “reasons,” the Court has held that various accommodations threaten to establish religion either because the reasonable nonbeliever finds such arrangements objectionable or because they fail one or more aspects of various Establishment Clause tests.¹³²

127. *Id.* at 72 (O'Connor, J., concurring). Such “coercion” leaves the nonbelieving student “with the choice of participating, thereby compromising the nonadherent’s beliefs, or withdrawing, thereby calling attention to his or her nonconformity.” *Id.*

128. *Id.* at 81 (emphasis added). Because of the mandatory attendance requirement, Justice O'Connor concluded that “government endorsement is much more likely to result in coerced religious beliefs.” *Id.*; see *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985) (noting that danger to be avoided by state is “enlisting—at least in eyes of impressionable youngsters—powers of government to support of religious denomination operating school”).

129. See *Welsh v. United States*, 398 U.S. 333, 340 (1970) (finding moral and philosophical beliefs to be functional equivalents of religious convictions in that setting and, therefore, qualifying as exemption despite Congress’s express prohibition). In essence the Court rejected the congressional judgment that religion is distinguishable from idiosyncratic subjective belief.

130. See, e.g., *Board of Educ. v. Mergens*, 496 U.S. 226, 287 (1990) (Stevens, J., dissenting) (characterizing religions as “divisive forces” that should be barred from public schools); *Meek v. Pittenger*, 421 U.S. 349, 365 n.15 (1975) (citing fears of political division in striking down auxiliary services program for nonpublic schools); *Committee of Pub. Educ. v. Nyquist*, 413 U.S. 756, 795-97 (1973) (striking down tuition voucher plan in part because it could be politically divisive). This line of argument was first introduced in *Lemon*, 403 U.S. at 622. Chief Justice Burger, writing for the Court, warned that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect” and that “[t]he potential divisiveness of such conflict is a threat to the normal political process.” *Id.* See also Edward M. Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 295 (1980), for a critical assessment of this aspect of the Court’s view of religion.

131. For example, although the Court in *Thomas v. Review Bd.*, 450 U.S. 707 (1981) showed considerable deference to Thomas’s religious beliefs and upheld his Free Exercise claim, the Court nevertheless used language suggesting that religion is idiosyncratic if not irrational. In discussing “the determination of what is a ‘religious belief’ or practice,” the Court expressed the view that “religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection.” *Id.* at 714.

132. In addition to the three separate elements of the *Lemon* test, several members of the Court have also employed an endorsement test, see, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (noting that unconstitutional endorsement occurs when “an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the action] as a state endorsement of [religion]”) (O'Connor, J., concurring), and a coercion test, see, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2658-59 (1992) (finding unconstitutional “coercion” where government directs formal religious exercise that obliges dissenter either to suffer

Consistent with the notion that the Court has reflected the estrangement between law and religion, Professor Michael McConnell has persuasively argued that the Court's negative stance toward religion has been clearly expressed, not simply in the application of the *Lemon* test, but also in its essential elements, which have "an inherent tendency to devalue religious exercise."¹³³ Consequently, the modern Court "placed the welfare-regulatory state on a collision course with religious freedom" such that "[a]s the sphere of government expanded, the field of religious pluralism had to shrink."¹³⁴ While it is clear that the Court has at times followed traditional accommodationist principles in construing the Establishment Clause¹³⁵ and has also required the government not simply to tolerate but affirmatively to protect religious liberty,¹³⁶ the negative view of religion found in the Court's precedents continues to surface even in its latest opinions.

In construing the Establishment Clause in *Lee v. Weisman*,¹³⁷ the Court was sharply divided in its analysis of the place of even nonsectarian prayer in public school settings. A strict separationist mood dominated Justice Anthony Kennedy's majority opinion. The nonsectarian prayer struck down in *Weisman* was constitutionally offensive because the state-sponsored invocation and benediction at a middle school graduation ceremony was a naked attempt "[t]o persuade or compel a student to participate in [a] religious exercise,"¹³⁸ which caused the nonbelieving student and parent to suffer psychological harm, given "[t]he embarrass-

"the embarrassment and the intrusion of the religious exercise" or to protest "an attempt to employ the machinery of the State to enforce a religious orthodoxy").

133. See McConnell, *supra* note 18, at 128-34 (demonstrating deficiencies of each of three prongs of *Lemon* test).

134. *Id.* at 134.

135. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (permitting religiously affiliated organizations to participate in Adolescent Family Life Act, 42 U.S.C. § 302 (1982 & Supp. III 1985), federal program designed to provide variety of services to pregnant teenagers, including efforts by church groups to encourage sexual chastity); *Witters v. Department of Servs. for the Blind*, 474 U.S. 484 (1986) (upholding application of neutral state tuition aid program to costs of seminary training for blind student who sought to become religious minister); *Mueller v. Allen*, 463 U.S. 388 (1983) (rejecting Establishment Clause challenge to state income tax deduction for educational expenses that disproportionately favored parents of parochial school children).

136. See, e.g., *Frazee v. Illinois Dep't of Employment*, 489 U.S. 829, 834 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 138-40 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 719-20 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

137. 112 S. Ct. 2649 (1992).

138. *Id.* at 2661.

ment and the intrusion of a religious exercise."¹³⁹ Justice Antonin Scalia, writing for the dissenters, argued that, given "the history and tradition . . . of prayers of thanksgiving and petition" in public ceremonies,¹⁴⁰ the denial of prayer in this setting "is as senseless in policy as it is unsupported in law."¹⁴¹ In *Zobrest v. Catalina Foothills School District*,¹⁴² the Court was once again sharply divided¹⁴³ and showed further signs of the estrangement of law and religion. Although the majority there found no Establishment Clause objection to state-funding of a sign-language interpreter for a deaf student enrolled in a pervasively sectarian high school,¹⁴⁴ Justice Harry Blackmun's dissent repeated the separationist's refrain that "[the] government crosses the [constitutional] boundary *when it furnishes the medium for communication of a religious message*."¹⁴⁵ Because "[i]n an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance,"¹⁴⁶ Justice Blackmun found the service to be an unconstitutional participation in the school's religious mission.

139. *Id.* at 2659. In a recent application of *Weisman*, which the Supreme Court has left undisturbed, the Fifth Circuit found no constitutional impediment to a secondary school administrator's decision to allow graduation prayers offered by student volunteers in accord with a majority vote of the student body. See *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *vacated*, 112 S. Ct. 3020, and *cert. denied*, 113 S. Ct. 2950 (1993). The Fifth Circuit had previously reached the same result applying the *Lemon* test, which judgment the Supreme Court had vacated and remanded for further consideration in light of *Weisman*. *Id.*

140. *Weisman*, 112 S. Ct. at 2679 (Scalia, J., dissenting).

141. *Id.* at 2686 (Scalia, J., dissenting).

142. 113 S. Ct. 2462.

143. Although the Court split five-to-four, two of the dissenters expressed no view on the merits because they objected to deciding the constitutional issue at that particular time. *Id.* at 2475 (O'Connor, J., dissenting). Consequently, even if the newest member of the Court, Justice Ruth Bader Ginsburg, assumes a separationist posture toward such aid, it is not clear how the Court might resolve a similar case in the future.

144. Notwithstanding unresolved state constitutional and federal statutory and regulatory issues, Chief Justice Rehnquist, writing for the *Zobrest* majority, characterized the provision of a sign-interpreter as part of a neutral school aid program, which created no financial incentive for parents to choose a sectarian school. Thus, "[the] interpreter's presence [could not] be attributed to state decisionmaking." *Id.* The fact that this service was offered on the premises of a parochial school was nothing more than an incidental consequence of a parental choice of schools. Thus, the Court noted that "[w]hen the government offers a neutral service on the premises of a sectarian school as a part of a general program that 'is in no way skewed toward religion,'" such programs do not offend the Establishment Clause. *Id.* (citations omitted) (quoting *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986)).

145. *Id.* at 2474 (Blackmun, J., dissenting) (emphasis added). One wonders whether Justice Blackmun on similar grounds would prohibit religious programming by federal licensees and cable operators who are clearly providing "the medium for communication of a religious message." See *id.*

146. *Id.* at 2472 (Blackmun, J., dissenting).

As the Court's studied indifference to minority religious practices expressed in *Smith* is emblematic of the estrangement of law and religion, that decision warrants a more extensive comment. Justice Scalia, writing for the majority, revealed that the Rehnquist Court's narrow reading of the Free Exercise Clause signified its repudiation of the compelling state interest test in all but the rarest of circumstances.¹⁴⁷ According to the Court, the legislature, not the judiciary, is the appropriate institution for the discernment of the creation of a nondiscriminatory religious practice exemption to otherwise neutral laws of general applicability.¹⁴⁸ Apparently untroubled by the inability of minority religions to secure legislative exemptions, Justice Scalia wrote:

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 that *unavoidable consequence of democratic government* must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of religious beliefs.¹⁴⁹

Smith therefore signaled a severe restriction of the *Sherbert* test and, more importantly, the Rehnquist Court's willingness to commit to the political process, outside of the rare instances of overt religious discrimination, the constitutional protection of minority religious practices.

As an element of constitutional theory, *Smith* stands the Free Exercise Clause on its head by implying that the contours of religious liberty should be substantially shaped by the political branches. As conceived by the framers, religious liberty is a *limitation* upon the power of government. To force religion to become a plaintiff before the legislature and beg permission to engage in its central religious practices is constitutional heresy. It implies a power not ceded to government and essentially degrades the constitutional status of religious liberty.¹⁵⁰

147. In choosing not to require Oregon to exempt a "central religious belief" like the ritual use of peyote from the scope of its criminal law, the Court followed the rule laid down in *Reynolds v. United States*, 98 U.S. 145 (1878). While the notion that sincerely held religious beliefs and practices that conflict with public law may not be entitled to an exemption is not controversial, what was surprising was the Court's suggestion that all religions should look to the political process for religious practice exemptions rather than to the courts.

148. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). In this regard, Justice Scalia wrote: "[To] say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts." *Id.*

149. *Id.* (emphasis added).

150. For an excellent discussion of *Smith*, see McConnell, *supra* note 18, at 137-40; Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB.

While Justice Scalia correctly notes that religious liberty is “[not] a law unto itself,” and is subject to police regulation like all other fundamental constitutional rights, his abdication of strict judicial scrutiny of the government’s justification for such an intrusion could not be more wrong.¹⁵¹ Because religious liberty is not constitutionally inferior to freedom of speech or of the press, any restraint upon it should require the same compelling state interest justification demanded of state restrictions of those First Amendment liberties. Before *Smith* was decided, I would have thought that had Congress *not exempted* the sacramental use of wine during Prohibition, the Court would have concluded that, absent an extremely compelling reason, the Free Exercise Clause *required* such an exemption for adversely affected religious communities. Such an exemption should not depend, as Justice Scalia suggests, upon whether Catholics and Jews have grown numerous enough or powerful enough to demand and receive a legislative exemption. It should be given because the form of ritual worship is a matter of religious liberty that may not be regulated by any government unless some very grave reason requires it. But in light of *Smith*, Justice Scalia apparently would advise his fellow Roman Catholics to seek the permission of the government if they desired to participate fully in their sacramental rites, were a hypothetical legislative majority to conclude in the future that such practices threatened the community.

The *Smith* Court’s apparent indifference to minority religious practice is stunning. The religious use of peyote is no less central to the Native American church than is wine to Roman Catholicism and Judaism. The failure of the Rehnquist Court to require Oregon to exempt that use on free exercise grounds in the absence of a compelling state interest is one of the more egregious examples of the estrangement of law and religion.¹⁵² At least in *Reynolds v. United States*,¹⁵³ the Court recognized the government’s need to justify the criminalization of polygamy. But here the Court simply deferred to the state’s admittedly rational, but constitutionally inadequate, decision to proscribe the general use of peyote. Even the Court’s latest free exercise decision protecting the religious sac-

L. REV. 651 (1991); and Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

151. *Smith*, 494 U.S. at 890.

152. *See also* *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (finding it unnecessary for government to advance compelling reason for knowing destruction of ancient worship sites sacred to several Native American Nations).

153. 98 U.S. 145 (1878).

rifice of animals¹⁵⁴ is consistent with *Smith* because the city ordinances there held unconstitutional were neither “neutral” nor “generally applicable” but were clearly directed toward the suppression of the practice of the Santeria religion.¹⁵⁵

While the foregoing review of the modern Court’s Establishment Clause and Free Exercise Clause jurisprudence reveals a rather consistent pattern of secular bias and a negative view of religion, this is but one symptom of a more systemic estrangement between law and religion. Conciliating that disaffection is imperative.

VI. RECONCILING THE ESTRANGEMENT

If the alienation of law and religion described in this Article is at all accurate, we may be in the midst of an intellectual, moral, and political crisis of rather critical significance.¹⁵⁶ Given the current state of affairs, it is hardly surprising that our tradition of church-state dialogue, which has encouraged a robust interdisciplinary exchange between the institutions of democratic governance and the religious communities within the body politic, is in doubt. Notwithstanding the depth of the problem, I believe that the estrangement between law and religion may be reconciled. To that end, several independent but complementary strategies seem promising.

First, as the primary source of the alienation lies in an intellectual bias against religion, what is needed initially is a recognition and diagnosis of the nature and depth of the bias itself. Studies revealing the presence of the bias would be useful. Because antireligious bigotry is largely hidden, and will not readily be admitted even by liberal fundamentalists,

154. *Church of the Lukumi Babaluaye v. City of Hialeah*, 113 S. Ct. 2217 (1993) (holding unconstitutional series of municipal ordinances designed to prohibit religious sacrifice of animals, which practice is central to Santeria religion).

155. Justice Kennedy, writing for the Court, fully embraced the *Smith* rule of decision as summarizing the free exercise principle:

In addressing the constitutional protection for the free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. A law failing to satisfy [neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Id. at 2276 (citation omitted).

156. The social consequences of the breach are regrettably abundant: the lack of virtue and civility that pervades so many quarters of our society, the rise of extreme factionalism, the cultivated selfishness which drives the engine of materialism and consumerism, the moral inarticulateness of too many of our citizens, and the corruption of too many of our religious, moral, and political leaders and institutions. These characteristics of our society reveal an intellectual, moral, and religious decline.

successfully confronting this prejudice will be difficult. Absent an intellectual, moral, or religious conversion, not much can be done to persuade individuals or institutions with deep-seated animosities toward religion to examine their prejudice much less to become free of it. However, unmasking that prejudice may help diminish its adverse sociopolitical effects. In addition, it has been my experience that this bias is often rooted not so much in ill will as it is in ignorance. Many intellectuals are simply not familiar with religion in general and even less so with the modern scholarship of religious men and women in theology, philosophy, social ethics, law, political theory, and the like. Thus, perhaps what is needed is the cultivation of a desire for discovery and self-disclosure between religious intellectuals and their nonreligious colleagues, as well as the creation of opportunities for such exchanges. To that end faculty colloquia concerning religion in various university settings or even programs sponsored by the national media might do much to dispel ignorance and increase mutual understanding.¹⁵⁷

To advance that educative process, interdisciplinary symposia dedicated exclusively to the dialogue between law and religion would be very helpful.¹⁵⁸ In addition, law schools, in conjunction with graduate schools of philosophy, theology, and political science, might consider collaborative ventures in the study of law and religion.¹⁵⁹ At a more fundamental level, university faculty and administrators might consider renewing their commitment to "the work of self-reformation" and accordingly examine the place of the study of religion in their curricular offerings and make appropriate adjustments where necessary.¹⁶⁰ Finally, universities and public interest foundations might profitably follow the example of Princeton University and the Lily Endowment, which established a Project on Church and State at Princeton University for the pur-

157. Being intellectually and morally virtuous, these estranged colleagues may indeed discover that faith is not the enemy of reason; they may also discover what is false about the notion that "a religious intellectual" is an oxymoron.

158. Interdisciplinary scholarly journals regularly investigating public affairs from religious perspectives would be of great service in advancing the dialogue as well.

159. Furthermore, centers for the study of law and religion even from a clearly defined religious viewpoint might be established in law schools. The Center for Jewish Law at Saint Louis University School of Law was established in 1990 by one of my colleagues, Professor Roger Goldman, with the full support of then-Dean Rudolph Hasl. The purpose of the Center is to explore the influence of Jewish law in the secular legal culture through the visitation of law professors and Jewish law scholars from Israeli universities, with special attention given to the religious foundations of public law.

160. This phrase—"the task of self-reformation"—is from the classic work JOHN HENRY CARDINAL NEWMAN, *THE IDEA OF THE UNIVERSITY* (Martin J. Svaglic ed., 1982) (1875), which Jaroslav Pelikan recently reexamined. See JAROSLAV PELIKAN, *THE IDEA OF THE UNIVERSITY: A REEXAMINATION* 168 (1992).

pose of sponsoring "scholarly publications on the interaction of religion and its political environment" and "to draw on disciplines beyond those traditionally concerned with church-state issues to investigate that interaction."¹⁶¹ Perhaps what is really needed is an American renaissance in the study of religion in society in general and of religion in relation to law and democratic governance in particular.

Second, the Enlightenment fundamentalist strategy of denying religious-ethical discourse admission to the public square should be rejected as a violation of fundamental liberal premises and our republican charter. Regarding the latter objection, as Professors Akhil Reed Amar and Michael McConnell have shown,¹⁶² religious liberty was recognized as an essential component of republican theory. Professor Amar has suggested that the Bill of Rights fully embraced religious liberty and gave its protection to religious assemblies in no small measure in the hope that religion would educate "ordinary Citizens about their rights and duties."¹⁶³ Churches were local institutions where the democratic virtues and majoritarian will could be forged and, when necessary, used to resist federal or state tyranny. Religious pluralism, as persuasively demonstrated by Professor McConnell, was one of the objects of the religion clauses, which James Madison had in mind.¹⁶⁴ On that account, the republic is best served not by state indifference to religion but by policies and actions that help religious communities to flourish.¹⁶⁵ In light of the historical

161. See John F. Wilson et al., *Foreword* to PETER I. KAUFMAN, *REDEEMING POLITICS* at ix (1990).

162. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131 (1991); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *HARV. L. REV.* 1409 (1990).

163. Amar, *supra* note 162, at 1210. Regarding the contemporary implications of this historical purpose, Professor Amar writes:

The idea of popular education resurfaces over and over in the Bill of Rights. As we have seen, each of the three intermediate associations it safeguards—church, militia, and jury—was understood as a device for educating ordinary Citizens about their rights and duties. The erosion of these institutions over the last 200 years has created a vacuum at the center of our Constitution. Thus, one of the main tasks for today's constitutional theorists should be to explore ways this vacuum might be filled.

Id.

164. On this point, Professor McConnell has observed:

The Madisonian contribution, familiar to us from *The Federalist* Nos. 10 and 51, is to understand factions, including religious factions, as a source of peace and stability. If there are enough factions, they will check and balance one another and frustrate attempts to monopolize or oppress, no matter how intolerant or fanatical any particular sect may be.

McConnell, *supra* note 162, at 1515.

165. The Madisonian confidence in religious faction and pluralism is in stark contrast to the Anti-Federalist belief that religion would unite and homogenize the populations of the respective states through common religious and moral beliefs and practices. See HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 19-23 (1981). For the Anti-Federalists, the

record and the most recent scholarship, the notion that religion ought to be a private matter having little bearing upon public law and civic life has been thoroughly discredited. In a similar fashion, the privatization of moral controversy should be rejected both because it violates the principles of liberalism and because of the great harm that it causes to the capacity of the political community to address and resolve contemporary moral controversies. In this regard, giving civic form to Professor Michael Perry's notion of public discourse as including an "ecumenical political dialogue" would do much to advance the reconciliation of law and religion.¹⁶⁶

Third, we must renew our commitment to the constitutional dignity of religious liberty and religious pluralism. With respect to that dignity, even the application of one of the most basic principles of textual exegesis would give some significance to the location of the religion clauses in the text of the First Amendment. Religious liberty is *at least* the constitutional peer of the Speech, Press, Assembly, and Petition Clauses. Given the democratic purposes of those liberties, a plausible construction of the text alone would admit the constitutional relevance of religious belief and practice to republican governance. With respect to religious pluralism, the duty of government vis-a-vis religion should be directed toward maximum liberty. Regarding the Supreme Court's role, Professor McConnell argues: "The Madisonian perspective points toward pluralism, rather than assimilation, ecumenism, or secularism, as the organizing principle of church-state relations. Under this view, the Supreme Court errs if it attempts to calm or suppress religious fervor by confining it to the margins of public life."¹⁶⁷ Thus, to the extent that the political branches and the courts actively seek or even quietly tolerate the systematic exclusion

practice of religion was essential to the formation and success of republican government. Accordingly, they demanded assurance that the federal government would have no legislative power to disturb existing state establishments or the free exercise of religion. However, under either the Madisonian or Anti-Federalist view, the political and moral function of religion was indispensable to the success of the new nation.

166. See PERRY, *supra* note 74, at 83-127 (detailing conditions under which "a plurality of religious/moral communities [might] together constitute a (pluralistic) political community"). While the realization of that *polis* is not entirely certain, Professor Perry is certain that if it were to emerge it would also require "an ecumenical political tolerance." *Id.* at 128-38.

167. McConnell, *supra* note 162, at 1516. To correct that error, he suggests:

The Court should not ask, "Will this advance religion?" but rather, "Will this advance religious pluralism?" The Court should not ask, "Will this be religiously divisive?" but rather, "Will this tend to suppress expression of religious differences?" Most of all, the Court should extend its protection to religious groups that, because of their inability to win accommodation in the political process, are in danger of forced assimilation into our secularized Protestant culture.

Id.

or marginalization of "religious people" from public policy discourse and the rule of law, such conduct bears little resemblance to the American democratic charter. But that is precisely what proponents of "liberal fundamentalism" would have the state do. In their rejection of the constitutional anthropology that sublates the First Amendment¹⁶⁸ and consequently in their general denial of the public relevance of religion to democratic governance, liberal fundamentalists repudiate the foundations of the comity between law and religion. That settlement gave constitutional form to a conception of the *persona democratica*, which not only permits but encourages the contribution of moral and religious discourse to democratic governance. This readiness to nullify the *political dimension* of religious liberty offers compelling evidence of the depth of the antireligious bias that characterizes this form of secular fundamentalism.

Finally, constitutional historians should continue to restore the authentic church-state record and to proceed with the systematic deconstruction of the revisionist history upon which the Supreme Court built its wall of separation. Just as the Court has corrected the doctrinal biases of its predecessors in the case of race and sex discrimination, so too may the Rehnquist Court begin to repair the breach between law and religion fully symbolized in *Lemon v. Kurtzman*¹⁶⁹ and in *Employment Division v. Smith*¹⁷⁰ by abandoning those decisions at the earliest possible opportunity in favor of religious liberty and its liberal accommodation. One can only hope that as the Court turns away from the antireligious bias of the Warren and Burger Courts, that it will embrace the founders' church-state settlement as much as possible.¹⁷¹ Accordingly, the Court

168. The constitutional status of religious liberty is grounded in an ideal anthropology, implicit in the First Amendment, that acknowledges the spiritual dimension of the human person, the rationality of religious belief, freedom of will and religious association, and the inviolability of the individual conscience regarding religious belief. The religion clauses were premised upon that anthropology and upon postulates drawn from natural theology and democratic theories that considered religious practice to be essential to the moral flourishing of human society and the rule of law.

169. 403 U.S. 602 (1971).

170. 494 U.S. 872 (1990).

171. I do not mean to imply that the original power of the states to establish religion should be restored. The principle of disestablishment is now undeniably (and rightly) constitutive of our federal-state polity. Furthermore, given the structural modification of our federalism caused by the Fourteenth Amendment and the selective incorporation of the Bill of Rights through the Due Process Clause, U.S. CONST. amend. XIV, § 1, it is clear that the original church-state settlement could not be followed today. However, the marginalization of religious faith and practice that has occurred in the last half-century is contrary to our deepest political sentiments, notwithstanding efforts by certain members of the Supreme Court during that period to revise our constitutional history and shape our church-state settlement accord-

should defer to all reasonable legislative accommodations of religion in public life and scrupulously avoid any indifference to the dignity of religious liberty.¹⁷²

VII. CONCLUSION

Throughout this Article, I have illustrated an estrangement between law and religion that is deeply rooted in an intellectual bias against religious belief and practice. As this bias is present in many influential quarters, so too is the disaffection. I have argued that this is an extremely grave matter, which not only undermines the possibility of substantive interdisciplinary discourse between law and religion, but which also oppresses religious liberty, violates the premises of liberalism, and tends to frustrate meaningful public discussion, debate, and political decision making. Unless reconciled, this disaffection threatens the rule of law and the possibility of democratic governance.

When the primary institutions of republican government—its political institutions, public school systems, universities, mass media, and law schools—systematically disregard and degrade the public value of the religious dimension of human experience, the nation is thereby seriously wounded. When the Supreme Court lends its voice in support of that marginalization, that wound is deepened. Public laws and constitutional decisions that violate the deepest values and considered moral judgments of the governed do more than alienate the political community; they subvert and may eventually destroy the necessary conditions for democratic governance. The rule of law simply cannot disregard the moral and religious horizon of the governed without placing the American democratic experiment in ordered liberty in very serious jeopardy.

While the estrangement of law and religion impedes interdisciplinary exchange, that fact alone creates the possibility for meaningful dialogue among academics. Further scholarly exposition of the alienation by theologians, philosophers, legal anthropologists, historians, political scientists, and constitutionalists could do much to reconcile law and religion. While that rapprochement is the object of the strategies presented in the previous section, the heart of the matter is a deep and yet elusive antireligious bias in certain quarters of postmodern American culture.

ing to a secular bias against religion. That recent distortion of the Constitution needs correction.

172. See McConnell, *supra* note 18, at 175-94 (detailing account of "pluralist approach" to religious freedom designed to correct distortion of "the false choice between secularism and majoritarianism" and to protect citizens "against government-induced uniformity in matters of religion").

Until that cultivated sin of intellectual pride or antireligious bigotry is recognized and expiated, the estrangement of law and religion may continue to deepen and further undermine religious liberty and, so too, all the liberties enjoyed in our society.