1997-98 Brennan Center Symposium Lecture

Religious Freedom as if Religion Matters: A Tribute to Justice Brennan

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My subject is the worship and following of God, which is, for tens of millions of Americans, the single most important activity of their lives. This crucial human activity, which has been with us in one form or another all through history, is treated in constitutional law under the heading of religious freedom. I shall argue that the choice to treat worship and following as rights is actually in severe tension with the idea of religion itself, and that a constitutional right to religious freedom, if understood in the usual language of rights, holds the potential for great harm to the religions. My lecture is dedicated to the late Justice William Brennan, because when Justice Brennan retired in 1990, the Supreme Court lost one of its two members (the late Justice Thurgood Marshall, who retired a year later, was the other) who seemed to have the richest understanding of this conflict, and of the likely need for the nation to accept a degree of postmodern ambiguity in responding to it.

I am not today concerned with the correct result in concrete cases as much as I am with theory and trend. Indeed, I am unpersuaded that constitutional law can resolve the dilemma I plan to present. The Supreme Court's 1997 decision in *City of Boerne v. Flores*,[1] striking down as unconstitutional the Religious Freedom Restoration Act (RFRA), illustrates as plainly as one could ask the difficulty the state faces in trying to

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† William Nelson Cromwell Professor of Law, Yale University. An earlier version of this article served as the basis of the Brennan Lecture, delivered at the School of Law, University of California, Berkeley (Boalt Hall) in November 1997 and at Georgetown University Law Center in April 1998. Some of the themes of the paper were also discussed in my presentation as part of a panel sponsored by the Law and Religion Section of the Association of American Law Schools in January 1997. I have benefited greatly from the many thoughtful comments and criticisms offered on those occasions, as well as at a faculty workshop at Yale Law School in November 1998.

1. 521 U.S. 507 (1997). One of the most thoughtful analyses of the decision, albeit by the lawyer who lost the case, is Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743 (1998).

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conceptualize the worship and following of God as constitutional rights rather than vital human activities. RFRA, it must be admitted, was no masterpiece of statutory drafting—but at least its advocates (I among them) sensed the outlines of the problem, even if we thought, mistakenly I now believe, that positive law could provide the solution.

I have lately come to the view that the challenge facing religions under the American constitutional regime is deeper, and more perplexing, than those of us who supported RFRA thought. The problem is not, as the statute supposed, that the courts have been applying the wrong standard in religious freedom cases. The problem is that religion itself, particularly deeply committed religious faith, with all the discipline that the term implies, is simply not a force that law can afford to unleash.

The legal instinct is the instinct to control human behavior, and every effort to define the contours of religious freedom as a matter of law is really an effort to limit what human beings can do when they worship and follow God. The religions by their nature resist the demands of law. In their traditional forms, all the Western religions teach that the obligation to follow the law as promulgated by God is superior to the obligation to follow a contradictory law as promulgated by human beings. Indeed, the idea that God's will is both different from and higher than the will of fellow humans, even humans with the power to create bindiug law, is one of the signal contributions of Judaism to civilization. In the Jewish tradition, the idea of this difference is illustrated by the prophets calling Israel to account for failing to adhere to the will of God. Christianity, founded as a prophetic religion, squandered much of this wisdom during its thousand-year effort to meld the spiritual and temporal powers into one.

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

This is no new insight, and it is not meant as a judgment. Any state will try to control the forces that might upend it, for a state, as though organic, will do whatever it must to survive. Religion is a potential threat to that survival. The domestication of religion is the process through which the state tries to move religion from a position in which it threatens the state to a position in which it supports the state. One way to do this is by designating a particular religion as the official one—that is, to *establish* a church. An established church makes a very bad trade, exchanging its faith

that God will preserve it for a trust in the state to preserve it. Worse, an established church loses its incentive to subvert the state, for if an established church subverts the state, it is subverting the source of its power.

American constitutional law (as interpreted from the middle of the twentieth century onward) does not allow the establishment of an official religion.[2] Yet, perhaps paradoxically, constitutional law is also one of the tools through which our nation tries to domesticate religion. How? By pressuring the religions, as the price of state protection, to shape themselves into a mold that the state itself prescribes. If you find this claim unpersuasive, I ask only that you withhold judgment, for I will shortly review it in more detail. For the moment, let us pursue a different point: Domestication, in the long run, almost always fails. It is religion's familiar habit to burst constantly the bonds placed upon it by human law.[3] When the subject is religion, law cannot deliver what it promises.

In discussing the unfortunate constitutional status of worshipping and following God—what is known in the Christian tradition as discipleship—I will talk a bit about theology, a bit about sociology, a bit about history, a bit about education, and even a bit about law. I will close the discussion by taking as my text an opinion written by Justice Brennan, concurring in a Supreme Court decision now more than a decade old. But first, in order to set the stage, I want to talk a bit about the Calendar of Saints.

ST. CHRISTINA, DUALITY, AND LAW'S DILEMMA

There is a wonderful old story about the search for the true history, if you will, of a fourth-century saint named Christina. I am not referring to the famous Saint Christina of Markyate, who lived eight hundred years later, but an earlier one, for whom a tiny handful of European churches are named. It turned out that there were two women who might have been the model for Saint Christina. Let us call them Christina One and Christina Two. Some legends favored Christina One; some legends favored Christina Two. After years of research, historians discovered that they had a problem: Christina One had indeed led a saintly life but could not have been

2. Until the middle years of the twentieth century, the question of the application of the Establishment Clause to the states was unanswered, a fact of constitutional history that we occasionally neglect when, in discussing the First Amendment, we wax poetic about the wisdom of the founders. The first case to apply the Establishment Clause to the states was *Everson v. Board of Education*, 330 U.S. 1 (1947). Many scholars have suggested that the incorporation of the Clause is harder than the courts tend to assume, particularly given its plain and well-understood reference to Congress. *See, e.g.*, Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991).

3. Domestication begins with a claim of protection. Thus I am not speaking here of the willed effort to destroy a religion through state violence, an effort which has, in recent human history, often succeeded (as in what the historian Jon Butler has called the "African spiritual holocaust" during slavery, *see* JON BUTLER, AWASH IN A SEA OF FAITH (1990)) but has also often failed (as when Hitler succeeded in murdering millions of Jews but not in destroying Judaism). I have in mind, rather, forms of domestication that are believed by the state to benefit the religions.

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the model for Saint Christina because she was not, in fact, named Christina. Christina Two was named Christina and also lived a saintly life but could not have been the model for Saint Christina because she never existed. In other words, there evidently *was* no fourth-century Saint Christina.[4]

I often think of this story when I ponder the difficulties in interpreting the First Amendment's guarantee of religious freedom. One reason I think of it is that it matches so well the problem with the competing theories on how the courts should interpret the religion clause (which common but erroneous usage translates into the religion "clauses"). There are, nowadays, two principal schools of thought. One strand, which survives in popular discourse and in the courts but is in serious danger of vanishing from the academy, is the view that the state must be neutral, neither choosing among religions nor choosing between religion and non-religion. Unsurprisingly, this is known in the literature as *neutrality*. The second strand, thriving in academic discourse but remarkably difficult to express in popular discourse, is that the state must take steps to accommodate religious believers whose practices are burdened by otherwise neutral state laws. This strand, predictably, is known as *accommodationism*.

I confess that I have somewhat oversimplified a vast and often intricate literature. There are any number of carefully nuanced middle positions. Yet, in the end, nearly all theorists lean toward one of these two positions, simply because legal theory (unlike, say, literary theory) must finally guide the decisions by actual judges of actual cases. Consequently, legal theorists quite understandably feel impelled to tell us in the end how the cases should come out. And, in the end, just about everybody who presents a theory—no matter what the theory is called—winds up favoring something that looks an awful lot like either neutrality or accommodationism.

Very well, what has all this to do with the search for Saint Christina? Just this: I think that neutrality is a theory about freedom of religion in a world that does not and cannot exist, whereas accommodationism, although a theory about the real world, is not really a theory about freedom of religion. But, unlike the typical academic critic, I am not going to call for some new and better theory. On the contrary, I shall argue that although a theory of religious freedom is plainly necessary to the proper function of the state (because its courts must decide actual cases), a theory of religious freedom may be unnecessary to, and might even prove dangerous to, religion itself.

Now, then: why do I say that neutrality is a theory about a world that does not and cannot exist? Because neutrality supposes that it is possible for the state to act without taking any account of religion generally, or of

4. See the discussion in David Hugh Farmer, The Oxford Dictionary of Saints 99 (4th ed. 1997).

the specific religious beliefs of constituent groups. No religion is to be favored over any other; nor is religion generally to be favored over non-religion. The metaphorical wall of separation of church and state (which is only a metaphor, although we sometimes pretend it is a part of our constitutional law) seeks to capture this idea: there is the sphere of religion and the sphere of the state, and a mighty wall protecting each from the other.

But none of this is possible.

In the first place, what we are bold to call neutrality means in practice that big religions win and small religions lose. When the Supreme Court decreed in *Lyng v. Northwest Indian Cemetery Protective Ass'n*[5] that three Indian tribes in California could not prevent the Forest Service from allowing roadbuilding and logging on their sacred lands, the Justices, I suppose, believed that they were acting neutrally: The tribes had no more right than anybody else to protect the lands. But from the point of view of the tribes, whose religious tradition, as the Justices admitted, would be "devastated" by the government's action, there was nothing neutral about the destruction of the forest.[6] With the forest gone, their religion also would be gone: a neutral result without any remotely neutral consequences.[7]

A more powerful religion would not suffer so from neutrality. To take what might seem a painfully obvious example, nobody proposes to build a road through the Cathedral of St. John the Divine in Manhattan. My own Episcopal Church, although its numbers are dwindling, remains sufficiently powerful that nobody would even dream of so absurd a notion. (And, lest you object that the federal government "owns" the national forests, but not the cathedral, let me add that nobody would dare try to take the cathedral through eminent domain either.) To be sure, neutrality governs this result: The cathedral is not safe because it is a religious building—it is safe because it is a building valued by a politically powerful constituent group. But that only illustrates the point. Neutrality is a blueprint for the accidental destruction of religions that lack power.

The reason neutrality fails is that it imagines an impossible world. No true wall of separation is possible. Religion and the state, the two great sources of control all through human history, will never be fully separate from each other. Each will always shade into the other's sphere. Schoolchildren learn this truth in their science classes: All containers leak. The only interesting question is how fast. In the case of religion and the state,

5. 485 U.S. 439 (1988).

6. *Id.* at 451.

7. As Professor Choper points out in his comment on this lecture, the roads have, as of this writing, not yet been built. *See* Jesse Choper, *Comments on Stephen Carter's Lecture*, 87 CALIF. L. REV. 1087, 1089 (1999). The Supreme Court, however, deserves none of the credit for the maintenance of the status quo.

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the leakage is rapid, and constant. How could matters be otherwise? Religion, by focusing the attention of the believer on the idea of transcendent truth, necessarily changes the person the believer is, which in turn changes the way the believer interacts with the world; which in turn changes political outcomes. Although there have been some clever moves in political philosophy to explain why the religious voice should not be a part of our public debates, such theories wind up describing debates from which deeply religious people are simply absent.[8]

Besides, in a nation in which the great majority of voters describe themselves as religious, religious belief will usually be the background—even if frequently unstated—of our policy debates. A widespread religious conviction that we must aid the poor will inevitably find its way into legislation, and so the nation will create welfare programs. A widespread religious conviction that long-term help is no substitute for hard work will inevitably find its way into legislation, and so welfare will evolve into workfare.

Once one recognizes that the wall of separation leaks, and leaks badly, the case for neutrality disappears. It seeks to impose an artificial order on a naturally chaotic relationship. By so doing, it cloaks hard truths about our society. Some of the truths are pleasant—for example, the happy truth that religion matters deeply to most people, even in politics. And some of the truths are unpleasant—for example, the tragic fact that other people's religions often matter less to people than their own. (One recalls Ambrose Bierce's definition of a Christian: "One who believes that the New Testament is a splendid guide for the life of his neighbor.") This truth, too, works its way into policy, which is why the "neutral" result in *Lyng* is able to stand. No constitutional problem arises, evidently, if the state acts in a way that "devastates" (the Court's word) a religion, as long as the state does so by accident.

The bureaucrats who decided to build the road and level the sacred forest were not wicked people, but fallible humans, engaged in the fallible human task of governance. Yet none of them, I suspect, would have considered for a moment allowing the destruction of whatever physical symbol their own religions held to be sacred. Neutrality's ideal world, in which all of us rigorously separate our religious and secular selves, simply is not the world in which most Americans live.[9] And so, although neutrality is certainly a theory about religion and law, it is not a theory about a world that exists.

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8. Rather than bore the reader with a lengthy footnote, let me simply state that I discuss some of this important literature, and what I see as its shortcomings, in my 1993 book *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, especially chapters 2 and 11.

9. The theologian Stanley Hauerwas has argued that this separation has a deeper flaw, that the very concept of the "secular" is imaginary and, to the Christian, incomprehensible. *See* STANLEY HAUERWAS, DISPATCHES FROM THE FRONT: THEOLOGICAL ENGAGEMENTS WITH THE SECULAR (1995).

But that is the easy half of the argument. Neutrality theory has had its critics for thirty years, and many of them have now become accommodationists; that is, they believe that the right approach is for the state to make itself quite intentionally aware of the religions of its constituents, and then, if necessary and possible, to adjust its legal requirements, offering special exemptions so that its constituents are able to exercise their religions freely. To the accommodationist, a decision like *Goldman v. Weinberger*[10] is risible, although the neutralist defends it—*Goldman* being the case in which the Supreme Court allowed the Air Force to discipline Major Simcha Goldman, an Orthodox Jew, for wearing a yarmulke while in uniform, a violation of military regulations. If you think the punishment was right, on the ground that the same rules should apply to everybody, you are a neutralist; if you think the case was wrong, that a special exception to uniform regulations should exist for religious apparel, you are an accommodationist. (And if you think the whole idea of military uniform regulations is risible, you are, without question, interestingly quixotic, but, when it comes to the resolution of concrete cases, not actually helpful.)

Ever since I began writing about religious freedom something over a decade ago, I have counted myself as an accommodationist.[11] I suppose that I still am—yet I have started to wonder. So let me here make a public confession. I have come to think that there is a deep problem with accommodation as a response to the state's denial of religious freedom. The problem is not really a problem about accommodation; the problem is a problem about constitutional rights. The problem is one I find sufficiently severe that it threatens (in my mind at least) the entire project of protecting religion through the Constitution. It bears a strong resemblance to a similar problem in public theology, identified long ago by Søren Kierkegaard. But rather than describe the problem directly now, I prefer, for the sake of clarity, to come to it by what might seem to be the longer route.

ACCOMMODATIONS, STATISM, AND BRENNAN'S INSIGHT

The problem I have in mind is a subset of a larger problem: our evidently hopeless passion for statism. When I say statism, I do not simply mean, as the formal definition would suggest, a preference for state solutions; I have in mind a sense of the state's rightness, or goodness—an empirical belief that the state is less likely than the individual to make a moral error. Since the Enlightenment, the entire liberal political project has rested on this idea. The rightness of the state (whether in the sense of social contract, as in Hobbes and Rousseau, or in the sense of reasoning about obligation, as in Kant) is the source of the state's authority to use force to

10. 475 U.S. 503 (1986).

11. I suppose my most optimistic statement of the accommodationist faith appears in my article *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993).

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coerce individuals. That we elect our government by majority vote and call our system democracy does nothing to change the statist truth that the democratic majority, when certain that it is right, can coerce the dissenting individual.

But, wait, you say—that is why we have constitutional rights. They are designed to avoid precisely the problem of statism. They carve out a sphere, we like to say, within which the individual is sovereign, and thus is not subject to state coercion. Free speech, for example: here, we might say, no state, no matter how great its democratic majority, may interfere. And the same for equal protection and for due process, and, of course, for religion. All of these rights are set out in the constitutional text. And so statism is turned back—isn't it?

Would that it were so! There is, unfortunately, a catch. The catch is that the engine of protection for constitutional rights is the judicial branch. That is, if I believe that the state is interfering with my sovereign sphere, I go to court and try to persuade a judge that I am right. If I lose, I make the same argument to some more judges. If I lose again, but am nevertheless very lucky, I make the argument a final time to a set of nine judges—Justices—who have the final word. They tell us, authoritatively, what the Constitution means, which means they also tell me, authoritatively, what I may and may not do. If they say I have the right I claim, I have it. If they say the state may coerce me, the state may coerce me.

Why is this a problem? It is a problem, as the Critical Legal Studies scholars used to point out, and the Legal Realists before them, because the judges are themselves a part of the state. They are not (despite what we tell our students) a *check on* the state—they are a *part of* the state. We think of rights, nowadays, as proceeding from the state. That is the precise meaning, today, of the phrase "constitutional right": a right that is protected in the foundational document of the state, and that the state is obliged, *because of that textual protection*, to respect.

But this is just a long way of saying that the state grants the right. We have grown accustomed to this rhetoric in America—the idea that rights are protected by judges—but the ubiquity of the idea should not blind us to the fact that to file a lawsuit before a judge is the analytical equivalent of asking state permission to exercise a constitutional right.

Perhaps this does not matter for most claims of right; but in any case, they are not my subject.[12] I do think this matters, deeply, when we consider religion. If we take religion seriously, as a force in the human spirit and as a connection to the transcendent, we can see at once why it matters. The

12. As it happens, I do believe that an obligation to God is not like an obligation to a strongly held secular moral view, but my analysis does not turn on this belief, and, in any case, I doubt that I possess the rhetorical tools to persuade those who disagree. But only in the mirror maze of secular discourse is the weakness of my rhetorical abilities evidence that I am wrong.

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three great Western religions, Christianity, Judaism, and Islam, all propose the existence of a Creator-God whose will is superior to any human construct, including human law. The demands this Creator-God places on humans—who are among the created, or creatures—are absolute. The Bible and the other narrative traditions of these faiths are full of stories of God's people practicing God's rules in the face of human disapproval, even human punishment. How, then, can God's people go to the state and seek permission to do what God requires?

For, again, this is what happens when a constitutional right is asserted. In the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[13] the city adopted an animal-rights ordinance with the sole apparent purpose of ridding itself of the practitioners of Santería. The Santería faith teaches that each of us is assisted by a personal God, an *orisha*, which must be nourished, lest it die and our fate be sealed. In their religious ceremonies, the *santeros* sometimes sacrifice live animals to the *orishas*. In their cosmology, they have no choice: They cannot allow the *orishas* to die, and the blood of ceremonially killed animals is crucial to the survival of the *orishas*. The Supreme Court struck down the ordinance on what amounted to a discrimination argument; it was not enforced against anybody but the church.

Now, suppose instead the case of a neutral animal rights ordinance, not one aimed only at shutting down Santería. The neutralist would enforce it. Many (not all) accommodationists would allow an exemption. But in either case, the *santeros* have no choice about what to do. If they truly believe the teachings of the faith, they *must* make the sacrifices, whether the state allows it or not. In other words, if the state refuses permission, that does not change their obligation to follow what they take to be the will of God.[14]

Of course, the obligation to God does not always survive the threat of state punishment. The willingness of the state to punish behavior B effectively pressures religionists who believe God requires B to change their faith. As the late Robert Cover pointed out in his classic article *Nomos and Narrative,* religions often discover their own true and best selves in the dialectic with the awful reality of the coercive power of their fellow

13. 508 U.S. 520 (1993).

14. The problem of the animal rights ordinance helps explain why the distinction between fact and belief that is so crucial to much of Western thought is often incomprehensible within the confines of a particular religion. To the *santeros*, the notion that their futures will be destroyed should the *orishas* die is a fact, not a belief. Thus, the *santeros* can provide what we might think of as a secular reason for their sacrifices: They want to live healthy, productive lives. True, nobody who lacks their faith in the *orishas* will accept this "secular" truth, any more than someone who lacks faith in the medicinal qualities of marijuana will be impressed by "secular" claims that its use should be normalized; but this is precisely what makes the notion of the secular so slippery.

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citizens acting as the state.[15] So the Mormons, harassed and brutalized by state power, yielded their insistence on polygamy (more accurately, polygyny). This demonstrates the awesome force the state can wield, but it also may suggest that polygamy was not truly at the heart of the Mormon religion.

Such discoveries are useful for a religion that prefers its doctrine pure. This does not mean that oppression is good. Even if one believes that even the worst evil, iu some mysterious way, serves God's plan, that answer is not quite adequate to the present point. Rather, I would say that although oppression of the religious (like oppression of other forms) is evil, when it does occur, it helps us to learn who we truly are.

In the end, the what-we-truly-are that religion R discovers of itself might involve behavior B, no matter how the state tries to discourage it. Sometimes, heroically, adherents of R will do B even when doing so means arrest, and worse. (The Jewish and Christian Bibles are thick with examples.) Sometimes adherents of R will do B even when most of us are quite convinced that B is actively wicked. Indeed, I will admit to a sneaking admiration for the Christian racists of Bob Jones University—the subject that sparked Cover's article.

In the early years of the Reagan Administration, the federal government joined forces with Bob Jones University to challenge the power of the Internal Revenue Service to deny tax exempt status to schools that discriminate on the basis of race. The university, citing principally the Tower of Babel story, did not allow interracial dating (it allowed very little dating of any kind) and did not admit as students people married to people of other races.[16] Bob Jones University lost its appeal before the Supreme Court,[17] at which point just about everybody expected the school to abandon its discriminatory policies rather than lose its tax exemption. But just about everybody was wrong. The school decided to stick with its version of Christianity and give up its tax exemption.[18]

There are happier examples—civil rights activists and abolitionists going to prison rather than recanting what their God has taught them—but we must not be ahistorical. The state imprisoned them not because a few nasty racists had their hands on the levers of power but because the side the

15. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 51-53 (1983).

16. The Reagan Administration took the view that the case was about the separation of powers, not the right to discriminate, and that the authority to deny the exemption rested in Congress, not the IRS. This claim of high principle would have been more persuasive had the Administration announced its decision to seek an amendment barring discrimination on the basis of race by tax-exempt entities before, rather than after, announcing its decision to join the *Bob Jones* lawsuit. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 585 n.9 (1983).

17. *See id.* at 574.

18. For a profile of the university a decade after the Supreme Court decision, see Kate Muir, *Majoring in Bible-bashing*, TIMES (London), Nov. 21, 1992, (Saturday Review), at 21.

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protesters took was, at the time they took it, not a popular one. Their mythic character depends on our belief today that the protesters had it right, but the heroic character of their resistance does not depend on whether we agree with them or not. Antiwar protesters, not popular in the early Vietnam days and pretty much ignored if the war happens to involve Saddam Hussein, are also resisters to state power; so are protesters who fight abortion. It is our habit to sort the resisters depending on what we think of the side they take on controversial issues, and this is a very human, as well as quite sensible, response. As Oscar Wilde noted, the fact that a man dies for a cause does not mean the cause is right. But even when the cause is wrong, we should not overlook the heroism of those willing to be punished for their belief in its rightness.

To be sure, not all religionists will be heroic in the face of official pressure, and not all religions demand martyrdom of their followers. Adherents of R, faced with the threat of state punishment if they do B, sometimes will not abandon their belief that God requires them to do B, but will decide nevertheless not to do it. This is not a sign that they do not "really" believe they are required to do B. It is a sign only of human frailty.

Those religions that will back off when threatened with pressure pose little threat to the state that tries to create a dominant meaning, for the hegemonic state naturally counts on human frailty as an ally. Those religions that refuse to back off are more threatening. Sometimes, the inability of the state to rout the resisting religion leads to deep and fundamental alterations in the state itself, as when the Roman Empire was transformed by Christianity (not that either Christianity or the Empire benefited much). So the state will work harder to achieve its goal.

What goal? The simplest way to put it is *standardization*—in particular, standardization of the people. For the modern Western democracies, whatever their pretensions to diversity, often seem to desire most a nation in which all citizens are essentially the same.[19] This tendency is a characteristic of nationhood, not of democracy as such. Totalitarian or religious states do it, too, and far more ruthlessly than democracies do. But democracies still do it.[20] The literature is full of assertions that it is a commonality of values and outlook, in short a shared sense of meaning, that makes a people a people and, thus, a nation a nation.

The temptation, however, is one that the just state will resist. Indeed, the strongest argument in favor of the accommodation of religion is the preservation of genuine diversity—not simply people who *look* different,

19. The most open and obvious version in the West was the transformation of France, as set forth in Eugen Weber's wonderful yet tragic book, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870-1914 (1976). As I shall argue, however, we Americans may only be less clumsy, not more just. *See infra* text accompanying notes 39-58.

20. *See* Charles Taylor, Storrs Lecture at Yale Law School (Nov. 1998).

but people who in deep ways *are* different. The accommodationist believes in religion as something that actually changes the way that people are; nurturing religion, then, also nurtures a plurality of nomic communities.[21] The accommodationist, therefore, argues that the state should back off whenever it can—formally, whenever a compelling state interest is not served by the effort to rein in religions that would otherwise press for meanings of reality that the state abhors.[22]

These are already dangerous words, because they can invite oppression: The state, after all, might reasonably conclude that many different ends are compelling. Indeed, the immediate difficulty for the accommodationist is that it is the state that is doing the accommodating. The problem facing the religionist is deeper than the struggle between the ideal of neutrality and the reality of accommodation. For the accommodationist, at the very beginning of the analysis, is faced with two crucial problems that necessarily limit religious freedom. First, the accommodationist must define religion, which already narrows the universe of what counts. One saw evidence of this, for example, in the Third Circuit's rather shaky attempt some years ago to show that MOVE is not a religion, and thus that adherents of MOVE who are incarcerated are entitled to none of the special consideration that prison authorities must grant to inmates of faiths that the courts recognize.[23] The same problem occurred when a Massachusetts appellate court decreed in *Needham Pastoral Counseling Center, Inc. v. Board of Appeals*[24] that when religious counseling is informed even in part by secular psychology, it ceases to be religious and is entitled to no free exercise protection. The problem is plain: If the religion seeking an accommodation must first prove to the state (through its courts) that it is a religion, it is already under pressure to meet a test that might have nothing to do with the religion's teaching.

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21. Both the terminology and the argumentation are borrowed from Cover, *supra* note 15. For a suggestion that the authors of the First Amendment believed in allowing communities of believers to struggle together toward a truer understanding of God, see WILLIAM LEE MILLER, THE FIRST LIBERTY (1986).

22. One of the simplest judicial statements of the compelling interest test for accommodation is that of Justice O'Connor (joined by Justices Brennan and Marshall) in her concurring and dissenting opinion in *Bowen v. Roy*, 476 U.S. 693, 727 (1986): "[T]he government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means." *Bowen* involved the religious objection by Native American parents to using a Social Security number to identify their daughter, Little Bird of Snow. The plurality opinion answered that victory for the claimants would require the government to "join in their chosen religious practices." *Id.* at 700. The theorist of resistance will immediately spot the weakness of the plurality's position: The state interferes quite actively with the nurturing of the religious community when it requires parents to conceptualize their children, even for a brief time, as the impersonal objects of bureaucratic scrutiny. On the other hand, as will become clear, I do not think the dissent got matters precisely right either.

23. *See* Africa v. Pennsylvania, 662 F.2d 1025, 1036 (3d Cir. 1981).

24. 557 N.E.2d 43 (Mass. App. Ct. 1990).

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The courts might try to avoid this difficulty, by adopting, for example, Kent Greenawalt's proposal (following a suggesting of Arlin Adams, the judge in the MOVE case) that we define religion analogically.[25] Greenawalt suggests that we begin with what we know to be religions, search out their common elements, and then compare other claimants by looking for similar (but perhaps not identical) elements. This approach (which is, I think, more impressionistic than analogical) would have the advantage of not forcing all religions into a single, narrow mold, a point to which I shall return. But it would have the disadvantage of beginning with the religions with which our culture is most familiar, which at once makes potential outsiders of religions that may look very different. Besides, like all definitional approaches, this one still says to people of faith that they must ensure that they come within the approved definition if they want, in a legal sense, to be free.

Second, the accommodationist must indicate a limit beyond which no claim of religious freedom will be recognized—to resolve, for example, the problem of religiously mandated murder. Most accommodationists, along with the now-unconstitutional RFRA, place the limit at "compelling state interest;" but even setting compellingness as the standard, and handling it correctly, the courts in the end will be centering their concern on the needs of the state, not the needs of the religionist. This became painfully clear in 1996, when the Supreme Court refused to review the Alaska Supreme Court's decision in *Swanner v. Anchorage Equal Rights Commission*,[26] which held that the state's interest in preventing discrimination against unmarried heterosexual couples is sufficiently great to trump the objections of landlords who believe they are forbidden by God to permit "fornication" on their property. It is not easy to discern what made the interest compelling, except that the state had decreed it to be so.

The simple problem is that the accommodationist must ultimately draw some lines; and every line divides those religions that will be privileged from those that will be demoted. The mere existence of these dividing lines creates pressures on religions to twist themselves into shapes that the state (through its courts) will recognize. Perhaps were we mortals sinless, the problem would not arise, for we would readily resist state pressure to be different. But that asks too much of weak flesh. We search for ways to ease our path through life; that is our nature. No religion picks a fight with the state if it can be avoided, and few religionists are able to resist the lure of state assistance. And so, precisely because the rules of constitutional law create some faint possibility of gaining special consideration, the question the religion must ask itself becomes (to take *Needham* as our

25. *See* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

26. 874 P.2d 274 (Alaska 1994) (per curiam), *cert. denied*, 513 U.S. 979 (1994).

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example) not What form of counseling does God require?, but What form of counseling will the state allow? Thus does constitutional protection of religion threaten to undo the specialness of religion itself.

The trouble all arises because our theories of religious freedom are not theories about religion; they are theories about the state and its needs. If the religious freedom claimant loses, it is because the state's interest is too strong—not because religion's interest is too weak. Although the tests are referred to as balances, they are not, for they suffer from the well-understood deficiency of such inquiries: The tests fail to tell us the weights to be given to the different variables. Indeed, the tests do not even tell us what all the variables are. In *Swanner*, what in the world was a fair-minded court to weigh—and against what else—in deciding whether the state's interest in protecting unmarried couples from discrimination is sufficiently compelling to trump the religionist's interest in following God's ban on allowing fornication? The test does not say, and probably cannot say, and so the judges, tossed upon the stormy seas of their own resources, seek the safest harbor they know: They are creatures of the state, and so is the Constitution, and so what comes to matter most is quite naturally the interest of the state. And that is where the problem centers: for the religion that makes a legal claim for religious freedom is petitioning a functionary of the state for permission to worship and follow God. But what sort of religion can (or should) comfortably do such a thing?

Suppose the state says, "No." Is the follower of R then to decide that B is not required after all—because the state will punish him if he does it? In principle, this outcome is no more appealing than the notion that the state should decide to allow the follower of R to do B because he is going to do it anyway, even if punishment follows. But no such symmetry exists. We seem to expect that the sensible religionist will take into account state response in making a decision whether to break the law or not; yet we evidently suppose it to be absurd that the sensible state should take into account religious response in deciding whether to enforce the law or not. The religionist who persists in doing B after it is deemed to carry no constitutional protection is a fanatic, but the state that puts him in jail is only doing its job. This result is possible because—and *only* because—the state, not the religionist, has the guns.

In a nation that properly prides itself on religious pluralism, we certainly do not want to put the guns in the hands of the competing religions instead. Yet the same pride should help us to recognize that the asymmetry of religious freedom is mischievous. Although the compellingness test (which only accommodationists believe in anyway) gives us a standard for determining which state interests are so vital that a claim of religious requirement cannot overcome them, we have no test for determining which religious interests are so vital that no state interest—*not even*

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a compelling one—can overcome them. In other words, the balance is struck in a way that creates only two sets of cases: those that are hard and those in which the state automatically wins. There may be no set of cases in which the religion automatically wins.[27]

The asymmetry is also unstable. The neat separation assumed by the model does not survive. The result is not chaos; the result, rather, is a steady leakage in our separation cylinder, but leakage in only one direction, so that the state wins more and more and the religionist wins less and less, precisely the trend line of the cases over the past twenty years. This does not mean that there is a point at which accommodation and neutrality converge (although there may be); it means only that as time and cases go by, the state-centeredness of what we are bold to call religious freedom is more and more apparent, and the pressure on religionists to conform to the expectations of others grows and grows, with the inevitable complicity of the judges who supposedly protect religion's "right" to be free.

RELIGION, COMMUNITY, AND RESISTANCE

But that, you might say, is simply the way the world works. For me to accuse the courts of being state-centered on religion issues, you might argue, smacks of sophistry. After all, the judges must decide the cases properly before them.[28] To decide cases they must draw lines. That the lines judges draw are occasionally a little bit arbitrary is a very old critique of judging. Unless we are to adopt a standard under which the religious freedom claimant always wins, then we must pick a point, by some method, at

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27. The Supreme Court has suggested in dicta, and at least one federal court of appeals has held as a matter of law, that the selection of clergy should be utterly beyond the scrutiny of the state. In *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115-16 (1952), the Supreme Court proposed that "a spirit of freedom for religious organizations" requires that churches retain the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." The Justices added: "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116. In *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), the Fourth Circuit applied the *Kedroff* language to hold that the provisions of Title VII of the Civil Rights Act of 1964 banning discrimination on the basis of sex cannot be applied to selection of clergy.

I obviously agree with the language and spirit of *Kedroff*, as well as with the result in *Rayburn*. But this approach has its critics. For example, Professor Jane Rutherford, in a provocative recent article, neatly turns contemporary legal scholarship on its head, pointing out that if the contemporary critics are right that the courts have erred by conceptualizing religion as a choice rather than an obligation, we have an additional reason to consider the application of Title VII to religious groups: those who are dissatisfied with a religion's hiring policies do not, as the courts seem to think, retain the option of easy exit. *See* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996).

28. Few scholars, and virtually no judges, seem to believe any longer in the passive virtues introduced into constitutional discourse by Alexander Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

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which the claimant loses. Whatever that point turns out to be, it will invariably be the point at which the losing claimant will accuse the judges of statism.

And besides (so the counterargument might continue), trade-offs are a necessary part of life in society. Of course religions will sometimes feel themselves pressured to change, because everybody is pressured to conform; that is a fact of life, not of law. If a religious belief is sufficiently strong, it will survive the pressure. I have already mentioned that Bob Jones University refused to yield to state pressure to abandon its religious belief in racial separation after losing in the Supreme Court in 1983. But even had the school chosen to back off, we might have concluded that societal pressure against segregation is so strong that the belief might have collapsed anyway, that it was social change, not state action, that led to the abandonment of Christian racism. Imagine, on the other hand, that the Internal Revenue Service had been after Bob Jones to abandon faith in Jesus Christ as Son of God and Savior, the bedrock on which Christianity rests. In that case, nobody would have been surprised by the school's refusal to back down.

Neither one of these objections disturbs the theory. Yes, judges must decide cases and draw lines; but it is the fact that *judges* must draw lines—not the place where the lines happen to be drawn—that creates the risk for religions that go to court to seek protection. And, yes, religionists should ideally be strong enough to resist state pressure; but the state itself has created layer on layer of purportedly neutral pressures that combine to weaken the ability of the religions (or, rather, the religious people) to resist. Among these layers are a variety of tax benefits, which encourage religions to shape themselves so as to be eligible, and the recent move, certainly constitutional but of dubious value to religion, to allow religious groups to share in the rather substantial largesse of the programmatic side of the welfare state.[29]

I noted earlier that some postmodern theologians describe religions as subversive to the society in which they exist. This description, although now and then ridiculed, is remarkably apt—at least when we consider religion at its best. The reason for religion's subversive power is its tendency to focus the attention and, ultimately, the values of adherents on a set of understandings often quite different from the understandings of the dominant forces in the culture. A simple example is the continued insistence of tens of millions of Americans that the Genesis story of creation is literally true and the theory of evolution, to the extent that it is inconsistent with

29. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 104, 42 U.S.C. § 604(a) (1998) (authorizing religious and other charitable organizations to provide certain forms of public service assistance).

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Genesis, is false.[30] It is religious community, and nothing else, that sustains these believers in their certainty. To answer by saying that we would be better off if they believed something else is imperialism, not argument, for it presupposes a cultural monopoly not only on truth, but also on the range of permissible belief about truth. And the same answer could have been offered to the abolitionists, who were also sustained by their faith communities in their certainty that the Biblical injunction to love our neighbors meant slavery was impermissible. Abolitionists, creationists, pacifists, pro-lifers: what religion at its best supplies to the larger society is a veritable cornucopia of difference.

The theologian David Tracy, in his masterwork *Plurality and Ambiguity*, has put it this way: "Despite their own sin and ignorance, the religions, at their best, always bear extraordinary powers of resistance. When not domesticated as sacred canopies for the status quo nor wasted by their own self-contradictory grasps at power, the religions live by resisting."[31] So the culture may press the religions to change; but the religions, at their best, press back. And they press back in a way that no other force does, for the transcendence of religious belief proposes an answer higher than mere human striving. The Western religions in their traditional forms all share the model of transcendence: The answers to the most profound questions are found not in human argument but in the will of God, which exists in the world in written form and sometimes in an oral heritage as well.[32]

When religion presses back against the dominant culture, both are changed as a result of the encounter. One reason that the culture changes may be that we are constructed in a way that causes our souls to resonate to religious language, even when we prefer to avoid it. The spirituality of religion, for most Americans, fills a hole in the human soul that the more material aspects of our world leave agape. Of the theistic religions this is particularly true, but a non-theistic faith, such as the more refined forms of Buddhism, can play the same role. We might, of course, take the totalitarian view that we should allow no forces that press us to be other than we are, but then we would not be either genuinely democratic or religiously free—and, indeed, we would not be American.

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30. In some surveys, this is the avowed view of a majority of Americans, but I doubt that, if pressed, all members of this majority would seriously try to prevent their children from studying evolution. See, for example, the data discussed in Betty McCollister, *Creation "Science" vs. Religious Attitudes*, USA TODAY, May 1996, (Magazine), at 74; and Mary Molvihill, *Going All the Way With Darwin*, IRISH TIMES, Sept. 30, 1995, (Supplement), at 8.

31. DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 83 (1987).

32. Nothing in this argument turns on one's view of who the authentic interpreter of God's word happens to be. One can believe that God's will is eternal and unchanging, and believe at the same time that fallible human beings often get it wrong, and believe at the same time that God's will, even imperfectly understood, remains transcendently authoritative.

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All of this suggests that if religion is indeed to be free, one of the things it must be free to do is to reinforce itself—that is, to strengthen itself against the inevitable incursions of state power. If we focus our understanding of free exercise on the needs of religion rather than on the needs of the state, especially on the need for religion to create meaning in the lives of the faithful, we can see at once the necessity of carving out a sphere in which religion is immense, not only in its ability to teach or even in its authority, but in its scope, its ability to fill a life—all in an effort to balance the subduing imminensity of the state.

These spheres are particularly important if we view the subversive power of religion as something to be valued rather than controlled. Justice William Brennan seemed to have a particularly sensitive understanding of this point. The case that makes the point most sharply may be *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, decided in 1987.[33] The decision upheld an amendment to Title VII of the Civil Rights Act of 1964, the federal statute which prohibits employment discrimination on a number of grounds, including religion. The amendment exempts religious groups, in most of their nonprofit activities, from the prohibition on religious discrimination. Without this protection, the Court explained, the state might be too free to interfere with "the ability of religious organizations to define and carry out their religious missions."[34] This conclusion is quite sensible, and the statute was a good idea. If religions are not allowed to engage in what would otherwise be illegal religious discrimination, they would, for practical purposes, cease to exist.

Justice Brennan wrote a concurring opinion, joined by Justice Marshall. This is what he wrote: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[35]

Let us pause for a moment. Brennan is here taking a side—and the right side—in the continuing debate over whether religion is an individual or group activity. And although he carefully hedges his bets, his sympathies seem to lie with those theologians who contend that it is the very groupness of religion that gives it its meaning—that religion is a narrative activity, a story a people tells itself and its issue about its relationship to God over time. This in turn suggests that a brand new religion, one founded yesterday, say, is not a religion at all, but simply a set of ideas

33. 483 U.S. 327 (1987).
34. *Id.* at 335.
35. *Id.* at 341.

about God, until it stands the tests of time and community; and that the phrase "a religion of one" is an oxymoron.[36]

To say that a religion becomes a religion by virtue of its ability to extend itself over time—into the future and into the past—is not to suggest that any religion is unchanging, for that very passage of time may help the people of God to gain a richer understanding of God's will. As Jaroslav Pelikan has written, "[T]he demonstrated ability to sustain and eventually to accept the development of doctrine is witness to the vitality of a tradition."[37] This is self-evidently true even of religions that often seem to critical outsiders to be hidebound, such as Orthodox Judaism and Roman Catholicism, both of which moved into their most orthodox phases only in the late nineteenth century. If Pelikan is right—and I believe he is—then the very ability of a religion to accommodate itself to the world is crucial to its survival; those that cannot evolve, die.

Brennan continues:

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[38]

Maybe it does, maybe it doesn't—I think Brennan is right, although the last point is not perhaps so obvious as to need no argument. But note Brennan's principal suggestion. If the religious community cannot define itself, cannot set the rules for membership, including the rules of behavior, then it is not, in any realistic sense, a religious community. This implies that protection of religious freedom requires a high degree of deference to the definitional process within the community, that each of the religions should possess a large sphere within which to undertake the activities of worship and following God. And that is what the theory I have been discussing requires, too; for it is only through the process of defining, creating, and strengthening itself that the religion gains the power to resist not only the competing meanings proposed by the larger society, but also the inevitable incursions of the state, which will, more often than is probably comfortable, pressure the religion to change.

RESISTANCE AND EDUCATION

This understanding of religion helps explain why the battles over the education of children are so intense. A religion exists, as we have seen,

36. The new set of ideas about God may thus be true and yet not be a religion.

37. JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 59 (1984).

38. *Corporation of the Presiding Bishop*, 483 U.S. at 342.

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through resisting the meanings pressed on it by the state and projecting its narrative of the people's relationship to God into the future. It will be impossible to do so if the religious community does not have significant control over the upbringing of its children. This is the point the Supreme Court understood in its much-maligned decision in *Wisconsin v. Yoder*,[39] which permitted the Old Order Amish to remove their children from school after the eighth grade. The Justices noted, correctly, that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable"[40]—that is, that the law hurt the religion and there was no way around the law unless the courts carved out an exception.

Critics of the decision have cast it as an abandonment of the "right" of the children to more of an education than their parents prefer, but language of this kind only obscures what is at stake. On the one side is a religious view of the world, on the other, another view—maybe religious, maybe not—held by the state. Both the claim that the children are being harmed and the compulsory attendance law itself simply represents the state's way of looking at the world. To conclude that it is superior to the parents' way of looking at the world is an extension of the state-centeredness of religious freedom. In particular, to lift the individual child from the context of the family, the place where the religion's set of meanings are most closely inculcated, is a coercive act that is very likely to destroy, in the long run, those religions with which the state is unhappy. The state will place few obstacles in the path of domesticated religions that seek to project their narratives into the future but seem supportive of the state itself; it is only religions that are subversive, particularly those that are radically so, that are at risk . . . if, as many scholars believe, *Yoder* is wrong.

The separation of individual child from family is a dangerous staple of the contemporary understanding of education. The state requires all families (with the exception of families with the resources to make a different choice) to send their children for education for 6 to 7 hours a day, 180 days a year, for at least 12 years of the child's life. Many parents complain that parts of the content of the public school curriculum interfere with their ability to raise their children in their religion—what I would call, more formally, the ability of their religious community to project its meanings into the future. Elsewhere, I have argued for very strong deference to the judgment of parents who object to the curriculum,[41] but that is not to the present point. Rather, I wish to show how our assumptions about the role of family and state in raising children not only retain the

39. 406 U.S. 205 (1972).

40. *Id.* at 218.

41. *See* Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce, *70 Years Later*, 27 SETON HALL L. REV. 1194 (1997).

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state-centeredness that is always poison to religion, but largely (although, of course, not entirely) originated in religious, not secular, visions of education.

It is hornbook constitutional law that the religious training of the young is a responsibility of the family and must take place outside the bounds of the public school day. Where does this understanding come from? Not from constitutional law, but—at least in part—from the nation's religious history. The history is complicated.[42] The shape of the school day has been influenced over time both by the contributions of educational theory and by the need of advanced capitalism for a well-trained workforce. But it also represents the outcome of a fierce battle in late nineteenth-century America between nativist Protestants and Roman Catholic immigrants. The Catholics, arriving on these shores from a Europe in which there were few common schools, saw religious instruction as pervasive, something to which youngsters should be exposed all day, every day. The Protestants saw religious instruction as something easily confined to that odd invention of America's Protestants, Sunday school.[43] The idea that children needed any more religion than they could get at home and in Sunday school was, to the Protestant mind, simply ridiculous. The Protestants won. And that is why the school day is shaped the way it is, without formal religious instruction. And that is why we have the principle that we do, which nobody discovered until this battle was joined. And that is why there are so many Catholic schools.

In other words, the choice to design the school day, and the school week, in the way that it has traditionally been designed in America, was a religious choice made for religious reasons. Indeed, the reasons are even more religious than I have suggested: The best evidence is that the common school was *designed* to make it harder for Catholic parents to raise their children as Catholics. Certainly the early nineteenth-century movement to create, as Horace Mann called it, "universal, free, public education"[44] generated little support until later in the century, after the great post-Civil War wave of European immigrants. The movement prevailed not under the banner of equality but under the banner of nationalism: The children of the immigrants would be "Americanized," supporters

42. I refer the reader interested in the historical discussion of religion and public education in this section to my book, THE DISSENT OF THE GOVERNED (1998), and to WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA (1995), which contain detailed citations on this topic.

43. *See* NORD, *supra* note 42. Other useful treatments of this history include JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT (1985), and ROBERT T. HANDY, UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA, 1880-1920 (1991).

44. HORACE MANN, THE IMPORTANCE OF UNIVERSAL, FREE, PUBLIC EDUCATION, *cited in* STEPHEN CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 151 n.5 (1998).

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wrote, which included, very explicitly, an effort to Americanize—meaning, Protestantize—their religious beliefs.

The same religious battle created our strange American tradition barring state aid to religious schools. When I say that the tradition is strange, what I mean is that it is difficult to explain. This tradition is shared by few other countries, not even those, like France, that zealously separate church and state. Most countries—and all Western European countries—consider direct aid to religious schools as part of a portfolio of pro-family policies, like generous family leave for all workers and, for those governments that can afford it, a regular stipend for parents. All these programs together are aimed at supporting families by supporting the choices that families make—the choice, for example, whether to stay home with a child, or whether to send that child to a religious school.

In America, we have gone our own way—or perhaps we have lost our way. So parents who stay home with their children are penalized in the employment market. Parents who send their children to religious schools are penalized in the pocketbook. Both American policy failures have the effect of channeling parental choices in the direction the state presumably wants them to go: Parents should spend less time with children and more time in the paid workforce, and, instead of educating their children in the close-knit, nurturing environment of the religious school, should send them to the bureaucratized, often impersonal, and aggressively secular public school. Although these may appear to be liberal values, they are, in practice, merely the values of capitalism.

Well, we Americans have always been the wonders of the world, and we are what we are. Still, even in the United States, the tradition against public aid to religious schools is of relatively recent vintage; it is only, perhaps, a century old. During the first century of the nation's history, such "public" schools as existed were for all practical purposes Protestant parochial schools, supported by local communities. (Whether we should think of local communities in the late eighteenth and early nineteenth centuries as "the state" raises tremendous risks of anachronism.) The schools of the day, supported by local assessments, featured both prayer and formal religious instruction.[45]

As the common school movement spread, instruction in Protestant values, along with school prayer, spread with it. Nobody doubted that government funds could be used to pay for these schools. For all the virtues of the movement, the schools it produced often amounted to little more than state-supported efforts to preserve Protestantism and kill the

45. *See* Nord, *supra* note 42, at 71-79. Although this evidence has been much picked over, one of the most enduring commentaries on the constitutional significanee of these early practices remains Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 CALIF. L. REV. 260 (1968).

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"un-American" religions before they could take their pernicious hold on the immigrant children. Unsurprisingly, Roman Catholic and Jewish immigrants quickly denounced the schools.

Yet the climate of the times was such that nobody bothered to hide any of these facts. On the contrary: it is hardly an accident of history that the first compulsory education law in the country was adopted in Massachusetts during the period when its legislature and state house were in the hands of the rabidly anti-Catholic Know-Nothing Party. And Governor William Seward, during his two decades of running New York, fought for state money to pay for separate Catholic and Jewish schools, on the interesting ground that immigrants should not be forced to send their children to schools where they would encounter prejudice. In New York City, the plan was partly adopted, as the municipal government, for a time, paid the salaries of teachers at the Catholic schools.

Supporters of compulsory education laws in the late nineteenth century were quite explicit about their goals. From politicians to schoolteachers (including the head of the fledgling National Education Association), they argued that it was the task of the schools to wean immigrant children from their foreign religions; and, under this banner, compulsory public education triumphed. At the same time, the nativists suddenly discovered—*invented* might be a better word—the principle that prohibits the use of state funds to support religious education, a mischievous idea that killed federal legislation that would have benefited the Catholic schools, while allowing local governments to continue to pay for their Protestant "public" schools.[46]

But look at the result. We inherit from this battle the shape of the school day, which we take as a given, notwithstanding its ridiculous assumption that parents struggling to offer one set of meanings can easily compete with the state, which prefers another. Yet it is not obvious that we have correctly calculated the number of hours children must attend school, and educational theory, although hunting around the margins in search of an hour more or an hour less, also begins with the baseline that we have: Six hours of classroom instruction a day, or thirty hours a week, is always the starting point.

And there is a deeper problem. The vision of education that we inherit is one that was designed to interfere with the ability of parents to raise their children in subversive religions—and millions of Americans evidently

46. The purportedly secular educational theorists of the twentieth century did not improve matters very much. John Dewey, for example, argued that formal religious education was bad for children, who should not, he wrote, "be inoculated externally" with ideas that parents "happen to have found useful for themselves." He added that religious schooling for children was simply a form of segregation, as objectionable as any other. His words should not be lifted from their context. He wrote at a time when the only formal religious schools considered religious were Catholic and Jewish; he wanted the immigrant children to attend the Protestant public schools.

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believe that it works, as evidenced by surveys indicating that as many as half of parents of public school children would prefer to send their children to religious schools if they could afford it. (The number who would prefer private schools is even larger.) Public education, in other words, began, at least in part, as an effort to domesticate religions that were seen as un-American, and, however more noble our rhetoric than the rhetoric of the nativists, there is every reason to think that it plays that role even today.

There are theorists who defend that role. Amy Gutmann, in *Democratic Education*, is quite explicit in urging that the schools be used to limit the ability of parents to raise their children in intolerant religious beliefs.[47] Stephen Macedo calls for a liberalism prepared to do battle, including through its schools, with religions that teach "illiberal" ideas.[48] Suzanna Sherry warns that educational policy must be crafted to limit the effect of the bad choices that religious parents will inevitably make for their children.[49] Quite apart from its totalitarian bent—it envisions America as the land of the single true meaning, which the state, distinct from the people who make it, alone decides—this literature seems to assume that the purpose of the schools is to minimize the aggregate cost of parental error. The family, in this vision, becomes a little baby-making factory, whose purpose is to create children for the benefit of the state.

Sadly, this is also the unspoken message of much of the criticism of *Yoder*—including, I would say, Justice Douglas's famous dissent, in which he explains why the parents' liberty to choose a religious education for the child is not unlimited: "Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views."[50] The image that comes to mind is of a state bureaucracy charged with determining, each time a "mature" child is sent to a religious high school, whether the child objects; the fact that we might call the bureaucrats judges does nothing to alter, from the point of view of the religiously resisting family, the totalitarian implications of the idea itself.[51]

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47. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 30-31 (1987). Gutmann insists, without citing any evidence, that many religious parents have historically taught their children "disrespect for people who are different." *Id.* at 31.

48. Stephen Macedo, *The Politics of Justification,* 18 POL. THEORY 280, 285-89 (1990). Macedo proposes educating children for what he calls "situated autonomy," a status in which "quiet obedience, deference, unquestioned devotion, and humility" become practically impossible. *Id.* One can easily see how many religious families would view such state action as imperialistic—and perhaps downright wicked.

49. *See* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship,* 62 U. CHI. L. REV. 131, 160-61 (1995); *see also* Ira C. Lupu, *The Separation of Powers and the Protection of Children,* 61 U. CHI. L. REV. 1317, 1353 (1994) (arguing that "compulsory education laws reduce the risk of totalitarian control or abuse of children")

50. *Yoder,* 406 U.S. at 242 (Douglas, J., dissenting).

51. One wonders whether Justice Douglas would have had the same solicitude for a child whose parents prefer public school but who would rather attend a parochial school—always assuming, for the

The case that here comes to mind, of course, is the Sixth Circuit's rather controversial 1987 decision in *Mozert v. Hawkins County Board of Education*.[52] The case involved religious parents who objected on religious grounds to a curriculum aimed at teaching what school officials described as "tolerance." (The official title was "critical reading.") The parents believed that the coutents of the critical reading course were actively at odds with the teachings of their faith. The court, siding with the school, responded that learning the tools of tolerance would not be harmful to the children and would not force them to reject the parents' beliefs. As Nomi Maya Stolzenberg has pointed out, however, the judges actually rejected not only the parents' legal claim, but also their religious claim.[53] The panel simply did not believe that teaching tolerance could be religiously objectionable.

The *Mozert* decision represents what I hope will be the zenith of judicial endorsement of the idea that we are, at heart, unsituated individuals, able to create and recreate ourselves constantly according to the new theories to which we are exposed, as against the view more common among the religions that we are, each of us, deeply connected to a community, and that the community and its norms are as constitutive of our selves as anything else.[54]

Over the years, any number of religious communities have gone so far as to try to make themselves geographically distinct, in order to preserve precisely the groupness, the communal connection to God, that creates a sense of identity and confers meaning on what might otherwise seem a hopelessly arbitrary world. The Supreme Court's sympathy for the Old Order Amish in *Yoder* has inspired few other judges to be as bold. On the contrary, the courts seem to agree with the assessment of the legal scholar Christopher Eisgruber that the Constitution itself somehow prefers assimilation—even when dissenting communities believe that too much contact with the larger society will injure their ability to preserve what makes them distinct.[55]

Mozert has plenty of academic defenders; I suspect that its academic defenders outnumber its academic critics. The strongest form of their

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sake of the example, that the parents have the means to pay. If, as I suspect, the answer would turn out to be that the ratchet turns only one way, then the state, through its courts, would be evidencing a quite open and obvious anti-religious bias.

52. 827 F.2d 1058 (6th Cir. 1987).

53. *See* Nomi Maya Stolzenberg, *"He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of Liberal Education*, 106 HARV. L. REV. 581 (1993).

54. The leading academic defenders of this vision of the communal self are Alasdair MacIntyre and Charles Taylor, even though their understandings of its significance are quite different. *Compare* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984), *with* CHARLES TAYLOR, SOURCES OF THE SELF (1989).

55. *See* Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996).

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argument might be summarized, in formal terms, this way: The family holds the potential to exercise enormous power, and power, in the liberal understanding, must always have a liberal justification. Arming the children with the tools of critical inquiry, then, might be seen as a way of limiting the power the family would otherwise be able to exercise.[56]

But the student of religion as resistance cannot help but be troubled by the degree of trust this approach places in the state. By positing a right of the children to gain sufficient critical insight to allow them the possibility of rejecting the religious community of the parents, *Mozert*'s defenders risk undermining the ability of the community to resist state domination.

Perhaps this state of affairs is inevitable. We have already seen that the conflict between religion and state is unavoidable. Once we concede the authority of the state to set up its own schools, we already give the state an enormous advantage in deciding which meanings to inculcate in children, and so we reduce the possibility the dissenting religions will successfully project their subversive meanings into the future. We domesticate the religions through the simple device of taking their children.

We can justify this, of course, by following the lead of the icons of the public school movement, Horace Mann and John Dewey, who argued with some force that the state needs citizens raised to respect certain democratic values if it is to function—in principle, a very good idea.[57] Yet now our state-centeredness becomes simple statism, for the argument assumes, on the basis of what evidence one can only guess, that the state, as an empirical matter, will make better judgments than the parents about what the children need to know. Or, more formally, it assumes that the aggregate costs of the errors the state will make if it is the central source of meanings will be smaller than the aggregate costs of the errors the parents will make if the family is the central source of meanings.

Moreover, the very idea that we can aggregate these costs rests on the assumption that our own paradigm will remain undisturbed, that no subsequent shift, perhaps led, as so often, by a radically subversive religious vision, will undo what we have thought settled moral and even scientific knowledge. How do we know that the system established today to promote liberal hegemony by wiping out opposing centers of meanings will not be captured tomorrow to promote racist or fascist hegemony in an America in which opposing centers of meaning are dead? How do we know, in other words, that the good guys will always, or even usually, be on top?[58]

56. This is the argument of Macedo, *supra* note 48, and Gutmann, *supra* note 47, as well as such mainstream liberals as William Galston and Bruce Ackerman.

57. See the discussion in CARTER, *supra* note 44, at 41-49.

58. As a believer in actual diversity of opinion, I leave it to the reader to decide whether the good guys are on top now.

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Nothing in the history of the state as an entity, or of humanity as a species, justifies so extraordinarily optimistic an assumption.

CLOSING THOUGHTS: RELIGION AS "RIGHT"

My argument, quite designedly, has no obvious legal consequences, except, perhaps, to support the Court's much-ignored 1925 decision in *Pierce v. Society of Sisters*,[59] which held that the state may force parents to send their children to school but may not force parents to send their children to public schools. Plainly, if the religious schools do part of the work of preserving religions over time and thus of nurturing the communities of resistance that undomesticated religions can be, it is only the totalitarian state, the state of the singular state-given meaning, that will want to suppress them. Thus, it should be unsurprising that the Oregon ballot initiative held unconstitutional in *Pierce*, a law basically prohibiting the operation of private schools, arose from precisely the same anti-Catholic animus that generated much of the support for the compulsory education laws themselves.

But it is not my purpose, as I said at the outset, to help decide concrete cases, for I am no longer persuaded that a constitutional theory of religion will ever be more than a constitutional theory about the needs of the state. To talk about religion in terms of the Constitution is already to take the first step toward taming the subversive nature of religion at its best; we already begin to strip away what David Tracy calls their power of resistance.

So perhaps the religionist's challenge is larger, in this legal order built so precariously on a foundation of state-decreed and state-defined rights. Perhaps the person of sincere and motivating belief should not conceptualize religion as an activity that needs the protection of constitutional right. Perhaps considering the exercise of religion as constitutionally protected is itself the source of the difficulty of which I have been speaking. Why? Because, inevitably, if only through the act of definition, the government becomes partner in the religion—almost always, the stronger partner. How stronger? For all the reasons we have seen, when we leave it to government (the courts) to decide what is protected and what is not, we create enormous pressure over time for religions to conform to the definitions that the government presses upon them. So the Mormons yield on polygamy and the Southern Baptists yield on racism and I suppose we can sit and congratulate ourselves and insist that state pressure has made these faiths morally better than they were before. But has the pressure helped moved these religions to a truer understanding of the will of God? I hope so—but the

59. 268 U.S. 510 (1925).

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future worries me. Because sometimes, when the state presses religions to change, congratulations will not be in order.[60]

One thinks here of Søren Kierkegaard, who warned that Christians should never think of themselves as defenders of the faith, because, in so doing, they reduce their faith to the status of a thing needing defense. Something closely analogous might be said of the worship of God, the activity at the heart of most Western religions. Perhaps it is an error for religionists to conceive of the worship of God as a *right* because, in so doing, they reduce it to a thing that one needs a right in order to do. And that reduction is potentially deadly to genuine freedom of religion.

Religious freedom, under a regime of constitutional rights, is like Christina Two: a lovely theory, but not really a theory about religion. Religious freedom is, instead, a theory about the needs of the state. The hard question for religionists is whether to participate in it or not. One answer is that there is no choice: We are where we are. The other answer is that God will provide.

60. In addition to some of the examples discussed in the text, a striking occurrence of this difficulty is found in *Hernandez v. Commissioner*, 490 U.S. 680, 689-703 (1989), holding that payments to a church for mandatory services are not deductible as a contribution or gift for religious purposes unless the government agrees with the church's definition—possibly an inevitable holding, but nevertheless a deeply tragic one.