THE SEPARATION OF CHURCH AND SELF

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AMONG the most hallowed precepts of American constitutional law is that the First Amendment builds a wall of separation between church and state.[1] As many theorists have noted, however, the existence of this metaphorical wall raises the question of how a public-spirited citizen who is also religiously devout should conduct her affairs. In particular, if the citizen participates in a faith with a tradition of making demands on the citizen's conscience, how does the individual translate those demands into the secular political realm without breaching the wall?[2]

The modern theorists of liberalism have either elided this question, by treating religion as one of the many prejudices that the citizen should cast aside, or thought the answer obvious, by insisting that religious dialogue has no place in the public square. The first approach is exemplified by the philosopher John Rawls, whose suggestion that principles of justice be derived from a hypothetical original position, behind a veil of ignorance about the characteristics one will have in the real world,[3] has been the subject of criticism on the ground that many people cherish the very characteristics Rawls wishes to discard.[4] The second approach is exemplified by my friend and colleague Bruce Ackerman, who dismisses from liberal dialogue arguments

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1. U.S. CONST. amend. I; *see* Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, Committee of the Danbury Baptist Association in the State of Connecticut (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (1904). Regarding the Bill of Rights, Jefferson stated he believed the First Amendment "built a wall of separation between Church and State." *Id.*

2. For a recent provocative stab at answering this question, see MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991). Other recent works include KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989).

3. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); JOHN RAWLS, A THEORY OF JUSTICE 17-22 (1971).

4. *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE 229-34(1981) (notes that people can never really exist behind Rawl's veil of ignorance); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 24-27 (1982) (argues that Rawl's veil of ignorance "excludes morally relevant information . . . necessary to generate any meaningful results"); *see also* Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL L. REV. 521, 531 (1989) (argues that "the case for bracketing a particular moral or religious controversy may partly depend on an implicit answer to the controversy it purports to bracket").

stated in religious terms because they are non-verifiable and non-neutral,[5] and whose views have been criticized on the ground that they require citizens to shut off vital components of their personalities in order to retain access to the public square.[6]

These otherwise admirable liberal theories simply fail to come to grips with the importance of religion as a facet of the human personality — or, at least, a facet of the personalities of many millions of humans.[7] The implication of these theories is that a religion is in some sense an arbitrary choice (perhaps an illiberal one at that), is not a fundament of personality, and is a choice that should not be respected in modeling the ideal public citizen. The vision of the public square that modern liberal theory seems to embrace is one in which citizens leave such impedimenta behind them when they enter. I have elsewhere described the proposition that ideal citizens are not motivated in their political selves by religious devotion as tending to trivialize religion.[8] Still, in an admittedly un-Kantian way, I have not heretofore considered the idea very dangerous because it has remained a theoretical construct rather than a model for solving practical problems. But this disturbing image of the ideal public citizen as leaving religion behind when entering the public square has increasingly found its way out of the academy and into American law and politics.

In this article, I will explore this image, which I call the separation of church and self,[9] through brief discussions of three contemporary problems, each of them a model of a separation dilemma: the role of religious groups in the pro-life movement, which exemplifies the problem of religious support for so-called "moral" legislation;[10] the role of religious belief in the anti-evolution movement, which exemplifies the problem of religious support for "empirical" legislation;[11] and the Supreme Court's recent decisions in the *Smith*[12] and *Lyng*[13] cases, which exemplify the problem of government pres-

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5. *See* ACKERMAN, *supra* note 3, at 110-11.

6. *See, e.g.*, MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 55-73 (1988) [hereinafter PERRY, MORALITY]; MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 1-28 (1991) [hereinafter PERRY, LOVE AND POWER].

7. The estimated religious population of the world as of mid-1990 was 5,292,178,000. THE WORLD ALMANAC AND BOOK OF FACTS 1992 725 (1992).

8. *See* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989) [hereinafter Carter, *Devout Judge*]; Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977 (1987) [hereinafter Carter, *Religion as a Hobby*].

9. My choice of terminology is influenced by Michael Perry's metaphor of the religious self in liberal theory as bracketed from the rest of the personality. *See* PERRY, MORALITY *supra* note 6, at 121-79, 180-84. Perry explores some of the implications of this metaphor (which he rejects, as I do) in his more recent book, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 1-28 & 139-45 (1991).

10. *See infra* notes 17-32 and accompanying text.

11. *See infra* notes 33-49 and accompanying text.

12. Employment Div. Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); *see infra* notes 57-68 and accompanying text for discussion of case.

13. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *see infra* notes 71-75 and accompanying text for discussion of case.

sure not to undertake certain religious practices.[14] It is not my intention in discussing the religious dimension to suggest the right answers to any of the underlying moral problems; I only hope to complexify them, to demonstrate that the problems of separation of church and self are more subtle than liberal dialogue usually admits.

Unquestionably, American pluralist democracy requires a vivid separation of church and state. But if the separation of church and state is understood as a doctrine prohibiting the government from endorsing a religion's claims or penalizing or encouraging membership, it is difficult to understand why that separation must go further and actually seek to exclude from the public square those to whom religion is important in forming their *personal* moral consciences. I have argued elsewhere that liberal democracy should be unconcerned with how individual conscience is formed, and equally unconcerned with how individuals, in dialogue with one another, justify their moral positions.[15] Even if one enforces a dialogic rule that limits how the *state* as an entity may justify its choices, that rule should not be one that prevents the state from listening to those whose appeals are openly and explicitly religious in nature — or from allowing such citizens to prevail in trying to enact secular legislation, if they can but convince other citizens of the wisdom of their positions.

In all of this, I will point to the importance of preserving, or perhaps restoring, a sense of religious autonomy. I have in mind the role of religions as independent entities, not part of or subject to control by the state. The religions, in this vision, become sources of power and sovereignty, making demands on the loyalty of adherents, thus effectively splitting the duties of citizens between these different masters. The religious citizen, then, is utterly loyal to the state, but is utterly loyal as well to another entity with its own teaching about a life well lived.

All of this should seem very simple. Indeed, as I argue elsewhere, the need for and value of autonomous religious institutions undergirds all the plausible arguments for religious freedom, and many conceptions of democracy.[16] And yet, I shall suggest, our legal and political cultures have in recent years embarked upon a quite serious attack on this understanding of religion — an attack born less out of a willed hostility to religion than out of

14. The public lecture on which this paper is based included a brief discussion of a fourth example: the recent dispute in New York City over the refusal by those in charge of the St. Patrick's Day parade to allow participation by groups of openly gay and lesbian marchers, which I described as exemplifying the problem of applying external moral standards to the internal organization of religious groups. The basic point of the argument, to which I continue to subscribe, was that although discrimination on the basis of sexual preference is wrong and should be prohibited in the market, religious groups should remain free to discriminate in some circumstances without government penalty. Autonomy of this kind, I contended, is crucial to the role of religion as an independent moral authority in a democratic society. However, because I am no longer satisfied with all of the details of the argument, I have omitted it from the published version of the lecture.

15. *See* Carter, *Devout Judge*, *supra* note 8, at 943-44; Stephen L. Carter, *Does the First Amendment Protect More Than Free Speech?*, 33 WM. & MARY L. REV. 871, 886-87 (1992).

16. See CARTER, THE CULTURE OF DISBELIEF (forthcoming in 1993).

a liberal politics to which religious devotion is more and more considered a threat.

I. PROBLEM 1 — "MORAL" LEGISLATION

There is an article of public liberal faith holding that it is wrong for the state to impose anybody's morality on anybody else. Nobody, of course, actually believes this; it is not possible to imagine a law of any kind that constitutes anything *but* a moral judgment, backed with the power of the state. Still, the notion that it is wrong to impose morality is a regular feature of our national political dialogue. And it is in the debate, the one over the imposition of morality, that the American attitudes that threaten religious autonomy are perhaps most sharply etched.

Everybody's political bugaboo, it seems, is abortion, and nowhere is the separation of church and state less understood, on both sides. On the one hand, there are some in the pro-life movement who seem to think that the purpose of secular politics is to transform America into a nation reflecting, in all of its laws and values, a particular set of religious traditions. On the other, there are many in the pro-choice movement who seem to think that the fact that many pro-lifers are religiously motivated automatically gives pro-choicers the moral and constitutional high ground. Neither of these visions is particularly appealing in a nation dedicated to the separation of church and state.

Although the vision of America as a country that should reflect in its laws a particular religious tradition is dangerous and oppressive, I have discussed it elsewhere and will not repeat the reasons here.[17] I have also discussed elsewhere the reasons that liberalism errs grievously if it attempts to wall off the religious facet of human personality as a justification for action in the public square.[18]

I do want to take a moment, however, to note an analogy that occasionally creeps into the literature and that deserves more thorough discussion. The analogy I have in mind is between the role of religion in the pro-life movement and the role of religion in the civil rights movement.

Let me state at the outset that an analogy is not an identity. By discussing the civil rights movement alongside the pro-life movement, I do not mean to imply that the goals are of similar weight or that the tactics or rhetoric are comparable. I emphatically do not mean to suggest that the mean-spiritedness of some in the pro-life movement compares in any way with the self-sacrificing idealism of the civil rights movements.[19] I claim only that some of the criticisms of the role of religion in the pro-life movement would seem, in their breadth, to apply equally to the civil rights movement.

The battle for racial equality — what the historian Clayborne Carson has

17. *See* Carter, *The Devout Judge*, *supra* note 8, at 940-41.

18. *See* Carter, *Religion as a Hobby*, *supra* note 8, at 978; Stephen L. Carter, *The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law*, 69 OR. L. REV. 483 (1990).

19. There are, to be sure, self-sacrificing idealists in the pro-life movement as well.

called the black freedom struggle[20] — was a mass movement, fought on a number of fronts, including the political and the legal. It had no central axis, that is, there was no joint leadership committee allocating this much energy to litigation and this much energy to protest. And yet, the movement's support base for much of its existence was in the church. The leaders of the mass-protest wing were drawn from the black clergy, which continues to supply a disproportionate share of the civil rights leadership. The movement's public appeals were openly and frankly religious, and many of the nation's political leaders joined in these appeals, and even echoed them in supporting legislation.[21]

Now, suppose that the time line of liberalism were to shift a bit. Suppose that *Roe v. Wade*[22] had been decided in 1954, and we were now struggling over the implications of a series of desegregation decisions that began in the late seventies. Had the nation been forced to confront the abortion issue prior to the issue of racial equality, and had religious groups taken the lead in an earlier pro-life movement, it is hard to imagine that a religiously based civil rights movement could get a foot in the liberal door.[23]

Consider, for example, Martin Luther King Jr.'s "Letter from Birmingham City Jail," which is often extolled as an outstanding work of justification for civil disobedience, but which is an overtly and unapologetically religious document.[24] The Letter's explicit appeal to a higher authority was an appeal to King's own conception of God. If there is any doubt that the Movement was religious, consider the fact that its leader was a member of the clergy — nowadays, a symbol sure to raise a degree of ire, but then, a matter raising no liberal concerns. Indeed, when the Roman Catholic Archbishop of New Orleans declared racial segregation a sin in the late fifties, explicitly forbidding Catholic legislators to support it, liberals applauded, and only rabid segregationists attacked what in today's terms would doubtless be considered a breach of the wall of separation between church and state. Indeed, at all its most dramatic moments, from King's "Letter" to the Montgomery bus boycott in the fifties and King's "I Have a Dream" speech in 1963,[25] the Movement's leaders spoke openly of the commands of God as

20. CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960s, 23-40 (1982) (discussing conflicts of the Student Nonviolent Coordinating Committee).

21. Mary Ann Glendon, *Notes on the Culture Struggle: Dr. King in the Law Schools*, FIRST THINGS, Nov. 1990, at 9.

22. 410 U.S. 113 (1973).

23. One might argue, of course, that religion was simply a camouflage in the civil rights movement, and that had religious arguments not been available, something else would have been used. Although I have no doubt that another rhetorical choice might have been available (and would have been used, had the separation of church and self then existed), there is little room for doubt that the religious appeals were both sincere and, to adherents, quite compelling.

24. Martin Luther King, Jr., Letter from Birmingham City Jail, (Apr. 16, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., 289-302 (James M. Washington ed., 1986).

25. Martin Luther King, Jr., *I Have a Dream*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING., JR., *supra* note 24, at 217.

a crucial basis for their public activism. Thus, they made no serious effort to disguise their true intention: to impose their religious beliefs on others.

Nowadays, of course, the idea of "imposing" religious beliefs is an accusation — something against which it is thought necessary for partisans to defend themselves. As a rhetorical choice, to limit the possibility of religious oppression, this approach is easy to understand, and probably sensible as well. At the same time, it is profoundly unrealistic. The state inevitably makes moral judgments (What should be the penalty for murder? Should the wearing of seat belts be encouraged? Should flood victims receive foreign aid?), and that is to the good. The Establishment Clause doubtless means that the state cannot explicitly base its laws on prevailing religious belief.[26] But the considered moral judgments of citizens are often (if we believe the surveys, *usually*, and, in the case of the Congress, *almost always*) informed by religious belief. Consequently, whatever strictures one might want to place on the actual decision-making process, one cannot exclude from the debate those whose consciences are formed in part by religion unless one wants to restrict debate to an unrepresentative agnostic elite.

In the particular case of the abortion debate, it should be plain that there is no escape from the imposition of morality. A pro-life statute enforces a moral regime on pregnant women; a pro-choice statute enforces a moral regime on fetuses. True, one might want to argue that fetuses don't matter, so that we needn't care what is forced upon them, but that argument simply assumes what is to be proved. It is frequently said — even, implicitly, by a very wise Justice of the United States Supreme Court, John Paul Stevens — that choosing to treat the fetus as a person is an inherently religious decision.[27] This claim does not seem quite empirically accurate — there are atheists and agnostics aplenty in the pro-life movement — but that is not quite the point. Rather, if the question of what constitutes personhood is an inherently religious one, there is no escape from that inherentness by giving a particular answer. In other words, if the decision that the fetus *is* a person is inherently religious, so is the decision that the fetus is *not*. To say that every woman should thus make the choice for herself has the style of a brisk, practical solution, and might even be the right one. But assigning the decision on fetal personhood to the woman says only that the state declines to make it, and if the state declines to make it, the state is declining to treat the fetus as a person — which is, according to the logic of Justice Stevens's position, a religious decision that the state is barred from making.

This conundrum is not difficult to resolve. Constitutional rights should be cast in positive, not negative terms: what should matter is the source of the right, not the motivation of those who want to take it away. Thus, the claim that the right to privacy is broad enough to encompass abortion, if it is to be defended, should be defended on its own terms, rather than on the basis of

26. U.S. CONST. amend. I.

27. Webster v. Reproductive Health Services, 492 U.S. 490, 565-68 (1989) (Stevens, J., concurring).

what forces motivate some opponents.[28] The argument must be pressed that the right stems from *this* clause, understood in *that* way — for if there is no pre-existing right, then there is nothing available for religiously motivated opponents to take.

The Supreme Court misses this point regularly. The majority missed it badly in *Edwards v. Aguillard*,[29] with the unfortunate suggestion that the unconstitutionality of a law requiring schools to teach scientific creationism turns on a showing that some of the supporters were religiously motivated[30] — a suggestion that would also render unconstitutional the religiously motivated teaching of evolution. The result in *Edwards* is correct, but not because of the Court's discussion of what is in the minds of the supporters of the laws.

Still, at least the *Edwards* approach is consistent with what the Justices have done elsewhere, even though what they have done elsewhere has led to troubling consequences. In particular, the notion that the content of a right varies depending upon what is in the minds of those who would do harm has been something of a setback to efforts to use the Constitution as a shield against racial discrimination.[31] Dressed up as a requirement that "discriminatory motive" be shown before a violation will be found,[32] this approach makes mock of the idea that the Constitution protects individuals against particular acts — instead, the Court seems to think, the Constitution, like a criminal code, protects individuals against particular guilty minds.

The definition of life is not appreciably different. For many people, the question might indeed be a religious one. But that does not free the state from the obligation to define life. In the absence of a definition of life, including its beginning and its end, the state could neither take a census nor prosecute murder. Indeed, liberalism itself requires a definition of the human, for in liberal theory, rights attach to individuals. If one needs a theology to determine what a human being is, and if that need is itself a disqualification under the Establishment Clause, then liberalism becomes a constitutionally impermissible theory of justice.

I do not mean, however, to seem anti-liberal; I just wish that less of mod-

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28. Indeed, even privacy may not be the right ground. I have argued elsewhere that the privacy rationale for Roe v. Wade, 410 U.S. 113 (1973), is shaky and perhaps even contradictory, and that the sex equality argument might be stronger. *See* Stephen L. Carter, *Abortion, Absolutism, and Compromise*, 101 YALE L.J. 2747 (1991). For an example of the sex equality defense of abortion rights, see CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93-104 (1987).

29. 482 U.S. 578 (1987).

30. *Id.* at 580.

31. Randall Kennedy has suggested that the Court's decisions restricting Fourteenth Amendment violations to cases of discriminatory intent have preserved the anti-discrimination edifice of the Warren Court, which outlawed purposeful discrimination by government entities. Randall Kennedy, *Indiscriminate Indictments*, TIKKUN, May-June 1992, 37, 43.

32. See Alabama v. Bolden, 446 U.S. 55 (1980) (holding that plaintiffs must prove defendants acted with racially discriminatory motive to prevail under a Fifteenth Amendment claim); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1976); Washington v. Davis, 426 U.S. 229 (1976) (holding that plaintiffs must prove defendants acted with racially discriminatory motive to prevail under a Fourteenth Amendment claim).

ern liberalism seemed so anti-religious. For if a citizen is told that access to the public square is available on a privileged basis to those fortunate enough to have reasoned their way to moral conclusions without benefit of religious consideration (precious few Americans), then it truly is demanding, even before the conversation begins, a separation of church and self.

II. PROBLEM 2 — "EMPIRICAL" LEGISLATION

Some pro-life legislative initiatives involve an explicit effort to define human life — the so-called "Human Life Bill"[33] is perhaps the best known.[34] Such legislation, although obviously in some sense "moral," might also be considered "empirical" because it is written as though reflecting a scientific judgment.

In scientifically sophisticated contemporary America, it is more than a little unfashionable to assert a privileged access to material truths based on one's reading of a sacred text, unless the text is sacred because reputable scientists have so pronounced it. If, however, the sacred character of the text flows from its role in one's religious faith, the widespread expectation is that the text will at best be used to discover moral truth — and even that is usually said to be acceptable as long as the reader does not try to "impose" that truth on anybody else. But to use one's sacred text as the index to truths about the material world is to lurch toward the lunatic fringe — the lunatics, in this case, being those who use their understanding of God's word to deny any of the teachings of modern natural science.

The conflict between religion and science is as old as human history and American courts have rarely been much good at resolving it. I will not labor here the long, difficult history of the judicial effort to cope with restrictions on the teaching of evolution in public schools, for I have discussed those cases in detail elsewhere.[35] Still, a brief consideration of the battle over so-called equal time statutes,[36] which require the teaching of scientific creationism alongside the teaching of evolution, is a useful method for understanding the way in which the separation of church and self creates pressures for what might be called "epistemic correctness" — that is, pressure by the state on its citizens to adhere to a particular way of discovering facts about the world.[37]

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33. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., 127 CONG. REC. 10194 (1981).

34. *See* Stephen Galeback, *A Human Life Statute*, HUM. LIFE REV. (Winter 1981). For academic criticism, see Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 413-38 (1982).

35. *See* Carter, *Religion as a Hobby*, *supra* note 8, at 977-84 (describing the controversy over statutes requiring students in public schools to study scientific creationism alongside evolution).

36. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 597 (1987) (holding statute that requiring equal time for different subject matter was unconstitutional).

37. *Cf.* Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3 (1990). Elsewhere, I have discussed the way that the Supreme Court's current vision of the protections of the first amendment seems to encourage the state to try to align the epistemologies of its constituents. *See* Carter, *supra* note 16, at 891.

Consider the way that the constitutional case against the teaching of creationism has always rested on the scientific case against it,[38] which I have described as a perhaps inevitable course, but a profoundly mistaken one.[39] After all, epistemology sometimes reflects religious conviction, for religious conviction may move people to decide, quite sincerely, whether to accept or reject both moral and factual propositions. To the biblical literalist who believes in creationism, the most telling evidence against evolution theory is not the complexity of the fossil record or the troubling matter of falsification, but the beginning of the Book of Genesis, comprising, as one creationist has written, "eleven chapters of straightforward Bible history which cannot be reinterpreted in any satisfactory way."[40]

Critics of creationism often miss the epistemic conflict, for they fail to understand that the creationist rejection of the evolution theory rests on a nontrivial hermeneutic and a rational application of it to the evidence — although, obviously, creationists dispute what counts as evidence. As Loren Graham, a prominent historian of science, has noted, there have always been charges by critics of "the epistemological bases of science"[41] that science "is, at best, so specialized that it misses the most significant modes of reality, and, at worst, fundamentally alienating to the human spirit."[42] Graham is no fan of creationism, but he recognizes it for what it is: a part of a larger movement toward "alternative modes of cognition."[43]

In this sense, the creationist position is less a mindless effort to get the state to proselytize than part of a much larger argument in American culture over how to determine truths about the natural world — an argument in which, for example, feminist theory and critical race theory both play their parts. Creationism rests centrally on a claim about what counts as authority, a claim that has been central to the fundamentalist movement in American Christianity for decades. As one observer has written, "The emphasis on biblical inerrancy, so puzzling to liberals, was at least in part a *rational* search for a form of authority strong enough to resist encroachments on traditional doctrine by liberal and modern ideas."[44]

Thus, the rejection of creationism exemplifies the separation of church and self because the rhetorical form of that rejection is that creationists are foolish for believing as they do, and would, perhaps, be better citizens if they believed something else. Yet there is an important difference, one that our secularized culture tends to miss, between the claim that creationism is wrong and the claim that it is irrational. It *is* wrong — it is shoddy analysis of shaky data — but that analysis and, that data, are only part of its source. To the extent that creationism is the result of the application of the herme-

38. *Edwards*, 482 U.S. 578, 634 (1987).

39. This point, like some of the discussion which follows, is anticipated in Carter, *Religion as a Hobby*, *supra* note 8, at 984.

40. D. WATSON, THE GREAT BRAIN ROBBERY 46 (1976).

41. LOREN R. GRAHAM, BETWEEN SCIENCE AND VALUES 312 (1991).

42. *Id.*

43. *Id.* at 313-14.

44. E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 214 (1991).

neutic of inerrancy to the opening chapters of Genesis, it is certainly rational. The trouble is simply that its essential axiom — literal inerrancy — is not one that is widely shared. Thus the wrongness of creationism becomes a matter of power: yes, it is wrong because proved wrong, but it is proved wrong only in a particular epistemological universe. Even within the epistemology of natural science, there is no way to disprove, for example, the old creationist claim that physical evidence against the biblical account is only a trap set by the devil for the unwary.[45] (One is reminded of the scene in one of Douglas Adams's comic science fiction novels, when one of the alien beings assigned to build the Earth mutters apologetically, "It's only half completed, I'm afraid — we haven't even finished burying the artificial dinosaur skeletons in the crust yet"[46]). To say that the creationism battle is ultimately over epistemology, not religion, is not to defend the so-called "equal time" statutes, but only to say that those who demand them are not irrational or fanatical. They are merely wrong.

For much the same reason, it is wrong to suggest that the "equal time" statutes necessarily officially represent authorized proselytizing. Although it is common to treat the creationism battle as an effort to impose religious beliefs on others, this is not the only possible explanation, and it may not be the most plausible one. More likely, the parents are frightened of the conflict between religious authority on the one hand, and the authority of secular society — as represented by the public schools — on the other. Parents who want scientific creationism taught in schools do not share the view that they are asking the schools to teach their religious beliefs. Their view is that they are asking the school to teach the truth — not the moral truth with which religion is commonly associated in our dialogue, but a truth about the material world. In this sense, their battle is not with the courts or with the First Amendment, but with the experts who insist on teaching children an account of creation and evolution that the parents believe to be fraught with factual errors.

Objections to the role of professed expertise in finding truth, when it conflicts with the central tenet of one's system, are common, and they are hardly limited to the scientific creationists. Consider, for example, those who cherish the market theory of value. If one considers value properly measured by the prices of goods and services in a market, it is easy to understand the wrath that is directed at government regulation seen as distorting the market. Take the idea of "comparable worth"[47] — the notion that experts can study the nature of a task, compare it with other tasks, and decide whether the market has valued it properly. Outside of committed advocates, one can find few economists who take the idea of comparable worth seriously. The

45. For a witty effort at logical debunking of this once-common creationist claim, see MARTIN GARDNER, SCIENCE: GOOD, BAD, AND BOGUS (1981).

46. DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 174 (1981).

47. See County v. Gunther, 452 U.S. 161, 166 (1981) (stating the theory of comparable worth but deciding case on other grounds). For an in-depth discussion of the comparable worth theory and its application, see Carin A. Clauss, *Comparable Worth — The Theory, Its Legal Foundation and the Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7 (1986).

late Clarence Pendleton, head of the United States Civil Rights Commission, was roundly attacked for his reference to comparable worth as "the looniest idea since Looney Tunes came on the screen."[48] But his rhetoric was not appreciably different from the way in which, for example, pro-choice forces refer to efforts by self-proclaimed experts to determine the point at which human life begins. There, too, one can scarcely find scientific experts who are not opponents of abortion rights but who nevertheless believe that human life begins at conception — and those who do are blasted for their assertedly unscientific approach.

Nobody, it turns out, much likes to defer to experts whose judgments might interfere with the ability to follow the call of one's most cherished value. Ordinarily, people who refuse to let the experts have their say are not dismissed as kooks. No one thinks that pro-choice forces are *irrational* because they do not consider the definition of human life a scientific question; no one argues that free-market economists are *crazy* because they think that the value of a service is the price that the market assigns. It is only when the claim interposed against expertise is of a religious nature that the specter of irrationality rears its head. So if, for example, parents who believe in the literal inerrancy of the account of creation in the opening chapters of Genesis refuse to let their children learn what the self-proclaimed experts say is the better answer, they are derided in terms strongly suggesting that they are fanatics, and quite out of their heads besides.

Because we do not usually consider people crazy or fanatical just because they refuse to accept the counsel of scientific experts, the reason for the verbal assaults on the parents who believe in creationism cannot be their rejection of scientific method. The one thing that distinguishes the creationist parents from other dissenters from expert advice is the *ground* on which they make their rejection. Parents who accept the Genesis account of creation are motivated by their religious faith — and that motivation, evidently, makes all the difference.

It is possible, of course, to hold the teaching of creationism unconstitutional without worrying about parental motivation. After all, whatever the controversy among legal scholars on the proper interpretation of the Establishment Clause of the First Amendment,[49] there is broad agreement that the government cannot endorse a particular religious belief, and the teaching of creationism alongside the theory of evolution does indeed seem to constitute such an endorsement. (I do not believe that teaching about creationism in a comparative religion or social studies course would constitute such an endorsement, and there is probably a way to teach about creationism, and others among Graham's "alternative modes of cognition," even in a science classroom without endorsing them). But whatever the legal status of efforts to teach scientific creationism in the classroom, it is terribly troubling to see

48. Statement of Clarence M. Pendleton, Chairman of the United States Commission on Civil Rights, at a news conference, Nov. 17, 1984, *as reported in* AP, *Concept of Pay Based on Worth is the 'Looniest' Rights Chief Says*, N.Y. TIMES, Nov. 17, 1984, at 15.

49. U.S. CONST. amend. I.

what a vast rhetorical difference religious motivation makes. For the rhetorical case against the creationist parents rests not merely or mostly on arcane questions of constitutional interpretation; the case rests principally on the sense that the parents themselves are wrong to rely on their sacred text to discover truths about the material world. The public school classroom, it turns out, is a part of the public square, and students must separate their civic from their religious selves if they hope to find welcome there.

III. PROBLEM 3 — OFFICIALLY DISAPPROVED RELIGIOUS PRACTICES

The separation of church and self also operates outside of the public square. It operates in a realm one might have thought sacred — the practice of religion, explicitly protected under the Free Exercise Clause.[50] Indeed, so thoroughly has the vision of religious choice as being essentially arbitrary invaded the legal culture, that the lesson of recent Supreme Court decisions on free exercise arguments seems to be this: If your religious practices are inconsistent with a state policy — almost any state policy — you should choose a new set of practices because the state will not be required to yield.

One might think that here, at the level of religious practice, the Free Exercise Clause would have its most direct application, for it is hard to imagine what other purpose the Clause could have. In recent decades, however, the Supreme Court has not seemed particularly impressed by free exercise claims. True, the Old Order Amish won a rather spectacular victory when in *Wisconsin v. Yoder*[51] the Justices allowed them to cease sending their children to school after the eighth grade.[52] And then there is the challenging line of cases that began with *Sherbert v. Verner*[53] wherein the Justices ruled that if an employer refuses to accommodate the religious needs of an employee and the employee is subsequently dismissed, the state cannot deny unemployment compensation.[54]

Sherbert, of course, is an analytical puzzle. It is not a bad ruling if one happens to have a religious objection to one's job; but it is not so easy an outcome to defend, either. The state should not treat employees who quit their jobs for religious reasons any worse than it treats those who quit for

50. *Id.*

51. 406 U.S. 205 (1972).

52. *Id.* at 234 (Court held that state could not compel "respondents to cause their children to attend formal high school to age 16").

53. 374 U.S. 398 (1963).

54. *Id.* at 403-06; Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138-46 (1987) (reversing Florida court's denial of unemployment compensation to claimant discharged for refusal to work on her Sabbath); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 719-20 (1981) (reversing Indiana court's denial of unemployment compensation to claimant who terminated job because of religious beliefs against production of armaments); Auslin v. Berryman, 862 F.2d 1050, 1051 (4th Cir. 1988) (holding that Virginia statute denying unemployment compensation to claimant who resigned to relocate with spouse violated First Amendment right to free exercise of religion); Lincoln v. True, 408 F. Supp. 22, 24 (W.D. Ky. 1975) (holding that Kentucky Unemployment Insurance Commission's denial of unemployment compensation to claimant who terminated job with tobacco manufacturer under compulsion of church doctrine violated rights to free exercise of religion).

other reasons, but what part of the Free Exercise Clause says that the state must treat them better? A state could choose to adopt a reasonable accommodation requirement as part of its anti-discrimination laws, and some states have done so.[55] So has the federal government.[56] If, however, the Constitution mandates such a provision, then surely *Employment Division Department of Human Resources v. Smith*[57] is wrongly decided.

Smith is a much criticized — and justly criticized — decision,[58] and it shows as clearly as one might like just where the current Court's free exercise jurisprudence is heading: toward a clear separation of church and self, a world in which citizens who adopt religious practices at variance with official state policy are properly made subject to the coercive authority of the state, which can pressure them to change those practices. The case involved the dismissal of two state employees who had violated policy by using a controlled substance, peyote. The employees protested that the Free Exercise Clause was a shield, because they had used peyote as part of a religious ritual. The majority scoffed at this claim, not so much disbelieving it as disregarding it.[59] The fact that the peyote use had religious significance, the Court said, was irrelevant as long as the state law was not "an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs"[60] — which, plainly, it was not.[61]

The *Smith* majority lamented that insisting on a heightened standard of review for statutes interfering with religious practices "would open the pros-

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55. *See, e.g.*, Kentucky Civil Rights Act, KY. REV. STAT. ANN. § 344.030(5) (Michie/Bobbs-Merrill 1991); Massachusetts Unlawful Termination Act, MASS. ANN. LAWS ch. 151B, § 4 (Law. Co-op. 1992); Ohio Civil Rights Act, OHIO REV. CODE ANN. § 4112.02 (Baldwin 1992); Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, § 955(a) (1991); Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 (1991).

56. Civil Rights Act of 1964, § 701(j), 42 U.S.C.A. § 20003(j) (West 1981).

57. 494 U.S. 872 (1990).

58. *See e.g.*, Yang v. Sturner, 750 F. Supp. 558, 559 (D.R.I. 1992) (quoting Blackmun, J., dissenting in *Smith* and concluding "free exercise of religion" is a 'luxury' . . . and that repression of minority religions is an "unavoidable consequence of democratic government"); G. Signey Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 981 (1991) (asserting that the trend towards a more lenient rational basis standard of review endangers individual rights); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991) (concluding that the *Smith* Court "mistreated precedent" and used "shoddy reasoning"); Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 27 (1992) (arguing that the rational basis standard of review leaves those acting out of religious conscience unprotected); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114-27 (1990) (criticizing the *Smith* Court for misreading the Free Exercise Clause and misusing historical context and precedent); Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925, 926-27 (1991) (contrasting the Court's increased tolerance for mainstream religious displays with an unwillingness to protect practices of minority religions); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231 (1991) (concluding that in response to confusion surrounding the Free Exercise Clause, the Court's discussion in *Smith* shows a virtual abandonment of protection of religious freedom); Tom Stacy, *Death of Privacy, and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 559 n.50 (1992) (stating that the Court's decision in *Smith* is simply wrong because it reduces the Free Exercise Clause to merely a protection against deliberate government religious discrimination).

59. *Smith*, 494 U.S. at 876-82.

60. *Id.* at 882.

61. *Id.*

pect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[62] One can understand the Court's worry about how to stay off of the slippery slope — If peyote, why not cocaine? If the Native American Church, why not *The Matchbook Cover Church of the Holy Peyote Plant?* — but the implications of the decision are unsettling. If the state bears no special burden to justify its infringement on religious practice, as long as the challenged statute is a neutral one, then the only protection a religious group receives is against legislation directed at that group. But legislation directed at a particular religious group, even in the absence of the Free Exercise Clause, would presumably be prohibited by the Equal Protection Clause. *Smith* is part of a recent and unfortunate line of cases that reduce the scope of the Free Exercise Clause until it lacks independent content, forbidding by its own force no more than do the document's other clauses that protect individual rights (here, equal protection, in other cases, free speech or assembly).

Indeed, Justice Scalia's focus in his majority opinion on the ability to *communicate* religious beliefs, whether to others or to one's progeny,[63] fits the traditional free speech model so snugly that one can assume that those protections would be available even if there were no Free Exercise Clause. The vision of the Clause as protecting acts of communication rather than acts of worship or public acts carries with it precisely the message that the separation of church and self entails: you are free to believe as you like, but, for goodness sake, don't act on it!

Now, one will not find many serious scholars of the Free Exercise Clause who think *Smith* is convincingly reasoned, and it seems inconsistent with *Sherbert*.[64] It is, however, the law of the land, and likely to stay that way, for both *Sherbert* and *Yoder* seem increasingly shaky.[65] The Justices have refused to extend *Yoder*-type protections to any other group, or, for the Amish, to any other activity. As for *Sherbert*, the Justices recently warned, in *Frazee v. Illinois Department of Employment Security*,[66] that the protection of religiously-based refusals to work might vanish if "Sunday shopping, or Sunday sporting, for that matter, [would] grind to a halt."[67] In fact, the Court's recent cases, *Smith* very much to the fore, point toward a free exercise jurisprudence that will more and more resemble the jurisprudence of free speech.[68]

Surely the Free Exercise Clause,[69] like every provision of the Constitution, should be read to have independent substantive content. But apart from a handful of peculiar cases,[70] the Court has not read the Free Exercise Clause

62. *Id.* at 879-82.
63. *Id.* at 882.
64. *See* text accompanying *supra* notes 53-56.
65. *See* text accompanying *supra* notes 51-56.
66. 489 U.S. 829 (1989).
67. *Id.* at 835.
68. *See generally*, Carter, *Does the First Amendment Protect More Than Free Speech?*, *supra* note 19, at 4.
69. U.S. CONST. amend. I.
70. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

to protect much more than the Free Speech Clause protects. In other words, outside the strangely chosen context of unemployment compensation, and one case — one only — favoring the special rights of the Old Order Amish not to send their children to school beyond the eighth grade, the Justices have generally supported free exercise claims only when they are nearly identical to free speech claims that might be made on the same sets of facts.

No wonder the Justices showed such little sympathy for the Indian tribes who challenged the Forest Service's decision to allow harvesting in an area used by the tribes for sacred rituals. The Court's response in *Lyng v. Northwest Indian Cemetery Protective Association*[71] very much smacked of *Oh, really?* True, the Justices said, allowing the harvesting and road building might have "devastating effects on traditional Indian religious practices,"[72] but "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[73] Again, the Court's fear seems to be the slippery slope. After all, were the Court to force the Forest Service to take account of the Indians' religious practices, thus enabling them to block the road, goodness knows who might be next. Hunters, maybe. Sunday sailors — or maybe the Sunday shoppers who so concerned the Justices in *Frazee*.[74] Maybe even (gasp!) environmentalists.[75]

Of course, none of these groups would have the Free Exercise Clause to support their claims. And it might seem logical to say that since the religiously devout have, under the Free Exercise Clause, a right that other groups lack, it is perfectly reasonable to give them special treatment that other groups do not receive. This, after all, is what the Supreme Court has done in the puzzling line of cases set off by *Sherbert v. Verner*.[76] But those cases, as I have indicated, seem to be reaching their end.

The whimpering conclusion seems to be this: if the state seeks to enforce a policy that is not aimed at a religious practice but effectively prohibits it, the state wins. Some might argue that this rule is only fair because the Establishment Clause does not allow the granting of special privileges based on religion. That reading of the Establishment Clause, however, reads the Free Exercise Clause out of the First Amendment — a terrifying result, but one that is consistent with, and perhaps even mandated by, the separation of church and self.

IV. CONCLUSION

I do not fully have answers to all these questions. I do not, for example, have a doctrinal solution to enforcing the Establishment Clause in a way that gives more breathing space to the Free Exercise Clause. I am certain, however, that finding the right doctrinal solution is a crucial task for theory.

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71. 485 U.S. 439 (1988).
72. *Id.* at 451.
73. *Id.* at 452.
74. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989).
75. For effective criticism of *Lyng*, see Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).
76. *See* cases cited *supra* note 54.

Crucial, but also incomplete — for the separation of church and self, far more than a legal doctrine, has become a conversational habit in the liberal state. The danger, then, is that what was once an esoteric classroom theory is now a guiding principle of our political culture.

Yet the separation of church and state, a metaphor essential to the working of American democracy, does not require a separation of church and self. Neither does the ideal of pluralist democracy. Possibly the leading theorists of liberalism do not even intend one. But they too often write as though they do, and the courts do the same. The result is a legal culture, and, increasingly, a political one, in which citizens whose moral conclusions are formed through important reference to their religious understandings are not welcomed, and indeed, are condemned as illiberal.

This cannot — this must not — be the state to which our liberal democracy falls, because if we allow it, then, far from cherishing religious belief, we are trivializing and discouraging it. We are, in effect (and sometimes in so many words), telling the religiously devout that religious belief is aberrational and arbitrary and essentially undemocratic.

We must, as a legal and political culture, find ways to welcome the religiously devout rather than shutting them out of the dialogue that liberal democracy requires. We must not force them to split off a portion of themselves; we must, therefore, reject the separation of church and self.