REVIEW ESSAY

THE SACRED, THE PROFANE, AND THE INSTRUMENTAL: VALUING RELIGION IN THE CULTURE OF DISBELIEF

THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION. By Stephen L. Carter.† New York: BasicBooks 1993. Pp. 328. \$25.00.

SCOTT C. IDLEMAN‡

It is no secret of history that the principalities of government and religion, when not producing oppression from their merger, are necessarily generating friction from their separation. Likewise, it is no secret of contemporary society that unresolved tensions between religion and the state continue to surface and that we have yet to arrive at any satisfactory concordance on the proper role of religion in public life. Professor Stephen Carter, in *The Culture of Disbelief*,¹ has done an admirable job documenting several of these current tensions, particularly those arising from the confrontation of religious devotion with our legal and political regime. According to Carter, the contemporary rhetoric of political and doctrinal neutrality, far from working a solution to these tensions, is actually

† William Nelson Cromwell Professor of Law, Yale University.

‡ Teaching Fellow, 1993-94, Stanford Law School. B.S. 1989, Cornell University; J.D. 1993, M.P.A. 1993, Indiana University at Bloomington. I would like to thank Patrick Baude, Daniel Conkle, Thomas Grey, Elizabeth Staton Idleman, Sue Idleman, Daniel P. Meyer, Kathleen Sullivan, David Williams, and Lauren Willis for their invaluable contributions to this Review Essay.

¹ STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) [hereinafter cited by page number only]. Carter's book is in part a continuation of several earlier works. See Stephen L. Carter, *The Separation of Church and Self*, 46 SMU L. REV. 585 (1992); Stephen L. Carter, *Scientific Liberalism, Scientistic Law*, 69 OR. L. REV. 471 (1990); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977. Carter has recently restated many of the book's ideas in Stephen L. Carter, *The Supreme Court, 1992 Term—Comment: The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118 (1993).

a source of deprecation, alienation, and disenfranchisement for many who take their religious beliefs seriously.² Over the last few decades, he argues, there has emerged a legal and political "culture of disbelief"—one that prompts us "to belittle religious devotion, to humiliate believers, and, even if indirectly, to discourage religion as a serious activity,"³ one that "presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them."⁴

Carter's words hardly bespeak a benevolent view of contemporary law and politics. Nor do they bode well for the future—that is, unless we begin to "take religion seriously" as a central source of understanding and moral reasoning for a majority of citizens and as a necessary and beneficial component of our sociopolitical system. In particular, Carter insists that religion be allowed to fulfill its historic and functionally optimal role of checking the power and policies of the state. According to Carter, religion is at its best, and thus the state and society derive the most from it, when it serves as a "mediating institution" between state and citizen—never in substantial alliance with the former and always a potential source of moral dissent for the latter.⁵ In turn, we must evaluate religious involvement in our legal and political culture, as well as religion's special treatment under the First Amendment religion clauses, in terms of this overarching rationale of institutional mediation. If religion could be taken seriously in this way, he argues, we would welcome the very religious participation in law and politics that many have recently been prone to dismiss and even actively to exclude.⁶

Carter's message will no doubt strike many as appealing, if not persuasive.⁷ Chapter by chapter, he provides his audience with an

² See, e.g., p. 13 (stating that society has a "prejudice against religious devotion that masquerades as 'neutrality'").

³ P. 16.

⁴ P. 3.

⁵ In Carter's words:

The idea of religion as independent moral force is crucial both to the self-definition of faith and to the role of the religions as intermediate institutions to which citizens owe a separate allegiance. As autonomous intermediate institutions, the religions can work against the state; as partners with the state, they cannot.

P. 39.

⁶ See p. 274 (maintaining that a state that values liberty and diversity should "revel" in conflicts between religion and the state as signs of "political and spiritual health").

⁷ I should admit my own predisposition to Professor Carter's work. Drawing in

intuitively sound, historically grounded, and ultimately pragmatic model for understanding and managing the relationship between government and religion in an era when that relationship is less than certain. Moreover, throughout the book he employs a kind of self-referential narrative, sprinkled with vignettes in the style of Lewis Thomas's *Late Night Thoughts*,⁸ which should put most readers at ease in this otherwise controversial, often alienating, area of inquiry.⁹ And Carter's uncommonly broad range of coverage—from the place of religion in public education to its role in our national debates over abortion, euthanasia, and the death penalty—should indicate to readers that he is generally forthright and that the strength of his arguments, in contrast to so much of the writing in this area, is not derived simply from the selective avoidance of reality. Taken as a whole, Carter's book should be greeted openly—as it was by President Clinton and those who mimic his reading habits¹⁰—if only for its candor and courage, two qualities so often absent, and sometimes even discouraged, from our most important public debates.

It is all the more troubling, then, that *The Culture of Disbelief* fails in the one realm where it ought most to succeed, namely that of law, and specifically that of the Free Exercise Clause of the First Amendment. What is more, the failure comes from within—an internal limitation placed on and resulting from Carter's basic theory regarding the proper relationship between religion and government. Precisely because his theory justifies a special relation-

part on his prior scholarship, I have addressed similar questions elsewhere. See Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene's Theory of the Religion Clauses*, 1994 U. ILL. L. REV. (forthcoming May 1994) [hereinafter Idleman, *Ideology as Interpretation*]; Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993) [hereinafter Idleman, *Religious Values*].

⁸ LEWIS THOMAS, *LATE NIGHT THOUGHTS ON LISTENING TO MAHLER'S NINTH SYMPHONY* (1983) (providing, through the use of vignettes and the first person, a series of philosophical reflections based on personal memories).

⁹ In particular, and in contrast to the traditional style of legal academic scholarship, he readily provides his personal views on even the most sensitive of issues. When discussing classroom prayer, for example, he begins by disclosing to his reader that "[p]rayer is a crucial part of our family life. We pray before important events: meals, trips, sleep. We give thanks for our good fortune, pray for those less fortunate, beg forgiveness for our sins, and ask forgiveness for the sins of others." P. 185.

¹⁰ See Kathy Lewis, *Booked Up: Clinton's Reading Habits Have Become a Hot Topic*, DALLAS MORNING NEWS, Sept. 4, 1993, at 1C (discussing President Clinton's voracious reading habits); Kenneth L. Woodward, *Making Room for Religion*, NEWSWEEK, Sept. 20, 1993, at 56 (noting that President Clinton recommended Carter's book to an audience of clergy).

ship between religion and government in terms of social utility (that is, in terms of religion's mediating value), it cannot logically justify the presence or practice of religion when no such utility is produced. The shortcoming is particularly acute, moreover, in the realm of free exercise, the very realm in which a special relationship can have the greatest practical importance. Although Carter's model would presumably give access to any religion seeking participation in the political or legal processes (since at that moment the religion would likely be serving its socially useful checking function), there is little or no logical reason to extend the same kind of presumptive protection to religious free exercise when doing so would yield no obvious social benefit. In effect, we would come full circle back to *Employment Division v. Smith*,¹¹ but instead of the false neutrality of unfettered democracy, there would predominate the false neutrality of a theory that values religion according to largely extrinsic and entirely secular criteria.

This Review Essay explores the substance and limits of Carter's conceptual approach to religion and government in two Parts. Part I provides both a summary and an assessment of the book, with Sections A through D each covering one of his central descriptive or prescriptive points. In addition, Section E addresses the possible consequences of his theory in terms of how we as a culture discuss and understand religion. Based on the analysis in this first Part, I argue that Carter's theory of government-religion relations, while generally sound, should absolutely not be extended to the free exercise of religion. To do so would reduce religious liberty to a mere tool of society and would construct the very culture of disbelief that Carter seeks to prevent. Prompted by these concerns, Part II fundamentally reexamines the concept of extending constitutional protection to religious free exercise and considers a number of criteria according to which the soundness of any free exercise theory should be measured. In addition, Part II presents an alternative theory of religious liberty grounded in the understanding that free exercise is an intrinsic good, one in need of no external justification, including social utility. For a variety of

¹¹ 494 U.S. 872 (1990) (holding that neutral, generally applicable laws that burden religious practices are, with limited exceptions, not subject to enhanced review). The majority readily acknowledged that "leaving accommodation [of religious practices] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in" but that this is simply an "unavoidable consequence of democratic government." *Id.* at 890; see also *infra* text accompanying notes 119-22.

reasons, this alternative theory has been increasingly neglected over the last several decades,¹² and Carter's avoidance of it is likely a reflection of that trend. Nevertheless, the intrinsic worth theory embodies a rich, liberty-protective vision of free exercise, a vision that in part animated the framing of the Free Exercise Clause and that for many religious citizens represents the heart, if not the soul, of the First Amendment.

I. *The Culture of Disbelief*: A SUMMARY AND CRITIQUE

Carter divides *The Culture of Disbelief* into three parts and a brief postscript.¹³ Part I, comprising chapters 1 through 5, sets forth the terms of the debate as well as the cultural backdrop against which religion-in-politics issues play out—the institutional and spiritual contexts from which religious concerns and positions emerge as well as the legal, political, and social contexts into which they are placed. Part II, comprising the next five chapters, addresses the specific battles—especially the interplay between religion and public education—that increasingly have taken on constitutional dimensions by way of the First Amendment. Finally, part III, comprising the last three chapters, discusses the liberal theoretical critique of religion in the public square,¹⁴ speaks to the potential role of religion in our most controversial national debates, and provides some final thoughts and speculations on the place of religion in our democratic political order.

In turn, my assessment of the book proceeds in five Sections, with each of the first four Sections providing both a synopsis and a

¹² See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 170-71 (1991) [hereinafter Smith, *Rise and Fall*] (discussing the apparent prohibition on the use of a religious justification as a basis for supporting the constitutional guarantee of religious freedom); Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 116 [hereinafter Smith, *Special Place*] (noting the tendency of some Supreme Court Justices to view "the religion worthy of being protected by the Constitution primarily as a secular activity").

¹³ The postscript discusses the Branch Davidian incident that occurred near Waco, Texas, in the spring of 1993. See pp. 275-77.

¹⁴ As used in this Essay, the term "public square" refers metaphorically to the forums and institutions of cultural and political policy formulation, discussion, and influence—the legislative floor, the town council meeting, the public schools and universities, public events such as political conventions or parades, and perhaps even the media. For further discussion of the meaning of this term, see Ruth G. Teitel, *Postmodernist Architectures in the Law of Religion*, 1993 B.Y.U. L. REV. 97, 102-04 (1993) (examining both the traditional architectural usage of the term and its contemporary nonliteral political usage).

critique of one or more of Carter's central ideas. Section A evaluates Carter's empirical claim that we now have a "culture of disbelief" and addresses several theses that he and other scholars have offered to describe this culture. Section B, which is normatively the most important Section, sets forth Carter's overarching theory of religion-government relations based on the role that religion can serve as a mediating institution between citizen and state. Turning to the constitutional realm, Sections C and D then address the consequences of this theory in the contexts of the Establishment and Free Exercise Clauses, respectively. In particular, Section D highlights the shortcomings inherent in Carter's social utility-based model when applied to religious free exercise. Finally, Section E takes a sizeable step back and examines the possible adverse effects of Carter's model on the ways we as a culture conceive of religion and its relationship to our politics and law.¹⁵

A. *Is Ours Truly a "Culture of Disbelief"?*

Two fundamental questions persist throughout Carter's book. First, does our legal and political regime truly comprise or engender a "culture of disbelief"—one that trivializes religious devotion? Second, if so, does Carter ultimately provide a model that both overcomes this culture and manages the interaction of religion and government in a satisfactory way? Putting the second inquiry aside for the moment, this first Section of the Essay asks whether Carter's culture of disbelief actually exists, or whether it is merely some sort of straw man or bogeyman, invoked to make the issues more dramatic or the conclusions more compelling. Accordingly, I have divided the question even further into three related inquiries: (1) what is the nature of Carter's proof for the culture of disbelief?; (2) what are the possible origins and causes of this culture?; and (3) in an effort to refine Carter's proof, in what ways might we conceptualize the elements of this culture? As I explain below, I find the culture of disbelief inquiry entirely too complex and subjective to yield a simple positive or negative response, and thus

¹⁵ I should note that my emphasis, especially in Sections B through D, is more on the theoretical and logical validity of Carter's model and less on its particular applications, whether to parochial school funding under the Establishment Clause or to sacramental peyote use under the Free Exercise Clause. These case studies are clearly important, but they are merely the surface of the problem. As Carter's book reveals, the ultimate issues are below that surface, and it is there that our efforts must be focused.

I necessarily call into question Carter's lack of a systematic methodology in approaching it. At the same time, this Review Essay will suggest that a refinement of the inquiry into its several constituent parts may help us to see that Carter's cultural indictment, though probably overbroad, is hardly without merit and should certainly prompt each reader to think seriously about the role of religion in public life.

1. Evidence for the Culture of Disbelief

Our first question concerns the nature and substance of Carter's proof for the existence of a culture of disbelief. Not surprisingly, his evidence comes in a variety of forms—judicial decisions, lawsuits, anecdotes, media accounts, statements by individuals and groups, and his direct observation and interpretation of events. Carter relates the stories of individuals and of institutions—from a television commentator's critical reaction to Hillary Rodham Clinton's wearing of a cross to a Supreme Court Justice's unempathetic understanding of the Sabbath¹⁶—which, he argues, “share a common rhetoric that refuses to accept the notion that rational, public-spirited people can take religion seriously.”¹⁷ At an individual level, for example, he offers the following tale:

A friend tells the story of how he showed his résumé to an executive search consultant—in the jargon, a corporate headhunter—who told him crisply that if he was serious about moving ahead in the business world, he should remove from the résumé any mention of his involvement with a social welfare organization that was connected with a church, but not one of the genteel mainstream denominations. Otherwise, she explained, a potential employer might think him a religious fanatic.¹⁸

An even more interesting form of personal evidence, and one not necessarily apprehended by Carter himself, can be found in Carter's apparent uneasiness about how his own religious beliefs ought to figure into the book. In several instances, particularly when raising sensitive issues such as abortion or school prayer, Carter seems to feel compelled to annotate or preface his discussion with a disclaimer to the effect that, despite his own religiosity, readers need not fear because he really is a liberal or moderate.¹⁹

¹⁶ See pp. 4-6.

¹⁷ P. 6.

¹⁸ P. 7. For a comment on Carter's use of this particular tale, see *infra* note 30.

¹⁹ See, e.g., p. 78 (discussing the ordination of women); p. 223 (discussing

Or, when advocating a relatively conservative view, he seems almost apologetic in tone.²⁰ While this dimension of the book has been criticized elsewhere,²¹ it is raised here because such apologetic passages provide evidence, albeit circumstantial, of Carter's very own thesis at work. Indeed, despite his repeated pleas that the merit of one's expression should derive from its content and not its religious underpinnings,²² one senses that Carter himself is fearful that his own religiosity, unless qualified as politically palatable, will somehow affect the legitimacy of his treatment of these highly sensitive issues.

While these individual accounts are interesting, however, the vast majority of Carter's evidence derives from the deeds and pronouncements of culturally influential or elite institutions, such as the U.S. Supreme Court, the media, and the scientific community. Regarding members of the media, for instance, Carter contends that when addressing religion in public life, particularly conservative religion, they tend to display the very kind of intolerance of which they accuse religious political participants—whether it is their likening the 1992 Republican National Convention to the Salem witch trials or their poking fun at, rather than recognizing as sacred, a joint marriage ceremony conducted by the Reverend Sun Myung Moon's Unification Church.²³ Likewise, Carter takes the scientific and educational communities to task for effectively monopolizing public education with their epistemological and ontological value systems while simultaneously seeking to exclude religious value systems which, they claim, are being "imposed" on the public school curricula.²⁴ Finally, Carter repeatedly and severely criticizes the Supreme Court for embracing an impoverished understanding of religion—as an entirely private and freely chosen matter—and for ignoring the unique institutional role that religion can fulfill in contemporary society.²⁵ In turn, he contends that these institutional attitudes collectively foster a cultural ethos that prevents religion from being taken seriously as a legitimate source of truth and

creationism); pp. 231, 234 (discussing abortion).

²⁰ See, e.g., p. 249 ("I must confess a bias. . . . I share the traditional Christian view that suicide is wrong.").

²¹ See William F. Buckley, Jr., *Right to Sin Cramping Right to Religion*, HOUS. CHRON., Sept. 20, 1993, at A14 (book review).

²² See *infra* text accompanying notes 55, 84-87.

²³ See, e.g., pp. 24-26.

²⁴ See, e.g., pp. 157-62.

²⁵ See, e.g., pp. 126-32, 141-42, 269.

meaning, and that treats religion as an irrational matter of private concern, ultimately unfit for the public square. "In contemporary American culture," he alleges, "the religions are more and more treated as just passing beliefs—almost as fads, older, stuffier, less liberal versions of so-called New Age—rather than as the fundamentals upon which the devout build their lives."²⁶

If Carter is correct, however, in his assessment of the declining perception of religion and the waning role of religion in public life, then what does he make of the ubiquitousness of religious references and figures in our politics, such as at the party conventions preceding the 1992 presidential election?²⁷ The problem with these references, insists Carter, is that far from evincing a meaningful place for religion in the public square, they in fact suggest the exact opposite. Precisely because they are so ubiquitous, the quality of such references is highly superficial and "can itself be a form of trivialization—both because our politicians are expected to repeat largely meaningless religious incantations and because of the modern tendency among committed advocates across the political spectrum to treat Holy Scripture like a dictionary of familiar quotations."²⁸ It is, in other words, largely a matter of perspective: when viewed in a different light or from a different vantage point, such references can be interpreted to support rather than under-

²⁶ P. 14.

²⁷ The ubiquitousness observation has been perhaps the most common rebuttal to Carter's theory. See, e.g., Michiko Kakutani, *Rewriting Religion's Role for the Political Arena*, N.Y. TIMES, Sept. 8, 1993, at C18 (stating that "the fact that the two most recent Democratic presidents—Jimmy Carter and Bill Clinton—are liberals and avowed Christians who regularly attend church" undermines Carter's assertion that "the liberal establishment treats religion as a hobby"); Michael Kinsley, *Martyr Complex*, NEW REPUBLIC, Sept. 13, 1993, at 4 (book review) (stating that "believers" dominate "the public discourse," leaving him "honestly bewildered by the frequent complaint that American culture is hostile to religion").

²⁸ P. 45. Needless to say, Carter is not opposed in principle to the express use of religion in politics, and he considers it entirely acceptable for one's politics to be driven by—to be a product of—one's religious beliefs. What he finds problematic is the superficial and self-serving appropriation of religion by politics—the secondary use of religion for explicitly political ends. "[T]here is a vital difference between a political inspiration that is fired by one's deepest religious beliefs and a claim of religious belief that is fired by a preexisting political commitment. . . . In this [latter] sense—as the *servant* of politics—religion is very much in the public square." P. 80. Personally, I am not sure that Carter's dichotomy is fully defensible insofar as the dynamics of the relationship between religious meaning and political culture are extremely difficult to discern. This is particularly true in the context of religions, such as various Christian denominations, which either developed amidst a specific configuration of historical and cultural circumstances or presently understand themselves as being in an ongoing relationship with history and culture.

mine the notion that a culture of disbelief truly exists. In fact, it may be entirely proper to say that both Carter and his critics are in some sense correct and that the references of which they speak may, depending on one's interpretative perspective, be at once trivializing to some observers yet not to others.

Yet it is this very realization—that the meaning of the evidence may largely be in the eye of the beholder—that presents the most serious challenge to Carter's basic contention that a culture of disbelief actually exists. Indeed, while page upon page of this Essay could be devoted to a point-counterpoint analysis of Carter's empirical proof, it is highly unlikely that such an analysis would yield a satisfactory answer. For the inquiry is not merely a straight-forward empirical matter (as Carter would apparently have his reader presume), but rather one that presupposes a variety of conceptual and interpretive premises. In turn, the evidence selected and the manner in which that evidence is arranged and assessed—each a product of prior expectations and biases—will inherently tend to favor one conclusion over another.²⁹ To see this, we might simply consider the innumerable ways the proof could be structured. Should one focus on the quality of religious references in politics (as Carter contends) or on their quantity (as his critics contend)? Should one focus on the place that religions do have in public life or the role which they do not? Should one focus on the subjective experiences of religious citizens or upon the objective reality of their involvement in law and politics? Should one focus

²⁹ Carter's perspective, for example, is no doubt influenced by his position as a law professor. Thus he might place greater stock in Supreme Court decisions than, say, a doctor or carpenter. Likewise, his academic affiliation probably oversensitizes him to the phenomena of trivialization and privatization. The modern university, after all, is not typically known for its emphasis on traditional religion. See Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 671 n.2 (1992) (noting that commentators have observed hostility on the part of the "legal academy" towards religion); Peter Steinfelds, *Universities Biased Against Religion*, *Scholar Says*, N.Y. TIMES, Nov. 26, 1993, at A22 (discussing perceived academic bias against "scholarship that reflects religious viewpoints, especially traditional Christian ones"). The legal academy, in particular, with its almost singular devotion to logical positivist reasoning, can certainly cause one to experience second thoughts about the public validity of one's religious faith. See generally Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978) (exposing the dominant normative and analytical mode in legal education and examining its relationship to competing sources of meaning and value such as religion).

on the political and legal treatment of all religions or of only certain types of religions?³⁰ In what ways should the historical or traditional role of religion be relevant to contemporary political society? And to what extent is it valid to rely on anecdotes, litigation, and other sources of evidence that are likely to contain a strong element of nonrandomness? However one chooses to answer these questions, they plainly expose the difficulty of the inquiry and the need to remain wary when entering the realm of cultural perception. For just as Carter's book is concerned with cultural attitudes and the impact of law and politics on those attitudes, so too must a critique of his book remain cognizant of the ways in which Carter himself creates or encourages certain cultural constructions.

This is not to say, of course, that Carter has not accurately described various events or that one can draw no conclusions whatsoever from their sum total.³¹ (To the extent that this critique cuts both ways, in fact, it would be equally problematic for Carter's critics to dismiss his claims out of hand.) But the contention that one can prove or disprove a "culture of disbelief" seems extraordinarily problematic in light of the complex nature of our political and legal institutions, the overwhelming array of forces and circumstances that give shape to our public discourse, and the significant degree of subjectivity inherent in such an undertaking.

³⁰ Consider more closely the employment applicant example cited earlier. See *supra* note 18 and accompanying text. Recall that the applicant was advised not to disclose his affiliation with a nonmainstream religious organization, lest "a potential employer might think him a religious fanatic." If true, this tale clearly illustrates that religious discrimination is perceived to be alive and well in contemporary society. But it hardly illustrates that our culture has undergone some type of conceptual transformation. To the contrary, discrimination against nonmainstream religions has a long and disturbing pedigree, in our culture no less than in many other cultures, and thus we should be hesitant to discern anything new from its continued presence. See, e.g., RELIGION AND POLITICS 23-46 (Peter H. Odegard ed., 1960) (focusing on anti-Catholic sentiment in the nineteenth and early twentieth centuries); Edwin B. Firmage, *Free Exercise of Religion in Nineteenth Century America: The Mormon Cases*, 7 J.L. & RELIGION 281 (1989) (detailing the legal and social persecution of Mormons); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 15 (1991) (describing "[t]he legal system's role in the present denial of the religious freedom of Native Americans").

³¹ See *infra* part I.A.3 (dividing the empirical inquiry into six elemental theses, thereby allowing readers to examine more systematically the role of religion in our political culture and possibly to draw certain limited conclusions).

2. Origins of the Culture of Disbelief

Assuming, however, that Carter may be correct in some objective sense and that the evidence fairly points to a culture of disbelief, we must then ask our second question: When and why did the culture of disbelief originate and what are its perpetuating forces? Carter's somewhat provocative answer is that the culture is directly traceable to *Roe v. Wade*,³² the 1973 Supreme Court decision that constitutionalized a right to abortion and that has influenced so much of our legal and political order. Prior to *Roe*, he argues, "the public rhetoric of religion [from abolitionism to civil rights] had largely been the property of liberalism."³³ The unanticipated radicalism of *Roe*, however, quite suddenly converted the nascent pro-life movement into a national phenomenon and moved religious conservatives, many of whom previously had preached political abstinence, into the role of religious political activists.³⁴ And according to Carter, then, it is precisely this abortion-related displacement of liberals as bearers of the religious torch in national politics that has created our present-day legal and political culture of disbelief—in which liberals are extremely uneasy about the presence of religion in politics (unless they turn a blind eye to the religion factor),³⁵ and religious citizens of all stripes feel alienated from the public square.

This explanation is appealing, and the constitutionalization of abortion no doubt has a great deal to do with the shape and substance of contemporary politics. But as Carter must know, this explanation is also too simplistic, for *Roe* was handed down in a cultural context that was, and continues to be, the product of a centuries-long philosophical transformation that has drastically altered the place of religion in society generally. Such a transformation might plausibly include the gradual displacement of religion by government as a major influence in the nation's social life;³⁶ the shift from relative homogeneity or hegemony to genuine religious

³² 410 U.S. 113 (1973).

³³ P. 58.

³⁴ See *id.*

³⁵ See pp. 59-60 (discussing politicians' treatment of religion and the resulting media response); see also *infra* notes 52-55 and accompanying text.

³⁶ See PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 10-11 (1964). See generally Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, in ARTICLES OF FAITH, ARTICLES OF PEACE 40 (James D. Hunter & Os Guinness eds., 1990) [hereinafter ARTICLES OF FAITH] (discussing the displacement of religion by the state in certain social functions).

pluralism;³⁷ the advent of certain political, social, or jurisprudential paradigms (such as positivism, utilitarianism, or liberal individualism);³⁸ the rise of modern science and a related emphasis on skeptical, empirical approaches to the world;³⁹ and theological changes from within religions themselves.⁴⁰ To be sure, it is possible to find commentators well before the *Roe* decision making observations, and using language, strikingly similar to Carter's:

[There are those who argue that r]eligion is to be driven out of public institutions, public functions, and public life in so far as possible. A modern measure of purely private piety may be useful—particularly in other people, but there is no need for the enlightened man of the twentieth century to take religion seriously as an intellectual discipline in his university or a shaping force in his social existence.⁴¹

Therefore, while *Roe* may have been a triggering event, it is difficult to say that it actually "caused" the culture of disbelief any more

³⁷ See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 749 (1972) (arguing that immigration during the nineteenth century awakened American spiritual self-consciousness); KAUPER, *supra* note 36, at 6-10 (discussing the significance of religious pluralism); James D. Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, in *ARTICLES OF FAITH*, *supra* note 36, at 54, 55-58 (discussing religious pluralism in the eighteenth and late nineteenth centuries).

³⁸ See generally John V. Orth, *Casting the Priests Out of the Temple: John Austin and the Relation Between Law and Religion*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* 229 (John Witte, Jr. & Frank S. Alexander eds., 1988) (discussing the nineteenth century Church of England's response to contemporary political developments); Robert J. Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 *CORNELL L. REV.* 811, 816 n.16 (1990) (noting that modernist modes of thought, such as rationalism, liberalism, and positivism, can be traced to the processes of secularization and rationalization (citing DOUGLAS KELLNER, *CRITICAL THEORY, MARXISM, AND MODERNITY* 3-4 (1989))); C. Ann Potter, *Will the "Right to Die" Become a License to Kill?: The Growth of Euthanasia in America*, 19 *J. LEGIS.* 31, 55-60 (1993) (examining the relationship between the post-Enlightenment decline of religious natural law jurisprudence and the rise of positivistic utilitarianism and secularism).

³⁹ See PETER L. BERGER, *A FAR GLORY: THE QUEST FOR FAITH IN AN AGE OF CREDULITY* 26-27, 124-26 (1992) (discussing the impact of science, technology, and modernity on religious beliefs); EDWIN S. GAUSTAD, *A RELIGIOUS HISTORY OF AMERICA* 267-70 (new rev. ed. 1990) (discussing the ideological clashes between modernists and fundamentalists and how their debate determines control of public institutions).

⁴⁰ See AHLSTROM, *supra* note 37, at 1079-96; GAUSTAD, *supra* note 39, at 270-83. See generally ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION* (1988) (suggesting that rationality, natural science, and the social sciences have exercised a negative effect on traditional religious beliefs and practices).

⁴¹ Franklin H. Littell, *The Basis of Religious Liberty in Christian Belief*, 6 *J. CHURCH & ST.* 132, 134 (1964).

than, say, the assassination of Archduke Francis Ferdinand actually caused World War I or the first Rodney King verdicts caused the Los Angeles riots of 1992.

3. Reordering the Search for the Culture of Disbelief

That Carter's empirical claims thus far should be so vulnerable to criticism reveals that the principal shortcoming of Carter's thesis is not a lack of imagination, or even a lack of evidence, but rather his failure to provide a clear and systematic methodology. Readers may reasonably and sharply disagree with Carter and with one another precisely because the "culture of disbelief," as an empirical concept, is not carefully defined and, hence, is largely in the eye of the beholder. I recognize, of course, that Carter is not a social scientist, and he certainly makes no formal pretense to that effect. Nevertheless, insofar as he has undertaken a complex empirical inquiry and has drawn definite conclusions, there is an obligation on his part to explain more fully the propriety of his chosen evidence, to classify systematically the phenomena he claims to have observed, and to address the underlying biases and expectations that can significantly color both one's analysis and one's conclusions.

In an attempt to move Carter's inquiry in this direction, this final portion of Section A is devoted to cataloging the various conceptual paradigms we might invoke to describe and understand Carter's culture of disbelief. Specifically, I have in mind six interrelated theses proposed by various scholars (including Carter), which are in turn raised by Carter in his book, that either describe a phenomenon or state a perspective relating to the relationship between religion and our political culture. These are: (1) the trivialization thesis,⁴² (2) the double-standard thesis,⁴³ (3) the privatization thesis,⁴⁴ (4) the false neutrality thesis,⁴⁵ (5) the hostility thesis,⁴⁶ and (6) the secularization thesis.⁴⁷ As one might imagine, each varies in terms of its acceptance among relevant observers. Carter, for example, strongly embraces the first four while he is ambivalent or unclear as to the last two.

⁴² See *infra* notes 48-51 and accompanying text.

⁴³ See *infra* notes 52-55 and accompanying text.

⁴⁴ See *infra* notes 56-63 and accompanying text.

⁴⁵ See *infra* notes 64-67, 71 and accompanying text.

⁴⁶ See *infra* note 68-70 and accompanying text.

⁴⁷ See *infra* note 71-72 and accompanying text.

Indeed, my hope in setting out each thesis is not to achieve universal acceptance, but simply to offer a more refined way of examining the phenomena that lead Carter, for one, to conclude that a full-fledged culture of disbelief exists. Rather than abandon his inquiry altogether, I believe that by breaking it down into its constitutive parts—in this case into six theses—we can more clearly discern the conceptual components of his proof and perhaps even the points that we, as participants in the inquiry, find ourselves in disagreement. What follows, therefore, is less a critical reanalysis of the evidence and more a preliminary attempt to reorder the inquiry.

The first and most obvious thesis is that of trivialization—the notion that contemporary law and politics trivialize, in purpose or effect, religion in general and serious religious devotion in particular. Needless to say, Carter wholeheartedly embraces this thesis, and indeed it serves as his central paradigm to describe the essence and effects of the culture of disbelief.⁴⁸ According to this paradigm, religious beliefs and practices are increasingly perceived as simply another type of preference, freely chosen and thus freely able to be ignored. Such a perception, he suggests, is the *reductio* of a “widely shared intuition” about what religion is and should be.⁴⁹ It is an intuition—apparently shared by some members of the Supreme Court⁵⁰—that tells religious citizens, when faced with conflicts between the demands of the state and the demands of their faith, that they should simply do nothing.

[T]he message seems to be that they should, if necessary, change their religion; but if they protest on religious grounds, they are somehow acting in an illiberal manner.

....

The intuition says, in short, that religion is like building model airplanes, just another hobby: something quiet, something private, something trivial—and not really a fit activity for intelligent, public-spirited adults.⁵¹

Second is what we might call the “double standard thesis,” a concept related to trivialization and equally embraced by Carter.

⁴⁸ See pp. 3-11 (discussing the increasing unimportance of religion in the political and legal culture of the United States).

⁴⁹ Pp. 20-22.

⁵⁰ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) (suggesting that religious faith is freely and individually chosen and maintained); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (same).

⁵¹ Pp. 21-22.

The general idea is that religious political participation is considered acceptable or unacceptable by the media and others depending upon the ideological agenda of the participants (for example, liberal versus conservative), where religiousness is used as a means to stigmatize only certain kinds of views.⁵² "[I]n the 1992 campaign," observes Carter, "the media often treated President Bush's speeches to religious organizations as pandering—but when Bill Clinton spoke, for example, to a black Baptist group, he was given credit for shrewdness."⁵³ Or consider the generally positive treatment given to religious involvement in the civil rights or antiwar movements of the 1960s, the election of Jimmy Carter in 1976, or the antinuclear movement of the 1980s with the generally negative treatment given to religious involvement in the antiabortion or antigay rights movements of the 1980s and 1990s.⁵⁴ As Carter further points out, this ideological manipulation of religion by political observers is fundamentally misguided, for "if one dislikes the causes in which the name of God is invoked, it is those causes, not the God-talk itself that should [be] . . . the object of criticism."⁵⁵

Third is the privatization thesis, which holds that religion is a private matter, relegated to the sphere of the individual, and that the injection of religious values or views into the public square may be impolite if not unacceptable.⁵⁶ Empirically, the phenomenon

⁵² See Idleman, *Religious Values*, *supra* note 7, at 451-53.

⁵³ P. 59. Likewise, there are surprisingly few critics of either President Clinton's or Vice President Gore's explicit linkages between religious faith and public policy. Regarding Clinton's religiosity, see Bob Keeler, *Faith in the White House*, *NEWSDAY*, Sept. 13, 1993, at 48; Kenneth T. Walsh, *Clinton's Journey Inward*, *U.S. NEWS & WORLD REP.*, Dec. 13, 1993, at 40 (discussing Clinton's religious odyssey since becoming President); Larry Witham, *Clinton's Religious View of His Job: The Bully Pulpit for a "Ministry"*, *WASH. TIMES*, Sept. 13, 1993, at A1 (discussing President Clinton's endorsement of religion's position in public life and the role of religion in securing "the common good"). Regarding Gore's religiosity, see generally AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992) (describing Vice President Gore's religious faith in the context of an examination of science and the environment).

⁵⁴ See generally pp. 45-49, 58-65.

⁵⁵ P. 49.

⁵⁶ See STEPHEN V. MONSMA, *POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING* 59-68 (1993) (discussing religion as a private activity); Gerard V. Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 *ST. LOUIS U. L.J.* 275, 277 (1986) (arguing that recent cases represent an attempt to move religion into the realm of subjective preference by eliminating religious consciousness); Susan Trausch, *Politics and Faith*, *BOSTON GLOBE*, Sept. 3, 1993, at 15 (noting an ethos of privatization within various professions).

of privatization is not nearly as disputed as the hostility thesis,⁵⁷ largely because it is relatively easy to find institutional expressions of privatization, such as those by the media⁵⁸ or the Supreme Court.⁵⁹ Normatively, however, its merits are far from uncontroversial. For example, while Carter accepts a vision of religion as private in the sense of being beyond the competence of the state (the public), he categorically rejects the view that religious citizens should not be allowed to be publicly religious or to participate politically or legally unless their religiosity is suppressed. Such a view, he argues, is both unrealistic and unfair; unrealistic because religious values are an integral part of one's personality and cannot be simply "shrugged off" like one's favorite color,⁶⁰ and unfair because it effectively asks the religious citizen to "split off a part of her self."⁶¹ Additionally, excessive privatization undermines the contributive potential of religion in our law and politics, a potential that is central to Carter's own theory of religion and government as set forth below in Section B. "In holding, as we must, that religion is part of the purely private arena that the state must never disrupt, we run the risk of disabling the religiously devout from working seriously in the realm of policy."⁶² Finally, Carter contends that such a view receives little or no support from the American public, at least in terms of the "sharp distinction between religion as a public force and a private one that the guardians of the public square suppose."⁶³

⁵⁷ See *infra* notes 68-70 and accompanying text.

⁵⁸ Commenting on Carter's references to his own religiosity in the book, one reviewer said, "What is unusual, indeed almost startling, is finding them in a book by a distinguished professor making serious arguments about constitutional theory and political philosophy." Peter Steinfeld, *Beliefs*, N.Y. TIMES, Sept. 4, 1993, § 1, at 8 (book review). Startling indeed, but only insofar as Carter is correct that religious references are implicitly understood as off limits within circles of (enlightened) public discourse.

⁵⁹ See *Lee v. Weisman*, 112 S. Ct. 2649, 2656 (1992) (holding that public school's activities in connection with the offering of prayer at graduation constituted government involvement prohibited by the Establishment Clause); *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (holding that statute allowing state to pay salary supplement to teachers in nonpublic schools involved excessive entanglement of government and religion); Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 21 (1991) (examining the privatization thesis through discussion of the Establishment Clause and substantive due process).

⁶⁰ P. 56.

⁶¹ *Id.* (citing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 72-73 (1988)).

⁶² P. 21.

⁶³ P. 119.

Fourth is what I shall call the "false neutrality thesis." This thesis is really a collection of three commonly overlooked errors pertaining to the concept of governmental neutrality. First, it is often suggested that positive law, including judicial constitutional doctrine, is "neutral" toward and among religions—that the state does not judge the truth or falsity of religious beliefs, or that our laws, as long as they do not single out religion specifically, are thus impartial towards religion. As Carter points out, however, such laws can effectively treat religious beliefs as false and can only be considered "neutral," if at all, "from the point of view of the state."⁶⁴ Second, it is sometimes suggested that, and certainly the courts act as if, the legal conception or definition of religion—for example, as a private, voluntary matter—is likewise neutral toward religious claimants or among religious traditions. Again, however, this kind of Jeffersonian understanding of religion excludes entire categories of religious faith and experience, and thus effectively discriminates against those religious beliefs and practices that deviate from it.⁶⁵ Finally, it is often said that governmental neutrality leaves religion unaffected—that neutral motives or words create neutral effects—and perhaps even that it benefits religion.⁶⁶

⁶⁴ P. 221 (emphasis omitted); see also Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 972-78 (1993) (asserting that even if the Supreme Court adheres to the "endorsement" test articulated by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), the "Court cannot guarantee completely equal treatment for all religious belief-systems that exist, or conceivably might exist, in our society"); Note, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1270 (1989) ("The seeming neutrality of objective tests allows courts to maintain the veneer of jealously guarding religious rights while actually denying protection to those who need it most.").

⁶⁵ See pp. 116-17, 297 n.31 (asserting that Jefferson's vision of the relationship between government and religion "was strongly shaped by his vision of religion itself, which he considered a matter of individual conscience rather than of corporate worship"); Edwin S. Gaustad, *Church and State Re-Examined: A Baptist View*, 4 J. CHURCH & ST. 76, 80 (1962) (Jefferson's view that religion is entirely a private matter "is untrue for the reason that th[e] vertical relationship [between each person and God] does not comprise the whole of religion. For there is a multitude of horizontal relationships in which this intimate experience must necessarily express itself."); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 23-30 (arguing that implicit in the Court's interpretation of the First Amendment is invariably a conception of religion, which is limited and overgeneralized); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 771 (1991) (noting that "discrimination against nonvolitionalism seems to violate our commitment to neutrality toward all religions").

⁶⁶ One expression of this type of neutrality can be found in William L. Miller, *The Principle of Religious Liberty*, 6 J. CHURCH & ST. 85 (1964), which argues:

Of course, to the extent that religion is not purposefully discriminated against under a regime of neutrality, this is largely true. However, as Carter's book and this Essay attempt to show, governmental doctrines and principles that appear to be neutral may nevertheless have palpable adverse effects on the public and legal understanding of religion, on the form and even the substance of religion, and on the way religious adherents perceive their faith and their relationship to the state.⁶⁷

The fifth thesis, more controversial than trivialization but of similar genealogy, is that of hostility. Our politics and law, according to this thesis, do not simply trivialize religious devotion; they are downright hostile to it.⁶⁸ In turn, the apparent difference between trivialization and hostility is a function of the underlying purpose or motive and perhaps of degree: trivialization becomes hostility when it is either intentional or excessive. While Carter unquestionably endorses the trivialization thesis, he seems unwilling (perhaps not to alienate readers) to provide the same kind of endorsement to hostility. Where he ends up, in fact, is directly in the middle of the debate, observing that "it is not difficult to understand why religious people seeking entrance to the public square"⁶⁹ might sense hostility, but suggesting that he himself is unsure as to whether such hostility actually exists.⁷⁰

The state is impartial with respect to ultimate beliefs not because it is entirely ignorant about and unimpressed with these, pursuing its secular goals without any reference to the religious or irreligious opinion of the people—but rather because it defers to the conscience of the people that it rules. . . . Our state leaves religious matters aside, not because they are beneath or against its concern, but because they are above its concern.

Id. at 85 (emphasis omitted).

⁶⁷ See *infra* part I.E.

⁶⁸ See, e.g., MONSMA, *supra* note 56, at 68-73 (noting hostility against particularistic religions whose adherents take their faith as an authoritative, literal force in their lives, the clearest evidence suggesting that "at least a degree of bias against religion is found in the widespread assumption that religious differences and disputes are particularly divisive, leading to intolerance and a bitterness that is normally absent from U.S. society"); Edward M. Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 270 (1992) (asserting that "Americans have been hostile to two religious communities—Muslims and Roman Catholics—throughout our history, and that we continue to reap the ill effects of this hostility"); Gedicks, *supra* note 29, at 671-72 nn.1-5 (citing various commentators', including Carter's, observations regarding American hostility to religion evidenced in the legal academy, Supreme Court decisions, and public life).

⁶⁹ P. 52.

⁷⁰ See pp. 51-56 (asserting that it is not "quite right" to say that the public square has become hostile to religion, but that it is correct to note that "the rules of our

The sixth and final thesis is that of secularization. This thesis can be expressed either empirically to explain other phenomena (for example, the increasing secularization of politics may explain religion's trivialization) or normatively (for example, the position that all facets of law and politics should be procedurally and substantively secular), the latter of which is commonly referred to as secularism. The normative thesis, in turn, can either be "neutral" toward religion, paying no attention to the effects of secularized government on religion,⁷¹ or be antireligious, or specifically aimed at the extermination of religion from public life (which of course would be one form of hostility).⁷² Carter himself appears to observe both the empirical and the normative versions of secularization, including the antireligious secularists, although once again he is ultimately ambivalent regarding the presence or absence of actual hostility.

These, then, are the six principal theses invoked by Carter and others to describe or explain the current treatment of religion in public life. In relation to Carter's book, their value is basically two-fold. First, although not exhaustive, they plainly reveal the range of phenomena that underlie Carter's conclusion that a culture of disbelief exists, and may in turn shed additional light on the accuracy of that conclusion. Thus, for example, while I personally find it difficult to derive inductively from them a full-fledged "legal and political culture of disbelief," as Carter obviously does, I find all six theses to some degree compelling and consequently have no doubt that Carter, like each of the authors from whom he draws, has unearthed a pattern of significant if not disturbing phenomena concerning our contemporary situation. Second, these six propositions further remind us just how complex Carter's undertaking actually is, especially since they mostly concern only the empirical dimension of that undertaking; the entire dimension of conceptual biases and prior expectations—no doubt the source of our ability to reach differing conclusions from essentially the same evidence—has remained largely unaddressed. And until that dimension is addressed, it must fall upon each individual reader, as both a

public square exist on uneasy terms with religion").

⁷¹ Throughout the book, Carter repeatedly cites Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992), as the exemplar of this version of secularism.

⁷² See Idleman, *Ideology as Interpretation*, *supra* note 7 (addressing scholarship that is not only largely secularist, but also appears to verge on antireligious in its presumptions and prescriptions).

member and yet a critic of culture, to discern the validity of Carter's analysis and the meaning of the evidence for the role of religion in our law and politics. That being said, let us now turn to the major normative dimension of Carter's book, namely his basic model of religion and government.

B. *Carter's General Theory of Religion and Government*

All in all, the most provocative and useful part of Carter's book may not be his empirical claim that we have a culture of disbelief, but rather his normative conception of the proper relationship between government and religion.⁷³ That conception, sketched out briefly in the introductory Section above, is premised on the idea that religious involvement in politics and law can be indispensably beneficial for the state,⁷⁴ even if—and perhaps especially if—the former is in vigorous dissent from the latter. This particular theory is not new, of course, and Carter himself draws from the observations of Alexis de Tocqueville:

Translating Tocqueville's observations to the present day (and removing his pro-Christian bias), one . . . sees two chief functions that religions can serve in a democracy. First, they can serve as the sources of moral understanding without which any majoritarian system can deteriorate into simple tyranny, and, second, they can mediate between the citizen and the apparatus of government, providing an independent moral voice. Indeed, from Tocqueville's day to contemporary theories of pluralism, the need for independent mediating institutions has been a staple of political science.

. . . Like other intermediate institutions, religions that command the devotion of their members actually promote freedom and reduce the likelihood of democratic tyranny by splitting the allegiance of citizens and pressing on their members points of view

⁷³ Carter defines "religion" in fairly traditional terms: "Although many thoughtful sociologists and historians have defined religion in other ways, the belief in supernatural intervention in human affairs is a useful divider for our present purposes, because that is where the culture seems to draw the line between that which is suspect and that which is not." P. 25.

⁷⁴ See, e.g., PETER L. BERGER & RICHARD J. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 26-33 (1977) (challenging the proposition, historically derived from the social thought of the Enlightenment, that "even if religion continues to flourish, it deals purely with the private sphere of life and is therefore irrelevant to public policy" by contending that "mediating institutions, including religious institutions, be utilized as much as possible as the implementing agencies of [public] policy goals").

that are often radically different from the preferences of the state.⁷⁵

Based on this understanding, Carter insists that the religious presence in politics and society should generally be welcomed, not feared. This, to be sure, is one of the great ironies in contemporary perceptions of religion:

The very aspect of religions that many of their critics most fear—that the religiously devout, in the name of their faith, take positions that differ from approved state policy—is one of their strengths. . . . Taking an independent path—exercising what [theologian David] Tracy calls the power of resistance—is part of what religions are *for*.⁷⁶

Of course, this kind of perspective on the political value of religion is not universally held, either as a normative goal or as an empirical norm, but rather derives from Carter's particular view of religiosity. According to Carter,

[a] religion . . . is not simply a means for understanding one's self, or even of contemplating the nature of the universe, or existence, or of anything else. A religion is, at its heart, a way of denying the authority of the rest of the world; it is a way of saying to fellow human beings and to the state those fellow human beings have erected, "No, I will *not* accede to your will."⁷⁷

In the context of his theory of religion and government, the paradigmatic illustration of religion as a mediating source of resistance would thus be the religious citizen who, when confronted with a governmental action antithetical to her faith, must profess to the state Luther's "*Ich kan nicht anderst, hie stehe ich.*" ("I cannot do otherwise, here I stand.")⁷⁸ We should not assume, however, that this dissentient function of religion—this "power of resistance"—is limited to the sphere of the individual or that, as its name implies, it is concerned only with resistance and not with the transformation of the political and social order. To the contrary, contends Carter,

⁷⁵ Pp. 36-37.

⁷⁶ P. 37 (citing DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 83 (1987)); see also pp. 9, 80-82 (stating that there is "nothing wrong and much right with letting religious faith be the wellspring of a citizen's public action").

⁷⁷ P. 41.

⁷⁸ Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1575, 1647 n.209 (1989) (citing and translating 7 D. MARTIN LUTHERS WERKE, KRITISCHE GESAMTAUSGABE 838 (1974) (1883)).

we must properly attribute to it the moral determination of such transformative figures as Martin Luther King, Jr.,⁷⁹ and Joseph Rummel, the Roman Catholic Archbishop of New Orleans who, in 1956, threatened Roman Catholic legislators with excommunication if they supported *de jure* segregation of private schools.⁸⁰

The central point of Carter's theory, then, is that a vigorous religious presence is a necessary part of a vigorous democratic order, and that we all stand to lose when religion is excluded from the public square—even if such exclusion seems expedient in the short run. In turn, it is precisely because of this institutional or structural relationship that the culture of disbelief, as a paradigm of religion in politics, is so inherently problematic. For just as the excessive entanglement of government and religion "tends to destroy government and to degrade religion,"⁸¹ the excessive detachment of religion from government—in this case through the related phenomena of trivialization, privatization, and secularization—may either emasculate religion and thus unduly empower government, or alienate religion and thus threaten government.

In the abstract, of course, Carter's theory seems largely unobjectionable. As Harold Berman correctly observes, "[w]here [law and religion] are divorced from each other, law tends to degenerate into legalism and religion into religiosity."⁸² The abstract, however, is rarely the forum either of heated public controversy or of practical political solutions, and in the end we are still left to confront a host of concrete and difficult controversies. How should we deal, for example, with the overzealous religious movement that purposefully seeks either to use the state as a conduit for its entire agenda (thus offending a liberal conception of the state) or effectively to become the state (thus undermining Carter's vision, let alone certain First Amendment values)? After all,

⁷⁹ See p. 38 (asserting that King, in his famous letter from the Birmingham City Jail, "was stating a bedrock commitment to the authority of God as *superior* to the authority of the state").

⁸⁰ See pp. 63-64 (noting that because segregationist Catholic legislators blasted Rummel for what they considered a violation of the separation of church and state, the "rhetoric of the 1950's was just like the rhetoric of the 1990's, except that in 1956, the liberals cheered and the conservatives got mad").

⁸¹ *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (stating that "government . . . should stay out of the business of writing or sanctioning official prayers").

⁸² HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 25 (1974) (stating that "law and religion are two different but interrelated aspects, two dimensions of social experience . . . [and d]espite the tensions between them, one cannot flourish without the other").

a simple exposition on the virtues of separation and robust democracy would likely do little to dissuade such a movement from pursuing its goals, particularly when each side defines a healthy constitutional order in starkly different terms. Aware of this possibility, especially given the recent rise of the Christian Coalition,⁸³ Carter argues that the proper response is not to single out religion for exclusion from the political process, but to confront such attempts within that process. "The error, as a matter of secular politics, is to suppose that it is the Christian Coalition's *religiosity* rather than its *platform* that is the enemy."⁸⁴ If it is the religious right's conservatism that is problematic, he contends, rather than use religion as an overbroad proxy for conservatism and banish it judicially by calling it an establishment, the conservatism should be confronted directly in the polls and on the legislative floor. It is these fora (the "political market"), and not the courts, he says, that "will always be our best check on potential oppressors."⁸⁵ And those "[o]pponents of the new Christian right who see this as too much work—*Why can't we just litigate? Won't a press conference do just as much?*—simply are less serious than the Christian Coalition itself about winning."⁸⁶ Such an approach, he suggests, would be fairer both to religion or religious citizens, many of whom harbor no such agendas and often have a great deal to contribute, and to our basic commitment to participatory politics, a commitment that is potentially undermined when citizens attempt to defeat or exclude one another through nonpolitical channels.⁸⁷

⁸³ See, e.g., pp. 264-68 (describing the attempts of the Christian Coalition to influence local elections). The Christian Coalition is a theologically and morally conservative organization, formed by the Reverend Pat Robertson, that seeks to acquire national political influence primarily at the grass-roots level—school boards, city councils, hospital boards, and the like. See Joe Conason, *The Religious Right's Quiet Revival: Pat Robertson's Christian Coalition*, 254 NATION 541, 541 (1992).

⁸⁴ P. 266.

⁸⁵ P. 267. Likewise, Carter argues that if creationism should be barred from school curricula, the reason should not be its religious association, but simply because it constitutes "bad science." Pp. 161-62.

⁸⁶ P. 268.

⁸⁷ See pp. 267-68 (arguing that "the defeat of the Christian right" must take place, if it is to take place at all, in the political arena). Similarly, Carter argues that liberal democratic theory's emphasis on accessible dialogue is misplaced, and that liberalism should embrace "whatever form of dialogue a member of the public offers." P. 230. This is a position that I basically share. See Idleman, *Religious Values*, *supra* note 7, at 443-48 (arguing that "[i]f taken to its logical end . . . the accessibility requirement would purge from the law-making process not only certain religious knowledge but also most moral discourse . . . consequently reduc[ing] the process to a sterile dialogue about a small body of data on which all citizens can agree").

By and large, Carter appears to provide a viable theoretical framework to explain and justify the relationship between government and religion, or at least some aspects of that relationship. Carter is certainly correct that religions may serve society through their ethical and prophetic functions⁸⁸ and even through their confrontations with the state.⁸⁹ As a practical matter, moreover, his model works because it would apparently encompass any religion that chooses to participate in the political and legal processes, for when a religion engages in such participation, it would presumably be fulfilling one of its functions as a mediating institution by serving to counterbalance the excesses and errors of the state. At the same time, any religion choosing to forego the benefits and burdens of political participation could do so and would not be obviously penalized for its choice.⁹⁰ In short, if society is to benefit from the unique contributions that religions can make, then at least as a nonconstitutional matter,⁹¹ religions indeed ought to have full and equal access to the political and legal realms.

This is not to say, however, that Carter's theory is entirely sensible. One very practical problem, in fact, is that of marketing

⁸⁸ See, e.g., KAUPER, *supra* note 36, at 84 (arguing that "the cultivation of moral insights and values is . . . a function of religious faith . . . , and it is the business of the churches to speak with a prophetic voice in addressing themselves to the conditions of our day"); George W. Forell, *Christian Freedom and Religious Liberty*, in RELIGIOUS LIBERTY 1, 19-20 (Cedric W. Tilberg ed., 1968) (arguing that Christian citizens and institutions have a duty to check the power of the state, and that this checking function is an important part of constitutional democracy); Robin W. Lovin, *Religion and American Public Life: Three Relationships*, in RELIGION AND AMERICAN PUBLIC LIFE 7, 13-21 (Robin W. Lovin ed., 1986) (arguing that religious communities play a vital role in the furtherance of social and political freedom and justice); James E. Wood, Jr., *The Prophetic Role of Religion in Society*, 30 J. CHURCH & ST. 225 *passim* (1988) (noting the importance of the "prophetic role of religion"—that is, "questioning the established order, refusing to sanctify traditions not in harmony with the norms of one's faith, advancing justice, and promoting the general welfare of society").

⁸⁹ See Forell, *supra* note 88, at 21 (noting the tradition of Christian confrontations with the state—"[f]rom John Chrysostom, who proclaimed God's Word in the state-church of Byzantium and died in exile, to Bernard of Clairvaux, who criticized popes at the zenith of their power, to Luther and Calvin, Menno Simons and Roger Williams").

⁹⁰ But see *infra* parts I.D-E (noting that Carter's model, if extended into the free exercise context, could effectively penalize religions that fail to conform to its instrumentalist ideal).

⁹¹ The First Amendment religion clauses clearly may affect the specific nature of religious political and legal involvement, see *infra* parts I.C-D, but they do not undermine Carter's general theoretical point that we should value religious participation for its intermediary and contributive roles.

it to the public. In particular, Carter seems not to take seriously enough the likelihood that a dissenting religion may not be a welcome religion, and that if the political presence of institutional religions is being justified in large part by their ability to challenge the state—which is to say the social, political, and economic status quo—then who could be blamed for wanting to keep religions, or at least certain religions, out of the public square? To be sure, Carter even acknowledges, in agreement with Mark Tushnet, that “it is precisely this ultimate radical possibility of refusing to accept the will of the state that leads to America’s political suspicion toward religious belief.”⁹² But Carter then does something quite bizarre: rather than addressing directly the hypothesis that religion’s antistate potential is one cause of the culture of disbelief, Carter simply reverses the causal chain and announces that it is a symptom.

The idea that a group of people will refuse to bow, either to law or to what some are bold to call reason, is, of course, a very subversive one in organized society. But religion, properly understood, is a very subversive force; subversive, at least, in a state committed to the proposition that religious ways of looking at the world do not count. No wonder, then, that our political culture seems to be afraid of it.⁹³

In other words, while religion in Carter’s view would be naturally subversive in any political culture, only or especially in a culture of disbelief—“in a state committed to the proposition that religious ways of looking at the world do not count”—would this subversiveness actually translate into fear. This, of course, is simply not true. The religiously devout Massachusetts Bay Colony,⁹⁴ for one, feared dissent with a passion, as it understood only too well the subversive power of a dissenting religious voice. In short, the notion that a political and legal culture that fears the subversive potential of religion must not be taking religion seriously enough plainly overlooks the reality that the oppression of religious dissenters has

⁹² P. 41.

⁹³ P. 43.

⁹⁴ See, e.g., Emil Oberholzer, Jr., *The Church in New England Society*, in SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 143, 145-47 (James M. Smith ed., W.W. Norton & Co. 1972) (1959) (describing the framework of strict ecclesiastical discipline that characterized the Puritan colony). Perhaps the most celebrated case of religious dissent and expulsion from the colony involved Roger Williams. See EDWIN S. GAUSTAD, *LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA* 24-58 (1991); Robert T. Miller, *Religious Conscience in Colonial New England*, 1 J. CHURCH & ST. 19, 25-30 (1959).

historically been conducted not by secularist political regimes, but rather by established religious orders—hence the need for the separation of church and state.

Even more anomalous, however, is an argument that Carter basically sneaks in at the end of chapter five. Invoking a type of normative historical determinism, Carter states:

[W]hen the guardians of the public square inveigh against religious dialogue, or when pundits worry about the influence of religion on politics, they are worrying, as it were, against history. The battle for the public square is already over. The rhetoric of religion is simply *there*; it is far too late in America's political day to argue over "shoulds." The important question is not whether religions can act as autonomous, politically involved intermediary institutions, or whether religious people should have access to the public square. Those questions history has already decided.⁹⁵

Needless to say, this passage evinces a drastically different rationale for supporting religious participation in politics (one arguably more drastic than supportive). The central difficulty is that while history may teach and admonish, it cannot "decide," at least not meaningfully, the kinds of questions posed by Carter. History may reveal that the separation of religion from government, or the political participation of religious citizens, has traditionally proved socially beneficial, but it cannot command us to embrace those institutions, particularly in an era when unprecedented circumstances—such as the spread of secularization and philosophical relativism—render the value of history increasingly uncertain. At the same time, however, we should be equally hesitant to conclude that history is entirely irrelevant and that Carter's invocation of history is thus entirely misplaced. In the spirit of moderation, therefore, it seems fair to propose that the lessons of history may suggest that presumptive weight be given to certain practices or traditions, rebuttable through sufficient evidence and persuasive reasoning. Such a presumption seems a reasonable way to account for history and yet avoid the twin pitfalls of determinism and nihilism. And to rephrase Carter, then, one could argue that history looks favorably on religious participation in politics, and that those who seek to secularize entirely the political and legal processes ought to face a presumption not in their favor.⁹⁶

⁹⁵ P. 101.

⁹⁶ Cf. Idleman, *Religious Values*, *supra* note 7, at 456 (proposing that, "in light of religion's historical place in judicial decision making," it may be appropriate to place

There are several other concerns raised by Carter's theory, particularly when channeled through the First Amendment. These problems, however, are properly the subjects of Sections C, D, and E below. Let us turn now to the consequences of his theory within the special context of the Establishment Clause.

C. *The Establishment Clause*

When the subject of one's inquiry is American law and politics, it is not enough simply to devise a theoretically sound model of religion and government and leave it at that. For the First Amendment begins with an explicit limitation: "Congress shall make no law respecting an establishment of religion . . ."⁹⁷ This limitation has in turn been interpreted to place restrictions on the acts of all governmental bodies at the state and federal levels.⁹⁸ Of course as Carter points out,⁹⁹ and as many scholars, lawyers, and judges are aware, these words provide little guidance to contemporary decision-makers concerning the nature of those limitations and the proper interaction of government and religion. And like so many other constitutional provisions, therefore, they are open season for theorists who are constantly attempting to devise coherent, legitimate, and workable models of nonestablishment for use by the Supreme Court—an institution that, according to Carter, presently lacks a meaningful theory.¹⁰⁰

In the second part of his book, Carter enters this theoretical fray, taking his own model on a trial run, as it were, and exploring

the burden of justification on those who seek to exclude religious values from the decision-making of contemporary judges). A more convincing type of deterministic argument would hold that religious values themselves will inevitably permeate the political processes, either because "religious values" should be understood broadly, thus making avoidance impossible, or because there will always be religious actors who are unable to avoid adverting to their religious values when participating in the political processes. *See id.* at 435-42, 454 & n.71, 473-78.

⁹⁷ U.S. CONST. amend. I.

⁹⁸ *See* *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause through the Fourteenth Amendment, thus rendering it applicable to state and local governments).

⁹⁹ *See, e.g.*, pp. 114-15 (surveying a variety of plausible yet conflicting interpretations of the Establishment Clause and noting that "[c]onstitutional provisions all too rarely, alas, have easily discernible meanings").

¹⁰⁰ *See* pp. 109-14 (discussing the awkward nature of the test used in *Lemon v. Kurtzman*, 403 U.S. 609 (1971), the Supreme Court's repeated attempts to apply the test, the Court's tendency to avoid applying the test when doing so "might prove too disruptive," and the consequent lack of any consistent theory defining the Court's Establishment Clause decisions).

the consistently divisive issues of religion in the public schools,¹⁰¹ on public property,¹⁰² and in the public square.¹⁰³ To a large extent, of course, his general theory of the relationship between religion and government,¹⁰⁴ and particularly his theoretical justification for their institutional separation, translates quite naturally to the Establishment Clause context. That translation is basically captured in the following syllogism. First, religion should be understood as having the potential capacity to serve as a mediating institution between citizens and the state—a role that Carter argues may benefit both citizen and state alike. Second, religion can fulfill this intermediary role only if it remains separate from the state, at least to the degree that it is not subservient to, or cannot be co-opted by, the state. And third, the Establishment Clause (which he understands as having been framed primarily to protect religion)¹⁰⁵ should thus be interpreted to maintain that degree of separation—no less and no more—that would optimize religion's mediating function. In other words, the Establishment Clause should set both a ceiling and a floor on the appropriate relationship between religion and government, prohibiting excessive detachment (that is, political and legal secularism) no less than excessive entanglement.

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

¹⁰¹ See pp. 183-210.

¹⁰² See pp. 33-34, 147-49 (discussing the St. Patrick's Day Parade in New York City); pp. 94-95 (discussing religious displays, such as nativity scenes).

¹⁰³ See pp. 213-32.

¹⁰⁴ See *supra* part I.B.

¹⁰⁵ See pp. 39, 105-08 ("[T]he metaphorical separation of church and state originated in an effort to protect religion from the state, not the state from religion. The religion clauses of the First Amendment were crafted to permit maximum freedom to the religious."). Carter's use of history in the establishment context (by which he really means original intent) is no less problematic than his use of it in the general theoretical context. See *supra* text accompanying notes 95-96. Here, however, the problem is not one of incongruity or dubiousness but rather of ambivalence—of raising history but feeling awkward about doing so. See pp. 115-20. The sense is that he included history (again a euphemism for originalism), in order to appease constitutional conservatives, while sufficiently discounting its binding quality, thereby appeasing constitutional progressives.

will be able to play their proper theological role of protecting the people of God.¹⁰⁶

As a consequence of this perspective, Carter necessarily advocates a moderately strong version of religion-government separation while at the same time finding a number of Supreme Court doctrines or decisions untenable. For instance, while he approves of the nonpreferentialism and noncoercion principles,¹⁰⁷ he would jettison from the Court's jurisprudence the inquiry into motive,¹⁰⁸ the excessive entanglement prong of *Lemon v. Kurtzman*,¹⁰⁹ and much of the concept of governmental endorsement.¹¹⁰ In turn, decisions such as *Stone v. Graham*,¹¹¹ in which the Court invalidated a school's practice of posting the Ten Commandments on classroom walls, might be considered incorrect as long as "the effect of the posting was [not] to teach students religious law."¹¹² In other words, for Carter, the mere fact that some legislators acted out of religious motivation or that the posting of the Ten Commandments would appear to be a governmental endorsement of religion is not enough to render it invalid under the

¹⁰⁶ P. 123.

¹⁰⁷ See p. 93 (discussing nonpreferentialism as "religious toleration"); pp. 187-89 (discussing coercion in the context of school prayer).

¹⁰⁸ See pp. 111-14 (criticizing the creationism case of *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987), in which the Court held that a law forbidding the teaching of evolution "unless accompanied by instruction in the theory of 'creation science'" was unconstitutional because most of the law's supporters were religiously motivated).

¹⁰⁹ 403 U.S. 602, 615 (1971) ("In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."). Although it is not entirely clear from his book, Carter has elsewhere stated that he "would delete from the [*Lemon*] test the excessive entanglement clause" for the reason that it "causes nothing but trouble, so much trouble in my judgment it causes religious groups to be discriminated against." *A Conversation with Stephen Carter*, RELIGION & VALUES PUB. LIFE, Fall 1993, at 1, 3.

¹¹⁰ See p. 94 (noting the "Supreme Court's ridiculous hemming and hawing" in the crèche cases). In religious symbolism cases, such as those involving crèches, Carter argues that the appropriate test is not whether anyone is offended by the symbolism (which could be a violation under the current endorsement standard), but rather whether a religious symbolic display is "maintained at public expense" or "whether the government is placing its imprimatur on a symbol of a particular religion." Pp. 94-95. Thus Carter has effectively abandoned the endorsement test, since his two proposed standards are simply restatements of other nonestablishment principles: maintaining a crèche at public expense is either coercion or the actual advancement of religion, while the government's placing of its imprimatur on a symbol of a particular religion is preferentialism.

¹¹¹ 449 U.S. 39 (1980).

¹¹² P. 189.

First Amendment; rather, their posting must result in the coercion of students, must amount to the preferential treatment of certain religious traditions, or must engender a relationship between the state and religion that in some way undermines the autonomy of the latter.

On the whole, this model of church-state separation would appear to constitute a legitimate and workable interpretation of the Establishment Clause, particularly when viewed in light of Carter's more general theory of government and religion. The nonestablishment rationale that Carter offers—that of religious autonomy—is particularly relevant in this modern age when the interests of religion can be so easily overshadowed by the interests of the increasingly pervasive state or so easily lost among fact-laden concerns about implicit endorsement or effective coercion. In a very real sense, then, Carter has done an invaluable service to his audience and to those institutions that fall under the influence of his book.

At the same time, however, Carter is arguably too narrow in his interpretation of the clause and his resultant view of the Court's current doctrines. This is true in at least two respects. First, without discounting the importance of religious autonomy, we must remember that there can be legitimate disagreement over how the autonomy of religion can best be preserved. The prohibitions on religious motivation and endorsement, for example, are unquestionably the source of a frustrating line of decisions.¹¹³ But they cannot be dismissed so easily, for they could plausibly be understood as mechanisms to further religious autonomy by making more difficult the governmental appropriation and manipulation of religious symbols or concepts. While Carter's proposed nonestablishment doctrine—based chiefly on the principles of noncoercion

¹¹³ Motivation analysis is problematic to the extent that (1) the actual motivations of government actors are frequently unknowable, (2) the issue of whose motivations are relevant is almost always debatable, and (3) the relationship between governmental motivation and any real harm to the plaintiff is often tenuous. For further critique of motivation analysis specifically in the nonestablishment context, see pp. 110-14; Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915, 916-25. Likewise, endorsement analysis is problematic to the extent that it invites arbitrariness, either because it must rely on the subjective perceptions of plaintiffs, which may be limitless and nonverifiable, or because it must rely on a judge's intuitive estimation of what a reasonable plaintiff would perceive. For further critique of endorsement analysis in the nonestablishment context, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 147-57 (1992); Smith, *Rise and Fall*, *supra* note 12, at 210-18.

and nonpreferentialism (that is, no preferential treatment either among religions or between religion and nonreligion)—would generally serve to maintain religious autonomy, there may be cases where Carter's doctrine would fall short and where either an endorsement or a motivation analysis would not. Second and related, there is no obvious reason that the protection of religious autonomy need be the primary or superior rationale. Although it is no doubt an important animating theme, nothing in our constitutional tradition indicates that it cannot coexist with other rationales,¹¹⁴ as long as it is not significantly undermined by their effects. In short, while Carter is correct to highlight the goal of religious autonomy, his singular concern with that goal must not result in a constitutional myopia that fails to apprehend the many meanings of our nonestablishment guarantee.

D. *The Free Exercise Clause*

Given his emphasis on religious autonomy, it should come as no surprise that Carter favors a vigorous jurisprudence of free exercise, similar to that spelled out by the pre-Rehnquist Court in *Sherbert v. Verner*¹¹⁵ and *Wisconsin v. Yoder*.¹¹⁶ These decisions announced the principle that a law or governmental action substantially

¹¹⁴ Nonestablishment theories and rationales are both numerous and diverse. See, e.g., Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 375-76 (addressing the views of strict separationism, pluralistic separationism, institutional separationism, nonpreferentialism, and restorationism); Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 55 (1990) (advocating a nonendorsement standard); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 941 (1986) (advocating a noncoercion standard); Sullivan, *supra* note 71, at 197-99 (arguing that the Establishment Clause should be understood as creating a secular public order). To be sure, the Court itself has recognized several rationales or standards for nonestablishment. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2658-60 (1992) (applying a noncoercion standard); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592-97 (1989) (explaining its nonendorsement standard); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (embracing institutional separation by prohibiting excessive entanglement); *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (adopting a nonpreferentialism standard).

¹¹⁵ 374 U.S. 398, 399-402 (1963) (holding that denial of appellant's application for unemployment benefits after she was fired from her job because of her refusal to work on Saturdays due to her religious beliefs was a violation of the Free Exercise Clause).

¹¹⁶ 406 U.S. 205, 207 (1972) (sustaining the Amish's claim that application of a compulsory school attendance law to the Amish community would violate their rights under the Free Exercise Clause).

burdening a claimant's religious practice, particularly one of central importance to her sincere religious beliefs, should be applied to her only if the governmental action is necessary to a compelling interest.¹¹⁷ If the government fails to meet this test, then the religious claim must be accommodated.¹¹⁸ What makes this an almost radical proposition today, of course, is the 1990 decision of *Employment Division v. Smith*.¹¹⁹ *Smith* held, essentially on formalistic grounds, that the *Sherbert-Yoder* standard is relevant only if the law or governmental action is targeted specifically at religion¹²⁰ or if the religious claim happens to be of a certain kind.¹²¹ Other-

¹¹⁷ See *Sherbert*, 374 U.S. at 403 (noting that "any incidental burden on the free exercise of appellant's religion may [only] be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'" (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963))); *Yoder*, 406 U.S. at 214 (noting that in order for the state to be able to compel school attendance of the Amish's children beyond the eighth grade, and thereby substantially burden their religious practices, the state must show that "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause").

¹¹⁸ See pp. 126-35 (discussing the accommodation of religion and advocating a "wider set of religious exemptions from law of general application"). As part of the calculus in determining when and to what extent the compelling interest test should be activated, Carter would apparently advocate a sliding scale of free exercise protection, turning on the centrality of the claim to the faith of the relevant religious community. See p. 143 ("As the acts of faith that the state seeks to regulate or forbid become less central, the state's burden of justification grows less."). For criticism of a centrality standard, see *infra* note 206 and accompanying text.

¹¹⁹ 494 U.S. 872 (1990). For an early critique of *Smith*, see Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (criticizing "the opinion's use of legal sources—text, history, and precedent—and its theoretical argument" as well as noting that "*Smith* is contrary to the deep logic of the First Amendment").

¹²⁰ *Smith* noted that although it would be true "that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban [certain] acts . . . only when they are engaged in for religious reasons," the Free Exercise Clause does not relieve an individual of the obligation to comply with a law that incidentally "requires (or forbids) the performance of an act that his religious belief forbids (or requires)" if the law is "not specifically directed at [his] religious practices." *Smith*, 494 U.S. at 877-78. Thus, for example, the Court had no difficulty invalidating four municipal ordinances enacted to prevent a particular religious denomination from locating in a particular city. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2222 (1993) (noting that city council ordinances prohibiting the killing of animals for ritual sacrifice "had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs").

¹²¹ The most apparent kinds, as set forth in *Smith*, are (1) claims that unemployment benefits have been denied, and (2) claims involving another constitutional liberty, especially free speech or parental substantive due process, in conjunction with the free exercise claim. See *Smith*, 494 U.S. at 881-83. For other potential exceptions, see Laycock, *supra* note 65, at 41-54. Significantly, the Court in *Smith* did not

wise, so long as the law is neutral, of general applicability, and within the government's authority, free exercise claimants can expect to lose.¹²²

Carter's almost nostalgic vision of a robust free exercise jurisprudence is widely shared among constitutional scholars and judges. Less widely shared, though, are the reasons offered for such a jurisprudence. Carter, once again in keeping with his theory of religion and government, offers a justification for free exercise based on the social utility that derives from religion's mediating capacity. "[I]f . . . the religions are at their most useful when they serve as democratic intermediaries and preach resistance, then it is at precisely that moment, the moment when the religious tradition most diverges from the mainstream, that protection is both most needed and most deserved."¹²³ According to Carter, in fact, a broad free exercise doctrine is absolutely essential to religion's fulfillment of its instrumental role.

In no other way can we enable the religions to stand as intermediaries between sovereign and citizen, thus limiting the prospect of

necessarily narrow the application of the *Sherbert-Yoder* standard any further than the holdings of its prior cases. See Sullivan, *supra* note 71, at 215 (noting that "[t]he Supreme Court has overwhelmingly rejected free exercise exemption claims" and that *Sherbert* and *Yoder* were merely exceptions to that rule). What the Court did do, however, was effectively to preclude the possibility of extending the application of that standard beyond the exceptions enumerated in *Smith*.

¹²² This should change under the Religious Freedom Restoration Act, which was signed into law on November 16, 1993. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (to be codified at 42 U.S.C. § 2000bb). The Act effectively overruled the *Smith* decision, or, more precisely, it "create[d] a statutory right where the Court declined to create a constitutional right." Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 246. In relevant part, the Act provides: "Government may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." 107 Stat. 1488-89; see also Robert Boston, *Past Due Bill: Religious Freedom Restoration Act Finally Becomes Law*, CHURCH & ST., Dec. 1993, at 7; Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18. Needless to say, if the constitutionality of the Act is upheld, we can expect to see both an expansion of the meaning of "compelling governmental interest" and an even greater body of law developing around the concept of "substantial burden." For a discussion of this latter concept's function prior to the Act, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937-46 (1989).

¹²³ P. 132; see also p. 134 ("[T]he reason for accommodation [that is, granting a religious exemption from a generally applicable law] becomes not the protection of individual conscience, but the preservation of the religions as independent power bases that exist in large part in order to resist the state.").

majoritarian tyranny; and in no other way can we translate the Founders' ideal of religious freedom in a relatively simple society into a new ideal for a new era, one characterized by a regulatory regime far more intrusive than the Founders could possibly have contemplated.¹²⁴

While this broad free exercise vision of Carter's is admirable, the logic of his actual free exercise model is simply inadequate to bring that vision about. First, Carter's choice of a single overarching rationale¹²⁵ (almost regardless of its content) suggests that the Free Exercise Clause should be interpreted through the lens of only one value or rationale, when in fact a multiplicity of rationales seems the only feasible way to empower it as a meaningful and independent source of substantive protection. It is tempting, particularly in western culture, to seek the elusive "mega-rationale"—the one overarching rationale that can explain, predict, or justify an entire genre of phenomena, whether that be physics, philosophy, economics, music, or law. As is more thoroughly explained in Part

¹²⁴ P. 126.

¹²⁵ As the text indicates, I read Carter as singularly advocating an instrumentalist rationale for the protection of religious liberty, the same rationale that he uses to support both his general theory of religion and government and his specific interpretation of the Establishment Clause. I have no doubt that others, including Carter himself, might not read *The Culture of Disbelief* so narrowly. Nevertheless, for a number of reasons I believe that this reading is justifiable. First, he employs strong language when describing his instrumentalist rationale—for example, "if religions are at their most useful . . . then it is precisely at that moment," p. 132—the kind of rhetoric one would not normally expect an author to use if his intent were to make clear that there are other important rationales that should not be excluded. Second, the instrumentalist rationale is essentially the only rationale he offers. Under other circumstances, of course, such an omission might be entirely benign or meaningless: the mere exclusion of other justifications would not suggest that the reason offered was intended to be exclusive. However, both because the omitted rationales are so powerful—for example, that persons have an inalienable right to religious liberty, or that religious liberty is a necessary aspect of what it means to be a free and autonomous being—and because the stated rationale is so specific and to some extent extreme—namely, that religious liberty ought to be protected because it is beneficial for the political order—Carter's omission cannot be dismissed as meaningless. Third and finally, there is no obvious reason why Carter could not have included, at some point in his 328-page book, even a one-sentence declaration that religion is valuable whether or not it is valuable to the state, and that religious liberty ought to be protected regardless of its instrumental relation to the democratic order. The only possible reason, and I discuss this later in the Essay, is that Carter may have chosen the instrumentalist rationale specifically to appeal to a constituency of nonreligious readers and therefore the exclusion of other rationales was a tactical decision to avoid alienating or confusing this constituency. See *infra* text accompanying notes 150-52. If this is the case, however, then my narrow interpretation is entirely in order, for Carter did in fact mean to offer a singular interpretation of religious liberty.

II, however, the Free Exercise Clause and the genre of human activity it encompasses are simply not amenable to some type of grand unified theory (as the astrophysicists call it), and hence we must look warily upon models, such as Carter's, that appear to reduce free exercise to the confines of a single rationale.

Second and more serious, Carter's particular choice of rationale—one grounded in social utility—would be nothing short of disastrous if actually implemented, for it would offer little protection to those who need it most and would transform religious free exercise, rhetorically if not actually, into a mere tool of society. In particular, at least three problems can be identified. First, there would be no logical reason to extend free exercise protection to those religions or religious practices—and perhaps not even those beliefs—that do not produce the kind of social utility upon which protection is otherwise predicated.¹²⁶ To what extent, for example, could Carter's model justify the protection of free exercise when the claimant's underlying religion is of an individual, and not an institutional, nature?¹²⁷ Likewise, to what extent could Carter's model logically justify the protection of religions that, although institutional or corporate, make no pretense of serving an intermediary role between their adherents and the state? Followers of various Native American religions, for instance, would find Carter's mediating rationale largely baffling—and hence no protection should be forthcoming—since their conceptions of spirituality are simply incongruent with the church-state dichotomy and all of its conceptual and institutional consequences.¹²⁸ (Ironically, Carter repeatedly

¹²⁶ There may, of course, be other reasons to extend protection, *see infra* part II, but the instant they are invoked, Carter's single rationale model is no longer governing the free exercise analysis. And that is the whole point—that single-rationale models, perhaps instrumentalist ones in particular, will invariably prove to be inadequate.

¹²⁷ Not all religions, after all, are institutional. *See* MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY 85-86 (1968) (noting that "[i]t matters not constitutionally whether a church has a million members or is a Church of One Member; . . . whether they listen to hymns and prayers or simply sit and meditate and listen to the inner voice and see only the inner light"); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 834 (1978) (noting that "[a] workable test of religion for purposes of the free exercise clause might . . . be stated to include any multidimensional system of beliefs that an individual claimant sincerely asserts to be religiously held"). The persistent public sense that religion must be institutional is, to be sure, one of the paradoxes of privatization: religion is a private matter for the individual, yet a system of beliefs is normally not considered religious unless it extends beyond the individual.

¹²⁸ *See generally* ÅKE HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS

invokes Native American religions as the paradigmatically nonmainstream religions most in need of constitutional protection.)¹²⁹ At the same time, there exist various other denominations that in fact accept the separation of religion and government, but that are so separationist as to render the notions of institutional mediation and social utility basically inapplicable.¹³⁰ Even mainstream religious groups engage in a variety of rituals and practices that are at best indirectly related to their mediating function, such that logically there would be little or no need to accord these practices protection under the First Amendment. To be sure, the courts in such cases could resort to tests of relatedness and necessity as the basis for

(Monica Setterwall trans., 1979) (1967) (surveying a number of Native American religious traditions and concepts, thereby providing the reader with an insight into the vast differences between these traditions and concepts and those found in western religions, such as Christianity); Rhodes, *supra* note 30, at 18 (noting the enormous conceptual gap between western spirituality and Native American spirituality). At one point in conjunction with a discussion of Native American religion, Carter offers a standard that would presumably protect certain practices of nonmediating institutional religions: "the central acts of faith of a religious community—the aspects that do the most to produce shared meaning within the corporate body of worship—are entitled to the highest solicitude by the courts." P. 143. The only problem is that no mention is made of his mediating rationale; the protected practices under this standard are entirely internal to the religion, and there is no logical connection to the religion's direct or indirect relationship to law and politics.

¹²⁹ See pp. 9, 11, 125-27, 131-32.

¹³⁰ The Old Order Amish, the claimants in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), would likely fall under this category. See WILLIAM M. KEPHART, *EXTRAORDINARY GROUPS: THE SOCIOLOGY OF UNCONVENTIONAL LIFE-STYLES* 6-49 (1976) ("[T]he Old Order Amish . . . have little real interest in politics. A good deal of the time they do not even bother to vote, particularly in national elections. . . . [T]he Amish have little interest in improving the world or making it a better place to live in. Their entire orientation is other worldly."); Paton Yoder, *The Amish View of the State*, in *THE AMISH AND THE STATE* 23, 31-36 (Donald B. Kraybill ed., 1993) (noting that "[t]he Amish try to minimize their participation in affairs of state and prefer to keep their distance from government"). Yoder also notes that the Amish believe "the state and the church have nothing of consequence in common." *Id.* at 39; see also Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 195-96 (1992) ("The Amish do not participate in public life and do not wish to be influenced by it."). Again the irony is unavoidable, for this is yet another group that Carter holds up as paradigmatically in need of protection. Another religious community that might fall under this category is the Village of Kiryas Joel, New York, composed almost entirely of members of the Satmar Hasidic sect. See *Grumet v. Board of Educ. of the Kiryas Joel Village Sch. Dist.*, 618 N.E.2d 94, 96 (N.Y.), *cert. granted*, 114 S. Ct. 544 (1993) (Nos. 93-517, 93-527, 93-539). Indeed, the *Grumet* case involves the constitutionality of a school district, created by the state to be coterminous with the religious community, after it became clear that sending the community's handicapped children to the secular public schools would, as in *Yoder*, effectively interfere with the community's ability to maintain its separate and distinct existence. See *id.* at 97.

constitutional protection, much like the (unenumerated) freedom of association is protected because it is presumed necessary to one's exercise of the (enumerated) freedom of speech.¹³¹ But the resultant uncertainty and broad judicial discretion seem terribly risky when the overarching goal is one of protecting religious liberty.

Carter's theory need not be interpreted so dismally, of course, and at least two alternative or modified interpretations are available. First, the mediation rationale could be understood as prescriptive rather than merely descriptive, such that religions in the United States ideally should act as mediation institutions regardless of their current function. The problem is that, although this is possible and indeed might be the cultural effect of pushing instrumentalism,¹³² it is unfashionably imperialistic and is highly incongruent with the proautonomy bent of Carter's book.¹³³ Alternatively, Carter might propose that these otherwise unprotected religions either should be protected incidentally in the course of protecting more mainstream religions—for the very reason that judicial line-drawing would be too risky or impossible—or should be protected through the operation of other supplementary rationales. The problem with these options is that despite their obviousness and simplicity, they are not raised in the book. Indeed, precisely because of their obviousness and simplicity, it is only rational to conclude that Carter's omission of them was both intentional and meaningful.¹³⁴

¹³¹ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). And what about the free exercise of prisoners—a class of persons purposefully disenfranchised from the political processes? To what extent would their religious free exercise yield social utility and thus warrant protection? Carter would apparently protect their free exercise. See p. 270 (noting that "[r]equiring prison officials to make reasonable efforts to honor the requests of prisoners for enough freedom to pursue their religious faiths would be a positive good"). Curiously, however, he does not support this stance with his mediation theory.

¹³² See *infra* part I.E.

¹³³ Any attempted transformation of another's culture or religion is, in this post-imperialistic age of tolerance and autonomy, basically an anachronism, reminiscent of the Inquisition or of colonial attempts to Christianize Native Americans. This is especially true to the extent that Carter hopes the state (particularly the courts) will adopt his interpretation of the religion clauses, since state-supported efforts to transform the nature of religious practice would indeed amount to imperialism (in the classic sense of the term) and would seriously conflict with our modern liberal commitment to individual autonomy and governmental neutrality.

¹³⁴ See *supra* note 125.

The second major problem with Carter's instrumentalist free exercise model is closely related to, and indeed explains, the first. It is that of inherent bias, the bias necessarily contained in a mainstream Protestant understanding of religion and its relationship to government. Stated in more specific terms, Carter is an Episcopalian and he has generated a largely Episcopalian theory—one reflecting the history of the separation of church and state in western society and particularly the mainstream, institutional American religious experience.¹³⁵ In turn, it is hardly surprising that the shortcomings listed above—specifically the logical exclusion of certain religions—are not mere coincidence, but rather the necessary result of Carter's starting point.¹³⁶ What is surprising, however, is the enormous gap between the reality of this bias and

¹³⁵ By and large, the formal separation of religion and government, as a political concept, has been accepted by most American Protestant denominations since at least, and in some cases well before, the nineteenth century. See RICHARD E. MORGAN, *THE SUPREME COURT AND RELIGION* 10-11 (1972) (noting the historical and contemporary Protestant consensus over institutional separation); Robin W. Lovin, *Rethinking the History of Church and State*, 76 CAL. L. REV. 1185, 1190-91 (1988) (book review) (discussing the "Protestant-liberal consensus" regarding government-religion relations, particularly institutional separation, that prevailed until the mid-twentieth century). The Episcopal Church, especially in the northern states such as Connecticut, has generally embraced this mainstream consensus position. In part this stems from its acceptance of a "separate spheres" conception of religion and government—the state having civil jurisdiction over the temporal, the church having ecclesiastical jurisdiction over the spiritual—while in part this stems from specific historical experiences, such as its effective break from the Church of England (especially following the American Revolution) and its own relative disenfranchisement among some of the northern colonies. See AHLSTROM, *supra* note 37, at 225 (discussing origins of Episcopal church in the United States and noting that "[m]ore than any other in America," the Anglican constituency in Connecticut, which spawned the Episcopal church, "stood without official or governmental support . . . and suffered considerable harassment by the authorities of church and state"); *id.* at 623 (noting that during the early nineteenth century, while "[i]n England the national [Anglican] church had retained all its prerogatives, vested interests, encumbrances, and temptations . . . [i]n the United States, the Episcopal was one voluntary church among others").

¹³⁶ Recall Carter's statement, in the context of the Establishment Clause, concerning the "proper" functions of religions—"their proper democratic role of mediating between the individual and the state and . . . their proper theological role of protecting the people of God." P. 123. Needless to say, many religions would not consider these roles to be "proper" in any sense of the term and might even find them incomprehensible if not insulting. In particular, while this two-function view of religion vis-à-vis the state may resonate among certain faiths, especially mainstream Protestant Christian denominations, it would presumably make little sense to followers of religions that are either nontheistic or individualistic or that have no desire to assume a "democratic role of mediating between the individual and the state." See *supra* notes 127-30 and accompanying text.

Carter's unquestionably good intentions. For example, while he explicitly wants very much to protect nonmainstream religions, it is precisely these religions—such as his paradigmatically nonmainstream Native American religions—that are the least likely to satisfy his model.¹³⁷ Indeed, to the extent such religions actually conform to his rationale, the likely reason, at least for Native American religions, is their (involuntary) Christianization, so that their protection would merely constitute a more subtle and ironic expression of bias. What is more, Carter is well aware of the idea of inherent bias, both generally¹³⁸ and specifically,¹³⁹ and thus his failure to address the bias inherent in his own model is largely inexplicable.

Third and finally, the use of an instrumentalist rationale, particularly when invoked exclusively, can bring about an assortment of adverse cultural side-effects above and beyond the restriction of religious liberty.¹⁴⁰ Let us now turn to Section E, the final Section of this Part of the Essay, and address some of these potential cultural consequences.

E. *The Cultural Consequences of Instrumentalism*

If logic were the only shortcoming of Carter's model, then a few simple modifications might suffice. There is, however, a more subtle and more serious problem. Briefly stated, the problem is that by talking about religion in terms of social utility, we not only place logical limits on the special treatment of religion, we potentially alter the way our culture perceives of religion generally. Indeed, we may even alter the way religious citizens and denominations see themselves. This final Section explores the cultural consequences

¹³⁷ For a provocative piece exploring the gap between western and Native American values, see Robin P. Malloy, *Letters from the Longhouse: Law, Economics, and Native American Values*, 1992 WIS. L. REV. 1569.

¹³⁸ Recall Carter's dismantling of the idea of "neutrality." See *supra* text accompanying notes 64-67, 71.

¹³⁹ Recall Carter's express attempt to disclaim and expunge Tocqueville's "pro-Christian bias." See *supra* part I.B.

¹⁴⁰ Instrumentalism, in and of itself, is neither evil nor undesirable. But its propriety is most certainly contextual. Thus, in the context of politics, instrumentalism may be an entirely appropriate, if not unavoidable, means to measure the value of religious participation and proposals. Problems arise only when that same instrumentalism spills over into less appropriate contexts, such as religious liberty, and pollutes or overtakes other values that properly ought to inform those contexts.

that an instrumentalist vision of religion, such as Carter's, might bring about.

Carter's instrumentalist model, as noted earlier, would likely prove functional as a paradigm for justifying and explaining one role of religion in law and politics, at least as a nonconstitutional matter. But ideas can engender cultural norms. Whether we are speaking of religion or race or sexual orientation, the paradigms we employ and the words we use may inadvertently alter the cultural perception or status of our subject.¹⁴¹ As one pair of commentators notes, "the relationship between law and political culture in America is curiously symbiotic. While our political culture defines the scope of interpretations considered legally legitimate, the argumentative and interpretive forms the legal system provides are so elastic that their creative use can powerfully alter the political landscape."¹⁴² In the case of Carter's theory, the invocation of an instrumentalist rationale to justify the special treatment of religion, especially when given the imprimatur of the courts, may induce people to conceive of religion in instrumentalist terms generally, well beyond the context of political participation or free exercise.¹⁴³ If, as Carter proposes, we as a political and legal culture

¹⁴¹ For a discussion of the relationship between the nature of religion and the nature of society, see WUTHNOW, *supra* note 40, at 57-61. See also PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 33 (Anchor Books 1969) (1967) (explaining that "[r]eligion legitimates social institutions by bestowing upon them an ultimately valid ontological status"). For a more general exposition on cultural construction, see PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (Anchor Books 1967) (1966). For discussions specifically on law and social construction, see MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 94-95 (1991) (discussing effect of legal discourses on cultural expectations); and Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. (forthcoming 1994) (discussing the nature and possible effects of social and legal categorization on racial and sexual identity).

¹⁴² Gregory A. Mark & Christopher L. Eisgruber, *Introduction: Law and Political Culture*, 55 U. CHI. L. REV. 413, 420-21 (1988) (footnotes omitted).

¹⁴³ We cannot assume, moreover, that courts will not be influenced by Carter's book. See *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1303 (7th Cir. 1993) (citing with approval pp. 111-15 of *The Culture of Disbelief* and explaining that a regulation's religion-related motive cannot be considered except in light of an actual effect on religion). Likewise, a good argument can be made that President Clinton's relatively recent interest in recruiting inner-city churches in his battle against violence and drug commerce in urban America is due in part to Carter's book, which the President read late in the summer of 1993. See Walsh, *supra* note 53, at 40-41 (discussing Clinton's interest in black churches as stabilizing forces within inner-city communities as well as his fascination with *The Culture of Disbelief*).

should value religion for its social utility as a mediating institution, then it is only logical that social utility will in turn become a standard by which the value of religion is measured. Moreover, any such effect would presumably be heightened in the realm of free exercise, since (1) free exercise by definition involves a claim against the state or society and thus is highly vulnerable to inquiries concerning its social utility, (2) free exercise is often the paradigmatic noninstrumentalist activity, such that attempts to convert its worth into instrumentalist terms may be unusually destructive, and (3) the nonmainstream religions, which generally lack political power and thus most require the protection of the Free Exercise Clause, would be disproportionately affected since their religious practices are least likely to create conventional social utility. In turn, the resultant harm would be not simply a net loss of religious liberty, but also a pressure on religious citizens and bodies to alter the form if not the substance of their religions—by acting as mediating institutions, for example—so as to gain the favor of the state and the public.¹⁴⁴ In effect, there could come about nothing less than a cultural reconstruction of religion.¹⁴⁵

Lest these consequences seem implausible or too remote, one need only consider the cultural transformations engendered by the legal interpretation of two other provisions of the First Amendment, the Establishment Clause and the Free Speech Clause. Prior to *Everson v. Board of Education*,¹⁴⁶ for example, the application of the

By raising this connection, I am not suggesting that President Clinton is misguided in his efforts. I am suggesting, however, that the book may have prompted him to realize the instrumental value of religious institutions in relation to some of his social and political goals.

¹⁴⁴ A good example of the law's capacity to alter the form of religion is the Native American Church (the religion involved in *Employment Div. v. Smith*, 494 U.S. 872 (1990)), essentially a hybrid of Christianity and traditional Native American ways, which engages in the sacramental use of peyote. See SAM D. GILL, *NATIVE AMERICAN RELIGIONS* 169-71 (1982). Professor Gill notes that following governmental efforts in the early twentieth century to outlaw peyote's use, "[m]ore and more groups of peyotists incorporated in order to obtain a churchlike base upon which to maintain the legality of their religious practices." GILL, *supra*, at 169-70.

¹⁴⁵ I am not saying, of course, that religion is itself a social construct, at least not in its essence. Rather, I am contending merely that the linguistic and conceptual dimensions of culture can adversely affect the way people, including religious people, understand religion and its relationship to law, politics, and the larger culture. Nor am I adverse to ever raising social utility as a justification for religious participation in law and politics. See Idelman, *Religious Values*, *supra* note 7, at 468-73 (setting forth five social utility-based arguments for the use of religious values in judicial decision-making). But I do think it is a mistake to frame religion, and especially free exercise, substantially or solely in those terms.

¹⁴⁶ 330 U.S. 1, 8 (1947) (holding that a state statute reimbursing parents for fares

Establishment Clause to state governmental actions not constituting a clear-cut religious "establishment" was a mere proposition. Today, however, not only is it black-letter constitutional law, it is a cultural norm. For many citizens—including those who have never read the case law and perhaps not even the Establishment Clause—the first impression that comes to mind when they perceive an interaction of religion and government is "establishment" or, even more telling, something regarding a "wall of separation." These are not legal conclusions, but nonneutral cultural concepts engendered by legal discourse. Even those who reject the Court's decisions nevertheless speak comfortably through the terms and concepts that the Court has pronounced. Likewise, consider the following analysis of the relationship between culture and the legal interpretation of the Free Speech Clause:

When an individual asserts the right to free speech, . . . the assertion is usually not a legal claim against the government. It is usually nothing more than a claim to be able to speak one's mind free from the interference of others. This claim, however, is legitimated not so much by the content of the speech as by the prohibition on governmental censorship embodied in the first amendment, which has been transformed into a claim that no one may authoritatively hush another. The claim is, nonetheless, phrased in the terms of a right, that is, a claim with legal force. In that sense a cultural tradition, one with decidedly indistinct historical roots and a controversial philosophical pedigree, has developed, at least in part, because it is constitutionally en-
sconced.¹⁴⁷

We should not suppose, moreover, that such cultural side-effects are limited to the clauses of the First Amendment. To the contrary, we could justifiably surmise that virtually all legal actions or declarations effectively produce or transform culture, often in unintended and adverse ways.

What is most puzzling about all of this is that the principal theme of Carter's book is that law and politics do in fact create cultural consequences—that "[t]he rhetoric matters"¹⁴⁸—and that cultural constructions of religion are both real and important.¹⁴⁹

paid for public transportation of children attending public and Catholic schools did not violate the Establishment Clause).

¹⁴⁷ Mark & Eisgruber, *supra* note 142, at 421.

¹⁴⁸ P. 7.

¹⁴⁹ Carter is certainly aware of the risks associated with using instrumentalism in other contexts. See, e.g., pp. 268-69 (noting that "our essential instrumentalist

And just as there was an enormous gap, then, between the expansive scope of his free exercise vision and the confining logic of his free exercise model, here there is a stark incongruity between his understanding of cultural perception (indeed his goal to have religion "taken seriously") and the possible adverse effects of his own theory. Given his otherwise thoughtful approach to the subject, we might take a moment and inquire as to why Carter has allowed such an incongruity to exist. One possibility is that his strong desire to present a single unifying model of religion and government occasioned a kind of myopia as to the costs of such an undertaking. Alternatively, he may have presumed that other factors, such as judicial prudence or supplementary rationales, would inevitably buffer the logical and conceptual effects of his instrumentalist formulation. Yet, even if we could explain away this incongruity, we should still be curious about the more fundamental question of why Carter chose an instrumentalist rationale in the first place, rather than, say, a theological or individual liberty rationale.¹⁵⁰ One plausible explanation, one which is again ironic, is that Carter selected instrumentalism so as to appease the very culture of disbelief that Carter advocates be countered, if not eliminated. Rather than attempt to transform the culture of disbelief by emphasizing the intrinsic importance of religion, Carter has simply packaged religion in order to satisfy those disbelieving readers who basically ask, "What's in it for me?" Indeed, what else besides an instrumentalist justification of religion would appeal to a political and legal culture that is perceived to operate as if religion had no inherent value?¹⁵¹ What kind of rationale other than social

conception of state—the conception that asks of every goal *how* it can best be done rather than *why* it should be done—is, potentially, quite destructive of religious communities [sic]). Accordingly, it is simply inexplicable why he does not show equal concern about the risks that may result from conceiving of religion in instrumentalist terms.

¹⁵⁰ Carter is obviously aware of the theological roots of religious liberty. See, e.g., pp. 106, 116-17 (discussing Jefferson's views on freedom of conscience).

¹⁵¹ In relation to his own time and culture, John Stuart Mill observed that:

If religion, or any particular form of it, is true, its usefulness follows without other proof. . . . The utility of religion did not need to be asserted until the arguments for its truth had in great measure ceased to convince. . . . An argument for the utility of religion is an appeal to unbelievers to induce them to practice a well-meant hypocrisy, or to semibelievers to make them avert their eyes from what might possibly shake their unstable belief, or, finally, to persons in general to abstain from expressing any doubts they may feel, since a fabric of immense importance to mankind is so insecure at its foundations that men must hold their breath in its neighborhood for

utility would appeal to a political and legal culture that has supposedly lost any sense of transcendence?¹⁵² Carter may not have consciously realized the strategic value of choosing instrumentalism, of course, but it is difficult to avoid the troubling and ironic significance that such a choice betrays. In the final analysis, we must remember that Carter's book was written to convince, not merely to inform. In essence he seeks to replace, with his own theory of religion and government, a number of popular conceptions and legal doctrines that he considers misguided, but that he knows are deeply embedded in our legal and political culture. And like a surgeon transplanting an organ, therefore, Carter must offer his patient—the culture of disbelief—a model that will not be rejected merely by virtue of that patient's own extant epistemological and ideological commitments.

Given this array of potential adverse consequences, it would simply be irresponsible to use Carter's model as a basis for interpreting the Free Exercise Clause, at least not without the use of other rationales that can offset its significant shortcomings. At best, Carter has simply placed too much stock in the incidental political benefits that may accrue from some forms of free exercise. At worst, he has generated a model that would appear to contradict if not undermine itself. For Carter's central goal, that of religious autonomy, is logically incompatible with a model that protects religion because it is good for the state. Such an approach neither embraces nor fosters religious autonomy (at least not if "autonomy" is broadly understood), and its application to the realm of religious liberty is therefore inherently problematic. In light of this conclu-

fear of blowing it down.

John S. Mill, *Utility of Religion*, in *NATURE AND UTILITY OF RELIGION* 45, 45 (George Nakhnikian ed., 1958).

¹⁵² This is not to say that our political and legal culture has not actually lost its sense of the transcendent. See, e.g., Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 *EMORY L.J.* 777 (1986). Berman notes that

[w]ithin the past two generations the public philosophy of America has shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory . . . Rarely, if ever, does one hear it said that law is a reflection of an objective justice or of the ultimate meaning or purpose of life. Usually it is thought to reflect, at best, the community's sense of what is useful.

Id. at 789. But the condition need not dictate the cure, and an instrumentalist culture need not have its instrumentalism affirmed merely because it is expedient to do so.

sion, let us examine alternative ways of conceptualizing the First Amendment free exercise guarantee.

II. BEYOND THE CULTURE OF DISBELIEF: RECONCEPTUALIZING RELIGIOUS LIBERTY

From the scholar's vantage point, the Supreme Court is most reproachable when it fails to articulate coherent, comprehensive rationales to explain its exercise of judicial review under various provisions of the Constitution. The Free Exercise Clause, for some time now, has been such a provision.¹⁵³ Indeed, the absence of a concrete paradigm of religious liberty is one obvious reason for a free exercise jurisprudence that over the last several years has been characterized by doctrinal revisionism,¹⁵⁴ division among the Justices,¹⁵⁵ and acute dissatisfaction among commentators.¹⁵⁶ Carter, as noted, offers a model of free exercise grounded in the idea that robust religious liberty and political participation are necessary for the nation's moral and political health—an essentially instrumentalist rationale rooted in historical observation and political pragmatism. And while Carter's model may be a bit extreme, it is by no means unrepresentative of current attempts to justify free exercise. Also as noted, however, there is an enormous gap between Carter's justification and Carter's vision—so great, in fact, that the model is substantially dysfunctional. But if Carter's utility-based model genuinely typifies modern attempts to justify a

¹⁵³ See John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 782 (1986) (noting that the "Supreme Court has not been much troubled by the issue" of why the free exercise ought to merit constitutional protection); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 848 (1984) ("That there is a need for a 'single, more encompassing construction' of the establishment clause, few readers of the [Supreme] Court's opinions in this area would care to deny" (quoting Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980))).

¹⁵⁴ See McConnell, *supra* note 119, at 1111, 1129 (criticizing Employment Div. v. Smith, 494 U.S. 872 (1990), as having ignored text, history, precedent, and the logic of the First Amendment).

¹⁵⁵ See *Smith*, 494 U.S. at 890 (5-4 decision) (indicating a deep division among the Justices as to the proper interpretation of the Free Exercise Clause).

¹⁵⁶ See Mary A. Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 (1991) (noting that "all sides" consider much of the Court's jurisprudence to be "unprincipled, incoherent, and unworkable"); Smith, *Rise and Fall*, *supra* note 12, at 149-50 ("It is by now notorious that legal doctrines and judicial decisions in the area of religious freedom are in serious disarray. In perhaps no other area of constitutional law have confusion and inconsistency achieved such undisputed sovereignty.").

strong free exercise guarantee, and if his model indeed falls short, then what alternatives, if any, are left?

That inquiry is the focus of this second Part of the Essay, which is divided into two Sections. Section A provides a concise overview of the many ways in which religious liberty can be understood and the various criteria that should be considered when interpreting the Free Exercise Clause. Section B then argues that, at the very least, a meaningful interpretation of that clause requires an understanding of religious liberty as an inherent good, a human undertaking of intrinsic worth. Additionally, Section B addresses the contours of such a model, including three potential shortcomings. I should emphasize that the principal underlying purpose of this final Part is not necessarily to resolve particular cases arising under the Free Exercise Clause, or even to offer a concrete doctrinal framework for the application of that clause. Rather, it is to probe below these first few strata and to discern, within certain boundaries, the considerations according to which any particular theory of free exercise should be considered legitimate or illegitimate. At an even deeper level, it is also implicitly to question why we have a Free Exercise Clause at all. If, as the formalism of *Smith* suggests, we inhabit a constitutional world in which the meaning of that clause can no longer be taken for granted, then we must ask, essentially de novo, why it is that the free exercise of religion should ever stand in unique, let alone superior, relation to the state.¹⁵⁷

A. *Thinking About Free Exercise: General Considerations*

Broadly speaking, religious liberty may warrant protection both from the government and by the government for any number or combination of reasons: social utility,¹⁵⁸ political pragmatism,¹⁵⁹

¹⁵⁷ In this regard, the nature of my inquiry is drastically different from the text-bound formalism of commentators, such as John Harrison, who make absolutely no attempt to ascertain the possible animating values of the Free Exercise Clause. See, e.g., John Harrison, *The Free Exercise Clause as a Rule About Rules*, 15 HARV. J.L. & PUB. POL'Y 169, 169-70 (1992) (proposing that the sole function of the clause is to preclude legislators, and apparently only legislators, from enacting laws specifically aimed at prohibiting free exercise).

¹⁵⁸ See, e.g., Smith, *Special Place*, *supra* note 12, at 102-03 (describing instances where the Court has observed that freedom of religion produces social benefits because of the community ties established and strengthened through religious participation, and by bearing burdens that would otherwise have to be met by general taxation).

¹⁵⁹ See, e.g., David Little, *The Reformed Tradition and the First Amendment*, in *THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS* 17, 17 (James E. Wood, Jr. ed.,

economic theory,¹⁶⁰ liberal political theory,¹⁶¹ republican political theory,¹⁶² theological doctrine,¹⁶³ social contract,¹⁶⁴ or as

1990) (asserting that "present-day commitments owe very little to a principled belief in religious liberty" evidenced by our predecessors, and that, historically, "[m]uch more is owed to the effects of pragmatic compromise and mutual convenience") (citing QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978)); Smith, *Rise and Fall*, *supra* note 12, at 199-202 (arguing that "religion is essential to our republic because it helps to inculcate in citizens the moral character necessary for a democratic society").

¹⁶⁰ See, e.g., Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 1 (1989) (proposing the use of "an economic definition of 'neutrality' to determine when government action impinges impermissibly on religious choice").

¹⁶¹ See, e.g., JAY NEWMAN, *ON RELIGIOUS FREEDOM* 135 (1991) (stating that "most instances of political interference in the religious affairs of individuals and groups trouble my conscience and strike me, on the basis of my own utilitarian calculations, as being contributory in the 'long run' to a diminution of 'general happiness'"); Merel, *supra* note 127, at 811 (noting that the Free Exercise and Establishment Clauses of the Constitution demonstrate that an "individual is freed from both the weight of government opinion and the oppressive effects of government regulation in order to believe or disbelieve as he chooses"); Miller, *supra* note 66, at 87 (arguing that the risk of anarchy is the necessary price of religious liberty, and the risk of anarchy in that sense is preferable to the risk of tyranny inherent in restrictions on liberty); Smith, *Rise and Fall*, *supra* note 12, at 202-04 (describing the personal autonomy rationale for religious freedom, which states that religious liberty is important to a person's sense of self or of who she is and what she wants to be); Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 730-35 (1986) (describing the historical and philosophical circumstances that shaped liberal political theory, and that have reduced the significance of religion in public life).

¹⁶² See, e.g., Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 90 (1992) (attempting to "construct a theory of free exercise from the insights of civic republicanism"); William L. Miller, *The Moral Project of the American Founders*, in *ARTICLES OF FAITH*, *supra* note 36, at 18 (asserting that "Americans resisted monofounderism . . . as they did monarchy, on republican principle"); Tushnet, *supra* note 161, at 735-38 (discussing the possibility of using the tradition of civic republicanism as a basis for interpreting the religion clauses).

¹⁶³ See, e.g., John Coventry, *The Theology of Religious Freedom*, 80/81 LAW & JUST. 100, 104 (1984) (stating that the doctrine of religious freedom is ultimately a doctrine about the irresistible freedom of God); Robert Gordis, *Judaism and Religious Liberty*, in *RELIGIOUS LIBERTY IN THE CROSSFIRE OF CREEDS* 25, 26 (Franklin H. Littell ed., 1978) (asserting three aspects of religious liberty: the right to practice a faith without interference from others, the extension of freedom of conscience by one group to another that differs in belief and practice, and the granting of freedom of thought and action by a group to dissidents in its own ranks); Winthrop S. Hudson, *The Theological Basis for Religious Freedom*, 3 J. CHURCH & ST. 130, 136 (1961) (arguing that there are theological justifications for the religious freedom enjoyed by U.S. citizens); Littell, *supra* note 41, at 145 (noting that religious liberty rests on an understanding of obedience to the will of God, which is voluntary service to fellow man); Mohamed Talbi, *Religious Liberty: A Muslim Perspective*, in *RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS* 175, 175-87 (Leonard Swidler ed., 1986) (demonstrating that Muslim theology supports the maintenance of religious freedom).

¹⁶⁴ See, e.g., Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE

a matter of basic morality or fairness.¹⁶⁵ Carter's theory, for example, could fairly be described as a blend of the first two—social utility and political pragmatism. As the earlier critique of his theory demonstrated, however, it is not enough simply to articulate a rationale; rather, the rationale must exhibit various characteristics that render it appropriate in the unique context of free exercise. These characteristics, in turn, may derive either from a particular normative theory of religious liberty (such as those listed above) or from an attempt to interpret or capture contemporary discourse on the meaning of the Free Exercise Clause.¹⁶⁶ This Essay, for a variety of reasons, ventures to do the latter.¹⁶⁷ Specifically, I propose that the following six nonexclusive, nonexhaustive criteria, insofar as they embody our extant mainstream discourse on free exercise, should be observed when considering the propriety of any particular free exercise rationale.¹⁶⁸ First, a free exercise rationale

L.J. 1611, 1634 (1993) (arguing that free exercise of religion should be interpreted pursuant to a reading of the religion clauses as embodying a contractual theory of law and politics); cf. THE WILLIAMSBURG CHARTER (1988), *reprinted in* ARTICLES OF FAITH, *supra* note 36, app. at 123 (drafted by representatives of the leading faiths in America to address the dilemmas, challenges, and opportunities posed by religious liberty in American public life).

¹⁶⁵ See, e.g., NEWMAN, *supra* note 161, at 135-37 (examining the position that religious liberty is justifiable either as an application of the "golden rule"—that one's moral treatment of others should stem from one's desired treatment by others—or as an application of the principle that one should not engage in conduct that might seem negligible if isolated, but would undermine the social order if its practice were to become universal); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 337 (1969) (stating that "[a] far more important interest protected by the free exercise clause relates to fairness to the individual").

¹⁶⁶ The notion of developing a theory based on the interpretation of legal discourse is strongly associated with the work of Ronald Dworkin. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

¹⁶⁷ These reasons are basically three-fold. First, the careful exposition of a distinct normative theory is simply beyond the scope of this Essay. Second, such an exposition would doubtless divide readers along normative lines; in contrast, an interpretive restatement of existing, albeit implicit, criteria should be significantly less controversial for most readers. Third, a primary value in presenting criteria in the first place is heuristic, and not normative as such. It is, as the following paragraphs show, to expose more systematically the shortcomings of various current free exercise rationales and to underscore the dangers of interpreting the Free Exercise Clause through the lens of only one rationale.

¹⁶⁸ Needless to say, the validity of these six criteria hinges in part on how accurately they represent the underlying assumptions or values of the prevailing discourse on the meaning of the Free Exercise Clause. As I see it, most of these assumptions or values concern liberal democratic principles, such as the importance of individual autonomy (for example, criterion one), an aspirational commitment to government neutrality (for example, criterion four and perhaps five), and a commitment to the related concepts of due process, the rule of law, and rationality

should be capable of according sustained protection to a broad range of religious practices.¹⁶⁹ Second, in some way it should account for the uniqueness of free exercise as a form of human activity or as a type of constitutional liberty.¹⁷⁰ Third, it should be grounded in one or more sources of constitutional legitimation—text, tradition, underlying or derivative principles, and so forth.¹⁷¹ Fourth, to the extent possible it should not undermine our rhetorical, if not our actual, commitment to liberal democratic principles, and in particular should avoid overtly embracing one vision of the good at the expense of all others.¹⁷² Fifth, it should

(for example, criteria two, three, and six). To the extent, however, that these principles do not characterize the prevailing discourse, either in part or in whole, then one may justifiably discount their heuristic or persuasive value.

¹⁶⁹ Lest this first rationale seem too obvious, it is a characteristic that, in effect if not in design, is patently absent from the Court's prevailing free exercise analysis. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (holding that the Free Exercise Clause permits a state to prohibit sacramental peyote use and thus deny unemployment benefits to persons charged with such use); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-43 (1988) (holding that the Free Exercise Clause does not prohibit the state from developing federal land in a way that would conflict with American Indian rituals); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987) (holding that prison regulations that prevented Islamic prisoners from attending weekly services were not violative of the prisoner's right under the Free Exercise Clause); *Bowen v. Roy*, 476 U.S. 693, 695-98 (1986) (holding that a state statute requiring welfare recipients to furnish social security numbers for all family members receiving benefits did not violate the Free Exercise Clause although the identification would allegedly rob the petitioner's daughter of her spiritual uniqueness in contravention of Native American beliefs); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (holding, due to the military's superseding interest in dress uniformity, that an Air Force regulation that disallowed the petitioner, an ordained rabbi, from wearing a yarmulke while on duty and in uniform did not violate the First Amendment); *United States v. Lee*, 455 U.S. 252, 254 (1982) (holding that the Free Exercise Clause does not prohibit "forced payment of social security taxes when payment of taxes and receipt of benefits violate the taxpayer's religion," in this case a member of the Old Order Amish). In every one of these cases, the free exercise claim was flatly rejected, even though these cases involved a diversity of religious claims (some of which were hardly unorthodox) and even though the Court admitted in at least one case that the governmental action might have "devastating effects" on the claimants' traditional religious practices. See *Lyng*, 485 U.S. at 451 (stating the Court's refusal to measure the effects of governmental action by its effects on a "religious objector's spiritual development").

¹⁷⁰ See *Smith*, *Rise and Fall*, *supra* note 12, at 198-99 (asserting a "distinctiveness requirement" that "explains why religion deserves a level of legal protection that most other human interest and activities do not receive").

¹⁷¹ See generally Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U. L. REV. 7, 11-46.

¹⁷² Neutrality, as illustrated earlier, may be an impossible absolute, but certainly some constitutional paradigms are relatively more or less neutral than others. Everything else being equal, I believe it is important that government should adopt

not adversely alter our existing legal and cultural regimes—for example, by controverting other constitutional provisions, by affecting the viability of other constitutional rights, or by creating undesirable cultural conceptions. Sixth and finally, it should be capable of practical implementation, providing reasonable guidance to citizens and the state alike, and should include a set of defensible limits on its operation.

For the purpose of illustration, let us apply these six criteria to assess three very different approaches to religious liberty—Carter's instrumentalist model, the prevailing philosophical approach of liberalism, and the prevailing doctrinal framework as stated in the *Smith* decision.¹⁷³ Let us turn first to Carter's model of free exercise as presented and critiqued earlier in the Essay. By using these criteria it should become even more obvious why Carter's instrumentalist theory, particularly when applied alone, falls short in its protection of free exercise. As we have seen, the social utility basis of Carter's theory logically would not protect a broad range of religious practices (criterion one), although for the same reason it may provide reasonable guidance on its scope of operation (criterion six). Likewise, while the instrumentalist model exhibits constitutional grounding (criterion three) and does not substantially conflict with liberal democratic principles (criterion four), it does not necessarily account for the uniqueness of religious free exercise (criterion two). Finally, as demonstrated above, Carter's model most certainly has the potential to produce adverse cultural consequences (criterion five). Of course, the failure of any particular rationale to satisfy all six criteria does not, for that reason alone, render the rationale illegitimate. But it does suggest that it may be inappropriate and at the very least indicates that it must be supplemented with additional rationales.

Let us further apply these criteria to contemporary liberalism—the prevailing philosophical approach to religious liberty. I call it the “prevailing” approach because, by and large, the principal philosophical framework of free exercise for the last several decades has been one comprised of various liberal conceptions—a conception of the self “as free and independent, unencumbered by aims and

interpretive frameworks that maximize inclusivity and minimize the perception, if not the reality, that the world-views of certain communities or individuals are not relevant to the contemporary meaning of the religion clauses.

¹⁷³ See *supra* note 11 and accompanying text; *supra* text accompanying notes 120-21.

attachments it does not choose for itself";¹⁷⁴ a conception of the state as thus necessarily "neutral on the question of the good life";¹⁷⁵ and a conception of religious faith and membership as matters of voluntary association and commitment.¹⁷⁶ However, as Michael Sandel observes: "the image of the unencumbered self, despite its appeal, is inadequate to the liberty it promises. In the case of religion, the liberal conception of the person ill equips the Court to secure religious liberty for those who regard themselves as claimed by religious commitments they have not chosen."¹⁷⁷ In other words, although the contemporary liberalism model would seem to further at least our rhetorical commitment to neutrality (criterion four), although it appears to have constitutional grounding (criterion three), and although is generally capable of implementation (criterion six), it does not guarantee the broadest of protection (criterion one), and it certainly does not treat religious commitment as unique (criterion two). Additionally, contemporary liberalism is potentially the source of adverse constitutional or cultural consequences (criterion five), as Carter's book and the earlier critiques of neutrality demonstrate.¹⁷⁸ In short, while the liberal model "seems to secure for religious liberty a firm founda-

¹⁷⁴ Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, *supra* note 36, at 75.

¹⁷⁵ *Id.* See generally BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) (discussing neutrality and liberal arguments connecting equality with the good life); Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978) (arguing that liberalism takes, as its constitutive political morality, the conception of equality that "government must be neutral on what might be called the question of the good life").

¹⁷⁶ See generally Sandel, *supra* note 174, at 74 (discussing "the political theory of contemporary liberalism" and describing "its stance towards religious practice and belief").

¹⁷⁷ *Id.* at 87. See generally Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1468 (1984) (proposing "an alternative to the liberal conception of human identity, one that encompasses both the separateness of the self and its connection to others").

¹⁷⁸ Sandel apparently does not go far enough in his critique of the liberal vision of individual religiosity, for even a model that protected the involuntary aspects of religious faith (which are only partly extrinsic to the individual) would nevertheless, and unjustifiably, exclude the nonvolitional aspects (which are entirely extrinsic). See Garvey, *supra* note 153, at 791-92 (noting that an autonomy-based understanding of free exercise may be disagreeable to many religious claimants who see themselves as being "chosen" by God, not the other way around); Williams & Williams, *supra* note 65, at 771-72 (analyzing nonvolitional religious traditions, in which individuals perceive many of their beliefs or practices as not being the product of rational and free choices as such).

tion,¹⁷⁹ like Carter's model, it invariably falls short when it confronts a free exercise claim that logically and conceptually deviates from its premises.

Third and finally, let us apply these six criteria to the free exercise analysis articulated in the Supreme Court's *Employment Division v. Smith*¹⁸⁰ decision. Under that analysis, the *Sherbert-Yoder* compelling interest standard¹⁸¹ is activated only where a law or other governmental action is targeted specifically at religion, such that the action is neither neutral nor generally applicable, or where the religious claim happens to be of a certain kind, such as unemployment compensation.¹⁸² Turning to the six criteria, this approach *may* have constitutional grounding (criterion three), at least purports to further the ideal of neutrality (criterion five), and most of all is easily administered (criterion six). However, the protection it provides is far from broad (criterion one), it takes absolutely no account of the uniqueness of religion (criterion two), and it can indeed produce adverse constitutional and cultural consequences (criterion five) insofar as it sends the message that religious practices are both inconsequential and largely subordinate to the needs of the state.

If the inadequacy of each of these approaches reveals anything, it is the unlikelihood that any one rationale will ever prove sufficient—and perhaps that theories that see the Free Exercise Clause as a one-rationale provision are significantly misguided. Indeed, as the mere variety of available rationales, the range of these legitimating criteria, and the religious pluralism of America suggest, there is no particular reason to seek one overarching rationale to the effective exclusion of others. To the contrary, it seems perfectly reasonable to propose that several rationales may simultaneously coexist and thus coanimate the vitality of the clause.¹⁸³ To some, of course, this proposition may seem slightly

¹⁷⁹ Sandel, *supra* note 174, at 86.

¹⁸⁰ 494 U.S. 872 (1989).

¹⁸¹ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *supra* notes 115-22 and accompanying text.

¹⁸² See *Smith*, 494 U.S. at 873.

¹⁸³ Cf. Garvey, *supra* note 153, at 794 ("It may be a mistake for lawyers to assume, like physicists who seek to unify the four forces, that there is only one ultimate principle supporting constitutional freedoms. There may instead be a cluster of values . . ."). Within the same clause, however, a multiplicity of rationales raises concerns about all three aspects of the rule of law—notice, treating similarly-situated parties similarly, and limited governmental discretion—to the extent that judges, lawyers, and citizens are unable to discern which rationale should govern in situations

heterodox, particularly given the seductive dogma of contemporary constitutional theory that we should seek the single "mega-rationale" that can at once explain and justify one or several areas of law.¹⁸⁴ By its very nature, however, the Free Exercise Clause is a multidimensional provision, for it attempts to reconcile contemporaneously the many needs of religious liberty with the many needs of our constitutional order.

In the end, we must move beyond unidimensionality and the relegation of free exercise to a culture of disbelief—beyond the confining effects of instrumentalism or liberal individualism, and certainly beyond the hollowness of *Smith*—to a richer, more expansive understanding of religious belief and practice.

B. *Rediscovering the Intrinsic Worth of Free Exercise*

In this final Section, I propose the rediscovery of "intrinsic worth" as a means to conceptualize religious free exercise. Although this conception should not be understood as the exclusive means to interpret the Free Exercise Clause (since the error of unidimensionality would then be committed), it is nevertheless essential to a full understanding of the meaning of that clause, both in terms of explaining its reason for being and in terms of justifying the broad protection offered through the *Sherbert-Yoder* standard. In particular, an intrinsic worth theory offers two primary advantages, one conceptual and the other practical, over many of the existing theories. First, at a conceptual level, the theory logically permits one to value religion in a unique and meaningful way, an attribute that is seemingly obvious but which, as illustrated above, is typically absent from prevailing approaches.¹⁸⁵ Second, as a practical

where different rationales are equally applicable but would produce different outcomes.

¹⁸⁴ The search for overarching rationales has been a hallmark of modern constitutional theory, especially in the context of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334 (1988) ("Foundation-alism has been the prevailing style of recent constitutional scholarship. Scholars have proposed various theories of judicial review in the effort to discover a unified principle that would provide the basis for judicial decisions."). However, "[a]s the arguments over constitutional theory enter the last few years of the twentieth century, theorists increasingly debate the consequences of their demonstrations of the failures and limitations of 'grand' or 'unitary' theories designed to restrict constitutional interpretation to a single overarching, unifying principle." MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 13 (1993).

¹⁸⁵ See generally *Smith, Rise and Fall*, *supra* note 12, at 149 (arguing that "our

matter, such a theory can rationally explain both why the government should bear the burden of persuasion when it seeks to interfere with free exercise and why that burden, once allocated, should be substantial.

1. The Nature and Foundations of an Intrinsic Worth Rationale

In the context of religious liberty, "intrinsic worth" encompasses the notion that free exercise is an inherently and uniquely valuable undertaking, and that the protection of free exercise should arise from a recognition of this fact. At its core, intrinsic worth rests on the possibility that there is meaning to be found beyond the profanity of our day-to-day, hand-to-mouth existence—within realms we might call the spiritual, or the supernatural, or the sacred—and on the ultimate or transformative significance that this possibility holds for our lives as individuals and as communities.¹⁸⁶ Thus formulated, the intrinsic worth concept is at once both strikingly simple and yet profoundly complex, for it implicates certain understandings about the nature of human beings, including their

constitutional commitment to religious freedom contains a fatal internal flaw" in that "it cancels itself out by precluding government from recognizing and acting upon the principal justification supporting that commitment").

¹⁸⁶ For a classic disquisition on the nature and importance of the sacred in human history, see generally MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (Willard R. Trask trans., Harcourt, Brace & World, Inc. 1959) (1957). Importantly, my purpose at this point is not to argue anew the independent merits of an intrinsic worth conception of free exercise; for the most part, its theoretical legitimacy and historical grounding are taken for granted. Those interested in pursuing further these foundational issues should see generally ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 37-40* (1990) (discussing historical precedent for "liberty of conscience" along with the Madisonian assertion that "[c]onscience is the most sacred of all property"); W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DEPAUL L. REV. 71, 80-84 (1992) (discussing historical precedent for religious liberty and focusing particularly on the Madisonian view of religious liberty and the need for a "jurisdictional division between religion and government"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1513-17 (1990) (arguing that the debate over whether the Free Exercise Clause requires the granting of religious exemptions from generally applicable laws with secular purposes has proceeded in a historical fashion and concluding that an interpretation of the Free Exercise Clause that mandates religious exemptions was both within the contemplation of the Framers, and consonant with popular notions of religious liberty and limited government that existed at the time of the framing); Smith, *Rise and Fall*, *supra* note 12, at 154-66 (providing a historical discussion of religious justification for the special protection of religious freedom in our constitution).

latent metaphysical potential, and takes seriously the possibility of human relationships with realms or beings beyond the material world. With these broad points in mind, let us now consider more closely the foundations of such a concept as well as its expression within the particular context of the First Amendment.

Just as religious liberty can itself be rooted in any number of justifications, the intrinsic worth of free exercise can also be derived from a variety of sources or framed in a variety of ways—natural rights, theologically based ethics,¹⁸⁷ international human rights,¹⁸⁸ or by analogy from other realms, such as environmental or animal ethics,¹⁸⁹ in which intrinsic worth has become a visibly important paradigm. The classic formulation, however, can still be found in Madison's *Memorial and Remonstrance*, in which religious liberty is framed as an inalienable right:

[W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.¹⁹⁰

A more modern, more expansive constitutional formulation of the right might be Professor Kauper's:

¹⁸⁷ See, e.g., RELIGIOUS LIBERTY: AN END AND A BEGINNING (John C. Murray ed., 1966) (focusing on a Catholic understanding of religious liberty and the 1965 Declaration on Religious Freedom).

¹⁸⁸ See, e.g., *Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981), reprinted in RELIGIOUS LIBERTY AND HUMAN RIGHTS IN NATIONS AND IN RELIGIONS, *supra* note 163, app. at 248; *Universal Declaration of Human Rights* art. 18 (1948), quoted in NEWMAN, *supra* note 161, at 124-25 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.").

¹⁸⁹ See, e.g., PAUL EHRLICH & ANNE EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES 48-52 (1981) (proposing an inherent "right to exist"); PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986) (proposing a "biocentric" approach to environmental ethics).

¹⁹⁰ JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 299 (Robert A. Rutland et al. eds., 1973) (quoting VIRGINIA DECLARATION OF RIGHTS OF 1776, art. XVI). See generally JAMES MADISON ON RELIGIOUS LIBERTY (Robert S. Alley ed., 1985). For a discussion of the central place of this formulation in the founding period, see Smith, *Rise and Fall*, *supra* note 12, at 156-66.

The Constitution . . . does not create religious liberty. . . . [R]eligious freedom is deemed to be not a concession or grant by the state but an indefeasible right of the person, which the government must recognize, respect and protect. Religious liberty is not to be confused with religious tolerance. Tolerance as a legal concept is premised on the assumption that the state has ultimate control over religion and the churches, and that whether and to what extent religious freedom will be granted and protected is a matter of state policy. Tolerance of minority religious groups and of nonconformists was an important half-way step in the struggle for religious liberty as evidenced in American colonial history. But our constitutional system embodies the full-blown concept of religious freedom as a natural right which limits the government, rather than a privilege dispensed by governmental authority in pursuing a policy of benevolent toleration.¹⁹¹

The critical element in these formulations—basically ignored by the *Smith* Court—is the *priority* of religious liberty relative to government, both in terms of being independent of and antecedent to the state and in terms of being superior to (almost all of) the claims of the state.¹⁹² Government exists not to serve its own ends at the expense of religious liberty; rather, all but its most central needs are recognized as subordinate to the religious claims of citizens.¹⁹³ Moreover, while political or social utility may derive *incidentally* from a robust religious liberty, any such utility is understood to be neither the basis for nor the measure of that liberty. As one commentator notes, “[e]very discussion of religious liberty which begins with the political objective ends in confusion. The political benefits of religious liberty, and they are very great, are *derivative*”¹⁹⁴

¹⁹¹ Paul G. Kauper, *Legal Aspects of Religious Liberty*, in RELIGIOUS LIBERTY, *supra* note 88, at 25; see also *id.* at 29 (“Religion . . . centers in a relationship to a divine being or force which is over and beyond human relationships and by its nature withdrawn from the sphere of civic control or intrusion. This relationship gives religion a special dimension. The constitutional protection accorded religious liberty is a recognition of this relationship.”); Forell, *supra* note 88, at 5.

¹⁹² The priority claim could also mean that religious goods “are more valuable or more important than most or perhaps all other human goods.” Smith, *Rise and Fall*, *supra* note 12, at 154.

¹⁹³ Cf. Douglas Sturm, *Repentance, Constitutionalism, and Sacrality*, 42 DEPAUL L. REV. 61, 67 (1992) (“[G]overnment is subordinate to the higher reaches of the human spirit and must accommodate those higher reaches. Religious liberty and its corollary, religious tolerance, are not a privilege granted by political authority”).

¹⁹⁴ Littell, *supra* note 41, at 137.

In light of this understanding, we can further see the problems inherent both in instrumentalist views of religious liberty and in the *Smith* decision, each of which effectively elevates government above the free exercise needs of its citizens and thus ignores the secondary role of government in the larger scheme of human good. Indeed, *Smith's* distinction between discriminatory laws and generally applicable or neutral laws is largely nonsensical to the extent that the priority claim of religious liberty is taken seriously. In a recent critique of *Smith*, Justice Souter had the cognizance and conviction to point out that:

[t]he extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government.¹⁹⁵

What is most disturbing today—Justice Souter notwithstanding—is the almost total lack of reference to this conception of religious liberty by those, such as Supreme Court Justices, who regularly pass judgment on the free exercise rights of religious citizens.¹⁹⁶ To some extent, of course, this state of affairs is traceable to the kinds of phenomena that prompt Carter to conclude that a culture of disbelief exists—trivialization, privatization, false neutrality, and secularization.¹⁹⁷ Likewise, this status quo may also be the *reductio*—the "self-cancellation"—of an understanding of religious freedom that prohibits governmental reliance on religious doctrine, since the intrinsic worth rationale seems unavoidably to have a religious dimension.¹⁹⁸ And certainly we must consider the collective

¹⁹⁵ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2250 (1993) (Souter, J., concurring).

¹⁹⁶ See *Smith, Rise and Fall*, *supra* note 12, at 167-68; *Smith, Special Place*, *supra* note 12, at 116-17. Prior to Justice Souter, in fact, only Justice William O. Douglas had been so explicit. See *id.* at 104-05, 117 (discussing Justice Douglas as having given a "religious justification for the special constitutional place of individual religion"). Whether or not the newest member of the Court, Justice Ruth Bader Ginsburg, will join Justice Souter in this conception of religious liberty is not known at this point. As a court of appeals judge, Justice Ginsburg took a relatively strong position in favor of free exercise but declined to articulate her theoretical basis for doing so. See *Goldman v. Secretary of Defense*, 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginsburg, J., dissenting), *aff'd*, 475 U.S. 503 (1986).

¹⁹⁷ See *Smith, Rise and Fall*, *supra* note 12, at 168-78 (discussing the influence of secularization and privatization in recent decades).

¹⁹⁸ See *id.* at 180-96 (discussing the impact of the constitutional prohibition of

impact of the pervasiveness of the modern welfare state coupled with a variety of demographic changes and pressures. In particular, as the size and demands of the population and the state have increased, it has apparently become no easier, and perhaps more difficult, to justify the individual deviations engendered by religious belief—whether they be the use of controlled substances such as peyote,¹⁹⁹ the preservation of sacred lands,²⁰⁰ or the avoidance of full participation in taxation or social security schemes.²⁰¹ At the same time, it has become less and less difficult to conceptualize religion in instrumentalist terms.²⁰² Religion is seen as something that appears to be exacting demands from the state—rather than something burdened by the state—and that therefore must be justified according to the utility that it produces.²⁰³ Needless to

“governmental reliance upon religious doctrines or beliefs”).

¹⁹⁹ See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

²⁰⁰ See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988).

²⁰¹ See *Bowen v. Roy*, 476 U.S. 693, 701 (1986); *United States v. Lee*, 455 U.S. 252, 261 (1982). I should offer two qualifications about using these cases, as well as *Smith* and *Lyng*, to support my rather broad allegation in the text. First, I am not suggesting that state-sanctioned intolerance for nonmainstream religious claims is somehow a new phenomenon. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878) (approving of the criminalization of polygamy despite its centrality as a Mormon practice); see also *Davis v. Beason*, 133 U.S. 333 (1890) (same). What differentiates the modern cases from their nineteenth century counterparts, however, is that they are all to some degree incongruent with the legal and cultural expansion of individual liberty that has transpired over the intervening years, particularly in the last three to four decades. See generally *Glendon & Yanes*, *supra* note 156, at 477-78, 492-518 (noting the disparity between the treatment of religion-related rights and the treatment of other rights). Second, these cases are by no means homogeneous, and it would be a mistake to assume that each of them supports my textual allegation in the same manner or to the same extent. See, e.g., *Sullivan*, *supra* note 71, at 220-22 (differentiating between allowing “religious opt-out” from the welfare state’s regulatory programs and religious opt-out from its redistributive programs). Nevertheless, while such distinctions may be useful at a conceptual level, they do not undermine the more general point that the welfare state, with its rich array of sub rosa ethical presuppositions concealed beneath a veneer of neutrality, poses an increasingly serious threat to nonmainstream, if not mainstream, religious claims.

²⁰² The displacement of individual rights-based conceptions of law by instrumentalist conceptions is not an unprecedented pattern in American legal development. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 112 (1992) (“As law [in the nineteenth century] became increasingly implicated in the process of promoting economic growth, the earlier natural rights justifications for the judicial function [that is, to vindicate individual natural rights] began to be overwhelmed by the overtly instrumental use of private law to advance utilitarian objectives.”).

²⁰³ Indeed, the common use of the term “claim” or “claimant” to describe the free exercise interest at stake lends rhetorical support to the idea that it is the govern-

say, this government-centered view amounts to a perversion of the free exercise ideal and turns the priority claim of religious liberty completely on its head. Various liberties, for various reasons, were removed from the often careless, if not self-serving political processes, and religious free exercise is one such liberty—removed for the very reason that it is intrinsically good and largely beyond the competence of the state to evaluate and, in turn, to regulate.

Like Carter, therefore, I see no other way to have religion taken seriously unless a scheme similar to the *Sherbert-Yoder* compelling interest standard is imposed upon governmental actions when they interfere with the religious free exercise of citizens. Unlike Carter's model, however, the intrinsic worth model would genuinely recognize the serious interests at stake from the claimant's point of view. Rather than create a balance between one state interest (the need to maintain religious autonomy insofar as it serves democratic ends) and another (whatever reason the state may have for interfering with free exercise), an intrinsic worth-based scheme would create a balance between that latter state interest and the very different interest inherent in free exercise, an interest theoretically unrelated to the needs of the state. At the same time, to the extent the priority claim of religious liberty is taken seriously, the second half of the balance would require from the state the most compelling of interests if the governmental action is to override the free exercise interests of the claimant. To be sure, the intrinsic worth model is one of the few satisfying ways to justify the standard set forth in cases like *Sherbert* and *Yoder*.²⁰⁴ By its own logic, the burden must fall upon the state, the burden must in turn be significant, and it matters not whether the law in question is neutral or generally applicable. Claimants may still lose, of course, but at least the state would be required to overcome a burden somewhat proportional to the gravity of its interference with their free exercise.

ment, and not the citizen, that is somehow being burdened by the other's demands. Likewise, Professor Douglas Laycock has noted that the term "accommodation" in the context of free exercise exemptions "implies that government is going out of its way to do religion a favor, but that usage fits only occasionally. . . . [M]ost of the time, we are not talking about special favors. . . . We are talking about the right to be let alone in the exercise of religion." Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 846 (1992).

²⁰⁴ Cf. Smith, *Rise and Fall*, *supra* note 12, at 149 (arguing that "the religious justification is also the most satisfying, and perhaps the only adequate justification for a special constitutional commitment to religious liberty").

2. Potential Shortcomings of an Intrinsic Worth Rationale

In addition to emphasizing these advantages, it is only proper to address the possible shortcomings of using an intrinsic worth theory of free exercise. All models, of course, contain shortcomings above and beyond the opportunity costs they incur. As we have seen, utility-based free exercise rationales present the problem of premature finiteness, while liberal individualist rationales are problematic to the extent that they deny certain dimensions of human religiosity. When we consider the intrinsic worth model, three potential problems come to mind: an inability to draw lines, the potential for violating either the Establishment Clause or our commitment to governmental neutrality, and theoretical impossibility.

First, it might seem that by trading utility for intrinsic worth, we have merely traded underinclusiveness for overinclusiveness. That is, instead of failing to encompass—and thus accord protection to—various beliefs or practices that do not meet the chosen instrumental rationale, we simply lose the ability to draw any lines at all. Indeed, is it even possible to discern logically coherent limits on an “intrinsic good,” particularly one as abstract as the free exercise of religion? To the extent it is not, moreover, would the intrinsic worth model not then run afoul of the sixth criterion, that of administrability and finitude? Of course, if we were to take the intrinsic worth of free exercise too seriously—as if nothing temporal could override it—then line-drawing would no doubt be either arbitrary or futile. To take the intrinsic worth of free exercise seriously, however, is not to say that it cannot or should not have limits, or that its limits cannot reflect legitimate governmental concerns. After all, being ultimately bounded by the needs of the state or the public (that is, by social needs) is not the same as being initially justified by social utility, and I see nothing inherently problematic with using the former type of social consideration. In defining these limits, moreover, I also see nothing inherently problematic in using several of the criteria already employed by the courts to limit the scope of free exercise protection. First and foremost, the use of a compelling interest standard necessarily creates limits at those points where the government’s interests become compelling. Second, to the extent we can agree upon a legal definition of religion, we also create limits by excluding those beliefs and practices that fall outside the definition. Third, allowing the trier-of-fact to evaluate a claimant’s sincerity of belief, though

admittedly a risky undertaking, places limits on the ability of claimants to appropriate fraudulently the special status of free exercise.²⁰⁵ Lastly, the use of a centrality standard—which would ask how central or important the religious practice is to the claimant's belief system—creates one more source of line-drawing, although like sincerity, it is not an undertaking free from difficulty.²⁰⁶ Even with the use of these limiting factors, of course, line-drawing may still prove difficult, which is one reason the *Smith* Court largely withdrew from the field. An inability to draw lines, however, although clearly problematic, is not a strong argument against attempting to provide vigorous free exercise protection. Perhaps it is true that courts should not be in the business of pronouncing entirely novel and unenumerated liberties, but neither should they be in the business of refusing to enforce those liberties that are reasonably embodied within the letter and the spirit of the Constitution.²⁰⁷ As Carter notes, “[d]eciding when to allow exemptions would place a tremendous burden on the courts—but there is no reason that the hard work of protecting freedom should be easy, and, certainly, the fact that the task is difficult is no reason not to undertake it.”²⁰⁸

Second, the use of an intrinsic worth rationale might run afoul of our constitutional commitment to avoid religious establishments (thus violating criterion five), since this rationale appears to have, at least historically, an unavoidably religious dimension, and since

²⁰⁵ See *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that the district court was correct in withholding from the jury all questions concerning the truth or falsity of respondents' religious beliefs).

²⁰⁶ One practical concern is that members of religious denominations are themselves frequently divided over the contours of their faith, such that centrality may be difficult to determine. See KONVITZ, *supra* note 127, at 77-79; see also Peter L. Berger, *Who's Afraid of Religious Values?*, N.Y. TIMES, Sept. 19, 1993, § 7, at 15 (book review) (noting that Carter's similar proposal that “obviously central” religious beliefs should merit accommodation does not explain how, or by whom, the determination of centrality should be made).

²⁰⁷ As Justice Souter recently observed:

There appears to be a strong argument from the [Free Exercise] Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duties to one's God, unless those activities threatened the rights of others or the serious needs of the state.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2249 (1993) (Souter, J., concurring).

²⁰⁸ P. 144.

the judiciary can itself be a source of impermissible establishment.²⁰⁹ Likewise, at a more theoretical level, the use of such a rationale might appear to offend a liberal conception of the state, thus also running afoul of criterion four. The constitutional problem, simply stated, is that a governmental recognition of this understanding of free exercise, insofar as it has roots in Protestant Christian theology and seems to embrace certain religious understandings about human spirituality, might plausibly be suspect under the Establishment Clause.²¹⁰ Such a recognition may be constitutionally infirm to the extent that it is found to lack a secular purpose,²¹¹ to constitute an excessive entanglement of religion and government,²¹² to amount to religious preferentialism,²¹³ to constitute an endorsement of religion,²¹⁴ or to be the product of religious motivation.²¹⁵

The extension of these nonestablishment principles so freely and formalistically into the free exercise context, however, would be a serious mistake. Precisely because of its uniquely important subject

²⁰⁹ See *North Carolina Civil Liberties Union Legal Fund v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) (invalidating a state judge's use of a courtroom prayer), *cert. denied*, 112 S. Ct. 3027 (1992).

²¹⁰ See Sandel, *supra* note 174, at 86; cf. Smith, *Rise and Fall*, *supra* note 12, at 149 ("[R]eligious freedom . . . forbids governmental reliance upon religious justifications as a basis for public policies or decisions. Therein lies the paradox—our constitutional commitment to religious freedom undermines its own foundation; it cancels itself out by precluding government from recognizing and acting upon the principal justification supporting that commitment."). Carter, for one, would likely perceive no establishment issue, since he rejects the motivation and endorsement inquiries—or at least would probably not consider this to be "the government . . . placing its imprimatur on a symbol of a particular religion," p. 94—and since this kind of governmental recognition would presumably further religious autonomy.

²¹¹ See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (stating that "a statute must have a secular legislative purpose").

²¹² See *id.* at 613 (stating that a "statute must not foster 'an excessive governmental entanglement with religion'" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970))).

²¹³ See *Larson v. Valente*, 456 U.S. 228, 244 (1982) (stating that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").

²¹⁴ See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (stating that "the prohibition against governmental endorsements of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring))).

²¹⁵ See *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (holding that "because the primary purpose of [Louisiana's] Creationism Act [was] to endorse a particular religious doctrine, the Act further[ed] religion in violation of the Establishment Clause").

matter, the Free Exercise Clause should not be understood as simply another law or governmental action, but rather as a special constitutional provision that must remain peculiarly unencumbered if it is to protect meaningfully the religious liberty of citizens. Indeed, if we were to follow only the logic of these nonestablishment tests and thus ignore the uniqueness of the Free Exercise Clause, the entire clause could very well be held invalid. After all, it seems to constitute an endorsement of religion, is most certainly not neutral (for it singles out religion, ostensibly for a benefit), and was the product, at least in part, of religious motivation. Unless we are willing to jeopardize the entire religious liberty guarantee, therefore, the intrinsic worth rationale cannot be rejected or avoided simply because it appears to controvert certain judicially devised doctrines of the Establishment Clause. There may be specific situations in which the use of the intrinsic worth rationale would so conflict with our understanding of nonestablishment—for example, where it is interpreted narrowly so as to protect only certain religious practices—that the interclause conflict could no longer be ignored and the Establishment Clause would necessarily prevail. But in the vast majority of situations, the use of an intrinsic worth rationale should simply be immunized from the normal application of Establishment Clause doctrine.

Even if we successfully resist the temptation of doctrinal formalism, however, there remains an apparent conflict between governmental recognition of this rationale and the liberal principle that the state should remain rhetorically if not actually neutral with respect to matters of ultimate truth and of “the good life.” At the same time, governmental recognition of a religiously informed rationale may seem problematic to the extent the state should be largely if not entirely secular in both its orientation and its means. And in neither case may we simply invoke the *sui generis* character of the Free Exercise Clause (as in the preceding paragraph), for liberal democratic principles are not necessarily beholden to constitutional doctrine. Nevertheless, I believe these problems can be resolved without engaging in a polemic over the underlying normative principles of neutrality and secularism.

Specifically, I would argue that a liberal conception of the state, including perhaps even the ideals of secularism and neutrality, need not be interpreted to preclude governmental acknowledgement of the unique importance of religious liberty, even though for many citizens this importance is understood in theological terms. First, the priority claim of religious liberty is substantially congruent with

a liberal contractarian conception of the state as a construct erected to "promote the general Welfare, and secure the Blessings of Liberty."²¹⁶ Second, the priority claim, if taken seriously, would maximize religious freedom to the extent feasible and would thus advance the liberal ideal of individual autonomy (although it should be further noted that individual autonomy is itself not the foundation of intrinsic worth²¹⁷). There may be "pro-Christian bias," or something akin to it, underlying the priority claim, but in contrast to Carter's instrumentalist model, the intrinsic worth model would incidentally err on the side of allowing greater individual freedom, not less. Third, while a recognition of free exercise as being intrinsically valuable is not neutral in the sense that the state takes a stance as to the goodness and preferability of religious liberty, this particular stance or preference has virtually always been a part of the liberal tradition's bundle of favored rights.²¹⁸ To the extent, moreover, that this overt preference is compatible with liberalism, the adoption of a strong version of free exercise—one, for example, that does not defer to generally applicable laws—may be understood not as a means to undermine true neutrality, but rather as a means to achieve it. For as Carter suggests, it is difficult to argue that the *ab libitum* enforcement of generally applicable laws is not, as a matter of effect and perhaps even design, actually a passing of judgment on the truth or falsity of a citizen's beliefs or practices that conflict with those laws.²¹⁹ Fourth, as far as the specific formulation of the intrinsic worth rationale is concerned, the corollary neutrality requirement that the government not adopt specific religious world-views would appear to be satisfied insofar as the state need only remain "agnostic" as to the existence of the sacred, to the possibility of a relationship between the citizen and

²¹⁶ U.S. CONST. pmb1.

²¹⁷ Accordingly, the intrinsic worth-based conception should not be subjected to the criticisms that some commentators offer against an autonomy-based conception. See, e.g., Garvey, *supra* note 153, at 788-92 (offering a number of objections to an understanding of free exercise based on the value of individual autonomy).

²¹⁸ This point underscores the tension within liberalism between the rhetorical commitment to neutrality and the actual traditional commitment to protecting certain rights as fundamental. See, e.g., PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 380-81 (1992) (discussing liberal neutralism and stating that "[t]he argument for neutrality is supported by a distinction between the right and the good").

²¹⁹ See pp. 220-21 (arguing that the legal system's refusal to take account of the religious belief of the Jehovah's Witness—that accepting a blood transfusion will lead to eternal damnation—is not to treat the claim as irrelevant, but as false).

the sacred, and to the potential importance and profundity of such a relationship.²²⁰ And the parallel concern for maintaining the secular nature of government may be overstated in the context of free exercise, since that context is one already defined by the special treatment of religion and since a recognition of the priority claim in that context would likely have little effect on the substantive content of the state's other functions. Paradoxically, it may even be the case that the more the state treats religion as special and unique, as something entirely distinct in character from itself, the more the secular nature of the state is emphasized or reinforced.

Finally, there should be some concern about the theoretical impossibility of an intrinsic worth theory of free exercise. Intrinsic worth, as many in the environmental and animal ethics realms have noted,²²¹ is logically problematic to the extent that its evaluators—that is to say, we or our government officials—theoretically cannot avoid making judgments that are in some way extrinsic to the

²²⁰ This approach is similar to Michael McConnell's position. See McConnell, *supra* note 186, at 1516 (stating that "[w]hile the government is powerless and incompetent to determine what particular conception of the divine is authoritative, the free exercise clause stands as a recognition that such divine authority may exist and, if it exists, has a rightful claim on the allegiance of believers who happen to be American citizens"). McConnell argues that

[f]or the state to maintain that its authority is in all matters supreme would be to deny the possibility that a transcendent authority could exist. . . . [T]he state is constitutionally disabled from disputing the truth of the religious claim and . . . it cannot categorically deny the authority on which such a claim rests.

Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15-24.

Steven Smith argues that such a position is logically indefensible to the extent one proposes that governmental agnosticism in turn leads to a policy of deferring to religious claimants. See Smith, *Rise and Fall*, *supra* note 12, at 187-93. In particular, he sees no obvious reason to place the burden of persuasion on the state if the state is to be truly agnostic. "[T]he logic might just as well run the other way: religious beliefs might be false, and the state cannot pronounce them true; therefore, the state should proceed as if those beliefs are false." *Id.* at 189. Within the confines of his analysis, of course, Smith raises a good point. However, when the agnosticism version of neutrality is viewed in conjunction with other liberal principles, such as individual freedom and a contractual understanding of the state, Professor Smith's rebuttal becomes substantially less compelling.

²²¹ See generally James C. Anderson, *Moral Planes and Intrinsic Values*, 13 ENVTL. ETHICS 49, 53-58 (1991) (discussing logical difficulties of according intrinsic moral value to nonhumans); Robert W. Gardiner, *Between Two Worlds: Humans in Nature and Culture*, 12 ENVTL. ETHICS 339, 339 (1990) (noting strong likelihood of using human-based ethical concepts to address ethics of nature); Tom Regan, *The Nature and Possibility of an Environmental Ethic*, 3 ENVTL. ETHICS 19, 19 (1981) (surveying various objections to an intrinsic worth theory of environmental ethics and ultimately questioning whether a rationally coherent theory of this type is possible).

subject. In turn, the entire concept of intrinsic worth may be nothing more than a conceptual sham—a construct premised on inherent value that in actual operation relies substantially on external assessment. As a practical matter, moreover, if extrinsic valuation is effectively the animating force of this rationale, then to what extent can the process of using an intrinsic worth model really be differentiated from a model such as Carter's that overtly engages in extrinsic valuation? At the theoretical level, of course, this is a difficult critique to counter, for it raises a host of epistemological questions that exceed the scope of this Essay. At the practical level, however, it is much less problematic. Once again, we must remember that the state need only assume an agnostic posture and that its adoption of an intrinsic worth conception of free exercise need only require it to proceed as if religious claims might be true. The critical element, in other words, is the relative orientation of the decision-maker—or, in practical terms, the placement of the burden of persuasion—and not the decision-maker's actual acceptance of religious reality or truth. Therefore, while extrinsic judgments will no doubt seep into the analysis, perhaps even judgments regarding social utility, the outward orientation prescribed by the intrinsic worth model—away from the state's interests toward the potentiality of the sacred—will at least keep such judgments to a minimum.

CONCLUSION

As this Review Essay has made evident, I disagree strongly with Carter both as to the methodology of his empirical efforts and, more significantly, as to the appropriate conceptual framework for religious liberty. At the same time, however, I would hope that my critique does not detract from the considerable remaining value of his provocative and important book, or from the contributions that *The Culture of Disbelief* will no doubt make to our contemporary debate over the proper relationship between religion and government. Significantly, Carter's book is not simply another law-and-religion propaganda tract, written to fan the flames of that already-heated debate. Nor is it a treatise of clear-cut answers, as Carter periodically concedes that some disputes appear to have no acceptable resolution.²²² Rather, it is a book

²²² See, e.g., p. 155 (addressing the propriety of prohibiting certain forms of discrimination by religious institutions that receive governmental funding, where, as

about attitudes—the attitude that we as a political society hold toward religion. . . . It is an effort to understand our instincts and our rules and our rhetoric, to figure out why it is that religion is seen as worse than other forces that mold people's minds, and to try to discover whether there might be a way to preserve the separation of church and state without trivializing faith as we do today.²²⁵

As for the validity of Carter's empirical claim that a culture of disbelief exists, I have argued that the highly relative and subjective nature of the inquiry renders any sort of objective determination extremely difficult. Precisely because the "culture of disbelief" is not some type of self-evident phenomenon, and because it is so contingent on the preconceptions of each reader, any genuine debate over its existence is doomed to stalemate. What is needed, and what this Essay has attempted in part to provide, is a more systematic inquiry into the treatment of religion in public life: the definition of specific relevant phenomena, such as privatization or secularization, as well as a clear statement regarding (and justifying) the ways that such phenomena, if and when observed, ought to be interpreted. Until a methodology of this type is available, it must simply fall upon each reader to pass judgment on the validity and meaning of Carter's proof.

The more interesting realm of Carter's book, in fact, is not the empirical but the normative. His general theory of religion and government, premised on the role of religions as mediating institutions, would appear to provide one viable paradigm for justifying and understanding religious participation in our law and politics. There should be some concern, of course, that his model may encourage an instrumentalist perception of religious political participation, but such a perception is arguably an inevitable part of the political realm and should not be problematic to the extent it remains limited to that realm. Likewise, Carter's theory appears to provide a reasonable interpretation of the Establishment Clause, one that is highly significant insofar as it reemphasizes the need to protect religion from the state no less than the state from religion. Indeed, at a time when the state is becoming increasingly pervasive and secular, it is important that the religious stake in the separation of religion and government not be lost amidst concerns over

in the case of sexual orientation, there is no clear-cut social consensus as to whether or not such discrimination is wrong).

²²⁵ P. 15.

endorsement, effect, or coercion. But Carter necessarily falls short when he extends his mediation theory into the realm of free exercise, particularly at the exclusion of other free exercise concerns and justifications. His attempt to ground the importance of free exercise in relation to the social utility of religion, while logically consistent with his overarching theory of religion and government, is simply inadequate to protect the diversity of religious beliefs and practices that exist in contemporary society. Even more serious, the reduction of religious liberty to instrumentalist terms may bring about an assortment of adverse cultural consequences, including changes in the ways citizens perceive their own religious commitments and their place in our political culture.

In an ironic way, of course, Carter's theoretical shortcoming has proven quite valuable, for it has invited serious consideration of why free exercise should merit special constitutional treatment at all. This Review Essay has argued that if religious free exercise is to receive meaningful protection, at the very least it must be understood in terms of its intrinsic worth. Under such a view, religious liberty should be protected because it encompasses the inalienable right of each person to realize and to fulfill his or her relationship to the sacred—independent of, and indeed prior to, the claims of the state. This Review Essay has further argued, however, that when interpreting the Free Exercise Clause we must avoid the temptation to reduce its essence to a single rationale—including that of intrinsic worth. Instead, the constitutional guarantee of free exercise must receive its meaning and vitality from a multiplicity of rationales, which may collectively provide the breadth of protection necessary for the diversity of religious traditions that today exist in the United States. Without such protection, we risk jeopardizing the role of the sacred in the lives and aspirations of citizens. And without the sacred, we risk becoming—in the true sense of the term—a culture of disbelief.