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"RELIGION-NEUTRAL" JURISPRUDENCE: AN EXAMINATION OF ITS MEANINGS AND END

L. Scott Smith*

INTRODUCTION

The United States Supreme Court has in recent years, more than ever before, rested its jurisprudence of religion largely upon the notion of neutrality. The free exercise of religion, the Court has asserted, does not guarantee a person the right, based upon religious observance, to violate a law that is religiously *neutral* and of general applicability.[1] The nonestablishment norm of the Constitution is accordingly

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* M.Div., Austin Presbyterian Theological Seminary; Ph.D., Columbia University; J.D., Texas Tech University. This Article is dedicated to Professors Kenneth Benson, Brick Johnstone, and Jill Raitt, with whom I enjoyed many inspiring conversations while I was a senior fellow in law at the University of Missouri's Center for Religion, the Professions, and the Public, from January through May, 2004.

[1] Employment Div. v. Smith, 494 U.S. 872 (1990). Michael W. McConnell correctly predicted in 1992 that, since *Smith*, with its emphasis upon neutrality, represented the Court's position on the Free Exercise Clause, "it is to be expected that the Court will soon reinterpret the Establishment Clause in a manner consistent with *Smith*." Michael W. McConnell, *Religious Freedom at a Crossroads*, *in* THE BILL OF RIGHTS IN THE MODERN STATE, 115, 166 (Geoffrey R. Stone et al. eds., 1992). He presciently added, "[t]he most logical step would be to read both clauses as embodying a formal neutrality toward religion." *Id.* McConnell identifies, in my opinion inaccurately, Justice Scalia's view with that of Philip B. Kurland, who argues that the two clauses should be "read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden." PHILIP B. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 18 (1962). Kurland's approach best represents that of classical liberalism, in which the state's stance is one of intentional indifference toward the religious, while the Justice's position represents one which is aptly described as de facto establishmentarianism. *See also* McConnell, *supra*, at 166; L. Scott Smith, *Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2005). It bears noting that Carl Esbeck argues that the "*Smith* Free Exercise case does not affect how the Establishment Clause is construed." Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 901 (2001). He contends that religion-neutral jurisprudence means two different things depending on which religion clause is interpreted. *Id.* at 901–02. Conflating the two meanings is, he states, "another pseudocomplexity." *Id.* at 902. Certainly, the concept of neutrality has implications for free exercise that it does not have for establishment, and vice versa. If this is the thrust of Esbeck's point, then it is obvious and trivial. If he is contending, on the other hand, that one is prudent to use the idea of neutrality to interpret the nonestablishment norm, but is misguided to use it to illuminate free exercise, then one must

not violated so long as state aid to an instrumentality of religion is allocated on the basis of *neutral* criteria, neither favoring nor disfavoring religion, and is available to both religious and secular beneficiaries on a nondiscriminatory basis.[2] Furthermore, when a *neutral* government program provides aid directly to a broad class of individuals who subsequently direct the aid to religious institutions, there is no violation of the Establishment Clause.[3] In addition to these recent pronouncements, the Court has reaffirmed the rather long-standing principle that government policies *neutral* toward religion, although incidentally benefitting it, are permissible under the Establishment Clause.[4] The most compelling question arising from such judicial positions is whether the concept of neutrality is essential, even helpful, to formulating a jurisprudence of religion. My answer to this question is in the negative. I am inclined to reinforce Rawls's assessment, "that the term *neutrality* is unfortunate[, because] some of its connotations are highly misleading, [while] others suggest altogether impracticable principles,"[5] by maintaining that the meanings of the term considered in this Article are, one and all, both misleading and impracticable.

Neutrality is an instrumental, or second-order, value.[6] When considering its meaning in any particular context, one must invariably ask: "Neutral how and as to

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regard his contention as not only unprincipled, but also as wreaking havoc on the notion of the neutral state. Why would a state, which regards it as virtuous being neutral toward competing religious ideas and practices, declare through its judiciary that this virtue is to be embodied for purposes of establishment, but ignored for those of free exercise? The troubling historical and philosophical concerns that such a question raises are far from "pseudocomplex."

[2] Mitchell v. Helms, 530 U.S. 793 (2000).

[3] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[4] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (holding that when religious expression takes place on government property that is opened to the public for speech, and permission is requested through the same religiously neutral application process and terms as required of other private groups, a religious applicant has the same rights as any other group under the Establishment Clause); Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding as religiously neutral under the *Lemon* test a federal statute authorizing grants to public and/or private organizations providing services and research in the area of premarital adolescent sexual relations and pregnancy against an Establishment Clause challenge); Witters v. Wash. Dep't of Serv. for the Blind, 474 U.S. 481 (1986) (holding that state aid directly paid to a blind student who was attending a Christian college was religiously neutral and not a violation of the Establishment Clause); Mueller v. Allen, 463 U.S. 388 (1983) (upholding as religiously neutral a Minnesota statute allowing taxpayers to deduct certain expenses incurred in providing for the education of their children, whether attending public or nonpublic schools); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday "blue laws" as an incidental benefit to Christianity).

[5] JOHN RAWLS, POLITICAL LIBERALISM 191 (1996).

[6] Robert E. Goodin & Andrew Reeve, *Liberalism and Neutrality*, *in* LIBERAL NEUTRALITY 1, 4 (Robert E. Goodin & Andrew Reeve eds., 1989).

what?" This question suggests that, in a political context, the content of the term depends upon the theory of state responsibility one espouses. One may clarify this principle by turning to business. If an individual adopts a laissez-faire approach to commercial activity, neutrality will stand for little or no state intervention. If yet another individual accepts a socialist theory of economics, neutrality will include a vast amount of state involvement in the means of production and in issues of distributive justice. Political theory is, in other words, intricately bound up with the particular meaning assigned to the term "neutrality."

Elsewhere I have advanced a jurisprudence of religion typology,[7] in which a political theory corresponds to a particular type of jurisprudential position. I propose in the present Article to elucidate the constitutional meanings of neutrality by utilizing the same typology. A caveat is in order. The typology is intended only as a vehicle by which to explore the various political meanings of neutrality in the jurisprudence of religion and should be judged in this instance solely upon the basis of whether it succeeds in accomplishing that goal. A typology is nothing more than a way to understand what is. The central concern of this Article is the illumination of the United States Supreme Court's jurisprudence of religion rather than an attempt, which would certainly be grandiose and misguided, to demonstrate that the history of Supreme Court jurisprudence must always imitate some theory of understanding it. The fact is that the judicial opinions of a single Justice can be, and often are, impossible to reconcile on philosophical grounds. A typology, even if it does nothing else, can bring this stubborn fact into clear focus.

The typology may be set forth as follows:

[7] *See* Smith, *supra* note 1.

	ESTABLISHMENT	
FREE EXERCISE	*Accommodationism (Positive Neutrality)*[8]	*Separationism (Negative Neutrality)*[9]
Narrow	De Facto Establishmentarianism: Neutrality as undertaking or justifying political action on the ground that it neither promotes nor enables individuals to advance a religious idea or practice, unless there is a valid independent reason other than favoring or hindering the same[10]	Classical Liberalism: Neutrality as intentional indifference by the state toward the religious
Expansive	Revised Liberalism: Neutrality as the state ensuring for all citizens equal opportunity to advance in the public square any permissible religious idea or practice they freely affirm[11]	Communitarianism: Neutrality as intentional non-interference by the state with the religious

The correlation of jurisprudential positions with political theories is as follows: (1) separationism and narrow free exercise, corresponding to the theory of classical liberalism; (2) separationism and expansive free exercise, exemplifying the theory of communitarianism; (3) accommodationism and expansive free exercise, characterizing the theory of revised liberalism; and (4) accommodationism and narrow free exercise, denoting the theory of de facto establishmentarianism.[12]

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[8] Peter Jones, *The Ideal of the Neutral State*, *in* LIBERAL NEUTRALITY, *supra* note 6, at 9, 20. Jones's distinction between "positive" and "negative" neutrality parallels and recalls the one made by Isaiah Berlin between "positive" and "negative" freedom. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118–72 (1969).

[9] Jones, *supra* note 8, at 19.

[10] For this formulation I am indebted to Joseph Raz's critical discussion of Robert Nozick's view of neutrality. Raz correctly observes that this principle "is not a [true] principle of neutrality." *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 114–17 (1986); *see also infra* note 280.

[11] I am indebted here to John Rawls's treatment of the issue of neutrality. RAWLS, *supra* note 5, at 192–93.

[12] Gedicks contends that the Court has spoken of the religion clauses of the First Amendment in terms of two kinds of "discourse," which are "secular individualist" and

I will now attempt to demonstrate that in classical liberalism the meaning of neutrality is "intentional indifference by the state toward the religious," whereas in communitarianism, neutrality is understood in a similar fashion, but with a hugely different nuance, as the "intentional non-interference by the state with the religious." Both meanings of the term denote a "negative neutrality,"[13] in accordance with which the state is disinclined to intervene in religious matters. In the spirit of revised liberalism, especially that of some of the "new religionists" within its ranks, neutrality is best interpreted as "the state [ensuring] for all citizens equal opportunity to advance [in the public square any permissible religious idea or practice] they freely affirm."[14] In de facto establishmentarianism, neutrality can properly be described as undertaking or justifying political action on the ground that it neither promotes nor enables individuals to pursue a religious idea or practice, unless there is a valid independent reason other than favoring or hindering the same.[15] These two definitions of the term suggest a "positive neutrality,"[16] in which the state actively intervenes in religious matters.

A second caveat is in order. The meanings of neutrality, which are defended under the typology, are not necessarily those to which philosophers and Supreme Court Justices have given explicit utterance. One must often read between the lines and proceed in the reverse direction by asking: "Given the fact that the individual

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"religious communitarian." The latter, he maintains, exemplifies a nineteenth-century understanding of church-state relations, while the former describes the prevailing twentieth-century understanding. *See* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 8–24 (1995). His analysis is insightful so far as it goes, although the term "discourse" tends to conceal the hard fact of the matter: the Court is concerned with competing political visions. It is primarily the Justices' political proclivities, as unsystematic and eclectic as they sometimes are, that pervade the Court's decisions in religion cases. Gedicks likewise fails to distinguish between communitarianism and de facto establishmentarianism. *Id.* at 63. It is true that communitarianism can be imperialistic and totalitarian and, when conceived on a national basis, is identical with establishmentarianism, which rests upon an accommodationist theory of the Establishment Clause. Yet there are other manifestations of communitarianism, e.g., those which issue in sectarianism but not in establishment, which are predicated upon a separationist theory of the Clause. A similar observation may be made concerning "secular individualist" discourse, which can spring either from classical liberalism or what I term "revised liberalism." Each implicates the religion clauses in its own way. I therefore must disagree with Gedicks when he writes of these forms of discourse, "[a]t present, secular individualism and religious communitarianism are the only two imaginable alternatives." *Id.* at 123. At worst the statement is misleading and, at best, it is an oversimplification.

[13] Jones, *supra* note 8, at 19.

[14] RAWLS, *supra* note 5, at 192. Rawls uses the term "permissible" to signify those comprehensive ideas and conceptions of the good that are compatible with the principles of justice he espouses. *Id.* at 192–93.

[15] *See* RAZ, *supra* note 10, at 114–17.

[16] Jones, *supra* note 8, at 20.

in question has made such statements, what am I to conclude about his or her conception of neutrality?" Moreover, in some instances, there may be inconsistencies between what a writer leads us to believe neutrality is as opposed to the meaning given to the term in application to concrete factual situations. This disconcerting state of affairs merely demonstrates that the notion of neutrality has often been treated in a less than systematic way by those who appeal to it and has, without surprise, resulted in confusion.

The overriding goal of this Article is to explain and analyze these four types of neutrality. This task is accomplished by appealing to leading political theorists for enlightenment whenever possible and also to case law. Between the negative and positive meanings of neutrality there is of course a continuum of intermediate meanings. One can aptly understand them insofar as one grasps the fundamental definitions at the corners of the continuum.

I. CLASSICAL LIBERALISM: NEUTRALITY AS INTENTIONAL INDIFFERENCE TOWARD THE RELIGIOUS

A. *Distinctive Emphases of Classical Liberalism*

The term "classical liberalism" arguably may be used to encompass a number of historical as well as present-day political and social ideologies, carving an arch from the tradition of humanism in the Renaissance, through the work of seventeenth, eighteenth, and nineteenth century thinkers such as Hobbes, Locke, Rousseau, Kant, and Mill, and touching contemporary liberal thinkers such as John Rawls, Ronald Dworkin, and Bruce Ackerman.[17] However one may choose to analyze the most subtle nuances of classical liberalism, or whichever thinkers and movements one may wish to include within its parameters, the philosophy contains indubitable themes which continue to bubble to the surface of any exposition to uncover its content. The dignity of the individual, the freedom from oppressive heteronymous authority, and the bold distinction between public and private life are distinctive emphases of this philosophy. When these are combined to address the subject of religion, the result is a political point-of-view that (1) uproots religious thought from the public sphere where state policy is debated and decided, and transplants it into

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[17] Rawls, Dworkin, and Ackerman probably are not best described as classical liberal theorists, although they have been profoundly influenced by classical liberalism. Classical liberal theory was summarized by Locke as "life, liberty, and property" and often rode in tandem with laissez-faire capitalism. Rawls, Dworkin, and Ackerman are certainly not economic libertarians seeking to "release human energies from the fetters of a feudal and mercantilist past. . . . [Instead, they seek] to liberate the disadvantaged from the stultifying effects of discrimination and economic hardship." PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 373–74 (1992). Theirs is a "welfare liberalism." *Id.* at 386.

the personal and private sphere where thoughts, feelings, and desires predominate, (2) extols individual autonomy and the right to choose one's own "good" over that which is delivered to us once and for all by external authority, and (3) is generally critical of religious doctrine that is defended solely on the basis of divine revelation or commended to adherents and others chiefly by tradition. The net effect of the classical liberal perspective is to marginalize religion, especially those of the historical variety, by adopting an attitude of neutrality as intentional indifference toward them.[18]

B. Exemplars of Classical Liberalism

Two exemplary thinkers of the classical liberal tradition are Immanuel Kant, whose critical philosophy was a momentous event in Western thought, and John Stuart Mill, whose essay *On Liberty*,[19] continues to be hailed as a masterpiece of

[18] Jeremy Waldron makes the captivating point that formulating the liberal position in terms of "neutrality" is a recent phenomenon. *See* Jeremy Waldron, *Legislation and Moral Neutrality*, *in* LIBERAL NEUTRALITY, *supra* note 6, at 61. When considerating Ronald Dworkin's position that legislators should be neutral on the issue of what constitutes the good life, Waldron states, "I am not aware of the use of this image [of neutrality] by any liberal writer to express such a position prior to 1974." *Id.* at 62. One wonders whether Waldron considers Justice Hugo Black a "liberal writer," for he certainly used the term to express such a position in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). If Waldron is correct, one may conjecture that the term has been avoided precisely because it presents a host of problems, not the least of which is its inherently ambiguous nature.

[19] JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) [hereinafter MILL, Rapaport ed.]. I am mindful that some, like Alan Ryan, do not associate Mill with classical liberalism. *See* Alan Ryan, *Liberalism*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 291 (Robert E. Goodin & Philip Pettit eds., 1995). They attach that moniker to those such as John Locke, Adam Smith, Alexis de Tocqueville, and Friedrich von Hayek because such thinkers are "hostile to the welfare state" and skeptical about "advances in morality and culture." *Id.* at 293. Mill, they regard by contrast, as a modern liberal, because he "appeal[s] to 'man as a progressive being'" and exhibits a "romantic appeal to an individuality which should be allowed to develop itself in all its 'manifold diversity.'" *Id.* at 294 (quoting MILL, Rapaport ed., *supra*, at 55). *Cf.* Stefan Collini, *Introduction* to JOHN STUART MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM, at vii (Stefan Collini ed., 1989). Certainly, John Locke's *Two Treatises on Government* stands for one of the foundational premises of classical liberalism, i.e., that government must rest upon the consent of the governed, and Adam Smith's *Wealth of Nations* is likewise the classical liberal defense of the proposition that the state should leave individuals alone to pursue their own economic self interest. *Id.* I would argue, with Collini, that "insofar as liberalism in the modern world could be said to acknowledge one text as setting out its essential moral basis, several generations of readers have concurred in according that primacy to *On Liberty*." *Id.* In that sense, the text towers above all others and is, in my view, a statement of classical liberalism's moral posture. I further agree with Collini that it is a mistake to confuse the main issue of *On Liberty*, namely, "the place of liberty and

political and social philosophy. Between these two thinkers, the reader can acquire a taste for the way this tradition treats its distinctive themes.

1. Mill and the Autonomous Pursuit of the Good

Mill's essay sings praises to individualism and to the liberty of choice. By cultivating them, he believed that society would progress toward enlightenment as well as increased happiness. "The initiation of all wise or noble things comes and must come," he asserted, "from individuals; generally at first from some one individual."[20] For Mill, autonomy and individualism often translated into sheer eccentricity.

> Eccentricity has always abounded when and where strength of character has abounded; and the amount of eccentricity in a society has generally been proportional to the amount of genius, mental vigor, and moral courage [which is] contained. That so few now dare to be eccentric marks the chief danger of the time.[21]

Mill emphasized that the "human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice."[22] The sway of custom and tradition in religious matters militate against individual choice and pose a decided threat to civilized society and to human happiness. Mill contended that the only freedom that deserves the name is that of pursuing our own good in our own way, "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it."[23]

2. Mill on the "Public" and the "Private"

Because society can scarcely afford a regressive slide into darkness, individualism should be encouraged, and anything an individual does that does not harm others should be solely of one's private concern. The public at large possesses no right of veto. Indeed, society can never be sure, when it suppresses a point of view, that "the opinion [it is] endeavoring to stifle is a false opinion; and if [it] were sure, stifling it would be an evil still."[24] Mill reasoned that, if the opinion happens

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individuality in human flourishing," with Mill's position on the degree to which the state should intervene in economic matters. *Id.* at xv–xvi.

[20] MILL, Rapaport ed., *supra* note 19, at 63.

[21] *Id.* at 64.

[22] *Id.* at 56.

[23] *Id.* at 12.

[24] *Id.* at 16.

to be correct, society is deprived of the opportunity of replacing its false notion with a truthful one, while if the opinion is wrong, society is denied the benefit of having a "livelier impression of truth produced by its collision with error."[25]

3. Mill and Religion

Mill regarded many issues of a religious and moral nature as matters of personal choice rather than public ones subject to majoritarian rule. He was impelled by the value he placed on autonomy and personal choice to admonish teachers, for example, to refrain from making authoritative pronouncements on religious issues. He insisted that

> diversity of opinion among men of equal ability, and who have taken equal pains to arrive at the truth. . . . should of itself be a warning to a conscientious teacher that he has no right to impose his opinion authoritatively upon a youthful mind. . . . The pupil should not be addressed as if his religion had been chosen for him, but as one who will have to choose it for himself.[26]

Supernatural religion, he argued, has outlived its usefulness. Supernaturalism is no longer necessary for religion to gain acceptance. A natural religion, derived from reason, would cultivate unselfish feelings and would liberate people from the obscurantism associated with supernatural claims.[27]

4. Summarizing Mill

Mill's attempt to safeguard individualism and personal choice, to liberate citizens from the heteronymous chains of custom and tradition so that they can search for their own conception of the good, and to bring logic and reason fully to bear upon religion, reflects distinctive emphases of classical liberalism.

5. Kant's Influence and the Values of Classical Liberalism

There is perhaps no thinker whose work embodies, and even glorifies, the most salient themes of this tradition more than that of Immanuel Kant. The influence of

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[25] *Id.*

[26] JOHN STUART MILL, *Inaugural Address*, *in* MILL'S ESSAYS ON LITERATURE AND SOCIETY 353, 399 (J. B. Schneewind ed., 1965).

[27] J. B. Schneewind, *John Stuart Mill*, *in* 5 THE ENCYCLOPEDIA OF PHILOSOPHY 314, 321–22 (Paul Edwards ed., 1967); *see also* 8 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 50, 88–92 (1966).

his thought has been deep and far-reaching throughout the West. He is one of those thinkers about whom it truly can be said that nothing was ever the same after he wrote. While no one can deny the immense influence of John Locke, direct and incomparable, upon the Framers of the United States Constitution, it is arguably Kant's thought that best elucidates and provides the most gripping justification of the fundamental themes of classical liberalism. These themes are underscored in his critical philosophy as well as in his later political writings. As time goes on, his giant shadow lengthens, as is demonstrated by the profound influence his thoughts had on perhaps the most acclaimed liberal theorist of our time, John Rawls.[28]

The overarching problem to which Kant primarily gave himself was that of understanding the limits of reason. He was impressed that one metaphysical system after another had been formulated over the centuries with radically divergent, but well-reasoned doctrines, such as those of God, immortality, purpose, and freedom. Each system had been intransigently defended, yet such systems seemed to him to litter the pages of intellectual history as so many abandoned carcasses, without definitive disposition having been made of any of them.[29]

6. Kant's Dichotomization of Reason

Fundamental to Kant's analysis of reason is the distinction between "phenomena" and "noumena."[30] Phenomena he described as "[a]ppearances, so far

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[28] *See* JOHN RAWLS, A THEORY OF JUSTICE 251–57 (1971) (writing of "The Kantian Interpretation of Justice as Fairness"). Indeed, it may, with some justification, be said that throughout Rawls's work he is in conversation with Kant.

[29] *See* IMMANUEL KANT, CRITIQUE OF PURE REASON (Norman Kemp Smith trans., St. Martin's Press unabr. ed. 1964) (1787) [hereinafter KANT, PURE REASON]. A typical statement by Kant concerning the enterprise of speculative metaphysics is the following:

> So far, too, are the students of metaphysics from exhibiting any kind of unanimity in their contentions, that metaphysics has rather to be regarded as a battle-ground quite peculiarly suited for those who desire to exercise themselves in mock combats, and in which no participant has ever yet succeeded in gaining even so much as an inch of territory, not at least in such manner as to secure him in its permanent possession. This shows, beyond all questioning, that the procedure of metaphysics has hitherto been a merely random groping, and, what is worst of all, a groping among mere concepts.

Id. at 21; *see also* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 20–27 (Lewis White Beck trans., Bobbs-Merrill Co. 1950) (1783) [hereinafter KANT, PROLEGOMENA]. Kant states, "There is no single book to which you can point as you do to Euclid, and say: 'This is metaphysics; here you may find the noblest objects of this science, the knowledge of a highest being and of a future existence, proved from principles of pure reason.'" *Id.* at 20.

[30] KANT, PURE REASON, *supra* note 29, at 257–75.

as they are thought as objects according to the unity of the categories."[31] An appearance, he stated, is a mental representation that possesses both a material and a formal component.[32] The material component consists of sense data, such as colors, smells, and tastes, and comprises that which is given to the mind from outside itself. The formal component consists of the *a priori* ways in which the mind receives what is given.[33] Any manifold of sense impressions is assimilated by the mind into our individual consciousness to appear as a single object in space and time,[34] ordered relationally to other such objects by categories of the understanding such as cause and effect.[35] The application of intellectual categories to intuitions of sense is made possible by "*schemata*," which are transcendental determinations of time, homogeneous with intuitions (as they are contained in time), as well as with the intellect (because it is universal and *a priori*).[36] The primary point at this juncture in Kant's analysis is that phenomenal objects comprise the sole content of theoretical knowledge. Phrased another way, theoretical (or scientific) knowledge contains not only an intellectual element, but also a sensible one. As Kant himself expressed it, "[t]houghts without content are empty, [and] intuitions without concepts are blind."[37]

The particularity of an appearance, for example, that it is blue rather than red or circular rather than square, is accounted for by that which appears, or by the thing-in-itself, which is the most notable limiting concept in Kant's thought.[38] He emphasized that we can know a thing only insofar as it appears, not as it is in itself.[39] This means that in his critical treatment of reason, he is led to an indeterminate something in general, which lies behind appearances and accounts for their objectivity. These are "intelligible entities" or "noumena."[40] No theoretical knowledge of them is possible, because noumena *qua* noumena can never be objects of sense.[41] That distinction belongs to appearances alone.[42]

This dichotomy between what is theoretically knowable and unknowable has had enormous influence in Western thought and culture. The phenomena/noumena divide is translatable into the public and private spheres hailed in classical

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[31] *Id.* at 265.
[32] *Id.* at 65–66.
[33] *Id.*
[34] *Id.* at 70–78.
[35] *Id.* at 172.
[36] *Id.* at 181.
[37] *Id.* at 93.
[38] *Id.* at 74.
[39] *Id.* at 266–67.
[40] *Id.* at 267.
[41] *Id.* at 162.
[42] *Id.*

liberalism. In an important critical essay entitled *What is Enlightenment?*,[43] Kant drew the latter distinction himself. He wrote of the differences between "public" and "private" reason and did so, in large part, by referring to religious teachings.[44] He explained that, while a clergyman may, in private, teach the doctrines of his religion to a congregation, the same clergyman may, as a scholar, in the public use of his reason, question and criticize the same doctrines.[45] The public sphere is one in which decisions are justified by appeal to reasons accessible to everyone; it is that realm where the sciences flourish, where empirical knowledge is possible, and where the enlightenment of the human race occurs.[46] The private sphere, by contrast, is one of thought, opinion, and faith; it is one where the transcendent ideas of religion and speculative ideologies reign supreme, where institutional authorities, like the church, dictate one's duty.[47] Since confusing the phenomenal and noumenal domains is based upon nothing short of an epistemological "illusion,"[48] it is fair to say that confusing the public and private spheres recapitulates that error.

7. Kant's Marginalization of Religion

Because religious ideas cannot, for Kant, rise to the level of theoretical knowledge, their competing truth-claims can never be cognitively determined. It follows that, while a particular set of religious doctrines may enrich a person's or a group's life, it may be vehemently rejected by another. All such claims on their theoretical side boil down to expressions of mere opinion.[49] The challenge now, as

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[43] Immanuel Kant, *What is Enlightenment?*, *in* FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 85, 85–92 (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785) [hereinafter Kant, *Enlightenment*].

[44] *Id.*

[45] *Id.* at 88–89.

[46] *Id.* at 86–87.

[47] *Id.* at 88–89.

[48] KANT, PURE REASON, *supra* note 29, at 99, 298–99.

[49] *See* KANT, PROLEGOMENA, *supra* note 29, at 24–25. Ernst Cassirer emphasized that the Enlightenment, of which Kant was a proponent in Germany, attempted "to emancipate religion from the domination of the understanding." ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 165 (Fritz C. A. Koelln & James P. Pettegrove trans., Beacon Press 1951) (1932). By that, Cassirer meant that religion is not to be regarded as "a mere acceptance of certain theoretical propositions." *Id.* This acceptance, he believed, sadly limits religion. "Such a limitation," he continued, "is neither possible nor desirable because it would change religion into mere opinion, and thus deprive it of its real moral and practical force." *Id.* I am not contending that, for Kant, religion is nothing but opinion, for there is clearly a practical and moral dimension to which religion belongs. What I am maintaining is that, for Kant, religious claims do not partake of theoretical knowledge and are diminished and banished to a separate, and what many might regard as an inferior, sphere of concern. Gedicks makes a point similar to mine when he addresses the issue of this country's "hostility to religion," but he traces the public-private distinction to the Lockean theory of

in Kant's time, concerns how to foster maximal human freedom and to honor a broad diversity of religious beliefs, all in the context of a single political state. The conclusion is not far to be found: the heteronymous ties of religious conviction can predominate in the private sphere, while the autonomous pursuit of enlightenment holds sway in the public sphere.

The dichotomies made famous by Kant have played a quite significant role in the classical liberal state's marginalization of religion. Importing religious claims into the public sphere, so the reasoning goes, results in disagreement, which in turn causes an imposition upon conscience and political divisiveness. Although religious concerns arise naturally from reason, they are intrinsically nonadjudicable and belong to one's inner, private life and not to the body politic. So long as religion remains a personal affair, the state's attitude toward it is rightly one of intentional indifference.

8. Kant on Religious Intolerance and the Autonomy of the Individual

Kant was well aware of the severity of religious mischief. Classical liberals frequently call attention to the painful experience of war in Europe, where 500,000 Protestants, Jews, and Moors fled as religious refugees from Spain between the fifteenth and seventeenth centuries, where 260,000 Protestants were forced to escape from France and the Netherlands during the fifteenth, sixteenth, and seventeenth centuries, and where German Catholics and Protestants were each compelled to take

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natural rights, which he contends mirrors the division in Western thought between subject and object. *See* Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 674–75 (1992). Citizens, in other words, possess inalienable rights, which are held independently of the state. Permissible government action (public life) cannot justifiably invade the boundaries of the sphere of individual rights (private life). *Id.* at 674–75. Gedicks goes on to explain that positivism usurped the position of natural law theory, with the result that public actions now must be justified empirically or rationally by reference to phenomena of the exterior world. *Id.* Certainly, a number of intellectual influences can contribute to the same effect. Yet I find Gedicks's argument that public "hostility to religion" stems from Locke's natural rights theory strangely curious, especially when Locke regarded himself as a Christian, saw merits in the competing claims of various religious groups, believed that the existence of God could be rationally demonstrated, and at the time of his death was working on Pauline commentaries as well as the draft of a fourth *Letter on Toleration*. James Gordon Clapp, *John Locke*, *in* 4 THE ENCYCLOPEDIA OF PHILOSOPHY 487, 501 (Paul Edwards ed., 1967). The public-private distinction is admittedly present in Locke's work, although hardly in a way that appears to prejudice religion. One should not forget that logical positivism, with its narrow criterion of meaning, was a twentieth-century development, *see* JAMES A. MARTIN, JR., THE NEW DIALOGUE BETWEEN PHILOSOPHY AND THEOLOGY 55 (1966), that had as much, if not more, to do with Kant's philosophy as with Locke's, *see id.* at 21–29. Gedicks's analysis appears, unfortunately, to overlook Kant's influence altogether.

refuge in their respective German sanctuaries during the sixteenth century.[50] European history is replete with conflicts occasioned by deep-seated religious disagreement.[51] The problem of religious intolerance continued in colonial America.

For Kant, progress lay in enlightenment, which he thought was conducive to intellectual freedom and self-determination; so the classically liberal solution to the problem of religious intolerance is to create a state in which the individual's autonomy is honored. No longer should government impose religious doctrine upon its citizens and compel them to worship at any altar other than the one of their choosing. The individual citizen must be free from the religious choices of others.[52]

9. Kant on Religion and Reason

Classical liberalism promotes the spirit of individual autonomy. Militating against this value are beliefs imposed by a doctrinaire and superstitious religious tradition and establishment. A thoroughly rational and moral approach to religion breaks the inertial force of blind belief in religious doctrine received from tradition-based ecclesial authority.[53]

Kant's analysis of reason in its *theoretical* capacity ended on an agnostic note. He concluded that one cannot attain empirical knowledge in matters of religious concern. Yet he added that one can know in a practical way what he or she cannot

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[50] Marlou Schrover, *Religious Wars in Europe*, History of International Migration Site, *at* http://www.let.leidenuniv.nl/history/migration/chapter21.html (last modified Feb. 22, 2004).

[51] *Id.*

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> A prince who does not find it unworthy of himself to say that he holds it to be his duty to prescribe nothing to men in religious matters but to give them complete freedom while renouncing the haughty name of *tolerance*, is himself enlightened and deserves to be esteemed by the grateful world and posterity as the first, at least from the side of government, who divested the human race of its tutelage and left each man free to make use of his reason in matters of conscience.

Kant, *Enlightenment*, *supra* note 43, at 91.

[53] IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 162–63 (Theodore M. Greene & Hoyt H. Hudson trans., Harper Torchbook 1960) (1794) [hereinafter KANT, RELIGION]. A typical statement of Kant is the following: "It is a superstitious illusion to wish to become well-pleasing to God through actions which anyone can perform without even needing to be a good man (for example, through profession of statutory articles of faith, through conformity to churchly observance and discipline, etc.)." *Id.* at 162. Kant also states:

> Ecclesiastical faith fancies it possible to become well-pleasing to God through actions (of *worship*) which (though irksome) yet possess in themselves no moral worth and hence are merely acts induced by fear or hope — acts which an evil man also can perform. Moral faith, in contrast, presupposes that a morally good disposition is requisite.

Id. at 106.

know empirically. One can derive the ideas of God, freedom, and immortality from morality. Morality, he maintained, is an unmistakable and indisputable fact of human life of which everyone is aware, although the moral law is not a phenomenal reality, but a noumenal one.[54]

Kant called the moral law "the categorical imperative."[55] One of the ways he expressed it was as follows: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."[56] He further asserted that the "moral law is given, as an apodictically certain fact, . . . of pure reason, a fact of which we are *a priori* conscious."[57] That law is predicated upon the reality of freedom but also assumes, less directly as postulates of reason, the reality of God the Righteous Judge and of immortality as a life of extra-terrestrial rewards and punishments.[58]

Moral duties, derived from pure reason and operating in their practical capacity, constitute the essence of true religion whenever such duties are conceived as divine commands.[59] It is fair to state that, while Kant may have been at least nominally a Protestant Christian, he emphasized the power of the individual person as opposed to God, and of life in the present as opposed to the hereafter. Convinced that true religion has a pure rational and moral character, he criticized much of the historical content of Christianity, such as the practice of private prayer, church-going, baptism, and communion.[60]

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[54] IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 6 (Lewis White Beck trans., Bobbs-Merrill Co. 1956) (1788) [hereinafter KANT, PRACTICAL REASON]. Kant maintains that the moral self is about freedom, as noumenon, just as the empirical self of empirical consciousness is about phenomenon. What Kant takes away in the first critique, he gives back in the second, but then only from a moral standpoint. Heinrich Heine, with tongue in cheek, relates that after Kant destroyed the theoretical foundations of religious belief, he saw that his servant, Lampe, was unhappy. So "the great philosopher showed that he was a 'good man'" by writing the second critique in order to restore Lampe's faith. *See* Lewis White Beck, *Introduction* to *id.* at xix.

[55] KANT, PRACTICAL REASON, *supra* note 54, at 19.

[56] IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 47 (Lewis White Beck trans., Bobbs-Merrill Co. 1959) (1785) [hereinafter KANT, FOUNDATIONS].

[57] KANT, PRACTICAL REASON, *supra* note 54, at 48 (emphasis added).

[58] *Id.* at 4. One can be a dedicated disciple of Kant and drop the ideas of God and immortality from one's moral life entirely.

[59] KANT, RELIGION, *supra* note 53, at 142–43.

[60] *Id.* at 181. Karl Barth related that

> when the university of Königsberg was proceeding in solemn procession from the Great Hall to the church for the university service on the *dies academicus* Kant used ostentatiously to step away from the procession just as it was entering the church, make his way round the church instead, and go home.

KARL BARTH, PROTESTANT THOUGHT: FROM ROUSSEAU TO RITSCHL 151 (Brian Cozens trans., 1959).

10. Kant's Political Theory

"The best order," Kant believed, "is one in which the power stems not from men but from laws."[61] It is a "republican" order,[62] where citizens are subject to laws they have made through their own representatives. Kant emphasized that this is an order in which "each man pursues his own happiness and every citizen is free to enter into dealings with every other citizen. It is not the function of government to relieve the private person of this concern."[63] The public principle of right holds sway over each citizen's private desire and search for the good life or personal happiness. The government's preoccupation with happiness invariably leads to political disaster. "The sovereign wishes to make the people happy in his own way, and becomes a despot; the people are unwilling to forego the universal human claim to determine their own happiness and become rebellious."[64]

11. Summarizing Kant and Classical Liberalism

Kant does not use the word "neutrality" to define the relationship between historical religions and the state; it is not necessary for him to do so. The state is indifferent toward the religious. This negative attitude is not in the nature of an afterthought or an appendix, but is rooted in the depths of his epistemology. The point for him is that religion makes truth-claims which cannot be verified by experience. As such, none of its claims stand on par with those of mathematics and science. "Religious truth," it must be remembered, belongs to a noumenal realm about which nothing can be empirically known. The epistemological "phenomena/noumena" dichotomy coincides with the "public/private" divide in political theory.

II. CASE LAW APPLICATION

A. Neutrality and the Everson *Case*

There is no statement of law that highlights the classical liberal attitude toward religion more than the one advanced by Justice Black in *Everson v. Board of*

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[61] JOHN HERMAN RANDALL, JR., 2 THE CAREER OF PHILOSOPHY 180 (1965) (quoting IMMANUEL KANT, *Idee zu einer allgemeinen Geschichte*, *in* 4 IMMANUEL KANT, WERKE 158 (Ernst Cassirer ed., 1922)).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 181.

Education.[65]

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[66]

The relationship between religion and state, according to Justice Black's formulation, is disjunctive. A "wall of separation" should divide state concerns from religious ones.[67] One sphere has nothing to do with the other. What is perhaps most significant is that, according to the Justice's view, it constitutes a violation of the Establishment Clause not only for the state to give preferential treatment to one religion over another, but also to provide any aid whatsoever to any or all religions.[68] Religion, succinctly put, is none of the state's business. The Justice asserts that the First Amendment "requires the state to be . . . *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[69] Justice Black's view of state "neutrality" is one of intentional indifference. The state is to support neither religion nor irreligion because these are in a private sphere over which the state has no concern. The public sphere where elected officials meet and deliberate on public policy is a secular, or religionless, one. Its secular character must be protected at all costs from the imperialistic encroachments of religion.

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[65] 330 U.S. 1 (1947).

[66] *Id.* at 15–16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

[67] *Id.* at 16 (quoting *Reynolds*, 98 U.S. at 164).

[68] *See id.* at 15–16.

[69] *Id.* at 18 (emphasis added).

B. Neutrality and Released Time from Public School

It is Justice Black's view of state neutrality which was reflected in *McCollum v. Board of Education*.[70] The Court, again speaking through him, struck down as a violation of the Establishment Clause, a voluntary "released time" program in Illinois public schools.[71] The Court reasoned that the program utilized a tax-supported public school system to assist religious groups to propagate their faith.[72] The majority believed that, in order to foster the program, the state and religious organizations were being required to maintain too close a working relationship with each other.[73] The private sphere was shading, however incrementally, into the public one and, as such, was a threat to secularism. Justice Black re-emphasized that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[74]

C. Neutrality and School Prayer Decisions

The same reasoning is at work in the school prayer decisions. In these cases, the Court has invalidated state-sponsored prayer in public school classrooms and related school activities. The classical liberal themes are accentuated in these cases.

In *Engel v. Vitale*,[75] a short nonsectarian prayer, composed by the New York State Board of Regents for voluntary recital by public school children, was outlawed. Justice Black, writing for the majority, stressed that neither the state nor the federal government is endowed with the "power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."[76] The Justice's words are a way of stating that, for Establishment Clause purposes, there is a structural disconnection between religion and state. The two comprise separate and distinct spheres, one being public, and the other personal and private. Attempts to connect the two, Justice Black declared, result in political divisiveness. The autonomy of the individual, he pointed out, is likewise violated by any such attempt, for "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[77]

Justice Clark, writing for the majority in *School District of Abington v.*

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[70] 333 U.S. 203 (1948).

[71] *Id.*

[72] *Id.* at 209.

[73] *Id.*

[74] *Id.* at 212.

[75] 370 U.S. 421 (1962).

[76] *Id.* at 430.

[77] *Id.* at 431.

Schempp,[78] which invalidated the devotional recitation of the Lord's Prayer and the reading of the Bible in public schools, quoted with approval Justice Black's words in *Everson* that the First Amendment "requires the state to be a neutral" in religious matters.[79] Clark additionally quoted from Justice Rutledge's remarkable dissent in the same case:

> The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. *It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.*[80]

Justice Clark took pains to clarify that studying the history of religion, comparative religion, or the Bible is not outlawed in public schools so long as the study is "presented objectively as part of a secular program of education."[81] Religious or devotional activity[82] thus has no place in the public square, because the public domain is secular. State neutrality toward the religious, at least for Justice Clark, boiled down to its banishment from public life.[83] In the public sphere, where knowledge is supreme, the religious has no place. Public officials are to be intentionally indifferent to all religious claims.

In *Santa Fe Independent School District v. Doe*,[84] the Court declared it a violation of the Establishment Clause for a student chaplain to pray at home football games. The practice was "coercive"[85] because attendees were compelled to participate when doing so violated their rights of personal autonomy. School sponsorship of the activity sent a message to "members of the audience who are nonadherents 'that they are outsiders.'"[86] Religious activity in publicly sponsored

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[78] 374 U.S. 203 (1963).

[79] *Id.* at 218 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).

[80] *Id.* at 217 (quoting *Everson*, 330 U.S. at 31–32 (Rutledge, J., dissenting) (emphasis added) (alteration in original)).

[81] *Id.* at 225.

[82] It should be noted that the "religious" is distinguishable from "religion," which Justice Clark states may be studied in a secular manner. *Id.*

[83] *See id.* at 225–26.

[84] 530 U.S. 290 (2000).

[85] *Id.* at 310.

[86] *Id.* at 309–10 (quoting Lynch v. Donnelly, 465 U. S. 668, 688 (1984) (O'Connor, J., concurring)).

events was therefore regarded as divisive.[87]

The Court, in *Lee v. Weisman*,[88] held that a public school's request of a rabbi to give a nonsectarian prayer at a graduation ceremony was a violation of the Constitution's nonestablishment provision. The majority found the proposed activity coercive and politically divisive,[89] while Justices Souter, Stevens, and O'Connor, in a concurring opinion, took the *Everson* position that fostering particular acts of religion, or even favoring religion in general, constitutes an establishment violation.[90]

This discussion of case law is intended to illustrate, in an admittedly abbreviated fashion, how the fundamental themes of classical liberalism are embodied in our "nonestablishment" jurisprudence. The transition from liberal values espoused by Kant and Mill to the jurisprudence of religion in twentieth century America involved many years of intervening cultural developments and assimilation. Yet ideas often have a long and durable life; they reappear in a future generation, sometimes boldly and sometimes subtly. Proving a direct ratio of cause and effect is beside the point. It suffices to demonstrate that the classical liberal attitude toward the religious is alive and well in the Court today. Echoes of Kant's and Mill's thought continue to be heard. The attitude of "neutrality" that owes so much to their thought is, as it turns out, actually one of intentional indifference toward the religious, leading to the marginalization of religious thought and experience.

III. ANALYSIS

A. *Neutrality and Intentionality*

Immediate questions present themselves when neutrality is conceptualized as intentional indifference. The first involves the problem of assigning "intent" to the state. A natural person, for example, can form the intent to murder her spouse. The murderess consciously decides that, because her husband's life is insured for ten million dollars, murdering him would be a plausible way to pay creditors, and

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[87] *Id.* at 311.

[88] 505 U.S. 577 (1992).

[89] *Id.* at 587. The "coercion test" advanced in this decision is the child of classical liberal doctrine as is the *Lemon* test. *See infra* note 127. The "endorsement test," used in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and first set forth by Justice O'Connor in her concurring opinion in *Lynch* is of the same type as the other tests; i.e., it asks whether the actual purpose of the state is to endorse or disapprove of religion and whether, notwithstanding that purpose, the practice under review serves to convey a message of endorsement or disapproval. Each of the three tests supports the classical liberal view that there are two spheres of activity, the public and the private, and that they should remain separate from each other.

[90] *Lee*, 505 U.S. at 610 (Souter, J., concurring).

afterward, to live a carefree life. Such intent is readily cognizable in courts of law. But how is intent to be assigned to the state when there are numerous actors with vastly different political agendas? A constitutional provision or a bill hammered out in Congress generally consists of a series of pragmatic compromises, resulting in a policy the probable consequences of which most framers or legislators may not fully understand, much less intend. The point here is that the state and its institutions are not necessarily the same as the sum of their parts. To argue otherwise would be as illogical as contending that, because every diamond in a bracelet is gorgeous, the bracelet itself must be so as well. Such reasoning exemplifies the logical fallacy of composition.

One may desire to understand the state's intent, in a weak sense, to mean nothing more than that it is "aware" of a particular problem and is endeavoring to respond to it. In order to be neutral in a conflict, the state must necessarily be aware of it. This can hardly be the subject of argument. The problem is that intentionality involves far more than being aware of a conflict. To formulate intent one must exercise one's volition regarding how to deal with it. The question concerning how and what intent to assign to the state remains obstinately unanswered. It is fair to say, then, that a concept of democratic state neutrality, understood by means of a deontological ethic, is incoherent.[91]

B. Neutrality as Indifference

Any state policy of indifference toward the religious penetrates to the heart of what a state is. To argue for its indifference to religious matters is essentially to argue for its non-involvement in matters that profoundly affect the lives of countless citizens. Can a state afford to do this? Is a position of virtual anarchy an option in religious matters? The answer to both questions is no. State and religious concerns often converge at a point where they become difficult to differentiate. An imam who preaches and teaches jihad in his mosque, a fundamentalist Christian university that enjoins the practices of interracial dating and marriage, and an organization of Christians, Jews, and Muslims that publicly advocates discrimination against homosexuals are cases in point.[92] A state indifferent to such matters is vulnerable

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[91] The critic may argue that all state policy is intentional; otherwise, what sense would it make to speak of a consciously entertained "policy" at all? The argument is well-taken, but it is peripheral to my main point, which concerns the focal point for the assessment of policy. Since state intent is a difficult concept to understand, a deontological emphasis is difficult to defend.

[92] Steven G. Gey considers the doctrine of separationism and argues that it is required for the true protection of religious liberty. He contends that the only problem with the *Lemon* test and endorsement test is that they are half-heartedly enforced. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 476, 530–32. The problem with the principle of separation is its complete impracticability. *See id.* at 531 ("The

to the charge that it does not care about all of its citizens.

There is another aspect of indifference that must also be explored. Consider the following example: Two children begin to fight over who will play with a particular toy. One of the children is five years old, while the other is three. Left to their own devices, the older child is certain to have her way with the younger. If their father intervenes to assist the younger sibling, the father ceases to be neutral. If he does not intervene in the conflict, then he has guaranteed that the older child will prevail, and the younger child might reasonably question whether the father has really, after all, remained non-neutral.

The critic may contend that the foregoing example demonstrates merely that there are certain conflicts in which a position of neutrality is impossible. The observation may be true, but the fact to be highlighted is that an attitude of indifference toward parties (be they religious factions or not) does not ensure the state's neutrality toward them.

C. Epistemological Issues Concerning Classical Liberal Neutrality

A simple, pragmatic banishment of religious matters from the public to the private sphere in order to avoid political divisiveness is not the sum total of the classical liberal position. If that were the case, then many highly charged and controversial matters might fast become private ones. Whether this country should be engaged in a war such as the one in Iraq, whether the state should sanction homosexual marriage, and whether those who are not human should be accorded legal rights are all contentious issues. So can they ipso facto be relegated to a private sphere?

There is, to be sure, another factor at play regarding religion. It is the following: There is a basic cognitive distinction that the classical liberal desires to make between religious and moral claims on the one hand and claims of "knowledge" on the other. It is the same distinction expressed by Kant's trenchant "phenomena/noumena" dichotomy and his dogged insistence that there is a difference between "thinking" and "knowing."[93] It was a variation of the same which led Mill to admonish educators to tread lightly when teaching religious doctrine so as to allow the student to choose for himself.[94] Although Mill advocated vigorous questioning across the spectrum of intellectual inquiry, one doubts that he would have imparted the same pedagogical instruction to teachers of physical science as he did to teachers

separation principle incorporates a recognition that religion and democratic government operate in two entirely separate universes."). It is a fact that the state and the religious converge. It is also a fact that, when a religious doctrine militates against the state's interest to protect its citizenry, the state can remain indifferent to it only at its peril.

[93] *See supra* Part I.B.6.

[94] *See supra* Part I.B.2–3.

of religion.[95]

The central question to be asked is whether Kant's distinction between thinking and knowing would be upheld today? One cannot ignore that he lived and worked during a time when Newton was thought to have unraveled the final mysteries of the physical universe just as Euclid had done in the world of geometry. Kant's understanding of the term "knowledge" was skewed by a worldview that is now passé. Newton, as we know, was not the last word in physics, nor was Euclid the definitive chapter in geometry. Relativity physics and quantum mechanics serve to remind us that "knowledge" is not about finality. Thomas Kuhn observed that there are paradigm shifts in science that have more to do with the mores of the scientific community than about a final, dispositive treatment of scientific theory.[96] Dewey also stressed the futility of searching for "antecedent Being"[97] in a quest for certainty. Whitehead perhaps phrased this insight best of all. "Mankind never quite knows what it is after. When we survey the history of thought, and likewise the history of practice, we find that one idea after another is tried out, its limitations defined, and its core of truth elicited."[98] So Kant's entire project, in which he attempts to differentiate between thinking and knowing appears, by today's standards, simplistic, wooden, and outdated.

Human knowledge is about drawing, at best, tentative conclusions from experience. Contrary to Kant's view, which he imported from Hume, "experience" on its material side is far more than sense data.[99] "Experience" should properly

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[95] *See supra* Part I.B.3.

[96] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 4–7, 16–17, 93–94 (1962).

[97] JOHN DEWEY, THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION 68–69 (Capricorn Books 1960) (1929).

[98] ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 17 (First Free Press 1969) (1929) [hereinafter WHITEHEAD, PROCESS]. With specific reference to Newtonian physics, Whitehead told Lucien Price:

> It taught me . . . to beware of certitude. We supposed that, except for a few dark spots which might take a few years to clear up, everything was known about physics, and then, by 1900, it was found that while the Newtonian physics were still a useful and convenient way of looking at things, they were, in any absolute sense, gone.

DIALOGUES OF ALFRED NORTH WHITEHEAD 302 (Lucien Price ed., 1954). Whitehead's attitude toward Kant's work was doubtlessly influenced by the twentieth century's evaluation of Newtonian physics, for Whitehead comments that "by the time that I gained my fellowship [to Cambridge] in 1885 I nearly knew by heart parts of Kant's *Critique of Pure Reason*. Now I have forgotten it, because I was early disenchanted." Alfred North Whitehead, *Autobiographical Notes*, *in* 3 THE LIBRARY OF LIVING PHILOSOPHERS: THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD 3, 7 (Paul A. Schilpp ed., Tudor Publ'g Co. 2d ed. 1951) (1941).

[99] See WHITEHEAD, PROCESS, *supra* note 98, at 201, where Whitehead explains that Hume and Kant propounded systems of thought that misunderstood, indeed inverted, the true

include all that is felt on either a conscious or an unconscious level and must cover such broad areas of concern as the moral, the aesthetic, and the religious. To contend as Kant did that, in the absence of sense data, there can be no experience and hence no theoretical knowledge, discounts the fact that sense data are themselves derived from a more basic and concrete bodily apprehension of what is. Sense perception represents a sophisticated level of awareness, which is abstract and derivative. As Whitehead put it, Kant's epistemological reliance upon sense data commits the "Fallacy of Misplaced Concreteness."[100] That which is abstract is mistaken for what is concrete.[101]

Knowledge, then, is about formulating logical and coherent theories that can explain whatever it is that is "experienced" in the broadest sense of the term. The key is that the theory, whether it concerns the origin of the species, waves or particles of light, the political process, or the deity itself, must be one which is an adequate explanation of "experience." A bold line, such as the one drawn by Kant between thinking and knowing, is simply a holdover from Newtonian physics and is not helpful in understanding the nature of knowledge. This antiquated and misguided distinction, as I have shown, eventually translates into one between the public and private spheres,[102] and it is the latter distinction to which the Supreme Court has often paid uncritical homage in that portion of its "religion-neutral" jurisprudence erected on *Everson*.[103] Any "wall of separation" is bound to become increasingly blurred and confounding to jurists, precisely because knowledge is not

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constitution of experience by characterizing sense perception as its primary fact. Whitehead writes, "By playing appropriate tricks on the body a man can be got to perceive, or not to perceive, almost anything." ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD 91 (Free Press Paperback 1967) (1925) [hereinafter WHITEHEAD, SMW].

[100] WHITEHEAD, SMW, *supra* note 99, at 51.

[101] *Id.*

[102] It is easy for a commentator to slip into the "public-private" method of theorizing without, perhaps, even realizing that he or she has done so. Abner S. Greene argues that, because the religious person is precluded from urging religious values as a source of law, the political balance of the religion clauses permits him or her to claim exemptions from laws that burden religion. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993). His argument presupposes that religious claims are inaccessible to the nonbeliever and should therefore be private. *Id.* at 1620. But whether they are inaccessible depends upon one's epistemology. Certainly for Kant they are inaccessible because they have to do with noumena. Yet for those like Whitehead the issue is not inaccessibility but rather drawing diverse, but equally well-reasoned, conclusions about an aspect of our experience. The notion of "inaccessibility," in other words, carries an enormous amount of philosophic baggage. To use or to presuppose the notion without carefully analyzing it can commit one, even unwittingly, to an outdated epistemology.

[103] *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (stating that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers").

now, nor has it ever been, contained in water-tight compartments.[104]

D. Appraising Classical Liberalism's Claim of Neutrality

Assume, arguendo, along with the above-described Court decisions, that the public-private distinction is fully justified in matters of religious and moral concern. The question becomes whether the distinction can support neutralism. The claim is made by many steeped in the classical liberal tradition that the state can, and should, be neutral toward all conceptions of the good. Charles Larmore wrote, "[t]he fundamental liberal principle is that the state should remain neutral toward disputed and controversial ideals of the good life."[105] Yet close examination of the claim reveals that it is not only inflated, but also nonfeasible.[106] Conceptions of the good are intricately connected with conceptions of the right.[107] The so-called neutral state must set aside conceptions of the right that are adverse to itself. The effect is to exclude some conceptions of the good. If as Montefiore states, "to be neutral . . . is to do one's best to help or to hinder the various parties concerned in an equal degree,"[108] then the classical liberal state is not a neutral one, because it does not help or hinder all conceptions of the good equally. It does not succeed in its anti-perfectionist goal. Individual rights tend, for example, to predominate over community consciousness, and democratic principles over theocratic ones.

IV. COMMUNITARIANISM: NEUTRALITY AS INTENTIONAL NON-INTERFERENCE BY THE STATE WITH THE RELIGIOUS

Modern-day communitarianism, while deriving inspiration and insight from thinkers as ancient as Aristotle, really began as a reaction to John Rawls's seminal

[104] *See* WHITEHEAD, PROCESS, *supra* note 98, at 16.

[105] CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY, at x (1987).

[106] Peter Jones writes that "views which challenge the neutralist's conception of the right society are not to be dealt with even-handedly by the neutral state. They are to be ignored because they address an issue that has already been settled in establishing a neutral state." *See* Jones, *supra* note 8, at 28. If the neutralist position holds, and I believe that it does, that judgment regarding competing conceptions of the good life is to be suspended by the state, then it is unsatisfactory to contend with Jones that any conception of society that challenges the neutralist's position should simply be ignored. Such a defense of neutrality serves only to undermine the *raison d'etre* of the so-called neutral state.

[107] One commentator has argued in a compelling and incisive way that, if Brian Barry's "sceptical uncertainty," Thomas Nagel's "epistemological restraint," and John Rawls's "burdens of judgment" rule out conceptions of the good as a basis of agreement, then they also rule out agreement on any principles of justice. *See* Simon Clarke, *Contractarianism, Liberal Neutrality, and Epistemology*, 47 POL. STUD. 627 (1999).

[108] NEUTRALITY AND IMPARTIALITY 5 (Alan Montefiore ed., 1975).

work, *A Theory of Justice*.[109] Often eschewing the label "communitarian" typically pinned on them by their critics, thinkers of the communitarian persuasion have advanced no grand theory of political philosophy. They have managed, however, to unmask the problematic character of the classical liberal position concerning the state and the promotion of virtue.[110] They have taken to task the notion that the principal role of the state is one of fairly equipping individual citizens with the necessary resources to pursue the ends that they autonomously have chosen. While the classical liberal's emphasis is upon individualism and the right to choose one's own ends, the communitarian is concerned, first and foremost, with fostering social and political bonds that allow for the creation of a state where issues of religious and moral virtue are freely and openly discussed and deliberated. The object of communitarianism is not to denigrate the freedom of individual choice, but rather to insist that the most significant choices in a democratic society do not arise in a moral vacuum. They involve social, historical, and cultural bonds. The cause of vibrant and robust statehood is served only by fostering and encouraging these bonds of communal cohesiveness.

"Neutrality" is a word, which carries a pejorative liberal connotation for communitarians.[111] Despite its unpopularity in communitarian circles, the word does have a distinct communitarian meaning. When used in a communitarian sense, the term stands for intentional non-interference by the state with those profound allegiances, including religious ones, which draw a community together and bind its conscience.[112] A communitarian policy of non-interference with religion has a decidedly different nuance from the classical liberal one of state indifference. The communitarian believes that religion can be a salubrious influence pervading the body politic to make it strong, while the classical liberal is profoundly suspicious of its claims and its purposes and tends to honor it only as the product of individual choice.

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[109] RAWLS, *supra* note 28.

[110] *See* Daniel Bell, *Communitarianism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 4, 2001), *at* http://plato.stanford.edu/archives/win2001/entries/communitarianism/.

[111] *See* STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS 29 (2d ed. 1996) (describing the so-called "neutral state" as a "dangerous concept, full of ambiguity") They are especially critical of the anti-perfectionist idea that the liberal state can remain neutral with respect to all notions of the good life. *Id.* at 32. Communitarian thinkers' antipathy to the concept of neutrality should therefore be understood in connection with their criticism of liberalism. *Id.* Interestingly enough, liberals have criticized Rawls's notion of the original position, because it demonstrates a view of the good life that is biased in favor of individualism. *See* Thomas Nagel, *Rawls on Justice*, *in* READING RAWLS: CRITICAL STUDIES ON RAWLS' *A THEORY OF JUSTICE* 1, 9–10 (Norman Daniels ed., 1975).

[112] The point is that, for either a radical or a moderate communitarian, the good that is often in community life associated with the moral vision of a particular religion takes precedence over individual rights. *See* Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852, 855–56 (1989).

A. *One Communitarian Critique of Liberalism*

Michael J. Sandel has described his public philosophy as "a version of republican political theory."[113] His communitarian vision is one that involves:

> [D]eliberating with fellow citizens about the common good and helping to shape the destiny of the political community. . . . To share in self-rule therefore requires that citizens possess, or come to acquire, certain qualities of character, or civic virtues. But this means that republican politics cannot be neutral toward the values and ends its citizens espouse.[114]

He emphasizes that any state which "banishes moral and religious argument from political discourse makes for an impoverished civic life."[115] Another way of expressing the reason for such impoverishment is to state that, without attention to moral and religious concern, a society will lack the social and political cement to be a cohesive community.[116] A lack of societal cohesion will in turn result in its members living "at a distance from one another."[117] The ultimate justification for a society is to be found in the goals and purposes which lead to "goodness," binding citizens together and giving them an identity beyond their own individuality.[118]

1. The Good Prior to the Right

Kant emphasized, as noted above, that justice precedes conceptions of the good. The underlying premise of morality, he insisted, amounts to having respect for persons as rational beings independent of their particular characteristics and circumstances. Such respect requires that we bracket all conceptions of the good, draw a bold line between our private and public identities and concentrate, in the public sphere at least, upon what is just rather than upon what is good. Yet Sandel is quick to observe that "principles of justice depend for their justification on the moral worth or intrinsic good of the ends they serve."[119] For a state to recognize rights means that it justifies them by demonstrating that they serve a significant human good. Sandel's prioritization owes a debt to Aristotle, who wrote that "it is

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[113] MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 5 (1996) [hereinafter SANDEL, DEMOCRACY].

[114] *Id.* at 5–6.

[115] *Id.* at 349.

[116] *Id.* at 3–17.

[117] *Id.* at 7.

[118] *Id.*

[119] MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, at xi (2d ed. 1998).

necessary for us first to determine the nature of the most desirable way of life. As long as that remains obscure, the nature of the ideal constitution must also remain obscure."[120]

2. Conscience over Choice

Whereas the classical liberal position stresses the individual's right to choose freely his or her own conception of the good notwithstanding the desires of the majority, Sandel maintains that characterizing the good in terms of personal choice constitutes a grave misunderstanding. The obligations imposed upon us by that which we understand to be good is far more than a matter of unencumbered choice. A careful study of the dynamics of moral decision making bear out this truth. When Robert E. Lee, for example, who opposed slavery and regarded secession as treasonous, made a decision not to fight against his fellow-Virginians and family in the Civil War, the claim upon him was one of conscience rather than of simple choice. Lee was bound by ties which preceded and predetermined his choice in the matter. Sandel is careful to explain that he does not admire the General for the choice he made, but for "the quality of character" that his deliberation reflects.[121] "The quality at stake is the disposition to see and bear one's life circumstance as a reflectively situated being — claimed by the history that implicates me in a particular life, but self-conscious of its particularity, and so alive to other ways, wider horizons."[122] The liberal conception of choice is, for Sandel, too thin and hollow to accommodate "obligations of solidarity"[123] like those reflected in Lee's case. Liberal choice, cut loose from the sense of social and political commitment to others, is to be distinguished from a genuine claim of conscience. The words, "*Heir stehe ich. Ich kann nicht ander. Gott hilfe mehr*,"[124] were not spoken by Luther or followed by Bonhoeffer in a moral vacuum that abstracts from all particularity. Historical identity and specific, concrete circumstances provide conscience with its possibility, and its flesh and blood.

3. The Self as Encumbered, Not Unencumbered

The classical liberal understands the self as a product of free moral choice. That is, the self is unencumbered by communal obligation and is *sui generis*.[125] As a voluntary act, the self determines what the good is. One originates and authenticates

[120] *Id.* (quoting THE POLITICS OF ARISTOTLE 279 (Ernest Barker ed. & trans., 1958)).
[121] SANDEL, DEMOCRACY, *supra* note 113, at 15–16.
[122] *Id.* at 16.
[123] *Id.*
[124] "Here stand I. I cannot do other. God help me."
[125] SANDEL, DEMOCRACY, *supra* note 113, at 12.

his or her own good rather than being determined and directed by it. Even those in the liberal tradition, like Rawls and Ackerman, who do not accept Kant's conception of the person as a noumenal entity, still adopt what Sandel calls a "[m]inimalist liberalism"[126] and insist that, as a matter of politics, one must bracket all moral and religious convictions when considering public issues. Whether the self is stripped of such "encumbrances" through the application of a descriptive metaphysic or, alternatively, as a perceived practical, political necessity, the result is the same – the individual *qua* individual chooses his or her own good. It is the individual's choice that is formative as opposed to a conception of the good. Institutions such as the family, church or synagogue, as well as school and workplace, do not encumber the self with any sense of obligation that precedes and conditions individual choice. Individuals, as Rawls puts it, are "self-originating sources of valid claims."[127]

Sandel's antidote for classical liberal choice, which he believes has served as an end in itself to make political discourse shallow and to detract most profoundly from civic life, begins with the recognition that the citizen has multiple layers of commitment that shape his or her identity. Sandel writes, "[d]eciding which of one's identities is properly engaged — as parent or professional, follower of a faith or partisan of a cause, citizen of one's country or citizen of the world — is a matter of moral reflection and political deliberation that will vary according to the issue at stake."[128] When citizens reflectively balance their allegiances and deliberate over them, their civic life assumes a rich content and texture. Community, then, is far more than a loosely-knit alliance of individuals voluntarily pursuing their own ends, but is a socially and politically cohesive group with common purposes.

One might express Sandel's vision by utilizing a word that he does not; his vision may be described, in biblical terms, as a kind of *koinonia*. The community of which he writes is one that is prompted by the ends it serves, and it is those ends in accordance with which its history and tradition are to be understood. This community, guided by *telos*, is not at first national or global so much as local. "The most promising alternative to the sovereign state is not a one-world community based on the solidarity of humankind, but a multiplicity of communities and political bodies — some more, some less extensive than nations — among which sovereignty is diffused."[129] Sandel explains that dispersing sovereignty "may entail according greater cultural and political autonomy to subnational communities . . . even while strengthening and democratizing transnational structures, such as the European Union."[130] He praises Tocqueville's belief that "[p]racticing self-government in

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[126] *Id.* at 18.

[127] John Rawls, *Kantian Constructivism in Moral Theory: Rational and Full Autonomy*, 77 J. PHIL. 515, 543 (1980).

[128] SANDEL, DEMOCRACY, *supra* note 113, at 343.

[129] *Id.* at 345.

[130] *Id.*

small spheres . . . impels citizens to larger spheres of political activity as well."[131] He points out with approval that Jefferson, in order to encourage political participation, proposed dividing counties into wards.[132] The point is that the moral impetus and spiritual roots of a state are found in its multiplicity of local communities.

4. Reflections on Law and the Communitarian Agenda

Sandel insists that the numerous Supreme Court cases, which place emphasis on choice as opposed to community, are either oblivious or fail to give proper historical weight to the fact (1) that the First Amendment was never intended to limit the States' power to protect religious establishments, (2) that Madison's *Memorial and Remonstrance* does not make mention of "autonomy" or "choice," and (3) that Jefferson's "Bill for Establishing Religious Freedom" attributes "choice" to God, but not to humanity.[133]

Curiously enough, Sandel reserves high praise for *Minersville School District v. Gobitis*,[134] in which Justice Frankfurter, writing for the majority of the Court, upheld a school district's right to require Jehovah's Witness students to salute the American flag under penalty of expulsion. Sandel interprets the holding as "a legitimate way of cultivating the communal identity of its citizens."[135] He applauds the Justice's argument that the "ultimate foundation of a free society is the binding tie of cohesive sentiment"[136] and that the Constitution should not be read in such way as "to prevent states and school districts from 'evok[ing] that unifying sentiment without which there can ultimately be no liberties, civil or religious.'"[137] Sandel believes that, with the overturn of this decision in *West Virginia State Board of Education v. Barnette*,[138] came the birth of "the procedural republic."[139]

One must wonder, however, whether his affection for *Gobitis* is misplaced. How can he reconcile its reasoning with the communitarian desire for an expansive right of free exercise? He approves of the decision in *Sherbert v. Verner*,[140] where the Court upheld on free exercise grounds the right of a sabbatarian to receive unemployment compensation after she had been discharged from her job for refusing to work on Saturdays. He supports *Sherbert* for illustrating that "the

[131] *Id.* at 347.
[132] *Id.*
[133] *Id.* at 56, 65.
[134] 310 U.S. 586 (1940).
[135] SANDEL, DEMOCRACY, *supra* note 113, at 53.
[136] *Gobitis*, 310 U.S. at 596.
[137] SANDEL, DEMOCRACY, *supra* note 113, at 53 (quoting from *Gobitis*, 310 U.S. at 597 (alteration in original)).
[138] 319 U.S. 624 (1943).
[139] SANDEL, DEMOCRACY, *supra* note 113, at 54.
[140] 374 U.S. 398 (1963).

Constitution was not blind to religion but alive to its imperatives."[141] But how was *Gobitis* "alive to its imperatives," and how can Sandel justifiably conclude, when everything about the decision is considered, that it supports his or any other brand of communitarianism? Sandel's analysis demonstrates how easily communitarianism can become imperialistic and converge into de facto establishmentarianism where the state lends support to one religious community over all others.

B. Case Law Application

1. *Wisconsin v. Yoder*[142]

The Supreme Court case that most exemplifies the communitarian philosophy is *Wisconsin v. Yoder*, in which the Court struck down a compulsory-attendance law requiring students to attend public or private school until reaching sixteen years of age.[143] Specifically at issue was whether the statute violated the right, of Amish parents, to the free exercise of religion. The majority opinion, written by Chief Justice Burger, made much of the communal character of Amish life.[144] Their beliefs "require members of the community to make their living by farming or closely related activities."[145] Their conduct is thoroughly regulated by the rules governing their church community. Theirs is a community that emphasizes "informal learning-through-doing; a life of 'goodness' . . . wisdom, rather than technical knowledge . . . ; and separation from, rather than integration with, contemporary worldly society."[146] Education beyond the eighth grade is contrary to Amish beliefs, in part, because "it takes [children] away from their community, physically and emotionally, during the crucial and formative adolescent period of life."[147] Amish beliefs are not merely a matter of personal choice, but are ones of "deep religious conviction, shared by an organized group, and intimately related to daily living."[148] Their beliefs, in short, determine "virtually their entire way of life."[149]

In *Yoder*, the majority of the Justices placed "community" considerations front and center when they decided that the Wisconsin statute invaded the Amish's free exercise of religion. It would appear that the Court, at least so far as the Old Order Amish are concerned, adopted the communitarian perspective that community is the

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[141] SANDEL, DEMOCRACY, *supra* note 113, at 68.
[142] 406 U.S. 205 (1972).
[143] *Id.* at 234.
[144] *See id.* at 209–10.
[145] *Id.* at 210.
[146] *Id.* at 211.
[147] *Id.*
[148] *Id.* at 216.
[149] *Id.*

bedrock of religious identity.

2. *Church of Jesus Christ of Latter-Day Saints v. Amos*[150]

Justice Brennan's concurring opinion in *Church of Jesus Christ of Latter-Day Saints v. Amos* set forth a strong communitarian point-of-view regarding religion. In this case, the Court considered whether it is a violation of the Establishment Clause to exempt, under the Civil Rights Act of 1964, the secular nonprofit activities of a religious organization from the statutory prohibition against religious discrimination.[151] Justice Brennan, by appealing to the communal aspects of religious experience, justified the Church's discharging of an employee after sixteen years of service for not being a member of the Church.

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual freedom as well.[152]

The Justice allocated considerable weight to the communal character of religious identity and seemed to stress the point that the bonds of community precede choice.

3. Neutrality and Communitarianism

In both the majority opinion in *Yoder* and in Justice Brennan's concurring opinion in *Amos*, we see a refusal to interfere with the religious because doing so would undermine the effect of religion upon the community. While in both classical liberalism and communitarianism the state's posture toward the religious is one of non-intervention, the underlying reasons for it are radically at variance with each other. In one instance, the purpose of neutrality toward the religious is to protect the state from the destructive divisiveness of warring opinions. In the other, the purpose is to protect the bonds of community that support virtue.

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[150] 483 U.S. 327 (1987).

[151] *Id.*

[152] *Id.* at 342 (Brennan, J., concurring) (footnote omitted).

C. Analysis

1. Communitarian Critique of Classical Liberal "Neutrality" Misses the Mark

Communitarians problematically contend that the primary fault with the classical liberal aspiration toward neutralism in matters of morality and religion boils down to a hypertrophic emphasis upon individualism and free, voluntary choice. The real issue, however, concerns the cognitive status of moral and religious claims. Do such claims constitute merely "thinking," or do they comprise "knowing?" Once this issue is decided, one can determine whether to relegate such claims to a "private" sphere especially reserved for them or to elevate them to the "public" sphere, where they can compete on an equal footing with others in the political market place of ideas and public decision making. The reason why classical liberalism treats religious claims with suspicion is because they are not generally viewed as knowledge. "Faith," for the classical liberal, is more akin to opinion than to knowledge. Yet the communitarian critique circumvents this crucial epistemological issue in favor of one that asks how community is possible. The communitarian analysis concludes that community requires cohesion, which in turn necessitates sharing common religious precepts. The Amish community is a case in point. But the problem with this analysis is that American society is now more pluralistic than ever. Religious beliefs (or opinions) are often conflicting. The question naturally arises: Which set of beliefs should shape the community at large? The response to this question must be proceeded by a probing epistemological inquiry followed by a political decision made by an appropriate state instrumentality.

The classical liberal's notion of neutrality is an attempt to come to grips with morality and religion, which are understood to involve claims not lending themselves to public accessibility and adjudication. Much like Kant's antinomies of reason, for every argument in favor of, there is an equally cogent argument opposed to any moral or religious proposition. Given this epistemological frame of reference, it is plausible for the state to respond warily and with caution to religious and moral claims. The communitarian critique must engage this crucial epistemological issue; otherwise, the critique has little force and can persuade only those who are already convinced.

Sandel and those of similar ilk are hardly justified in praising the *Gobitis* decision for boosting "the binding tie of cohesive sentiment"[153] without likewise offering justification for the school district's physically coercing the Gobitis children, under penalty of expulsion from school, to execute a physical act they believed would result in their eternal damnation. The salute could be properly imposed upon the Gobitis children only if the "truth" of the school district's beliefs

[153] *Gobitis*, 310 U.S. at 596.

that mandated the salute takes precedence over the Gobitis's "truth." So how are opposing religious claims to be treated by the state? It is precisely this most difficult question that fires the concern over neutrality and choice in classical liberalism. My purpose is not to attempt to answer the question, but to observe that, without dealing comprehensively with it, the communitarian cannot credibly argue that a school district has the right to sacrifice some students' religious beliefs to support "the binding sentiment of cohesive sentiment."[154] The communitarian critique, so far as it avoids delineating any criterion by which to adjudicate the cognitive merit of religious claims, begs this pressing question and is unconvincing.

2. Neutrality and Non-Neutral Results

The communitarian substitutes a laissez-faire notion of neutrality, as "intentional non-interference with the religious," for the liberal notion of neutrality, as "intentional indifference toward the religious." Both notions founder on the idea of state intentionality, but that concern need not be revisited. My point is that neither notion renders neutral results. To the extent that the Court refused to interfere with the Minersville School District (in *Gobitis*)[155] the state was as non-neutral as it was when the Court decided that the Abington School District (in *Schempp*)[156] could have no religious exercise on school property. The former decision prejudiced Jehovah's Witness children in the name of social cohesion, while the latter prejudiced Christian children in the name of individual autonomy and free choice.

The following hypothetical example will clarify the point. Suppose that 100 families were establishing a state on a deserted island. Two-thirds of the families were Christian, a sixth of them Jewish, and another sixth nonbelievers. If the supreme tribunal of the island decided to approve a school program in which every child was required to recite the Twenty-Third Psalm along with a brief nonsectarian prayer, the requirement surely could not pass as neutral because it would prejudice the nonbelievers. But if, on the other hand, the tribunal decided at a later time that the system ought to be purged of any practice partaking of religion, that requirement too would be non-neutral, because the beliefs and practices of Christians and Jews would be discriminated against. The tribunal might justify the first decision on the ground that "neutrality" dictates it not interfere with the broad community sentiment, while justifying the latter on the basis that the absence of religion demonstrates its indifference toward all things religious, which have been banished to the private sphere.

The lesson advanced by the hypothetical is that the particular argument one

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[154] *Id.*

[155] *Gobitis*, 310 U.S. at 600.

[156] *Schempp*, 374 U.S. at 307.

makes in favor of neutrality will determine one's conception of it. The notion of neutrality, as it happens, is worse than useless because the arguments used in its defense reflect nothing more than one's concept of it, while attempting to delude us into believing otherwise. The sacred mantra of neutrality merely obfuscates the political reasons underlying a judicial decision.

3. Neutrality and Fairness

Neutrality as non-inference by the state with the religious poses yet another problem. It is best explained by considering again the example of the two siblings who fight over a toy. Because one of the children is older and stronger than the other, her physical prowess and maturity are sure to lead to her triumph in the conflict. If their father intervenes on behalf of the younger child, the father will cease to be a neutral actor. If the father, on the other hand, fails to intervene, then he assures victory for the older child. Neutrality as non-interference does not necessarily amount to fairness. By the father's failure to intervene in the conflict, the younger, weaker child loses.

Analogies are not difficult to find in matters of church and state. When a fundamentalist Christian university, tax-exempt under the Internal Revenue Code, is communally bound by an understanding of the races that promotes segregation, should the state's position toward the university be one of non-interference? If so, the state will most certainly be condoning a policy of apartheid. To adopt a view of neutrality the consequence of which is injury to others may cause even a communitarian to question its social value. Why adhere to a theory of neutrality that, while promoting the social and political bonds of community, does so by unfairly stigmatizing and wounding many of its citizens?

The issue of female genital mutilation provides yet another analogy drawn from religion and state. One may choose this particular ritual for consideration, although any one of a number of others perpetrated against women would also clarify the issue. The question is the same: Is the state justified in adhering to a view of neutrality as non-interference with respect to a particular religious ritual when the failure to intervene results in barbaric acts against women or another group of people? Fostering strong communal bonds through a doctrine of neutrality as non-interference does not in and of itself legitimize a ritual that is shocking to the conscience. If such acts promote neutrality, then for whom and at what expense? It would thus appear that state neutrality needs to be conceptualized other than in a negative manner for the state to consider and to control the consequences of such actions.[157]

[157] One might question whether the *Lemon* test, *see* Lemon v. Kurtzman, 403 U.S. 602 (1971), utilized by the Court so often during the last thirty-five years to adjudicate cases under the Establishment Clause, does not attend to both the purpose (intent) and effects

4. Neutrality and Its Justifications

Sandel astutely observes, "[w]hat counts as neutrality depends partly on what justifies neutrality."[158] He notes that the decisions in which the Court adopts a classical liberal posture reflect a view of neutrality the justificatory premises of which are individualism and free and voluntary choice. Yet the same point can be made with regard to communitarianism. When the Court espouses a "hands-off" position with respect to the religious, as in *Yoder*,[159] the justification of the decision is the bonds of community. This point draws attention to the fact that the concept of neutrality, whether implicit or explicit, always involves a specious circularity in its application.

V. REVISED LIBERALISM: NEUTRALITY AS THE STATE ENSURING FOR ALL CITIZENS EQUAL OPPORTUNITY TO ADVANCE ANY PERMISSIBLE RELIGIOUS IDEA OR PRACTICE THEY FREELY AFFIRM IN THE PUBLIC SQUARE

A. What Is "Revised Liberalism"?

Whereas classical liberalism sought to extricate human reason from all authority external to itself and to restrain the state from the imposition upon the individual of any particular conception of the good, revised liberalism reaches beyond laissez-faire meanings of rationality and autonomy and is concerned with the welfare of the individual in a broad sense. The goal is to liberate the individual from social and political discrimination and economic hardship. The state must, to that end, assume a policy of active intervention in the lives of its citizens rather than one of intentional indifference or of non-interference.

The revised liberal view of state neutrality markedly differs from that of the previously described theories. It exhibits a positive notion of neutrality as opposed to a negative one. From passive non-intervention to active intervention expresses the difference. Early proponents of revised liberalism, in the words of Philip Selznick:

> [A]ccepted the necessity of government intervention to enhance

(consequences) of a state action. The answer to the question is that the consequences of state action are not evaluated under the test in terms of their "fairness," but in terms of whether the public and private spheres remain "separate." *Id.* at 625. The *Lemon* test is one which examines a statute in order to safeguard the principle of separation in support of negative neutrality. Studying the consequences of state action to determine whether a statute is fair concerns the principle of accommodation, which supports positive neutrality.

[158] SANDEL, DEMOCRACY, *supra* note 113, at 61.

[159] 406 U.S. 205 (1972).

> public welfare, especially the condition of the poor; demanded full economic opportunity and civic participation for all sectors of society; [and] rejected a sharp division between public and private spheres of life . . . . A recurrent theme was the need for a doctrine that would acknowledge the claims of community.[160]

Revised liberalism may therefore be understood as a cross between classical liberalism and communitarianism. When political liberty and personal autonomy are on the line, revised liberalism joins hands with its first cousin, classical liberalism. But when economic interests are front and center in the debate, revised liberalism is not hesitant to sound the trumpet of communal interest. The "right" still precedes the "good" as in classical liberal theory, but the theory is revised to demonstrate a commitment to distribute basic liberties and resources to each and every individual. It is this commitment to the general welfare of its people that paves the way for the state to create programs which vigorously address all forms of social inequality.

Revised liberalism is far from being value-neutral. As a political theory it cannot be legitimated without appeal to moral values that configure the parameters of the state within which individuals can be socially and politically equal and autonomous. John Rawls, perhaps the leading contemporary proponent of this philosophy, left the door partially open for the introduction of comprehensive doctrines of the good, including those from religion, into the political arena. He stated that citizens may endeavor, "in certain situations, to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason itself."[161] Cases in point are the abolitionist movement, where many citizens publicly advocated the emancipation of slaves and did so on religious grounds, and the civil rights movement of Dr. Martin Luther King, Jr., who appealed simultaneously to both constitutional and religious principles.[162]

B. The "New Religionists"

There are thinkers who readily embrace this admission in Rawls's thought, invest in the agenda of revised liberalism, and emphasize that the religious deserves a place within the political arena. They do not accept the historic posture of liberalism toward the religious. They desire no sharp separation between either the public and the private or the political and the nonpolitical. The "new religionists" believe that religion has been marginalized in American politics and that the

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160 SELZNICK, *supra* note 17, at 375–76.

161 RAWLS, *supra* note 5, at 247.

162 *Id.* at 249–51.

political process is weaker for it.[163] Neutrality, for them, is not a matter of establishing a restrained political dialogue established only upon premises the dialogic parties find reasonable.[164] Nor is neutrality about reaching an "impartial" or "impersonal" justification for the legitimacy of political coercion.[165] Neutrality may, in general terms, be broadly and positively defined as the state's ensuring for all citizens equal opportunity to advance in the public square any permissible religious conception or practice they freely affirm.

C. One View of Religion and Revised Liberalism

Michael J. Perry's thought has not been the paragon of consistency. He has often changed his mind on what role religion should play in the political process.[166] It is nonetheless clear that he desires to make a case for religion in the public square and to do so within the framework of a revised liberal understanding. He asserts that the "foundational moral commitment of liberal democracy is to the true and full humanity of *every* person, without regard to race, sex, religion, etc."[167] He additionally maintains that this commitment "is a principal ground of liberal

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[163] *See* Theodore Y. Blumoff, *The New Religionists' Newest Social Gospel: On the Rhetoric and Reality of Religions' "Marginalization" in Public Life*, 51 U. MIAMI L. REV. 1 (1996). Blumoff takes issue with the central assumption of "New Religionists" Michael McConnell, Stephen Carter, and Michael Perry, that religion must fully be allied with the state. *Id.* at 6.

[164] BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980).

[165] Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 223–24, 230–32 (1987).

[166] *See* MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 15 (1991) [hereinafter PERRY, LOVE & POWER] (stating that he is willing to allow religious reasoning into the public decision-making process so long as such reasoning is publicly intelligible and publicly accessible); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 66 (1997) [hereinafter PERRY, RELIGION IN POLITICS] (arguing that when the state makes a coercive political choice about the morality of human conduct, the state should not rely on a religious argument about the requirements of human well-being unless an independent secular argument reaches the same conclusion about the requirements of human well-being); MICHAEL J. PERRY, UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY 25 (2003) [hereinafter PERRY, UNDER GOD?] (In commenting on the nonestablishment norm, he contends that "it does not go so far as to forbid government to make a political choice, including a political choice disfavoring conduct, on the basis of a moral belief *just in virtue of the fact that the moral belief is, for those making the choice, religiously grounded*.") Perry also adds that, not only is this rule not part of our "constitutional bedrock," it also should not become a part of it. *Id.* In three separate books on the role of religion in public life, Perry has taken three positions which, together with their own particular nuances, are not easy to square with one another.

[167] Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 226 (2001).

democracy's further commitment to certain basic human freedoms."[168] From these two revised liberal premises, Perry's thoughts about religion and politics unfold.

1. Neutrality and the "'Truly, Fully' Human"[169]

Perry insists that neutral politics, in the sense professed by Ackerman and Nagel, is "impossibly restrictive."[170] Such models leave no room to address the compelling political and moral question: "Are there human rights and, if so, what are they?"[171] This question is subsumed under one concerning human nature; specifically, whether all human beings are, in spite of their many differences, alike in significant respects. Perry believes that there is much that human beings have in common.[172] It is not, after all, as Richard Rorty and others would have it, that we share nothing but physical needs with one another.[173] Such a position, according to Perry, is nihilistic.[174] We have the need for "affection, the cooperation of others, a place in a community, and help in trouble."[175] To be "truly, fully" human, according to Perry, is to respect those needs in oneself and in others.[176] The good life is the one which "includes concern and respect for the well-being of all human beings and not just for the well-being of oneself or one's family or tribe or race or religion."[177] This concern for the other's well-being constitutes the quintessence of life's meaning and of our humanity. As Perry otherwise puts it, "'Man's concern about a meaning of life is the truest expression of the state of being human.'"[178]

Perry acknowledges that there are numerous competing conceptions of the good.[179] They come in many varieties, both religious and secular. Yet there is, he states, a pattern of "emergent convergence"[180] among them. This pattern is evidenced both in American society and internationally. The semitic and Indic religions, as well as Marxism, all accept at least "some responsibility" for the well-being of others.[181] This universal characteristic highlights that which is "truly, fully" human

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[168] *Id.*
[169] PERRY, LOVE & POWER, *supra* note 166, at 29.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 31.
[173] *Id.*
[174] *Id.*
[175] *Id.* at 32 (quoting Philippa Foot, *Moral Relativism*, *in* RELATIVISM: COGNITIVE AND MORAL 152, 164 (Jack W. Meiland & Michael Krausz eds., 1982)).
[176] *Id.* at 39.
[177] *Id.*
[178] *Id.* at 69 (quoting VICTOR FRANKL, MAN'S SEARCH FOR MEANING (1963)).
[179] *Id.* at 40.
[180] *Id.* at 41.
[181] *Id.* (emphasis omitted).

within us.[182]

Neutrality must, then, be defined in a way as to embrace the ideal of being "truly, fully" human. Meeting this challenge entails a recognition of both unity and diversity within all human beings. That we have a common core of social need and empathy but are, at the same time, members of different communities and cultures, often with their own languages and customs, means that the concept of neutrality can be narrow enough to cover common needs and aspirations while broad enough to encompass the multiplicity of differences. When applied specifically to the vast array of religious beliefs and practices in American society, the resultant view of neutrality is one where the state ensures for all citizens equal opportunity to advance within the public square any religious belief or practice they freely affirm so long as the belief or practice is in keeping with the constitutive elements of revised liberalism.[183]

2. Neutrality and Ecumenical Politics

The foregoing view of neutrality is embodied in Perry's view of "ecumenical politics."[184] The "emergent convergence"[185] among conceptions of the good leads him to conclude that an ecumenical dialogue is indeed possible in public life.[186] Human beings who share a common core of not only physical, but also social needs, can establish between themselves a dialogical partnership.[187] The partners are members of all the great religious faiths, including but not necessarily limited to Christianity, Judaism, Islam, Hinduism, Buddhism, and religions indigenous to America.[188] They openly declare, persuade, justify, and deliberate about religion and politics in the public square.[189] Given the commonalities in human experience, Perry explains there is no reason to fear that public discourse between such a multiplicity of faiths will reenact the communication plight at the Tower of Babel.[190]

The paramount issue of this ecumenical political dialogue concerns not what we should do or how we should conduct ourselves, but rather how we are to "be" together and what is the institutional framework required for that being-together.[191] Lock-step agreement is not the goal.[192] "Because common ground cannot always

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182 *Id.* at 39.
183 *Id.* at 45.
184 *Id.* at 43–51.
185 *Id.* at 41.
186 *Id.*
187 *Id.* at 45.
188 *Id.* at 90.
189 *Id.* at 45.
190 *Id.* at 90.
191 *Id.* at 47.
192 *Id.*

be achieved, another aspiration of ecumenical political dialogue is to achieve a position on a political issue that is within the range of reasonable positions on the issue, given the relevant authoritative premises."[193] Yet to allow a "range of reasonable positions" on a political issue does not entail reasons which militate against the structure of revised liberalism or utilize warrants that are publicly unintelligible or publicly inaccessible.[194] Public intelligibility is the habit of attempting to elaborate one's position in a manner comprehensible "to those who speak a different religious or moral language."[195] Public accessibility is likewise "the habit of trying to defend one's position in a manner neither sectarian nor authoritarian."[196] Defending one's position in a sectarian fashion means relying upon experiences or premises having little, if any, authority beyond the confines of one's moral or religious community.[197] Defending a position in an authoritarian manner involves relying on "persons or institutions with little if any authority beyond the confines of one's own community."[198] Reasoning demonstrative of Perry's dialogical virtues may enter freely into the public square, although the point of view represented is indisputably religious.[199] The aim that Perry envisions "is a civil public square in which citizens of all religious faiths, or none, engage one another in continuing democratic discourse."[200]

Perry underscores the virtue of tolerance as a precondition of ecumenical dialogue.[201] The kind of tolerance that he has in mind is exemplified by the state's refraining from coercing others even while it judges their beliefs to be false and their actions to be immoral.[202] He invokes the doctrines of fallibilism and pluralism to support his view of tolerance.[203] He explains the former doctrine as follows: "There is always the possibility that the moral judgment in the service of which a coercive strategy has been proposed is mistaken."[204] The latter he describes "as a brake on the regrettable tendency to condemn and outlaw choices, behavior, and ways of life different from one's own."[205]

When the public decision-making process refuses to accommodate ecumenical dialogue, politics in effect suppresses the political nature of religion. "[A] politics

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[193] *Id.*
[194] *Id.*
[195] *Id.* at 106.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.* at 107.
[200] *Id.* at 45 (quoting THE WILLIAMSBURG CHARTER: A NATIONAL CELEBRATION AND REAFFIRMATION OF THE FIRST AMENDMENT RELIGIOUS LIBERTY CLAUSES 19 (1998)).
[201] *Id.* at 128–38.
[202] *Id.* at 129.
[203] *Id.* at 132–33.
[204] *Id.* at 132.
[205] *Id.* at 133.

without prayer or mysticism" is, as the Catholic theologian Schillebeeckx has warned, both "grim and barbaric."[206] Perry admits that when religion and politics are combined, there is "a dark side."[207] Yet he sees no need to "project[] into the future of the Republic the nightmares, real or fancied, of the past."[208] The mistakes of the past need not be repeated. The point of which he appears reasonably certain is that the integrity of both religion and politics requires that they inform each other. The issue is not *whether* they are to be mixed, but "*how* to mix them."[209]

3. Neutrality and the Constitutional Norms of Religion

Perry states that the free exercise norm in the Constitution is antidiscriminatory.[210] "It forbids government to take prohibitory action discriminating against religious practice (i.e., disfavoring religious practice as such)."[211] Yet he points out that, because the free exercise of religion is such an enormously important constitutional value, the state must not only refrain from discriminating against religion, but "must also do what it can, short of compromising an important public interest, to avoid putting substantial impediments in the way of religious practice."[212] The state thus accommodates free exercise as in *Sherbert* rather than *Smith*. This expansive right of free exercise coincides precisely with a view of neutrality that ensures for all citizens an equal opportunity to advance their religious belief or practice in the public square.

Perry's view of the nonestablishment norm presents some problems for the broader reaches of his thought. He explains that it too is antidiscriminatory, but in the sense that it prohibits the state from *favoring* a religious belief or practice.[213] The problem arises when he considers the matter of school vouchers. While he admits that the state can accommodate religion by providing financial aid to religious schools, he maintains that the program must be "religiously neutral."[214] He fleshes out the meaning of "neutral" by asserting (1) that participation in the voucher program cannot depend, directly or indirectly, on the school's religious affiliation, and (2) that though the voucher program may operate to favor one religious group over others, the favoritism cannot stem from a religious preference on the part of the

[206] *Id.* at 82 (quoting EDWARD SCHILLEBEECKX, THE SCHILLEBEECKX READER 274 (Robert J. Schreiter ed., 1987)).

[207] *Id.*

[208] *Id.* (quoting JOHN MURRAY, WE HOLD THESE TRUTHS 23–24 (1960)) (alteration in original omitted).

[209] *Id.*

[210] PERRY, RELIGION IN POLITICS, *supra* note 166, at 13.

[211] *Id.*

[212] *Id.* at 28.

[213] *Id.* at 15–16.

[214] PERRY, UNDER GOD?, *supra* note 166, at 7–9.

state.[215]

This view of neutrality is one that Perry correctly attributes to Justices Rehnquist, Scalia, Thomas, and Kennedy.[216] These Justices, however, are a far cry from being revised liberals of a "new religionist" persuasion. Their view of neutrality is, as we shall see in the following section of this Article, quite different from the one implied by Perry's ecumenical politics. In revised liberalism, one must remember that the state intervenes in citizens' lives to provide them genuine equality of opportunity. This means that the state is concerned not only with facial policies, but also with their effects. Depending upon their nature, such effects can either enrich or diminish opportunity. For Perry to take the position that the effects of a school voucher program are irrelevant so long as its intent is in keeping with the antidiscriminatory character of the nonestablishment norm is both inconsistent with and a repudiation of the revised liberalism underlying his position. This intellectual glitch signals his failure to systematize adequately his thought so that its foundational principles and derivative formulations are consistent.

In a state that supports public ecumenical dialogue consonant with Perry's proposal, it will not do for the government to favor one religious group over others and to defend the practice by claiming that it is inadvertent or unintended. A revised liberal state that values the equal respect and dignity of others seeks to ensure to all groups the same opportunity (which includes, of course, equivalent financial assistance) to advance any religion in the public square.

D. Case Law Application

The group of cases with which the revised liberal notion of neutrality is most compatible is that of the "open public forum" cases, like *Widmar v. Vincent*,[217] *Board of Education v. Mergens*,[218] and *Lamb's Chapel v. Center Moriches Union Free School District*.[219] In these cases, the Court granted religious groups equal access to participate in public forums,[220] holding that religious points-of-view, like any other, could be advanced in public. The concept of neutrality that emerges from a jurisprudence of expansive free exercise combined with an accommodationist interpretation of the nonestablishment norm is one that, at least theoretically, ensures to all religions an equal opportunity to advance their respective conceptions of the good in the public arena. The compatibility of the "open public forum" cases with the revised liberal view of neutrality is not complete, although the fit is close. It is

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[215] *Id.*

[216] *Id.* at 9.

[217] 454 U.S. 263 (1981).

[218] 496 U.S. 226 (1990).

[219] 508 U.S. 384 (1993).

[220] *Widmar*, 454 U.S. at 265, 267; *Mergens*, 496 U.S. at 232, 234; *Lamb's Chapel*, 508 U.S. at 394.

the *spirit* of the cases as opposed to the *letter* of their application that commends their incorporation under the rubric of revised liberalism. Their vision is one of inclusion rather than exclusion. The problem, as we shall see, is that they also serve the establishmentarian agenda.

1. *Widmar v. Vincent*[221]

In *Widmar*, the Court upheld a religious group's right to equal access to university facilities where the group could conduct its meetings and worship.[222] The majority's opinion turned on the idea that the university in question could demonstrate no "compelling state interest" to prohibit the group from meeting there[223] and that, in addition, an "open forum"[224] had been created. Perhaps Justice Stevens, whose opinions on the subject are usually of the classical liberal type, came closest to articulating a revised liberal rationale for the decision in his concurring opinion:

> It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.[225]

Justice Stevens's words might be paraphrased in the following way: In the interest of the state's ensuring to all groups concerned with religion an equal opportunity to advance their views, not to allow those professing a belief in God to do so would be non-neutral.

2. *Board of Education v. Mergens*[226]

In *Mergens*, the Court upheld the right of a Christian club that was devoted to Bible-reading, discussion, and prayer, to meet after hours on school premises, and did so by extending the *Widmar* rationale to public secondary schools.[227] Justice

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[221] 454 U.S. 263 (1981).
[222] *Id.* at 265, 267.
[223] *Id.* at 276.
[224] *Id.* at 273–75.
[225] *Id.* at 281 (Stevens, J., concurring).
[226] 496 U.S. 226 (1990).
[227] *Id.* at 232, 234.

Marshall's concurring opinion scrutinized the nature of the forum in question. The Justice was concerned that the Christian club was the only religious club on campus and that other groups within the forum were those involved with activities like scuba diving, chess, and counseling for special education students.[228] He discerned a danger: "Given the nature and function of student clubs at Westside, the school makes no effort to disassociate itself from the activities and goals of its student clubs."[229] It is fair to suppose that the Justice's primary issue with the arrangement was that, because the Christian club was really in a category by itself, there was no genuine equality of opportunity for others to express their religious views. For that reason, Marshall warned that "the actual effects" of the "'equal access' policy" must be vigilantly monitored[230] and that "[i]f public schools are perceived as conferring the *imprimatur* of the State on religious doctrine or practice as a result of such a policy, the nominally 'neutral' character of the policy will not save it from running afoul of the Establishment Clause."[231] His words carry a revised liberal tone. They gauge the neutrality of a program by its actual effects, but neither formally nor according to its stated intention.

3. *Lamb's Chapel v. Center Moriches Union Free School District*[232]

In *Lamb's Chapel*, the Court upheld a church's right to screen, on school property, a religious film series about family and child-rearing issues.[233] Other groups were given access to the premises for "'social, civic, and recreational' purposes."[234] To deny the church a right of access simply because it addressed social and civic issues from a religious point of view amounted to the suppression of free speech.[235] The Court reversed the court of appeals' decision, for the latter had found that the school district's denial of access was viewpoint-neutral since the purposes of the public forum in question did not include religion.[236] Rather than agreeing with the lower court that the school district's policy was viewpoint-neutral inasmuch as the forum was limited to social, civic, and recreational concerns, the Court found that the policy was violative of free speech because a religious point of view concerning issues of social and civic importance was suppressed.[237] Under this rationale, the Court's demonstrated understanding of neutrality was to ensure the

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[228] *Id.* at 265 (Marshall, J., concurring).
[229] *Id.*
[230] *Id.* at 264.
[231] *Id.*
[232] 508 U.S. 384 (1993).
[233] *Id.* at 394.
[234] *Id.* at 391 (quoting N.Y. EDUC. LAW § 414).
[235] *Id.* at 393–94.
[236] *Id.* at 395.
[237] *Id.* at 394.

same opportunity for every group to advance in public any permissible religious belief or practice it freely affirms.

E. Analysis

1. Neutrality and the Emphasis on Consequences

When considering views of negative neutrality, I critically noted that it is not sufficient for a state desiring to be neutral to disregard the lop-sided consequences of its policies.[238] The "separate but equal" doctrine, which concentrated on intent to the exclusion of consequences, is a stark example of the absurdity inherent in blind disregard of consequences. Revised liberalism is an attempt to measure neutrality by not only the intent, but also the consequences of policies. In moral terms, the distinction is between a deontological outlook, in which an action is valued *in spite of* its consequences, and a teleological approach, where an action is valued *with respect to* its consequences. Yet to condemn a deontological definition of neutrality is not necessarily to approve of a teleological one.

2. Neutrality and Equal Satisfaction

In striving to be neutral, how does a state measure satisfaction in terms of consequences? There are many variant conceptions of the good life in American society. For the state to be neutral toward them, at least in terms of granting them "equal opportunity" for promotion, and to measure neutrality according to consequences, might mean resorting to a consideration of levels of individual satisfaction. But how do individuals, assuming that they are honest, reveal their relative levels of life satisfaction? What baseline is to be used to do so? The problem is not one of implausibility, but of impossibility.

Two additional problems concern the nature of "satisfaction" itself. Some satisfactions are "all or nothing." If one's life goal is to star in a Hollywood film, there is no intermediate ground between success and failure or happiness and misery. Searching for a principle by which to measure the intermediate levels of happiness is beside the point. There is no single, smooth line by which to chart the relative levels of life satisfaction when intermediate levels are unavailable.

The second problem involves the prospect that some individuals may choose conceptions of the good life inherently less satisfying than others. Assuming that this choice is possible, as in the case of a hypochondriac who chooses sickness over health, how does one measure happiness by a single criterion or set of criteria? The task is analogous to comparing apples to oranges. The standards by which they are judged are incommensurable. If however the argument is made that there is indeed

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[238] *See supra* Part IV.C.2.

only one standard by which all satisfactions are to be measured, then a position of absolutism, is implied, which in turn is non-neutral.

3. Neutrality and Equal Fulfillment

One might, for the above-stated reasons, decide to jettison the principle of equal satisfaction. In its place one might substitute the principle of equal fulfillment. The state could, at least theoretically, examine each individual's conception of the good, determine how to fulfill it, and then attempt to ensure that everyone at any given moment is equidistant from the attainment of his or her ultimate fulfillment.

A state that attempts to approach the matter in this way is indulging in a utopian fantasy. The resources available to any state for the purpose of fulfilling individual conceptions of the good are limited. In addition to that intractable fact, the most coveted positions in industry, entertainment, education, and sports are rare. The state goal of equal fulfillment is sure to leave many citizens hopelessly disappointed.

There is, moreover, a host of difficulties associated with measurement. How does one measure equal fulfillment when there are countless variables to be considered? One person may, for example, be single-minded and fulfilled if, and only if, he or she reaches a particular goal, while for other people there may be a constellation of factors contributing to the same level of fulfillment. How are we to compare the former with the latter, especially when the former is a matter of linear progression while the latter involves no such progression at all but a delicate balance? The difficulty of the problem is compounded when one modifies or outrightly changes his or her conception of the good or adjusts the balance of its components midway through his or her life journey.

Finally, there is a compelling question regarding how the state should deal with significant differences in native ability. Does neutralism in a revised liberal state mandate that those who have been advantaged by the "biological lottery" be appropriately penalized in order that those not so advantaged can be ensured equal fulfillment? Must all lanes in the race be staggered? In terms of religious neutrality, the concern might be phrased another way: because Western religions have for centuries enjoyed a social advantage in this country, should Eastern religions be accommodated in ways that Western religions are not in order to level the playing field between them? If the response is affirmative, then how does the state determine the magnitude of the accommodation?[239]

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[239] My analysis of the teleological or "consequentialist" position is informed by Peter Jones's succinct presentation of the position's problems. *See* Jones, *supra* note 8, at 14–18. Because of the sundry problems with the position, I disagree with those thinkers who argue that "the results analysis of neutrality is the correct one in the context of the state." *Cf.* Robert E. Goodin & Andrew Reeve, *Do Neutral Institutions Add Up to a Neutral State?*, *in* LIBERAL NEUTRALITY, *supra* note 6, at 193, 202.

4. Neutrality and "Ecumenical Politics"

In view of the plethora of problems inherent in the revised liberal understanding of neutrality, it is not surprising that, when one speaks of "ecumenical politics," suspicions are aroused.[240] Perry's aspiration, according to which religious reasons may be introduced into the public square to inform the political process, creates a result that is religiously and politically selective.[241] Only "permissible" religious beliefs are actually welcomed. Those not compatible with the foundational principles of revised liberal democracy (e.g. those which advocate theocracy or which do not believe in equal dignity and rights for all) are confronted with a Hobson's choice: either stay out of the public square or recast yourselves in another mold. One must question what Perry would say about reformed theology, which is profoundly indebted to theologians like John Calvin and Karl Barth, whose formulations of Christian thought are based primarily upon revelation. Would Perry suggest a reduction of revelation to that which is publicly intelligible and accessible? If not, then at least some religious reasoning in the public square would be esoteric and unavailable to others, and that is hardly a democratic prospect. If, on the other hand, reformed faiths were to "rationalize" their doctrines so as to meet Perry's requirements, the tradition of reformed theology would likely be transmogrified from one of revelation to natural reason. Assuming that this is possible, the question becomes whether it enriches the tradition of revealed theology. Perry's Roman Catholicism, with the *Summa Theologica* of St. Thomas Aquinas at the core of its intellectual tradition, would naturally pass the test for entry into the public square. But, as splendid as Thomistic thought is, the Christian tradition might lose much of its richness and diversity were it homogenized in its entirety according to Perry's model. Ecumenical politics is, ironically enough, not liberal since all religious public discourse would have to be cast in a single mold.

5. Neutrality and *Mergens*

There is nothing in the *Mergens* case that could be legitimately referred to as an "open forum" but for the fact that Congress intended that there be "a low threshold for triggering the [Equal Access] Act's requirements."[242] No other religious club was meeting on school premises. If in addition to a Christian club there had been Jewish, Buddhist, Hindu, and Confucian clubs, one could justifiably speak of there being an open forum. The point is that the Christian club that some students sought to form was in a category by itself. Justice Marshall was correct to raise questions

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[240] PERRY, LOVE & POWER, *supra* note 166, at 43–51.

[241] *Id.* at 45.

[242] Bd. of Educ. v. Mergens, 496 U.S. 226, 240 (1990).

regarding the neutrality of a regime under which others who received access to school premises were interested not in holy writ and prayer, but rather in scuba diving and chess.[243] If *Mergens* demonstrates a philosophical truth, it is that the revised liberal notion of neutrality that touts equal opportunity for each person to promote his or her own religious views in the public square, while perhaps a commendable regulative goal, is one that seldom coincides with reality.

6. Summarizing the Revised Liberal View of Neutrality

The revised liberal notion of neutrality presents insuperable theoretical difficulties in terms of measuring results. From a practical standpoint, attempting to manage in the public square the social consequences of state policies so as to ensure "equal opportunity" for all to promote their respective religious beliefs and practices verges upon the phantasmal.

VI. DE FACTO ESTABLISHMENTARIANISM: NEUTRALITY AS UNDERTAKING OR JUSTIFYING POLITICAL ACTION ON THE GROUND THAT IT NEITHER PROMOTES NOR ENABLES INDIVIDUALS TO PURSUE A RELIGIOUS IDEA OR PRACTICE, UNLESS THERE IS A VALID INDEPENDENT REASON OTHER THAN FAVORING OR HINDERING THE SAME

De facto establishmentarianism is seldom a position that any jurist or political theorist overtly espouses. This does not mean, of course, that the position is not alive and well.[244] My aim here is to consider the manner in which those who are either consciously or unwittingly devoted to de facto establishmentarianism promote it by utilizing the concept of neutrality.

A. More About Mergens

I have already commented upon the *Mergens* case.[245] While Justice Marshall's concurring opinion served to hoist a red flag, at least to half mast, concerning the Christian club some Westside students sought to organize and to meet on school premises comprised a class of one, the majority of the Court under the aegis of *Widmar* and the Equal Access Act found no Establishment Clause violation.[246] The spirit of *Mergens* tends to create a public square where various voices are heard, including those of religion. Yet it cannot escape notice that the Court took a position allowing for Christian devotional practices in a public place where there

[243] *Id.* at 265 (Marshall, J., concurring).
[244] Smith, *supra* note 1 (describing and analyzing de facto establishmentarianism).
[245] *See supra* notes 226–31 and accompanying text.
[246] *Mergens*, 496 U.S. at 253.

were no other religious voices being heard. Squaring this anomaly with the majority's view of neutrality apparently posed no overwhelming problem for the Court's majority.

B. Employment Division v. Smith[247]

On the free exercise side, the Court's positions often disfavor minority religions. The Court in *Smith* interpreted free exercise as meaning that a Native American Church member could not ingest peyote as part of an age-old religious ritual if and when doing so violated a law that is religiously neutral and of general applicability.[248]

What view of neutrality would allow Christian practices to be promoted on public property as part of an open forum with all competing religious voices conspicuously absent, while at the same time outlawing a significant ritual of the Native American Church? The answer is sufficiently obvious to render the question rhetorical. So perhaps it should be rephrased. Under what *formal* notion of neutrality can *Mergens* and *Smith* coexist? I propose that the majority in these cases worked under the following definition of neutrality: An action by the state is neutral when it undertakes or justifies political action on the ground that it neither promotes nor enables individuals to pursue a religious idea or practice, unless there is a valid independent reason other than favoring or hindering the same. The last clause, "unless there is a valid independent reason other than favoring or hindering the same," is the key to unlocking the mystery. The *Mergens* decision had "an independent reason" for justification, i.e., the creation of an open public forum.[249] *Smith* likewise had its "independent reason," i.e., a criminal statute of general applicability.[250]

C. Rosenberger v. University of Virginia[251]

In a number of the Court's cases in recent years, it is this conception of neutrality that has been used to create a de facto establishment of the Judeo-Christian faith in the public square. In *Rosenberger*, the Court approved the direct defrayal of the printing costs of a Christian organization's publication from the Student Activities Fund (SAF) of a state-supported university under the nonestablishment norm.[252] The stated mission of the publication was two-fold: "to

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[247] 494 U.S. 872 (1990).
[248] *Id.*
[249] *See Mergens*, 496 U.S. at 284.
[250] *See Smith*, 494 U.S. at 879.
[251] 515 U.S. 819 (1995).
[252] *Id.*

challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[253] No "religious activity," defined as one that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality,"[254] could qualify for SAF disbursements. The university argued that it was attempting with the regulation to draw a distinction based on content as opposed to viewpoint.[255] The "forum," in other words, was simply not opened to religious groups.[256] Direct defrayal of the printing costs, the Court countered, was religion-neutral.[257]

Yet the following question immediately arises: Is it not peculiar that neutrality toward religion results in the Christian faith being the only religious point-of-view that a university funds? The Court asserted that there was an independent reason, a limited open forum, that justified the arrangement.[258] The Court declared that, if the university precluded a viewpoint simply because it would "primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality,"[259] there would be no funding of "essays by hypothetical student contributors named Plato, Spinoza, and Descartes."[260] The Court's statement was overdrawn; these "students'" essays would receive funding so long as their content did not concern religion. The university precluded religious content and had the right to do so. The Court, however, interpreted the ban on content as one on viewpoint. But how could the publication properly represent a "viewpoint" in the absence of any competing religious opinion that qualified for funding? The concept of neutrality is, in this case, little more than a judicial artifice for allowing public funds to be used to support the promotion of the majority's faith.

D. Mitchell v. Helms[261]

The Court in *Mitchell* considered whether a federal statute distributing financial aid to state and local governmental agencies, which used the aid to provide educational materials and equipment directly to public and private schools, violated the Establishment Clause.[262] Approximately thirty percent of the funds in one Louisiana parish that received aid was allocated for private schools, the vast

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[253] *See id.* at 826.
[254] *Id.* at 823, 825 (alteration in original).
[255] *Id.* at 830.
[256] *See id.* at 829–30 (discussing the forum).
[257] *Id.* at 844–46.
[258] *Id.* at 829–30.
[259] *Id.* at 836 (quoting App. to Pet. for Cert. at 66a, *Rosenberger* (No. 94-329) (alterations in original)).
[260] *Id.*
[261] 530 U.S. 793 (2000).
[262] *Id.* at 801.

preponderance of which were Roman Catholic. Justice Thomas, writing for Chief Justice Rehnquist and Justices Scalia and Kennedy, maintained that the statute was religion-neutral:

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. . . . If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.[263]

Justice Thomas further stated that so long as the aid to a religious school is not unsuitable owing to its having a religious content and the eligibility for the aid is determined in a constitutionally appropriate manner, it is without constitutional significance whether the school utilizes the aid to indoctrinate students.[264]

There are major problems with the Justice's reasoning. One cannot ignore the fact that most of the private schools receiving government funding were Roman Catholic.[265] Moreover, a mere five of the forty-six schools in the program were not religiously affiliated, while only seven of the forty-six were religiously affiliated other than with the Roman Catholic Church.[266] So the question becomes how unevenly must the results favor the majority religion before a state program is invalidated for being "non-neutral?" For the Court to take the position that it is constitutionally irrelevant whether religious schools utilize state funds to indoctrinate their students is to support in the jurisprudence of religion a doctrine roughly analogous to "separate but equal" in racial matters.

E. Good News Club v. Milford Central School[267]

The majority of the Court, speaking through Justice Thomas, relied upon *Rosenberger* and *Mitchell* as precedents for its decision in *Good News Club*, in

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[263] *Id.* at 809–10.
[264] *Id.* at 814.
[265] *Id.* at 803.
[266] *Id.*
[267] 533 U.S. 98 (2001).

which a public elementary school had prohibited a club from utilizing school premises after-hours for the purpose of encouraging (1) memorization and recitation of Bible verses, (2) Biblical storytelling, (3) instruction pertaining to the application of Biblical stories to the childrens' lives, and (4) prayer.[268] The Court took the position that prohibiting the club from meeting on school premises constituted viewpoint discrimination in the context of a limited public forum and refused to make a distinction between religious instruction and worship on the one hand and "discussion of secular subjects . . . from a religious perspective" on the other.[269] Certainly, there are crucial differences in context and design between an evangelical Christian worship service, for example, and a discussion of morality from the disparate perspectives of Sigmund Freud and C. S. Lewis. It does not serve either activity well for the two to be confused under a policy of purported neutrality where the state's antennae are so insensitive as to receive and to measure both types of discourse on one and the same frequency. The Court's failure to make such an obvious distinction as this seems nothing more than an exercise in judicial disingenuousness driven by a desire to aid the majority's religion.

Justice Thomas is undoubtedly capable of distinguishing between two kinds of discourse, even when the line between them is not always clear-cut. Consider, for example, his concurring opinion in *Capitol Square Review & Advisory Board v. Pinette*,[270] where the majority upheld the Ku Klux Klan's right to display an unattended cross in a traditional public forum next to the seat of Ohio's government.[271] The Justice observed with alacrity that the Klan's cross is much more a "political" than a "religious" symbol, appropriated by the Klan as "a symbol of hate."[272] Distinguishing between an act of worship and a discussion of secular subjects that involves a religious perspective[273] would seem to pose no greater difficulty than differentiating between the religious and political implications of a Latin cross.

F. Zelman v. Simmons-Harris[274]

The Court subsequently considered another religion case out of Ohio. The question was whether a pilot educational program, which provided vouchers or financial assistance to families in Cleveland for use in public and private schools,

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[268] *Id.* at 103.
[269] *Id.* at 104.
[270] 515 U.S. 753 (1995).
[271] *Id.*
[272] *Id.* at 770–71 (Thomas, J., concurring).
[273] *See Good News Club*, 533 U.S. at 104.
[274] 536 U.S. 639 (2002).

violated the Establishment Clause.[275] A so-called "circuit-breaker"[276] was in place: parents received government checks and decided to whom they would be endorsed. Forty-six of the fifty-six participating private schools were religious schools.[277] The Court's majority, speaking through Chief Justice Rehnquist, pointed out that, when there is a "government aid program . . . neutral with respect to religion," providing aid "directly to a broad class of citizens who, in turn, direct [the] aid to religious schools or institutions wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."[278] As noted by Justice Souter in his dissent, the problem was that there were far more private religious schools than private nonreligious ones, and the latter were able to accommodate only a severely limited number of voucher students.[279] The upshot was that if a student chose to attend a private school, the chances were overwhelming that it would be one supported by the Christian faith. Such results belie any claim of neutrality and engender many suspicions regarding the primary intent of those who attempt to justify their reasoning by appeal to the subterfuge of neutrality.

G. A "Valid Independent Reason" and Non-Neutrality

What the establishmentarian position demonstrates is that an action by the state promoting or enabling individuals to pursue a religion is non-neutral even when there is a so-called "valid independent reason" for the action. That reason can consist of safeguarding the integrity of an open public forum, addressing a dire educational situation in the inner city, or approving of the enforcement of a criminal statute of general applicability. It is well to remember, however, that law and politics are not air-tight disciplines. In the adjudication of any case there can be found a multiplicity of "reasons." There is likewise often an immense number of warrants that can support the drafting and enactment into law of a statute. A "valid independent reason" is not usually difficult for a judge or a legislator to find. Yet when such a reason produces grossly uneven or imbalanced results, the final product can hardly be labelled "neutral."

Consider the following example: Two individuals, *A* and *B*, are embroiled in litigation. *A* possesses unlimited financial resources, while *B* does not. Every day that the issues between the parties remain unadjudicated, both lose money, although that fact is far more damaging to *B* than to *A*. Suppose that the judge in the middle of the trial decides for "a valid independent reason" (e.g., that the trial is spilling

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[275] *Id.*

[276] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000); *see also Zelman*, 536 U.S. at 652.

[277] *Zelman*, 536 U.S. at 647.

[278] *Id.* at 652.

[279] *Id.* at 700–07 (Souter, J., dissenting).

over into a time frame when her vacation is scheduled) to order a continuance of six months. Who can say that, even with "a valid independent reason," her act is a neutral one respecting the two parties? The claim would be preposterous.[280] So it is with attempts to advocate for "neutral" government programs without carefully measuring and controlling their results, which is a task that is unfortunately impossible. Without accurate measurement and control, one may have a vision of neutrality but no assurance that it has been or ever will be implemented.

CONCLUSION

The concept of neutrality, when carefully examined, is not one that can inspire much confidence in the jurisprudence of religion. Regardless of the meaning that the term "neutrality" may carry in a religion case, there are invariably many more questions than answers. The term constitutes a ruse. It stamps with the air of public legitimacy the underlying political theory that it serves to conceal, whether the theory is classical liberalism, communitarianism, revised liberalism, de facto establishmentarianism, or some intermediate position. I have shown elsewhere that each of these named theories is checkered in its appeal.[281] So it is also with the second-order value of neutrality in terms of which jurists seek public approval for the political underpinnings of their decisions. A notion of neutrality is never worthier than the politics it attempts to veil.[282] Politics is about making choices and

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[280] Robert Nozick considers whether the minimal state of which he is an advocate is non-neutral, and he answers in the negative. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 272–73 (1974). He attempts to illustrate the ridiculousness of the welfare liberal position that the "enforcement of a prohibition which differentially benefits people makes the state nonneutral." *Id.* To that end, he asks whether a prohibition against rape is non-neutral, since the prohibition obviously benefits women more than men. He emphasizes that, because there is an *independent* reason for prohibiting rape:

> people have a right to control their own bodies, to choose their sexual partners, and to be secure against physical force and its threat. That a prohibition thus independently justifiable works out to affect different persons differently is no reason to condemn it as nonneutral, provided that it was instituted or continues for (something like) the reasons which justify it, and not in order to yield differential benefits.

Id. What Nozick has shown is not that the minimal state is non-neutral (for it is), but that the prospect of neutrality is not even desirable. Who would desire to live in a state in which every prohibition against crime was evaluated according to whether it yields differential benefits? Would such a state not invariably award the criminal as much as the victim?

[281] *See* Smith, *supra* note 1.

[282] My conclusion agrees with that of Larry Alexander. The state cannot be neutral about the good. For the state to survive means that it must make choices. Some values are always sacrificed for the sake of others. In short, as Alexander humorously puts it, "It's politics all the way down." *See* Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 636 (2002).

relinquishing some values for others. A political view is always a view from somewhere. There is no "neutral" place.

The net effect of utilizing the concept of neutrality in religion cases amounts to little more than judicial legerdemain and obfuscation. With this truth in mind, the words "neutral" and "neutrality" in the context of a judicial decision regarding religion should be greeted with sanguine skepticism along with tenacious effort to decode the hidden political meaning buried under the terms. For this reason, the concept of neutrality should not serve, as it has in recent years, as a pillar in the jurisprudence of religion.