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RELIGION AS OBJECT AND THE GRAMMAR OF LAW

LARRY CATÁ BACKER*

It is a commonplace notion that Religion¹ has been disestablished as a formal matter in the United States.² We also understand that our legal culture has extended the reach of this formal disestablishment well beyond that minimally required under the Federal Constitution.³ What Steven Smith suggests in his thoughtful article is that this well-known phenomenon of *de facto* disestablishment is far more pervasive and influential than we might suspect. "[I]t powerfully influences legal thinking—and thus judicial decision making—in a variety of ways and on a whole range of issues, many of which hardly anyone thinks of as religion clause issues at all."⁴

The result of this disestablishment is a deep and enduring depriving of Religion as a normative basis for decision making. Religion is relegated to *object*. As such, it is inconceivable to think of Religion as part of the *grammar* of law. "If an unspoken and irregular

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1. As I explain more fully in part II, *infra*, I distinguish here between Religion and religion. Religion connotes communities bound by fully formed formal integrated belief systems. Such systems may include more or less fully formed codes of everyday conduct derived from the tenets of the community's beliefs. This is what we normally think of when we hear the words Catholic, Methodist, Muslim, or Jew. The other—religion—is the more amorphous; it implies systems of religious sentiment which can be personal or collective, free-floating or coercive, open or exclusive. The former is a subset of the latter. All Religion can be deemed to be expressions of personal religious sensibilities. But amorphous religious sensibilities do not necessarily constitute Religion.

2. Formal disestablishment was enacted as a constitutional limitation on the federal government through the First Amendment. U.S. CONST. amend. I. This disestablishment was extended to the states, according to the courts at least, through the Fourteenth Amendment. U.S. CONST. amend. XIV.

3. See the articles cited in Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203, n.1 (1998) [hereinafter, Smith, *De Facto Disestablishment*].

4. *Id.* at 204.

but nonetheless powerful prohibition excluding religion from public and especially legal discourse has been in effect for some time, then those of us who are interested in 'law and religion' need to pay attention to that phenomenon."⁵

The deprivileging of Religion is at its most acute in what is described as the "fourth zone" of disestablishment.⁶ This is the zone of non-constitutional judicial, and I would add, legislative, decision-making. "[I]n the fourth zone it seems that the *de facto* disestablishment combines with a kind of residual legal positivism to produce a relatively strong restriction on the invocation of religion by judges."⁷ Professor Smith uses the example of the measure of damages to show how American hyper-disestablishment obliterates the measure of the psychic benefit of injury because of its quasi-religious connections. "Damages calculations do not offset lost salary, or compensation for pain and suffering with any credit for enriched insight, or enhanced self-understanding, or chance for reflection on the purpose of life, or the possible recovery of one's soul."⁸ The only reason for this omission is the "religious" character of that enterprise.⁹ As such, a potentially useful approach to the law of damages is "sacrificed" on the alter of disestablishment.

Professor Smith does not set out to judge the value of this state of affairs.¹⁰ However, by the end of Professor Smith's investigation, I was left with the clear sense that some sort of *conscious* reconciling of religion and the *process* of law is necessary to alleviate the tensions inherent in the current state of affairs. Professor Smith here speaks of the *de facto* disestablishment's "troubling consequence: It deprives legal discourse of the counsel of our deepest convictions and reflections, and thereby renders our discussions superficial and obtuse."¹¹

Ahhh, religion! In this paper, I wish to address three points raised

5. *Id.* at 227.

6. *Id.* at 211.

7. *Id.* at 217.

8. *Id.* at 223.

9. Professor Smith considers and rejects several arguments against the quantification of this "vertical element" of damages: (i) that the vertical element of damages is not realistically quantifiable, and (ii) the current civil approach is the only practical approach to measuring damages. *Id.* at 224-26.

10. Professor Smith begins his essay by acknowledging that that judges, citizens and legislators rely "upon their religious convictions in making political decisions." *Id.* at 203. However, he does not "intend to enter into the merits of that debate here, or to question whether that debate as typically framed is a meaningful one." *Id.*

11. *Id.* at 227.

or implied with respect to the notion of the objectification of Religion. First, I suggest that the American approach to Religion is not haphazard or serendipitous, nor is it accidental. Rather, *de facto* disestablishment reflects a basic normative choice made at the time of the founding of our Republic. The discursive quality of the Establishment Clause itself serves to compel treatment of Religion primarily as an *object of law*. That we understand that religion is something that is acted on can be readily seen in the Supreme Court's recent *City of Boerne v. Flores* decision,¹² as well as in the recent attempts to constitutionalize institutionalized prayer in public places.¹³

Second, many of the efforts of late twentieth century American commentators have moved away from a conceptualization of Religion as an object of law. In its place, we seek to substitute a conceptualization of Religion as part of the *grammar of law*. However, when we seek to stretch the utility of Religion—that is, when we attempt to make Religion serve as part of our grammar of law—we *cheat*. We do this by pretending that we do not speak of traditional Religion at all. Instead, we hide Religion behind the cloak of any one of an infinite number of amorphous personal belief systems. Yet, to engage in that enterprise is to belittle the normative significance of Religion as *independent imperial systems of law*.

Third, even assuming that society is inclined to permit the inclusion of Religion into the grammar of law (its process), we must be willing to *sanitize* Religion of both its context and its history. To accomplish this task, we must induce a national cultural amnesia. Yet it seems to me most odd in this day of cultural and historical reawakening that we engage in a project of official “forgetting.” Those who bear the effects of history and context find it harder to forget. Those whose Religion is built upon such history and context, especially in relation to other Religions, cannot but continue to behave in accordance with those dictates, even under the guise of “individual subjective belief.”

Finally, if we *must* insist on incorporating Religion into the grammar of law, we must be prepared for the consequences. I will speak here

12. 117 S. Ct. 2157 (1997).

13. I refer here, of course, to the constitutional amendment concerning public prayer which is championed this time around by Rep. Istook (R-Okla.). The amendment provides that: “To secure the people’s right to acknowledge God: The right to pray or acknowledge religious belief, heritage or tradition on public property, including public schools, shall not be infringed. The Government shall not compel joining in prayer, initiate or compose school prayers, discriminate against or deny a benefit on account of religion.” Katharine Q. Seelye, *Lawmaker Proposes New Prayer Amendment*, N.Y. TIMES, March 25, 1997, at A20.

briefly to what I consider the most important negative ramification of such a course. We must be prepared for the possibility that such an enterprise will endanger that other great cultural project of this Nation—the project of assimilation. While less appreciated today than in earlier times,¹⁴ the project of assimilation defined our character as a nation. Its abandonment can only be accelerated by the rush to incorporate Religion into the grammar of law.¹⁵ As such, I would argue, to paraphrase the language of Steve Smith, that “those of us who are interested in ‘law and [society]’ need to pay attention to that phenomenon.”¹⁶

I. RELIGION AS AN OBJECT OF LAW IN THE FEDERAL CONSTITUTION

Steven Smith suggested, in an earlier work, that “[e]ven when it does not dictate the results in particular cases, legal doctrine has the power to orient and direct the kind of discourse in which those cases are debated

14. See, e.g., NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 96 (1997) (“Indeed, in recent years it has been taken for granted that assimilation—as an expectation of how different ethnic and racial groups would respond to their common presence in one society, or as an ideal of how the society should evolve, or as the expected result of a sober social scientific analysis of the ultimate consequence of the meeting of people and races—is to be rejected”). This dislike of assimilation is, I would argue, a matter of aesthetics, an affectation that hides the reality behind the dislike. That reality is one in which control of the machinery of assimilation is contested among several groups. The use of the language of dislike shrouds this battle and is meant to prevent any of the contestants from usurping the machinery completely prior to the end of the contest. See Larry Catá Backer, *Essay: Poor Relief, Welfare Paralysis and Assimilation*, 1996 UTAH L. REV. 1, 34-46.

15. This is not to say that Religion will be the cause of the demise of assimilation. Rather, it forms part of that assault on the assimilative model which had dominated American thought through the end of the Second World War. Leading that assault, of course, has been what has been described as “multiculturalism.” In its guise as political diversity, its champions have sought quite openly to force the abandonment of all assimilative notions, and substitute any one of a number of other bases for union within one nation-state. See, e.g., PETER D. SALINS, *ASSIMILATION, AMERICAN STYLE* 95-99 (1997); GLAZER, *supra* note 14, at 1-21, 57-78. Cf. Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1958-1960 (1991) (arguing that the incorporation of diverse ideas and perspectives in the judicial process may prevent judges from making morally erroneous decisions because it allows judges to better understand the diverse body of litigants). Incorporation of Religion into the grammar of law might at first blush be seen as an effort, on the part of traditionalists, to counter this anti-assimilationist thrust. It is sometimes marketed under that banner. See generally, ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND THE AMERICAN DECLINE* (1996). However, it is better understood as a traditionalist version of anti-assimilation by reinstitutionalizing, as political, those cultural bases of governance and norm setting which predated the loss of hegemony by American Protestants, at least among the political elites. See discussion, *infra* part I.

16. Smith, *De Facto Disestablishment*, *supra* note 3, at 227.

and decided [It can] powerfully influence the way in which the debate is framed."¹⁷ I believe that the federal Constitution itself serves this discursive purpose. It has a strong discourse-orienting power which has crafted the framework within which we Americans have bound ourselves to think about Religion. With respect to Religion, the Federal Constitution has oriented Religion as a *noun* within the grammar of the law.

This orientating power is especially apparent in the Religion Clauses.¹⁸ The Religion Clauses orient Religion as an *object* of law. Those provisions gather up Religion as a bundle of issues involving worship by or through the state, and treats this bundle as a tangible *res*.¹⁹ Religion, as a body corporate, is separable and distinct from law. Indeed, as Justice O'Connor and Justice Scalia clearly illustrate in their dueling opinions in *City of Boerne*,²⁰ the colonial lawmakers, as well as the Founders, were concerned with Religion (as a formally constituted *res*) only as an object upon which law might act.²¹ Even in an age of great deference to Religion in all aspects of life, the American approach appeared to be "that the appropriate response to conflicts between the civil law and religious scruples was, where possible, accommodation of religious conduct."²² Accommodation is a curious word—one which does not suggest the incorporation of Religion in the process of everyday law making.

Indeed, this discursive quality of the Religion Clauses themselves follows the pattern laid down by our English progenitors as they struggled to effect religious peace in the Realm after almost two centuries of strife. In a society in which Christian principles as the moral philosophical substructure of law was unquestioned, Religion became noteworthy only in the guise of *practices*. One need look little further than John Locke for an understanding of the basis of which our constitutional discourse is framed (that is, bounded, and thus bounded, limited).²³

17. Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 526 (1994) [hereinafter, Smith, *Discourse of Disrespect*].

18. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

19. I would argue that the manifestations of Religion are tangible, and that the law is concerned with those manifestations.

20. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

21. See *id.* at 2172-76 (Scalia, J., concurring) and 2176-86 (O'Connor, J., dissenting).

22. *Id.* at 2183 (O'Connor, J., dissenting).

23. See John Locke, *A Letter Concerning Toleration*, in 35 GREAT BOOKS OF THE

Yet, we must understand that Religion was treated as *res* not because of a desire to disestablish "religious principles." Rather the reason implied quite the opposite rationale. Religion could be treated as *res* in a society in which Christian principles were firmly and unconsciously entrenched in the interstices of everyday law making.²⁴ Religious disestablishment of the kind described by Professor Smith becomes noteworthy only because civil decision making has strayed from the traditional religious principles which underlay law making through the end of the Second World War. Only in an America in which the normative substructure of systems of civil law have strayed from those of the systems of the old dominant religious discourse, could disestablishment at the level of mundane law making become *visible*. "Consensual pluralism at mid-century had been marked by a simply envisioned matrix of religious groups. Succeeding and replacing this was a more complex but still informal polity, one that did not focus on religious groups."²⁵ In the sections that follow, I attempt a exhibition of this Religious substructural complacency in law.²⁶

Because the religious principles of Christianity were so normatively ingrained in American law making, Religion could be treated as little different, conceptually, from objects like, for example, "corporations." Each such object is an intangible with tangible manifestations. Each is regulable to some extent. Thus, we have agreed for the moment that American state governments may regulate the "internal affairs"²⁷ of

WESTERN WORLD 1 (Robert M. Hutchins ed., Encyclopedia Britannica, Inc. 1952).

24. See *infra* part III.

25. MARTIN E. MARTY, *THE ONE AND THE MANY: AMERICA'S STRUGGLE FOR THE COMMON GOOD* 101 (1997).

26. See *infra* part IV.

27. "Internal affairs" is generally defined as "relations inter se of the corporation, its shareholders, directors, officers, or agents." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313 cmt. a (1971). "The regulation of the internal affairs of American business corporations and, thus, corporate governance, has largely and traditionally been a function of state law. A widely recognized conflict of laws principle establishes that the law of the corporation's state of incorporation is the governing law for that corporation." Mark J. Loewenstein, *The SEC and the Future of Corporate Governance* 41 ALA. L. REV. 783 786-87 (1994). See also Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29 (1987), RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 301 (1971) (providing a list of internal corporate affairs). The internal affairs principle has real application in the way in which we conceive of the intersection of "law" and "religion."

It may be appealing to characterize modern lawyers as priests in disguise, but such characterization would not change the fact that the secularization of the law was completed in England by the fifteenth century when Common Lawyers took charge of the Chancery. On the Continent, the clergy, which was strongly represented in

these intangible bodies corporate. Yet corporations remain free to order themselves within the limits of the regulations and in return are protected by the states. Analogously, Religion is also loosely regulable with respect to its tenets (polygamy, sacrifice, and the like) and operations (tax status), and is in turn protected by the state. The converse, however, would prove to be an unruly means of informing the way in which law (other than the law of their internal governance) is made. Indeed, such an application of ethos could be deemed "out of bounds" for the very reason that it would suggest the imposition of alien norms, that is, the internal governance principles of one or more of our religious "corporations," on a group (the "nation") which has negotiated another set of standards for governing conduct. These standards, of course, require sensitivity to the issue of "pari-corporate" significance.

This is perhaps the intuitive understanding of writers such as Scott Idleman and judges like Raul Gonzalez. Each considers the use of "religion" as something important for the process of law making. But each reserves this active use of "religion" to shape law making for the exceptional case.²⁸ In a sense, they seem to suggest that Religion remains an object unless a matter directly impacts on an area of direct concern to the ability of Religion to conduct its "internal affairs."

Consequently, for Religion to form part of the discursive paradigm of law while at the same time existing as the object of that paradigm, would appear inconsistent with the discourse of our basic law. Indeed, the recently decided *City of Boerne* case demonstrates the power of this discursive model.²⁹ In a case in which the extent of the enforcement power of the Fourteenth Amendment was ostensibly the issue, religion was treated as the object of the regulatory power of the legislature. May

the parliaments until the French Revolution, has also been finally excluded from the legal process. Consequently the legal profession (attorneys, judges, law professors) is clearly distinct from the priesthood in the Western legal tradition of today. Roughly speaking, the relationships between individuals, organizations or institutions in society are the province of the lawyers. The relationship between the individual and his or her internal conscience and/or between the individual and the transcendental or the supernatural mysteries may be considered the province of the priests.

Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 35-36 (1997).

28. See Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 434 (1993); Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH. L. REV. 1139, 1148 (1996). Both are cited by Professor Smith. See Smith, *De Facto Disestablishment*, *supra* note 3, at 215.

29. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

the legislature incidentally burden "religion,"³⁰ and may the legislature permit "religion" to burden "legislation" within the federal system?³¹ The Religious Freedom Restoration Act of 1993 ("RFRA")³² appears to mandate the use of Religion in the grammar of law in a limited range of legislative activity—when legislation might burden an individual's "exercise" of "religion." A majority of the Court substantially agreed that the intrusion of Religion into the grammar of law—even in this area of most direct affect on and concern to Religion—was beyond the power given the Congress under the Federal Constitution, even as amended by Section Five of the Fourteenth Amendment. Indeed, Justice Stevens was concerned that the RFRA amounted to a preference for "religion" over "irreligion" and as such, established religion in violation of the First Amendment.³³ For Justice Scalia, who concurred in part of the Court's decision, and Justice O'Connor, who dissented, the issue was the means by which and the limitations on the power of the state to affirmatively or incidentally burden the "right to participate in religious practices and conduct."³⁴

If this discursive power emanates from our basic law, then it follows that anti-establishment of the kind Professor Smith describes should not seem problematic. Indeed, Professor Smith himself demonstrates the strength of this choice to objectify Religion through his description of the way in which objectification has affected the curricular structure of legal education almost from its inception. "But the important point is that even when religion is considered, it typically appears more as a specialty item or a distinctive type of problem, *not* as a valuable way of thinking about law and legal issues generally."³⁵ Thus understood, we did not blunder into the anti-establishmentarianism of that area of the law described by Professor Smith as the Fourth Zone of disestablishment.³⁶ To have Religion work as a *verb* within the grammar of law would require a sharp departure from our discursive orientation of constitutional theory, which may, at some point subvert the framework within which we interpret our basic law.

Consequently, the failure to recognize the discursive quality of our

30. *Id.* at 2168-71.

31. *Id.* at 2169-72.

32. 42 U.S.C. § 2000bb-4 (1994).

33. *City of Boerne*, 117 S. Ct. at 2172.

34. *Id.* at 2177 (O'Connor, J., dissenting).

35. Smith, *De Facto Disestablishment*, *supra* note 3, at 212.

36. *See supra* notes 6-9.

Constitution, and the limits this quality suggests, especially in the guise of the Religion Clauses, may lead one to overstate the importance or nature of the lack of Religion as a discursive element of law making. We accepted the necessary repercussions of characterizing Religion as object with the crafting of the federal Constitution. Such a characterization was no accident; and neither is the resulting disestablishment at the level of the prosaic. Any change of this state of affairs may well require deliberate and constitutional re-making. Still, Professor Smith's unveiling of disestablishment at the level of mundane law making is all the more striking for exposing the twentieth century American revolution in normative consensus for law making. Our approach to Religion has not changed. What has changed is the normative substructure on which the decision to objectify Religion was made. Law making based on a Judeo-Christian normative substructure can no longer be taken for granted. As such, Professor Smith clearly illustrates how this cultural transformation of (ir)religious normativity may impact on the way those with religious sensibilities must approach law making. What makes this difficult is not the place of Religion in law, but the ways in which challenges to the normative Supremacy of Protestant Christianity may require us to abandon ways of thinking about law which were commonplace and deeply held since the time of the colonization.

II. THE FAILURE OF RELIGION AS PART OF THE GRAMMAR OF LAW

I have suggested that when we attempt to treat Religion within law as something other than an object of regulation, we "go against the grain" of the discursive scheme of the federal Constitution. In this section, I submit that when we seek to stretch the utility of Religion, that is, when we attempt to make Religion serve as part of the grammar of law, we must invariably fail . . . *unless we cheat*. To cheat is to equate private subjective religious sensibilities with Religion, and to confer on the comprehensive and exclusive systems of Religion the same benign indulgence that we would accord these private subjective sensibilities. The result is an intolerable state of affairs in which incompatible systems battle using as "fronts" the personal subjective "religious" and "civil" sensibilities of individual proxies. Our civil law began as an aping of religious law; it incorporated the basic postulates of religious law. To the extent that we have begun to reject that model (as some have begun to reject the dominance of Christian moral philosophy as the root of law in this century), religious sensibilities may of necessity offer not merely a different approach to law making, but an incompatible one.

Religion comprises wholly developed systems of laws, as comprehensive as anything devised by the secular state. It is not for nothing that Professor Smith notes in passing that a discussion of the effect of religion on fourth zone (everyday common law issues) would necessarily have to "compare secular contract, tort and property law with Catholic, Protestant, Mormon, Jewish and Muslim versions of the same subject."³⁷ Religion as legal codex and jurisprudence demands an exclusive allegiance every bit as jealous as that traditionally required by the state in civil matters. To merge such systems requires the disappearance of one in favor of the other.

We have become quite adept at substituting this notion of religious sensibilities, and politically expedient religious moral philosophy, for what used to pass for Religion. We have the temerity to do this in the name of Religion. Yet to do this is to pretend that Religion does not exist, at least in the sense commonly understood at the beginning of the Republic. Yet we know that this complete system of law—Religion—does exist. Still, we engage in this strange enterprise. Increasingly we have chosen to substitute this thing I will call *religion* (with a lowercase) for Religion when describing the relationship of "Religion" to civil "legal culture." This (lowercase) religion posits personal belief systems for the organized jurisprudence of what now might be more narrowly described as "organized" Religion.

But such recasting ignores the traditional normative significance of Religions in their own right as independent, fully-formed systems of *law*. Any such Religion does not blend into our law, it tends to supplant or retreat. And the problem is not ameliorated because the "results" under each may be similar. Religion has become "object" in our system to avoid such "conflict of laws" problems. Early in our history, we chose to avoid having to engage in the political battles implied by any necessity of "compar[ing] secular contract, tort, and property law with Catholic, Protestant, Mormon, Jewish and Muslim versions of the same subject"³⁸ and choosing a "winner" from inconsistent approaches. Consequently, treating "Religion" as "religion" in order to provide a place for it within the grammar of law merely finesses the problem without confronting it. Such an approach can do little but create

37. Smith, *De Facto Disestablishment*, *supra* note 3, at 218.

38. *Id.* at 218. Of course, our Founders would have had little difficulty making this choice because the competition then was between variants of what we now consider mainstream Christian sects. But today the stakes are higher since the religious *and* secular competitors have become so diverse.

another site for potentially irresolvable conflict.

Thus, even as he acknowledges the complete and competing legal systems of Religion, Professor Smith defines religion somewhat loosely. "What we call religion typically amounts to a comprehensive way of perceiving and understanding life and the world; it affects everything."³⁹ Religion becomes a benign, individualized, subjective spiritualism. In this form it is made more palatable as an active element of our legal grammar. This modern view has become increasingly accepted in the West. For example, Professor Winnifred Fallers Sullivan suggests that we pay more attention to the idea of religion as a sort of varied and shifting phenomenon. We must discard the tendency to objectively classify and adopt a subjective view of belief.⁴⁰ Wrapped in the veil of subjectivity, we can more palatably embrace individual belief as spiritualism and spiritualism as Religion. My personal belief ought to be accorded the same dignity and likened to the equivalent of, say, Islam, Judaism, or Catholicism. Under this view, my moral philosophy ought to be accorded the same weight as the Shari'a, the Canon Law, or the Talmud. And all of this I ought to bring to my construction of the civil law, especially with respect to the way in which the civil law embraces you. I believe that this notion of subjectivity as the basis of acknowledging "religious" belief is fundamentally right, as a matter of anthropology, and certainly as a matter of faith (perhaps understood as

39. *Id.* at 216.

40. Professor Sullivan describes the way in which academics have deconstructed the notion of "religion" in recent years. See Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 443 (1998). A central problem has centered on the indeterminacy of the concept of religion. We cannot seem to agree on a formula for "knowing religion when we see it." The problem has been described as originating from the necessity of creating a definition useful in a world in which religious diaspora exist everywhere and where the old Religious definitions of "religion" have ceased to be definitive. *Id.* The two basic methods take very different approaches. The *objective* approach looks to group norms to "find" religion. *Id.* at 446-47. Religion is encountered as a community. Evidence of Religion centers on community—written doctrine or oral tradition, systems of rules or codes of behavior, mechanisms for policing conformity to community norms and the like. *Id.* at 447-48. The object is to make a determination that a requisite level of shared norms and beliefs exist so that, as an "objective" matter, that it would be possible to say that a multi-generational community of believers exist. *Id.* The *subjective* approach concentrates on the individual. Religion is not equated with community; religion is a function of evidence of the existence of some threshold set of coherent personal spiritual beliefs. *Id.* at 447-49. The notion of the indeterminacy of religion is one of long standing in legal academia. See, e.g., Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964) (arguing that even defining religion might violate the First Amendment). See generally Jesse Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (advocating a definition of religion that is specific enough to allow courts to draw reasonable lines between religion and non-religious belief systems).

the Calvinists would have us understand the concept).⁴¹ As a matter of the historical experience of America, however, such a definition may prove more dangerous than useful. It will serve as a cloaking device—to raise personal belief to a dizzying dignity while hiding the way in which the “personal” religious “sensibilities” of adherents of Religions with powerful and well-developed traditions of “law” actually exalt assimilation of the norms of the more influential of these communities. Think of it at the level of the mundane. When you speak as an individual, do I hear the collective voices of the group of which you are a member? I suspect that most of us will hear you as an individual and then weigh the value of your sentiments by the strength of the conformity of that view to those officially professed by the Religion to which you belong. In the ears of one’s audience there may be no such thing as individual voices.

Ironically, what this new “subjective” theoretics of the sociology of religion calls to mind is not so much late twentieth-century pluralism but third-century Imperial Roman spiritual *anomie*.⁴² We now seethe with

41. On faith, *see, e.g.*, JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION, 542-92 (1559) (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960). “[W]e hold faith to be a knowledge of God’s will toward us, perceived from his Word.” *Id.* at 549. “For, as faith is not content with a doubtful and changeable opinion, so it is not content with an obscure and confused conception; but requires full and fixed certainty, such as men are wont to have from things experienced and proved.” *Id.* at 560. “Here, indeed, is the chief hinge on which faith turns: that we do not regard the promises of mercy that God offers as true only outside ourselves, but not at all in us; rather that we make them ours by inwardly embracing them.” *Id.* at 561. For a thoughtful defense of Christian faith as fully compatible with a pluralistic democratic society, *see* RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 160-64 (1996). Yet even Dean Thiemann admits that any “theoretical defense of public religion will be of little effect unless religious communities reform their views of faith’s contribution to a pluralistic society.” *Id.* at 160.

42. The fourth century marked a bitter war for the “soul” of Rome, even as effective power passed out of Italy and to Constantinople. A celebrated battle in that war was fought around the statue of goddess Victory, which the Emperor ordered removed from the altar in the Senate in order to placate the Christian minority in the Senate. This sparked the famous exchange between Symmachus, the pagan, and Ambrose, bishop of Milan, around 382. Symmachus pleaded for toleration and respect for the traditions on which the whole of Roman civilization was based. Ambrose’s response, full of the hubris of a religion on the ascendant, was ruthless and uncompromising. For a discussion of the debate, *see* J.M. WALLACE-HADRILL, THE BARBARIAN WEST A.D. 400-1000: THE EARLY MIDDLE AGES 10-11 (rev. ed. 1962). The parallels to the “religious” struggle for the “soul” of America should not be dismissed. The irony is that religious traditionalists occupy the position of Symmachus in twentieth century America, though they continue to speak the language of Ambrose.

We can never be certain what was happening. But we can often guess what contemporaries though was happening. We can see that the material troubles of their day had sharpened, without creating, their sense of un-ease both with the

official subjective spiritualisms standing in the place of Religion; rather, subjective spirituality is now treated like Religion. We are attempting to change the traditional conceptions of Religion, yet we have not begun the hard process of reconfiguring the political superstructure that we built on the basis of the traditional definitions.

The stresses of this dislocation constantly appear in our Religion Clause cases. The traditionalism of Justice Scalia is a model of political disestablishment coupled with a fear of subjective spiritualisms:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.... But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.⁴³

Yet, that same political disestablishment would seemingly approve the use of subjective moral and religious "sensibilities" to disenfranchise discrete groups of voters.⁴⁴ On the other hand, Justice O'Connor would have us believe that such subjective spiritualisms, in the form of religious practices, are entitled to an "affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application."⁴⁵ However, such guarantees might not prevent the government from regulating "licentiousness," which itself is a concept deeply routed in the moral paradigms of the old Christian legal

classical and with the Christian explanations of man's function in society. Some contended that Antiquity was passing away; others that it was not; some that Christianity and classical culture were good bedfellows; others, including some Christians, that they were not. The history of the times is the fact rather than the outcome of this deep dispute.

Id. at 20.

43. *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

44. *Romer v. Evans*, 517 U.S. 620 (1996). See Larry Catá Backer, *Reading Entrails: Romer, VMI, and the Art of Divining Equal Protection*, 32 *TULSA L.J.* 361, 384-85 (1997).

45. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2185 (1997) (O'Connor, J., dissenting).

discourse hegemony.⁴⁶

Such hegemony underlies the Pandora's box which was the now invalidated RFRA.⁴⁷ Iranian clerics understood the power of religious structure well. There is a thin line between the use of religious sensibilities in forming political decision-making and democratic theocracy based on absolutist obedience to the interpretive powers of religious leaders. We ought not to pretend that individual religious sensibilities can mask the potentially incompatible systems of Religion for which they are meant to substitute when we think of "religion" informing "politics." Nor can we fail to remember that, until quite recently, Religion, or at least the Christian Protestant Religion *was* different in this country. Professor Smith's observations about the fundamental nature of disestablishment at the level of the mundane cannot be appreciated without an appreciation of the notion of the special place of Religion in our traditional civil society. It is to this understanding that I turn to next.

III. RELIGION IS DIFFERENT

Professor Smith makes a strong case for the inclusion of Religion within legal grammar on the basis of the now increasingly commonly held notion that Religion is merely different in kind from other forms of legal grammar. For example, there ought to be no difference in effect between informing law making by recourse to Religion, and informing law making by political, ideological or moral systems not labelled Religion *per se*. These might well include moral and social philosophy, economics, critical race or feminist theory, principles of history or any number of other such referents for valuing choices in law making.⁴⁸ Indeed, there is something to be said in favor of the comparability of Religion to other normative frameworks for decision making in our society.⁴⁹

46. *Id.* at 2180.

47. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994).

48. Thus, for example, Professor Smith notes that Religion is no less widely believed in, or relevant, or controversial than the non-religious systems of moral philosophy which have gained currency among the American elite in the last half of this century. See Smith, *De Facto Disestablishment*, *supra* note 3, at 212-13.

49. Thus, some have intimated that comprehensive belief systems may well be "religions" under any inclusive definition (but without the conventional Godhead). See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, 1182-83 (2d ed. 1988) ("A generous functional definition would seem to classify any deep-rooted philosophy as religion, Marxism as well as Methodism."). Judge Adams has noted that "moral or patriotic views are not by themselves 'religious,' but if they are pressed as divine law or a part of a

However, as my discussion in the last section intimated, Religion is different. Religion, and the Protestant version of this Religion, has had a critical place in the development of American civil society. To assume otherwise requires us to *forget*. It requires us to sanitize Religion of its history and context. We have fought wars over Religion.⁵⁰ We still do.⁵¹ We still worry about the "status" of religion—belief system or nation/state.⁵² We have used Religion as the identifier on the basis of which we segregate groups within our nation, sometimes by choice,⁵³ and sometimes not.⁵⁴ We have used it to establish hierarchy.⁵⁵ We have racialized Religion.⁵⁶ In this we are truly the inheritors of Pagan Rome.⁵⁷

comprehensive belief system that presents them as 'truth,' they might well rise to the religious level." *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring). *But see* Choper, *supra* note 40, at 597-601.

50. For an interesting discussion, see Marvin Becker, *An Essay on the Vicissitudes of Civil Society with Special Reference to Scotland in the Eighteenth Century*, 72 IND. L.J. 463 (1997) (discussing the development of the concept of civil society in eighteenth century Scotland after a long period of civil and religious war).

51. Consider in Europe, the religious disharmony underlying the wars between Irish Protestants and Catholics. Or, for that matter, between Catholic Croatia, Muslim Bosnia, and Orthodox Serbia. See generally MARK JUERGENSMEYER, *THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE* (1993) (arguing that current religious violence evidences the decline of the intellectual hegemony of the Enlightenment notion of civil society and spawns attempts to reimpose some version of society based on modern renditions of traditional religious norms); Donald L. Horowitz, *Democracy in Divided Societies*, 4(4) J. DEMOCRACY 18 (1993).

52. See Yasmin Abdullah, Note, *The Holy See at the United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835 n.3 (1996).

53. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

54. For example, so-called social clubs which restrict membership on the basis of religious affiliation were common to the American landscape until fairly recently. Secular in everything but membership criteria, they have been used to exclude and subordinate the groups deemed unworthy of inclusion. Justice Ginsberg has recounted how, until fairly recently, it was extremely difficult for a Jewish person to get a job as a lawyer with the large New York City firms it being expected that Jews would work "with their own." See ELEANOR H. AYER, *RUTH BADER GINSBERG: FIRE AND STEEL ON THE SUPREME COURT* 33 (1994).

55. This use of Religion to establish social hierarchy is most evident in the case of homosexuals. Homosexuals and Jews have been inextricably bound together by a common core of religious sentiments which have been used to subordinate the one and then the other. Indeed, as Didi Herman has demonstrated, Religion—or at least the religious sentiments of certain groups of self-professed Christians—has used the old language of separation and hierarchy, developed over the centuries to maintain the reduced status of Jews, in the battle to maintain the social and legal disabilities of gay men and lesbians. See DIDI HERMAN, *THE ANTI-GAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 38-42 (1997).

56. The Spanish were early practitioners of this art and their subjects were the people of Israel. Consider that the first set of "Jim Crow" laws were developed in Spain in the sixteenth century and were aimed at excluding newly converted Jews from the economic and gene pools of the "old" Christians. See, e.g., JANE S. GERBER, *THE JEWS OF SPAIN: A*

Each new wave of immigrants has brought to these shores the baggage of their traditional view of and adherence to Religion and the use of Religion to define (and oppress) the world from which they came. That history—Religious culture—does not disappear merely by the expedient of entry into the United States. However a bloodless discussion of individualized religious sensibilities would pretend that such things neither exist nor influence such individual expressions of such “religious sensibilities.”

We still compete fiercely for religious loyalty—and are not above using the state’s instrumentalities to advance the interests of Religion. This is a world-wide phenomenon. Consider the recent efforts of the Russian Duma to limit the influx of charismatic Christian sects,⁵⁸ the efforts of the Catholic hierarchy in Spanish-speaking America against Protestant and Mormon missionaries,⁵⁹ or that of Muslim Indonesia to

HISTORY OF THE SEPHARDIC EXPERIENCE 120-124 (The Free Press ed. 1992). The Germans were the most ferocious practitioners of this sort of sensibility in the twentieth century. See DANIEL J. GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 65-69 (1997). On the creation of the “mythical” Jew in Anglo-American tradition, see, e.g., *BETWEEN “RACE” AND CULTURE: REPRESENTATIONS OF “THE JEW” IN ENGLISH AND AMERICAN LITERATURE* 1-15 (Bryan Cheyette ed., 1996); STEPHEN M. FELDMAN, *PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* 10-21 (1996).

57. Consider in this light the contrast between the condition of the Jews and early Christians in Rome:

The difference between them is simple and obvious, but, according to the sentiments of antiquity, it was of the highest importance. The Jews were a *nation*, the Christians were a *sect*: and if it was natural for every community to respect the sacred institutions of their neighbours, it was incumbent on them to persevere in those of their ancestors.

EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 448 (Harcour Brace, & Co. 1960) (1737). We have inherited an old tradition indeed.

58. See, e.g., Tom Carter, *Yeltsin Blocks Limits on Religious Liberty; U.S. Report Details Global Persecution*, WASH. TIMES, July 23, 1997, at A1. For an interesting perspective, see Julia Shargorodska, *Religious Restrictions Echoed in Other Countries*, MOSCOW TIMES, July 25, 1997, available in LEXIS, News Library, Curnws File.

59. Indeed, sectarian rivalries reflect more than a struggle for the souls of men; as it has so often manifested itself over the past several thousand years, such rivalries also seem to reflect a contest for the control of the mechanisms of political power.

While the conspiracy theories of the left about the evangelicals as agents of American imperialism are less frequently heard today, the Catholic church continues to be concerned about the advances of what the Catholic bishops at their 1992 Conference in Santo Domingo called “the sects.” Referring to the challenge posed by “proselytizing fundamentalism by sectarian, Christian groups who hinder the sound ecumenical path,” they accused them of hostility to Catholicism and of resorting “to defamation and to material inducements,” adding that, “although they are only weakly committed to the temporal realm, they tend to become involved in politics with a view to taking power.”

pacify Catholic East Timor.⁶⁰

Our constitution was written at a time in history when the ferocious use of Religion for this or that political aim was fresh in the minds of the American post-colonial populace. Consequently, we formalized our fears about the use of Religion for oppressive purposes by regulating and limiting the use of Religion for making political and economic decisions about people.⁶¹ And yet, the Founding Fathers were only partially successful. The price (gladly paid) for formal dissociation between Religion and the state was the retention of the value systems of the dominant Religion(s) in the civil state.⁶² None of this can be easily brushed aside by the simple expedient of converting Religion into some sort of individualized set of spirituality. That we would look to individual expression rather than to the underlying formal web of conformity and obedience, which constitutes systems of Religion when we speak about "religion" and its "use" in arriving at political decisions, does nothing to change the historical character of Religion.

Consider that, until recently, such notions of "individualized subjective spiritualism" could exist only within the umbrella of

Paul E. Sigmund, *Religious Human Rights in Latin America*, 10 EMORY INT'L L. REV. 173, 179 (1996).

60. See, e.g., *Timor Rebels Widen Attacks on Indonesia Rule*, N.Y. TIMES, June 8, 1997, at 17; Ethan Casey, *A Nation Out of Control? Indonesia's Christian Minority Faces Beating, Burnings, and Death*, CHRISTIANITY TODAY, March 3, 1997, at 50, available in LEXIS, News Library, Curnws File.

61. Thus, for example, we have prohibited the making of (most) economic or political decisions based on the religious beliefs of the object of their decision. Justice Scalia's dissent in *Romer v. Evans* provides a nice summary of these notions. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting). However, in the style of John Locke, we still permit making private social decisions on the basis of religious beliefs. We also permit individual Religions to discriminate against certain forms of social intercourse (i.e. marriage outside the faith, etc.) in the enforcement of its own norms, as long as enforcement is limited. See Locke, *supra* note 23.

62. "The reviewed [19th century] commentaries offer explanations why the constitutional framers avoided an explicit Christian designation, and emphasize the document's few explicit references to the Deity and implicit incorporation of Christian customs and belief into constitutional law." Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 938 (1996) (reviewing earlier commentaries in an attempt to explain the basis for the lack of explicit references to a Christian deity in the Constitution). Dean Thiemann also recognizes that at the time the religion clauses appeared to establish diversity, "the *de facto* establishment of a cultural Protestant Christianity remained a reality at least until the mid-twentieth century." Ronald F. Thiemann, *Religion and Legal Discourse: An Indirect Relation*, 81 MARQ. L. REV. 287, 290 (1998).

Christianity.⁶³ It existed because the basic acceptable tenets of such spirituality were firmly grounded in Christian cosmology and moral philosophy. There was no major rift between basic religious notions, so understood, and the civil state. We never spoke of it, but why should we have? "Notions fundamental to the dominant worldview and operation of a society, precisely because they are taken for granted, often are not expressed in a manner commensurate with their prominence and significance or, when uttered, seen as worthy by others to be noted and recorded."⁶⁴ From our perspective at the end of the twentieth century we cannot see Religion and civil society intimately intertwining. But we live in an age of competing Religion. In a prior age, the conversation about Religion and civil society was hardly heard. At the level of cultural, normative, and political life, Religion (understood as the Protestant Religion) had completely penetrated law.

Evidence of this union, of this "knowing" in the Biblical sense, is available at the margins. Consider the regulation of "sodomy."

The early cases speak substantially in religious terms. The conduct proscribed represents the type of "moral filthiness and iniquity" which ought to be controlled through the criminal law. This was a crime committed against the very foundation of the Christian, and therefore social order, and was of so vile a magnitude as not to be named by Christians—"Peccatum illud horribile inter christianos non nominandum." The crime was considered "one of the most revolting known to the law." It was as simple as that.... In this sense, the scope of the legal

63. "For much of American history, it was an unchallenged assumption that America was a 'Christian nation,' not in any particular denominational sense, but more generally as manifested in traditions, institutions, values, and symbols." Dreisbach, *supra* note 62, at 937. On the history of movements in group expressions of "subjective spiritualism" within American Christianity, see, e.g., ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES (1971); MARTIN E. MARTY, RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA (1970); ERNEST L. TUVESON, REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE (1968). This notion changed radically in the second half of the twentieth century, when, in accordance with the fever dreams of traditionalist advocates, "a distinct minority in America—including extreme deists, liberal religionists, rationalists, free-thinkers, secularists, agnostics, and hyper-Calvinists—have maintained that the Constitution's failure to acknowledge God evidenced an intent by the framers to create a wholly secular polity—one that discontinued all connection between civil government and religion, or that indicated official indifference or even hostility toward religion." Dreisbach, *supra* note 62, at 936. The result is the formal emergence of non-Western spiritualisms as religion. See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding unconstitutional a series of city ordinances substantially prohibiting non-Western religious rituals involving the sacrifice of animals).

64. GOLDHAGEN, *supra* note 56, at 32.

proscription reflected the moral condemnation of the community. This was thought a sound basis of criminalization, especially where the moral order was unquestioned.⁶⁵

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Prior to the First World War, then, a consensus appeared to have been reached by American courts This consensus was based in large part on acceptance of the Christian paradigm of sex and sexual conduct. There were the two kinds of sex, only one of which was, within the confines of marriage, licit. All other forms of sexual conduct were illicit—and an unthinkable violation of the absolute commandment of God. The “goodness” or “badness” of particular conduct was judged from the perspective of Christian sexual taboos—the closer the conduct resembled “good” sex the less offensive the conduct. Conversely, the less the conduct proscribed resembled the only form of licit conduct the more vile was the conduct.⁶⁶

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To courts of an earlier age, there was perhaps only a difference of degree between the vileness of fellatio and that of, say, murder. Both amply demonstrated the election of the perpetrator to ignore as a matter of indifference the moral and ethical rules of a society based on the marriage relationship imposed on humankind by God. To a society that unthinkingly accepts these fundamental norms of social ordering, any activity in derogation of the family, especially non-marital sexual activities, is not merely immoral and sinful, but also threatens the secular order of society, and is therefore a matter of state regulation. This notion has been reflected from the time of American independence. Thus, in the guidebook published in 1795 for Virginia justices of the peace, the form to be used for indictments for buggery declared that the acts giving rise to the crime resulted from a lack of fear of God, and a disregard for the order of nature, were instigated by the devil, which greatly displeased Almighty God, and were against the peace and dignity of the commonwealth. Good public order, therefore, seems to require the containment of activity that might have posed a threat to the state as well as to the divine order.⁶⁷

“When a conversation is monolithic or close to monolithic on certain

65. Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37, 77 (1993) (citations omitted).

66. *Id.* at 79.

67. *Id.* at 80-81.

points—and this includes the unstated, underlying cognitive models—then a society's members automatically incorporate its features into the organization of their minds, into the fundamental axioms that they use (consciously or unconsciously) in perceiving, understanding, analyzing, and responding to all social phenomena.”⁶⁸ It was not so long ago, and consistent with the values we imputed to the First Amendment, that states could criminalize blasphemy against the Christian sacred.⁶⁹ We still appear to share the same religiously based revulsion about polygamy,⁷⁰ though, as traditionalists have pointed out, we have begun (passively and perhaps blindly) to dismantle legal objections to the practice.⁷¹

When we speak of the use of “religious” values in civil debate, we forget, at our peril, that to many ears, what is heard is a traditionalist call, not so much to spirituality and morality, but to the restoration of Christian moral values hegemony in the civil state.⁷² That baggage is hard to overcome.⁷³ Religion creates community. The *Christian* moral order once created the uncontested basis for law making (and its limits)

68. GOLDHAGEN, *supra* note 56, at 33-34.

69. See, e.g., OKLA. STAT. ANN. tit. 21 §§ 901, 903 (West 1983) (defining “blasphemy” as “wantonly uttering or publishing words, casting contumelious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures or the Christian or any other religion.”); See *id.* § 903 (declaring blasphemy a misdemeanor). Each of these provisions were taken from the laws of the Dakota territories.

70. See *Reynolds v. U.S.*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); see also *Church of Lukumi Babalu Aye Inc. v. Hialeah*, 508 U.S. 520, 569 (1993) (in which Justice Souter made the suggestion that polygamy could be suppressed as a “substantial threat to public safety, peace or order” under *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (Souter, J., concurring in part and concurring in judgment)).

71. “If homosexuality may not be discouraged by state constitutions, it is difficult to see how the provisions of various state constitutions banning polygamy can stand. They can’t as a logical matter, but the Court (like modern liberal culture) is not as solicitous of polygamy as it is of homosexuality.” BORK, *supra* note 15, at 113-114.

72. “It was the apparent invasion of the private and sacred zone by forces which religionists considered alien, subversive or disruptive that occasioned their reactions. Meanwhile, having yielded so much to secular forces, element after element on the religious scene found reasons and ways to aspire to recover some vision of the whole, some means to address all of life.” Martin E. Marty, *The Twentieth Century: Protestants and Others*, in *RELIGION AND THE AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S* 322, 334 (Mark A. Noll ed. 1990).

73. “For good or ill, Biblical foundationalism has shaped our social ordering in ways in which the merely political or economic cannot fundamentally change.” Larry Catá Backer, *The Many Faces of Hegemony: Patriarchy and Welfare as a Women’s Issue*, 72 NW. U. L. REV. (forthcoming 1997) (manuscript at 54, on file with the author) (reviewing MIMI ABRAMOVITZ, *UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES* (1996)).

in this society. Christianity provided what Professor Fish might describe as our foundationalist basis for law.⁷⁴ Consequently, I do not believe one can divorce Religion from the context in which it has existed in the world. Religion is not merely a series of conduct codes and precepts. Religion is not merely a moral philosophy, nor a naked spirituality. It is a world view, which necessarily incorporates judgments about others, and particularly other religions, as well as a sense of its relationships with those not of that particular religious community.

Understand that the sanitizing which I describe is not limited to Western European religious history and context. Islam provides its own sets of oppressions, no less nasty than anything coming out of Europe. Consider the situation of the Coptic Christians in Egypt,⁷⁵ or the Ba'hais in Iran.⁷⁶ Asia provides its own context with, for example, the recent efforts of the People's Republic of China to suppress Christianity.⁷⁷ One could go on and on. But this suffices to make the point. Even if we are prepared to concede that religion can exist as a collection of subjective spirituality, it is hard to apply Religion as the grammar of law shorn of the history and context of the religious values thus infusing the debate.

IV. IF RELIGION FORMS THE GRAMMAR OF LAW, DO WE ABANDON ASSIMILATION AS A FORCE IN AMERICAN LIFE

Religion, therefore, can be dangerous as a source of the grammar of law today, as merely another moral or ethical component of legal decision making.⁷⁸ I do not speak to the value of religious community or to the utility of fostering such communities of believers. However, when applied as the grammar of the law of the *American* community, I believe

74. See, e.g., Stanley Fish, *Is there a Text in this Class?*, in *IS THERE A TEXT IN THIS CLASS?* 303-04 (1980).

75. A.M. Rosenthal, *On My Mind: The Well Poisoners*, N.Y. TIMES, April 29, 1997, at A23.

76. See Sajid Rizvi, *Dateline: The Third World Iran's Mullahs Wage War on Bahai Faith*, UNITED PRESS INT'L, July 18, 1983, available in LEXIS, News Libraries, Arcnws Lib. (Reporting that "[t]he Bahais have faced harassment in Iran . . . since the birth of the religion in the 1840s.").

77. See, e.g., Thomas W. Lippman, *U.S. Cites Foreign Foes of Christianity: China, Saudi Arabia Top State Dept. List*, WASH. POST, July 23, 1997, at A18; Frank Langfitt, *"We Will Not Stop" Dissident Pastor Says; China "Underground" Churches Continue to Grow Despite the State's Attempt to Control Them*, BALTIMORE SUN, July 24, 1997 at 1A, available in, LEXIS, News Library, Curnws File.

78. Again, this is not to imply that other normative structures are any less dangerous. Marxism, for example, may be as dangerous as Religion when it serves as a basis for law's grammar.

it threatens that other great American project—*assimilation*. The danger does not arise because Religion is illogical or “bad” in itself. Instead, the danger lies in the power of Religion to *exclude*. Were this merely a theoretical danger, perhaps it would not be so great. However, Religion, unsanitized of its history and context, provides a powerful site for exclusion, racialization, and anti-pluralism. Religion comes with too much baggage; it is imperialist and uncompromising; it is conversation ending.

In a society which makes the basic decision to accept as binding the fundamental norms animating a Religion, such a Religion is unproblematic. In such a society, Religion serves its natural role as supplier of the foundation of politics, society and culture—as providing the language of discussion and the limits of thought. Disagreement in such a society occurs at the margin and involves small questions of hermeneutics within a well defined moral-political world. Toleration is permitted for social and religious characteristics which are not too dissimilar from the fundamental Religion.⁷⁹ That, indeed, might well have characterized the basic agreement of this nation prior to the Second World War.⁸⁰

Sometime thereafter, our elites decided, with the acquiescence of some but by no means all, of the rest of us, that in a pluralist society, these characteristics are potentially dangerous to a free people. Formally divorcing official Religion from law permits the development of a unifying language of law and social discourse shorn of the divisive effects of differences in dogma in an America in which differences in religious dogma, and its effects on fundamental approaches to law making, have been magnified.

The question thus arises, in contesting the traditional binding of civil norm to Religious value, have we chosen to substitute a different sort of faith for that we seemingly abandon, or have we chosen merely to better camouflage the religious sentiment underlying our law making?⁸¹ One

79. “[T]oleration need not be an infinitely elastic principle and tends to cluster around a norm. The norm itself assumes critical importance as the referent for determining whether and to what extent a given form of expression is to be suppressed.” Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 772 (1993).

80. See generally MARTIN E. MARTY, *PROTESTANTISM IN THE UNITED STATES: RIGHTEOUS EMPIRE* (2d ed. 1986). But see generally ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION* (W.W. Norton & Co. 1996).

81. Thus, for example, in *The Godless Constitution*, not only do the authors attempt to refute the current conservative Christian arguments that the Founding Fathers intended to establish some sort of Christian nation, but they make the further argument that a secular

can argue that the irresistible force of faith sustains the drive to this modern form of assimilation of and conformity by the not yet *saved*. "If you believe you are saved, you can easily come to believe that you can do no wrong. Because you believe in God, you will believe you are God, or at least that you're in tight with Him."⁸² The critical change, however, lies in the fact that Religion no longer occupies an exclusive position as the source of legal rationale. It must share this role with potentially competing systems. To the extent other voices win, assimilation through norm imposition finds a basis in which the old exclusions of Religion can be avoided.

*McGowen v. Maryland*⁸³ provides the classic example of this substitution syndrome. As long as we are able to supply rationales not explicitly "religious" then even the "religious" can pass muster under our basic law. This arguably sophistic transformation is quite explicit in the American approach to "welfare reform."

Our species of late-twentieth-century welfare foundationalism is little more than a secularized Christian aesthetics of a proper world order's care and maintenance.... [T]he fundamental substructure animating poor relief has not changed since the fourth century. The basic framework of our thinking about poverty is as old as our Anglo-European culture's dominant religion. It was first shaped by the early Fathers of the Roman Catholic Church and adopted by their Protestant heirs. Its basis is the direct, immutable, and unavoidable command of God. Religious teaching mirrors the civil notion of the destitute social maladjustment. What emerges is a reminder that God has not lifted the command to be self-sufficient, first delivered at the time of the expulsion from the Garden of Eden. Sloth is still sin; the taking of alms when one can work is theft from the giver as well as from the deserving who would then have to make do without and therefore a double sin. Children born out of wedlock are *illegitimate*, and that illegitimacy means something quite real and concrete. Poverty is a sign of sin, to be remedied

nation, free of religious sensibilities was what they intended. See KRAMNICK & MOORE, *supra* note 80, at 23-24.

82. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 78 (1996). And yet, Professor Delgado would limit the application of its principles to dominant group culture—no others suffer this infection. I am not convinced this is so, especially given the (for example) vibrant separatist traditions of African-Americans in this country.

83. 366 U.S. 420 (1961). The Court expressed the view that the "Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *Id.* at 442.

by greater devotion to religious teaching and greater application to work [T]he modern manifestation of these teachings is as religiously neutered as our own public culture, they have found their way into the core of our economic conception of the ideal society, a society peopled by the self-sufficient. Our notion of a pauper's place in our social order has become enshrined in our social sciences as well.⁸⁴

Yet, I would argue that substitution has had significant effect on the way we understand our normative roots. We speak the unifying language of fairness in law making in the late twentieth century and not the language of Religion. This is the age of *due process*. The language of fairness provides the unifying glue to our law making, formerly exercised by Religion, irrespective of the similarity of result to that which might have been determined through the application of traditional religious value. To the extent that explicit resort to religious sensibilities may fit within this structure, there may well be a place for it within the new assimilative model into which we have drifted.

Still, this is a perverse, or rather, a "modern" view of assimilation and its relationship to religion. Until fairly recently, I have argued above,⁸⁵ the great imperatives of assimilation and that of the Christian Religion⁸⁶ were practically two different ways of describing the same thing. The decision to treat Religion primarily as an object of law is thus an important assimilative discipline. Indeed, *e pluribus unum* assumes a role of civil antipode to the assimilative potential of majoritarian religions. The mix becomes murkier when one throws into this stew the historical reality that until very recently, it was a subconscious commonplace to speak the language of mainline Protestant religious sensibilities in law making, and thus treat Religion, in its formal manifestations, as *object*. But we have crossed the Rubicon—we have attempted to distance our law making from its religiously based normative roots. The reintroduction of those ancient roots suggests an

84. Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1, 34-35 (citations omitted).

85. See *supra* notes 41-42.

86. Again, I use this phrase deliberately and ambiguously. In the West, the Christian religion might at times have been understood to exclude either Catholics or Protestants, depending on the perspective of the speaker. When used in relationship to non-Christian religions, the term might unite Catholics and Protestants (though not necessarily always). Also in the West, Eastern Christians have almost automatically been excluded—either on the grounds of heresy or exoticness—since the eleventh century era. My sense is that it has been used more frequently in its widest meaning as the number of Catholics in the United States has grown in this century.

overturning of the post-war liberal consensus of law making. Or it suggests the imposition of some newer version of religious orthodoxy in an age of more militantly clashing orthodoxies.

There is, as I have suggested, a very fine line between using Religion as a tool for legal discourse and re-converting legal discourse into Religious discourse. It is a line which our Founding Fathers had no reason to think about because they were all parties to the general consensus of Christian values guiding law making in the first two centuries of our independent existence. With the loss of that consensus, the disestablishment of religious discourse even at the level of mundane law making becomes plainly obvious, as Professor Smith suggests. Its reintroduction becomes painfully more dangerous as well as we struggle for a new basis of consensus on which the peoples of America choose to join.⁸⁷

What remains is a kind of dialogue based on mutual non-recognition. This is a dialogue which breeds subordination as groups apply the normative principles of conformity and assimilation to as large a group of people as possible. Social cohesion, the discipline of the group in the face of mutual incompatibility, requires choice. From the perspective of the dominant group, subordination means reducing contrary cultural norms to a silence in the public (though not the private) space. Polyculturalism can exist in theory—in reality it describes a transitional period between the dominance of one set of socio-cultural norms and another. A set of norms must govern, and yet all norms are subordinating of those who are defined as outsiders—and every group has its outsiders.⁸⁸

What we have left, then, is an assimilation imperative shorn of its roots in Religion, but in which Religion(s), along with a host of other voices, vie for norm-setting dominance. Each community of norm-setters, within the context of the current language of *fairness*, hears all others as the strident attempts by other groups to impose its norms on the others—norms which will subordinate and exclude in ways different from that of the current norms, but exclude and subordinate nonetheless. For traditionalists, Professor Smith's article uncovers the truly tragic: Explicitly religious sentiments have been transformed from

87. For interesting searches for other bases for civic assimilation, see generally MARTIN E. MARTY, *THE ONE AND THE MANY: AMERICA'S STRUGGLE FOR THE COMMON GOOD* (1997); GLAZER, *supra* note 14.

88. Larry Catá Backer, *By Hook or by Crook: Conformity, Assimilation and Liberal and Conservative Poor Relief Theory*, 7 HASTINGS WOMEN'S L.J. 391, 439 (1996).

the ever-present subconscious arbiter of legal normativity, to just another voice vying to be heard among the cacophony of systems seeking norm-setting dominance in our nation.

V. CONCLUSION

I end, where I began, with the perceptive questions Professor Smith raised. Religion has certainly been deprivileged. Disestablishment exists now in the very heart of places once almost exclusively reserved to it in law making. But we are stuck on the horns of a dilemma of our own creation. We conceived of the separation of Church and State, of the treatment of formal Religion and its values as *res* at a time when religious consensus made these religious sentiments an unconscious and almost inextricable part of the legal dialogue. We have entered an age when this unconscious acceptance of underlying religious Christian norms is contested. Indeed, since *McGowen v. Maryland*, courts have become publicly scared of it. Yet, the unconscious acceptance of fundamentally Christian norms as the basis for law making remains powerful in this society. It is merely contested in ways that were unheard of fifty years ago and eroded in some areas of law making. It remains to be seen whether dialogue over law making must now make room for what had once been a dominant norm-setting voice as yet another and perhaps important voice in law making, even at the level of the mundane. I suggest that this is a dangerous enterprise. "As long as the 'myth of absoluteness' dominates the self understanding of religious communities, they cannot be confident participants in a pluralistic society."⁸⁹

89. THIEMANN, *supra* note 41, at 161.