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BOOK REVIEWS

WHERE ANGELS FEAR TO TREAD: RELIGION AND THE "PUBLIC SQUARE"

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I. INTRODUCTION

Writing in 1962, historian Richard Hofstadter decried the anti-intellectualism plaguing 1950s America.1 Though “anti-intellectualism” was not a new development, during that decade the term became “a familiar part of our national vocabulary . . . .”2 The 1952 presidential election epitomized the contrast “between intellect and philistinism,” with Democratic candidate Adlai Stevenson, possessed of an “uncommon mind and style,” facing Republican Dwight D. Eisenhower, “conventional in mind [and] relatively inarticulate.”3 Eisenhower handily won the election, a victory that only confirmed the growing belief that the intellect’s voice was not welcome in America’s “public square.”4

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1 RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1963).
2 Id. at 3. Hofstadter continued:
   In the past, American intellectuals were often discouraged or embittered by the national disrespect for the mind, but it is hard to recall a time when large numbers of people outside the intellectual community shared their concern, or when self-criticism on this count took on the character of a nationwide movement.

3 Id. at 3–4. Against Eisenhower’s simple promise to “go to Korea,” Stevenson “could offer little but eloquent intellectualism and a defense of the Democratic administrations . . . being blamed for all the difficulties the country found itself in.” WILLIAM H. CHAFE, THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II, at 138 (1986).
4 The “public square” refers to the “arena in which our public moral and political battles are
In 1992, a superficially similar contrast presented itself in the opposing presidential candidates. On one side, as embodied in its champion, George Bush, the Republican Party appealed to the religious right by advocating "prayer in public schools, severe restrictions on abortion, [and] discrimination against homosexuals ...." On the other side, Bill Clinton and the Democrats offered a message of simple toleration without any overt religious endorsement. Clinton prevailed, perhaps because of the unanticipated reaction to what many Americans perceived as the politics of hatred and division espoused by the Republicans at their 1992 convention.

The 1992 election may be symptomatic of the antireligious sentiment that currently pervades American discourse. Many consider faith and worship as "hobbies," and treat religious views with thinly veiled contempt in the "public square." America's current aversion to including the religious voice in the cacophony of public debate may be compared with the emotionalism of the midcentury's anti-intellectual movement. But the anti-intellectualism of the 1950s had firm roots in America's past, while the modern disregard for religion is a relatively recent development. Indeed, religion has played an essential part in American society since Colonial times. Religion helped to shape the early law of the country, functioning as "a unifying force in the colonial experience." Its impact is not simply a memory of the distant past; religion thrived in American life as recently as the 1950s. Even today, Americans remain a religious people.

Yet religion as an institution finds itself besieged, not for sponsoring unpopular views, such as those elaborated at the 1992 Republican fought. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 51 (1993). As a forum for debate and discourse, the "public square" represents an aspect of the abstract "marketplace of ideas," and its very existence likewise "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public ...." Associated Press v. United States, 326 U.S. 1, 20 (1945).

5 CARTER, supra note 4, at 49.

6 Or, perhaps, Clinton won because Americans genuinely desired change from the Republican excesses of the previous 12 years. Answering this question is, naturally, beyond the scope of this Review.

7 See CARTER, supra note 4, at 25-26, 51-56.

8 KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 14 (1989). Though churches were "significantly less important as legal institutions than in England," the "law of God and the Bible" nonetheless functioned as sources of Colonial law. Id. at 26. Early Americans "looked to their churches as institutions of conflict resolution and social control." Id.

9 See CHAFE, supra note 3, at 120-21. Ironically, this was the period when anti-intellectualism was at its peak. See supra notes 1-3 and accompanying text.

10 1993 surveys show that a majority of Americans believe in God, and a large number regularly attend worship services. See CARTER, supra note 4, at 4, 279 n.2.
Convention, but simply because these views are religious.\(^1\) The current assaults target religion itself rather than the agendas with which the name of religion has come to be associated. In *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, Stephen L. Carter\(^2\) suggests that "[t]he trouble with the attacks on the 1992 Republican Convention is that most of them were misdirected"; the causes, not the religion, "should have been the object of criticism."\(^1\)

This position is a difficult one. The resurgence of the Christian movement in the right wing of the Republican Party resembled an effort to turn back the clock of American social and political progress. But Carter’s point is well taken. In our collective desire to prevent religion from commingling with the state and dominating our politics, "we have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them."\(^1\)

Carter speaks of more than simply encouraging tolerance of differing religious views. He disdains a society that emphasizes the "right to believe," but encourages the faithful to keep their beliefs to themselves.\(^1\) Moreover, Carter argues that the religious be allowed entry to the "public square," because religions function as natural and essential "bulwarks against state authority."\(^1\)

In exploring these ideas throughout *The Culture of Disbelief*, Carter considers "the case for taking religion seriously as an aspect of the lives and personas of the tens of millions of Americans who insist that religion is for them of first importance."\(^1\) In the book’s first section,

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\(^1\) Like Carter, this Review uses the term "religion" to refer to "a tradition of group worship (as against individual metaphysic) that presupposes the existence of a sentience beyond the human and capable of acting outside of the observed principles and limits of natural science, and, further, a tradition that makes demands of some kind on its adherents." *Id.* at 17.

\(^2\) Stephen L. Carter is William Nelson Cromwell Professor of Law at Yale University School of Law. In addition to numerous articles, he is also the author of *Reflections of an Affirmative Action Baby* (1991).
Carter discusses the ways in which American culture has come to trivialize religion and thereby undermine its function as a necessary mediating force between the people and the state.18 Therein, he notes the American tendency to belittle religious devotion as somehow less "rational" and therefore more dangerous than nonreligious behavior.19 Next, he addresses how politicians on both the political left and the political right have contributed to the deterioration of religion's role in American life, and how more powerful religions oppress those with less power.20 In the book's final section, Carter turns to ways that liberal theory might comfortably encompass religious views in the American "public square."21 He then examines the impact of religious viewpoints in some of the most controversial issues currently facing American society: euthanasia, abortion, and the death penalty.22 Carter concludes by contemplating alternatives for the future of law, politics, and religion.23 Carter devotes the core of his book to a discussion of the constitutional status of religion and the religion clauses of the First Amendment.24 In addition to illustrating Carter's thesis that the law has contributed to the marginalization of religion in American society, this section also provides an opportunity to test Carter's ideas and suggestions with real-world examples. The examples are presented by two religion cases from the 1992–93 Supreme Court term, decided after Carter had completed his book.25 Accordingly, this Review first addresses religious freedom and the Free Exercise Clause by discussing Church of the Lukumi Babalu Aye v. City of Hialeah.26 It then considers Zobrest v. Catalina Foothills School District27 and the constitutionally mandated separation of church and state. This Review then concludes with general observations about Carter's work and about religion in America.

18 Id. at 25–43.
19 Id.
20 Id. at 44–101.
21 Id. at 213–62.
22 Id. at 233–62.
23 Id. at 263–77.
24 Id. at 105–210. The First Amendment states in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. CONST. amend. I.
II. THE FREE EXERCISE CLAUSE

"To be consistent with the Founders' vision and coherent in modern religiously pluralistic America," Carter writes, "the religion clauses should be read to help avoid tyranny—that is, to sustain and nurture the religions as independent centers of power [and as] democratic intermediaries . . . ."\(^{28}\) To this end, courts must do more than simply protect religion against overt discrimination.\(^{29}\) This ideal has become increasingly speculative. The Supreme Court has consistently looked “askance at claims of a free exercise right to violate laws that everyone else must obey."\(^{30}\) In its most notorious decision on the subject, Employment Division v. Smith,\(^{31}\) the Court held that an antidrug law that incidentally banned the use of peyote during Native American Church rituals did not violate the Free Exercise Clause.\(^{32}\) In this ruling, the Court chose not to apply strict scrutiny to what it considered a neutral, generally applicable law.\(^{33}\)

The import of the Court's decision in Smith was twofold. First, it had the effect of reinforcing the continued dominance of accepted, "majority" religions in America.\(^{34}\) Indeed, "not a single religious exemption claim has ever reached the Supreme Court from a mainstream Christian religious practitioner" because mainstream Christianity "does not need judicial help . . . ."\(^{35}\) Legislatures do not enact laws offensive to mainstream religious organizations because most legislators are members of mainstream religions; therefore, laws that have the "incidental effect" of burdening religion virtually never impact on the lawmakers themselves.

\(^{28}\) CARTER, supra note 4, at 124.
\(^{29}\) Carter acknowledges that “[m]ore and more, the American answer, as with all tough questions, is to let the courts do it.” Id. at 101.
\(^{30}\) Id. at 125.
\(^{32}\) Id. at 878–80. See also CARTER, supra note 4, at 125.
\(^{33}\) 494 U.S. at 886.
\(^{34}\) See CARTER, supra note 4, at 126–29. “The judgment against the Native American Church . . . demonstrates that the political process will protect only the mainstream religions, not the smaller groups that exist at the margins.” Id. at 128 (footnote omitted). Simply put, Smith served to “entrench[] patterns of de facto discrimination against minority religions.” Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195, 216 (1992).
\(^{35}\) Sullivan, supra note 34, at 216. Among the “minority” religious exemption claims that have reached the Supreme Court and been rejected, are the wearing of a yarmulke by a Jewish military officer, Goldman v. Weinberger, 475 U.S. 503 (1986); the attendance at Jumu'ah religious services by a Muslim prisoner, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); and the preservation of sacred Native American religious sites, Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439 (1988).
Second, the *Smith* decision signaled what Carter refers to as the "reduction" of religious freedom.36 Such decisions "reduce the scope of the Free Exercise Clause until it lacks independent content, forbidding by its own force no more than do the [Constitution's] other clauses that protect individual rights . . . ."37 This reduction also reinforces the general marginalization of religion as an entity in American society by emphasizing the importance of governance over any perceived obstacles, no matter how small. That the obstacle may be a historical religious practice appears to be of little consequence.

Like *Smith*, the Court's decision in *Church of the Lukumi Babalu Aye v. City of Hialeah* illustrates the shortcomings of insubstantial judicial review of free exercise claims. The Church of the Lukumi Babalu Aye is a nonprofit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion, which "teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of [spirits called] orishas."38 The Santeria religion finds its basis in "the nurture of a personal relation with the orishas, and one of the principal forms of devotion is an animal sacrifice."39 When the Church leased land from the City of Hialeah in 1987, many citizens reacted with distress, prompting the city council to adopt resolutions in the name of preserving the "public morals, peace [and] safety" of the community.40 Additional city ordinances prohibited religious animal sacrifice and specified criminal penalties for violations.41

The Supreme Court questioned neither Santeria's legitimacy as a religion, nor the sincerity of its adherents' beliefs.42 But the Court reasoned—correctly—that the ordinances might nonetheless infringe upon the freedom of religion guaranteed by the First Amendment. In

36 See *Carter*, supra note 4, at 129–32.
37 *Id.* at 129.
39 *Id.*
40 *Id.* at 2223.
41 See *id.* at 2223–24. The city's ordinances applied to any individual or group that killed, slaughtered, or sacrificed animals "for any type of ritual, regardless of whether or not the flesh or blood of the animal [was] to be consumed." *Id.* at 2224. The district court upheld the ordinances, concluding that compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice . . . ." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467, 1487 (S.D. Fla. 1989). The Court of Appeals for the Eleventh Circuit affirmed the district court's ruling in a brief per curiam opinion. 936 F.2d 586 (11th Cir. 1991). The court of appeals simply concluded that "the ordinances were consistent with the Constitution." *Id.*
42 *Church of the Lukumi*, 113 S. Ct. at 2225–26.
determining the ordinances' constitutionality, the Court applied the test from Employment Division v. Smith: a neutral law of general applicability "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." But if a law is not both neutral and generally applicable, it will survive only if the government articulates a compelling interest, and if the law is "narrowly tailored to advance that interest." The Court held that, in this instance, the city ordinances failed to satisfy these requirements.

The ordinances were not neutral because the city enacted them to suppress a central element of the Santeria worship service. The cumulative effect of the text, history, and operation of the ordinances amounted to outright "animosity to Santeria adherents and their religious practices . . . ." The ordinances also were not generally applicable, since the city decided to pursue governmental interests only with respect to "conduct with a religious motivation." Because of this, the Court concluded that the ordinances had "every appearance of a prohibition that society [was] prepared to impose upon [Santeria worshippers] but not upon itself."

Only after determining that the ordinances were neither neutral nor of general applicability did the Court impose rigorous scrutiny upon them, stating that in order to satisfy "the commands of the First Amendment," laws restricting religious practice "must advance "interests of the highest order" and must "be narrowly tailored in pursuit of those interests." Even assuming, arguendo, that the city presented compelling interests, it did not draw the ordinances narrowly, for each ordinance was "overbroad or underinclusive in substantial respects."
The absence of narrow tailoring alone sufficed to establish the ordi-

44 113 S. Ct. at 2226.
45 Id.
46 Id. at 2231. As the Court stated:
the ordinances by their own terms target . . . religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppressed much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.

47 Id. at 2232.
48 Id. at 2233 (quoting The Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in the judgment)).
50 113 S. Ct. at 2233–34.
nances' unconstitutionality. Moreover, the ordinances lacked any compelling governmental interest because they restricted only religious activity while allowing other substantially similar conduct to continue unfettered.

On the surface, the Court's opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah* appears to be a resounding reaffirmation of the constitutional principles supporting a group's right to practice its religion, however unusual such practice appears to Western sensibilities. As the Court stated, "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." Beyond such lofty rhetoric, however, *Church of the Lukumi* clearly represents the exception rather than the norm in free exercise cases; the Supreme Court has "overwhelmingly rejected free exercise exemption claims," usually by finding "some reason to forego any searching judicial scrutiny . . . ."

*Church of the Lukumi* is the proverbial easy case. Courts do not often confront legislation so blatantly designed to single out particular religious conduct for prohibition. As Justice Souter observed in his concurrence, "the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise . . . ." More typically, courts will face a law like that in *Smith*: formally neutral and generally applicable. Justice Souter, recognizing that the *Smith* rule does violence to the meaning and, indeed, the very existence of the Free Exercise Clause, would impart the test with some substantive meaning. He would define "neutrality" as barring more than facially neutral laws—those "with an object to discriminate against religion"—by also requiring government "to accommodate religious differences by exempting religious practices from formally neutral laws."

Souter's interpretation of the Free Exercise Clause would, if adopted, necessitate more probing judicial scrutiny in these cases. It would allow a reviewing court to determine whether a particular law is de facto discriminatory against a "minority" religion by ascertaining whether the law operates to "impose[] greater costs on religious than

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51 Id. at 2234.

52 Id. A "law cannot be regarded as protecting an interest 'of the highest order' . . . . when it leaves appreciable damage to the supposedly vital interest unprohibited." Id. (quoting *The Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring in part and concurring in the judgment)).

53 113 S. Ct. at 2234.

54 Sullivan, supra note 34, at 215; see also supra note 35.

55 *Church of the Lukumi*, 113 S. Ct. at 2243 (Souter, J., concurring in part and concurring in the judgment).

56 Id. at 2241.
on comparable nonreligious activities,"57 thereby precluding a religious practice and, by extension, undermining “adherence to religious belief.”58 In addition to protecting nonmainstream religions, such scrutiny would inevitably slow the Free Exercise Clause’s “reduction” into a hollow incantation, by reaffirming its constitutional place in securing an individual’s right to practice a particular religious faith.59 Moreover, giving “neutrality” substantive meaning would engender respect for religion as religion, rather than treating it “like any other belief.”60

Naturally, these objectives could also be accomplished by requiring strict scrutiny of free exercise claims from the start, rather than requiring a court to first determine that a particular law is not neutral and generally applicable.61 As Carter admits, this “is not to say that the religions should always win and thus be exempt from the laws that apply to everybody else.”62 But the government would have the burden of proof to justify the suppression of religious conduct. A compelling interest test would thus help to achieve a functional vision of religion “as [an] autonomous moral . . . force[]” and a bulwark against tyranny.63


59 Indeed, scholarship indicates that the Free Exercise Clause “was originally understood to preserve a right to engage in activities necessary to fulfill one’s duty to one’s God, unless those activities threatened the rights of others or the serious needs of the State.” Church of the Lukumi, 113 S. Ct. at 2249 (Souter, J., concurring in part and concurring in the judgment). Thus, there exist “powerful” historical reasons “to interpret the Clause . . . as applying to all laws prohibiting religious exercise in fact, and not just those aimed at its prohibition.” Id. (emphasis added).

60 CARTER, supra note 4, at 134.

61 Four justices in Smith supported requiring “the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.” Smith, 494 U.S. at 894 (O’Connor, J., concurring) (emphasis in original). Justices Blackmun and O’Connor again advocated a compelling-interest test in Church of the Lukumi. See Church of the Lukumi, 113 S. Ct. at 2250 (Blackmun, J., concurring in the judgment).

62 CARTER, supra note 4, at 132.

63 Id. at 134.
The Religious Freedom Restoration Act, enacted in 1993, would change the outcome of cases like Employment Division v. Smith and Lyng v. Northwest Indian Cemetery Protective Association. The Act would ensure outcomes like that in Church of the Lukumi, by "requir[ing] a state to show a compelling interest before it would be able to apply a neutral law in a way that interfered with a central aspect of a religious practice . . . ." But the Act does not necessarily alter the country's vision of the role of religion, for "rights become mired in the delicate negotiations over statutory drafting," eventually "looking as cramped and instrumental as anything else that government does." Nor does the act undo free exercise jurisprudence so far as the Constitution is concerned. Supreme Court decisions like Smith and Lyng still tell us that the Constitution has little to do with preventing government from restraining uncommon religions, though it forbids government from pursuing similar interests with regard to comparable secular moral and political institutions.

III. THE ESTABLISHMENT CLAUSE

Carter freely acknowledges that not all religious contributions to the "public square" are constitutionally permissible under the Establishment Clause. He rightly criticizes the Supreme Court's lack of a coherent Establishment Clause theory, exemplified by the haphazard application of the oft-cited Lemon test. Lemon v. Kurtzman provided that statutes must have a secular purpose, the primary effect of which neither enhances nor inhibits religion, nor fosters "an excessive government entanglement with religion." Over the years, a number of Supreme Court justices have condemned the test without offering an alternative that encompasses what Carter views as the Establishment

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65 Carter, supra note 4, at 269; see also Religious Freedom Restoration Act of 1993, § 3(b).
66 Carter, supra note 4, at 270.
68 Id. at 613.
69 As Justice Scalia wrote in Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141 (1993), "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again . . . ." Id. at 2149 (Scalia, J., concurring in the judgment). See also Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (asserting that Lemon is "difficult to apply and yields unprincipled results"); Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring) (Lemon "imposes unnecessary, and . . . superfluous tests for establishing [constitutional violations]").
Clauses's central purpose: to protect religion from the state, and not the state from religion.\textsuperscript{70}

Liberal political theory posits a world where government remains unequivocally neutral in the debate between competing moral and theological visions of society.\textsuperscript{71} Carter's view of the Establishment Clause defies traditional liberal thought by breaching the metaphorical wall separating church and state.\textsuperscript{72} Carter's analysis has a historical basis; as he notes, unlike many constitutional provisions:

we actually know a great deal about the history of the Establishment Clause and about the development of the ideal of a separated church and state. We know so much, in fact, that it is something of an embarrassment that we so enthusiastically ignore our knowledge in our church-and-state jurisprudence.\textsuperscript{73}

The Framers understood that the role of religion was apolitical, and that to fulfill this role, government should not have the opportunity to regulate religion.\textsuperscript{74} Thus, the Clause should work not to "disable religious groups from active involvement" in the "public square," but to protect religious liberty from control by the state.\textsuperscript{75} For example, where the Clause is used as a sword in the fight against granting religious nonprofit organizations tax-exempt status, it has the incidental effect of empowering the state as the primary actor in the "public square." Carter equates such treatment with "tyranny," though "it is called the separation of church and state."\textsuperscript{76}

Carter advocates an Establishment Clause jurisprudence that "proscribe[s] establishments but would allow support [from government] on the same basis as other groups."\textsuperscript{77} The result of such an analysis

\textsuperscript{70} See Carter, supra note 4, at 105.


\textsuperscript{72} Justice Black first wrote of the "impregnable wall" between church and state in Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

\textsuperscript{73} Carter, supra note 4, at 115.

\textsuperscript{74} According to Carter, James Madison's oft-quoted \textit{Memorial and Remonstrance} frames the separation of church and state "principally as a protection of the church, not as a protection of the state." Id. at 116. Similarly, Carter interprets Thomas Jefferson as having "shared the general view" that "the state had to be prevented from exercising coercive authority over the religions . . . ." Id. at 117.

\textsuperscript{75} Id. at 123.

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 120.
would often be the same as the traditional liberal approach: the state should not pay for creches or sponsor organized prayer in the classroom, but religions should "be able to compete on the same grounds as other groups for the largess of the welfare state—they should not, on Establishment Clause grounds, be relegated to a second-class status." Accordingly, Carter would agree with liberal theorists that the Court correctly decided *Lee v. Weisman*, which prohibited religious invocations and benedictions at public high school graduation ceremonies, while probably only Carter would agree with the Court's decision in *Bowen v. Kendrick*, which upheld the distribution of federal funds for sex education to religious organizations as part of a general grant to family planning groups.

*Zobrest v. Catalina Foothills School District*, which concerned the placement of a public employee in a sectarian school, represents a particularly troubling decision, aptly demonstrating the difficulties in consistently adhering to either theory. The case involved James Zobrest, who had been deaf since birth. James attended grades six through eight at a public school operated by the Catalina Foothills School District, which furnished him with a sign-language interpreter. For the ninth grade, his parents enrolled him in Salpointe Catholic High School, a sectarian institution in which the "two functions of secular education and advancement of religious values or beliefs are inextricably intertwined ..." The school district declined the Zobrests' request for an interpreter, fearing that providing an interpreter would violate the First Amendment.

The Supreme Court began its opinion by noting that it had never stated that "religious institutions are disabled ... from participating in publicly sponsored social welfare programs." Rather, the Court has

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78 Id. at 121.
80 The Court held that the religious invocation and benediction represented "a state-sponsored and state-directed religious exercise in a public school[,]" because it appeared as though the state "decreed that prayers must occur." Id. at 2655.
82 The Court held that the federal grants had a "legitimate secular purpose," id. at 602, and did not impermissibly advance religion. Id. at 621.
84 Id. at 2464 n.1 (quotations omitted).
85 Id. at 2464. The district court granted the school district summary judgment, because the effect of the interpreter would be to promote religious inculcation at government expense. Id. The court of appeals affirmed, applying the three-part test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). The court of appeals held that providing James with an interpreter would violate *Lemon*'s second prong by having the effect of advancing religion. See *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1194–95 (9th Cir. 1992).
held that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."87 Applying this standard to the facts, the Court reasoned that because the service at issue was "part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped,'"88 without regard to the religious nature of the school, it was simply a neutral service offered as a part of a general program "in no way skewed towards religion . . . ."89 Nor did the physical presence of a public employee in the classroom create a constitutional problem, because the government's provision of an interpreter did not relieve the school "of an expense that it otherwise would have assumed in educating its students."90

The Court's decision in Zobrest offends traditional liberal thinking: it is doubtful whether the state could be any less neutral toward religion than by placing a public employee at the disposal of sectarian masters. Such a placement promotes religion, in violation of the second prong of the Lemon test,91 by making the public employee "the conduit for . . . religious education . . . ."92 Moreover, Zobrest is antithetical to the idea that the Establishment Clause should "protect[] individuals from compulsory financial support of other people's religion . . . ."93 The purpose of a liberal reading of the Clause is to encourage a "public square" with a theoretically even playing field, upon which no particular faith has an advantage over any other. The price of such an approach is an "asymmetrical treatment" of religion as compared to other moral and political institutions, denying religion the state's financial support while allowing it for similar secular institutions.94

The traditional liberal approach to Zobrest would prevent the provision of a public employee to the sectarian school, in effect preventing religion from claiming its share of government largess. But the actual decision does not necessarily embrace Carter's vision of the Establishment Clause; if anything, it works to negate religion's role as an intermediary force in American life. As Justice Blackmun noted, the

87 Zobrest, 113 S. Ct. at 2466.
88 Id. at 2467.
89 Id. (quoting Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 488 (1986)).
90 Zobrest, 113 S. Ct. at 2469.
91 See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190, 1194–95 (9th Cir. 1992). See also Carter, supra note 4, at 122 (discussing Lemon as applied to funding a hypothetical religiously sponsored treatment program).
92 Zobrest, 113 S. Ct. at 2474 (Blackmun, J., dissenting).
93 Sullivan, supra note 34, at 209–10.
94 See id. at 212–13.
case involved nothing less than enlisting "the machinery of the State to enforce a religious orthodoxy." The situation entailed "ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine." Thus, Zobrest does not represent a genuine recognition of religion's independent character, for it envisions a sharing of responsibilities between government and religion that can only work to undermine religious autonomy. As the Court stated in Engel v. Vitale, the "union of government and religion tends to destroy government and to degrade religion."

Articulating a coherent Establishment Clause constitutionalism is no small task. Though Carter would advise that religions be treated like any secular group, he admits that such treatment opens the door to potential state regulation. It is doubtful whether any court would ever allow the state to become involved in the actual administration of a particular religion, but it is well established that where government provides funding, it may also impose conditions. In the end, then, a traditional liberal reading of the Establishment Clause, as informed by Carter's analysis, may offer the soundest approach to cases like Zobrest.

To review: in order to insure a common baseline in the "public square," so that no single religious voice may drown out another, the state must act neutrally, neither promoting nor inhibiting religion; this discourages the state from capitalizing upon its regulatory power to religion's detriment. In essence, the state discriminates against all religions, because they may not partake of the benefits available to their secular counterparts. But religions, released from the threat of state incursion, are consequently freer to function as the Framers envisioned: to discover and argue "meanings that are in competition with those imposed by the state." Of course, this balancing is not perfect, but neither is the world in which we live. Demanding a perfect modern constitutionalism where so many interests conflict seems, if not unreasonable, at least somewhat disingenuous.

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95 Zobrest, 113 S. Ct. at 2474 (Blackmun, J., dissenting) (quoting Lee v. Weisman, 112 S. Ct. 2649, 2658 (1992)).
96 Zobrest, 113 S. Ct. at 2474.
98 See Carter, supra note 4, at 145–52.
99 In both the free speech and abortion rights contexts, the Supreme Court has held constitutional government's power, within rather broad limits, to condition the use of federal funds. See Rust v. Sullivan, 111 S. Ct. 1759, 1772–75 (1991).
100 Carter, supra note 4, at 273.
IV. CONCLUSION

_The Culture of Disbelief_ is a challenging book for many reasons, not the least of which is that it presents a view of religion's role in democratic society that appears to subvert liberal orthodoxy. Though Carter's charge is formidable, he succeeds both in surveying the modern condition of religion and in convincingly arguing that entrée into the "public square" should not necessarily be conditioned upon separating one's faith from one's self. While this Review has focused on Carter's analysis of the religion clauses of the Constitution, that is not to say that the answers to the questions of religion's role in society are to be found exclusively within the judicial system. As Carter notes, "the ultimate security of religious liberty lies not in judges' opinions but in citizens' commitments . . . ."101 It is in the give-and-take of the marketplace of ideas that the parameters of religious involvement in American discourse will be decided, and it is in the local political arena that the power of any particular religious group will be tested.102

Though Carter writes persuasively, especially in discussing the intersection of religion and the law, the reader may remain unsure that in the ebb and flow of American life, religion's current "state of repose" should be cause for great alarm. Americans are historically not only a religious people, but also a wary people; we share a worldview descended from the American Revolution, and based on suspicion. Among other things, Americans are suspicious of "far-removed and energetic government, of manipulators of money, of taxes [and] of the use of force at home or abroad."103 Perhaps it is this healthy suspicion that ultimately keeps tyranny in check. Certainly, as between religion and the state, our suspicion plays no favorites.

101 Id. at 145.
102 See id. at 267–68.