

## REVIEW

### God as a Lobby

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*The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion.* Stephen L. Carter. Basic Books, 1993. Pp vii, 328.

The President of the United States rarely recommends a book to the reading public, so Stephen Carter can count President Clinton's recent recommendation of *The Culture of Disbelief* at a prayer breakfast as a blessing.<sup>1</sup> Or a curse, for the President's enthusiasm for the book might be thought to undermine Carter's central descriptive claim: that religion is excessively marginalized in American public life. If the President himself publicly cites a book urging Americans to take religious devotion seriously, how marginal can religion really be? In Carter's view, dangerously marginal—notwithstanding the President's revival of forthright religiosity on the Democratic side of the aisle, the copious airtime that Republicans have given to God in recent presidential campaigns, and the political prominence of clerics from Pat Robertson to Jesse Jackson.

Indeed, in Carter's view, contemporary political "God-talk,"<sup>2</sup> far from being part of the solution, is itself part of the problem. Some contemporary religious rhetoric, Carter suggests, amounts

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<sup>1</sup> See Peter Steinfelds, *Beliefs*, NY Times 8 (Sept 4, 1993).

<sup>2</sup> Carter defines "God-talk" as "public discussion in explicitly religious terms, rather than, for example, in the generalized spiritual terms with which Americans are often more comfortable" (p 49).

to mere "ritualistic incantations of the civil religion," in which "God is thanked for the success of an enterprise" (p 52) such as Desert Storm (p 54) or "God is asked to bless the nation, its people, and its leaders" (p 52). Such "faintly Protestant platitudes [ ] reaffirm the religious base of American culture" but lack "theological significance" (p 51).<sup>3</sup>

In other instances, Carter argues, "political preachers" trivialize faith by hitching their political causes cravenly to the "Word of God" (p 68), as if "the will of God is not *discerned* by the faithful but *created* by them" (p 73). For example, "[President] Reagan became God's candidate" not because of his personal piety (he was not a churchgoer), but because churchmen of the religious right viewed him as "politically correct" (p 98).

Finally, Carter claims, some contemporary "God-talk" is sincerely and nontrivially religious, but causes understandable "public revulsion" (p 20). He cites as recent examples the "terrifying and outrageous" death sentence pronounced in 1989 by Ayatollah Khomeini upon author Salman Rushdie for blasphemy (p 10), and the "scary religious rhetoric of the 1992 Republican Convention," which issued "calls for a jeremiad" in God's name (p 20).

Carter is all for God-talk in the public square—but a kinder, gentler God-talk. He is concerned that the "excesses of some Christian fundamentalists" have "driven the left to shed religion like a second skin" (p 99). He cautions liberals against demonizing religiosity itself as right wing, citing anti-Vietnam War activism and especially the civil rights movement as powerful examples of religiosity deployed in the service of "vital cause[s]" of the left (see pp 49, 59-60, 63-64, 227-29).

Dysfunctional God-talk is bad enough, but public silence about religion, in Carter's view, is even worse. He suggests that religious devotion has been driven into the closet. While most Americans admit they are religious, they practice their faith in private, keeping their convictions to themselves in their public interactions. Who silences religion? The cultural elite: academics, the media, and "well-educated professionals" stand ready to ridicule anyone who claims to hold a political position "because it is required by [his or her] understanding of God's will" (p 23). Thus, according to Carter, the family that prays together may stay together, but it keeps that fact to itself.

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<sup>3</sup> Quoting Frederick Mark Gedicks, *The Religious, the Secular, and the Antithetical*, 20 Cap U L Rev 113, 122 (1991).

Such privatization, Carter suggests, exacts two costs. The first is personal and psychological: by requiring a religious person to "bracket" religious convictions from the rest of her personality," we force her to "split off a part of her self" (p 56).<sup>4</sup> Like any kind of silencing or closeting, this causes cognitive dissonance, and, Carter suggests, unfair hardship. The second cost is political and systemic: the bracketing of religion in public moral discourse, he implies, impoverishes the quality of the discourse itself (see pp 80, 229).

Carter's book seeks solutions to this contemporary religious malaise. It is lucid and engaging, written in an accessibly conversational and often personal style.<sup>5</sup> It steers away from conceptual extremes and toward a middle ground. It is ornery and contrarian. It defies conventional wisdom. It resists pat answers and political pigeonholing. These very virtues, however, also make the book unsystematic and at times maddeningly elusive. Carter often seems deliberately unwilling to state his bottom line, and backs off from endorsing outright the conclusions that his arguments seem to dictate. It takes some work to weave the book's various strands into a tight argument. As I read it, that argument is as follows.

In answer to our religious malaise, we need a theory of the role of religion in politics. That general theory will yield particular prescriptions for a cure. Carter's theory is that religious communities serve as valuable mediating institutions between individuals and government in the democratic state. Carter prescribes that we change our culture and our constitutional law to ensure that religion can serve that mediating function. This will entail allowing religion to opt out of more aspects of the modern regulatory and welfare state, while at the same time increasing openly religious participation in secular politics.

## I. RELIGIONS AS DEMOCRATIC INTERMEDIARIES

Carter sees religions as communal associations that serve as buffers between the individual and the state.<sup>6</sup> "Faith communi-

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<sup>4</sup> Citing Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 72-73 (Oxford, 1988).

<sup>5</sup> The reader learns, for example, that Carter is a practicing Episcopalian (p 75), that he and his wife and children "pray before important events: meals, trips, sleep" (p 185), and that his children attend a private religious school where they "pray in school, in an organized fashion, each morning before classes begin" (p 184).

<sup>6</sup> Carter derives this view, in part, by "translating Tocqueville's observations to the present day" (p 36).

ties" (p 38) serve as "independent centers of power" (p 35) and therefore as "bulwarks against state authority" (p 85). Like "political parties" or "civic clubs" (p 37), they help "fill the vast space between the people and the government created in their name" (p 36), thus keeping government in its place. Carter speaks of religions in democracy as Madison did of "factions" in the "extended sphere."<sup>7</sup> Religions, according to Carter, "promote freedom and reduce the likelihood of democratic tyranny by splitting the allegiance of citizens" (p 37). They also "mediate between the citizen and the apparatus of government, providing an independent moral voice" (pp 36-37).

Religions best fulfill their function of checking state power, Carter suggests, when they cultivate actual resistance to "approved state policy" (p 37).<sup>8</sup> "Anyone who believes deeply is a potential martyr" who might "refus[e] to yield to what [ ] society demands" (p 42). Thus, "religion, properly understood, is a very subversive force" (p 43 (emphasis omitted)) because "[f]or some it is more real than the state" (p 41) and commands superior allegiance.

Religion's powers of mediation and resistance, Carter suggests, depend upon its epistemological autonomy. Religions are not just separate loci of power but "independent sources of meaning" (p 40). They enable the religiously devout to "see many things differently from the way their fellow citizens do" (p 37, emphasis added). Religion is "an alien way of knowing the world . . . in a political and legal culture in which reason supposedly rules" (p 43). Carter writes that creationists, for example, are "not a superstitious rabble" but rather "independent thinkers" with "their own means for seeking knowledge" and thus their own "world view" (p 179). The power of religions to contest state policy derives from their ability "to discover meanings that are in competition with those imposed by the state" (p 273).

If religion is to retain this power to generate "alternative meanings" (id), Carter argues, it must shield itself from the infiltration of secular knowledge. Carter deplors those "political preachers" who "adjust[ ] the interpretation of the Word to meet the demands of the faithful" (pp 74, 68-74). He likewise admon-

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<sup>7</sup> See Federalist 10 (Madison), in Clinton Rossiter, ed, *The Federalist Papers* 83 (Mentor, 1961) ("Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . .").

<sup>8</sup> The "resistance" concept is borrowed from David Tracy, *Plurality and Ambiguity: Hermeneutics, Religion, Hope* 83-84 (Harper & Row, 1987). See also p 41.

ishes religious practitioners that "there is a vital difference between a political inspiration that is fired by one's deepest religious beliefs and a claim of religious belief that is fired by a pre-existing political commitment" (p 80). His concern here is not that religion corrupts politics but that politics corrupts faith; the quest for religious knowledge is tainted when influenced by secular concerns. When preachers manipulate the faith for political ends, Carter "tremble[s] for their souls" (p 47).

Carter expresses confidence that scriptural interpretation can be performed in isolation from political commitments. For example, in deciding to favor ordination of women by his own Episcopal church, he says that he reasoned in purely "theological terms" (p 77). Upon "prayerful consideration," he determined that "the revealed Word of God, Holy Scripture, creates [no] explicit bar" to this practice (pp 75, 77). His view, he asserts, followed from "the will of God," not "the rights of women" (id), though he acknowledges that one might in good faith reach the opposite scriptural conclusion.

What are the legal consequences of Carter's theory of religions as mediating institutions? His emphasis on the need for religions to maintain epistemological autonomy leads him to favor a broad interpretation of the Free Exercise Clause. He believes, of course, that intentional discrimination against a religion's practices based on secular condemnation of its world view is plainly impermissible. For example, he heartily approves the Court's invalidation of the ordinances barring Santeria practitioners from the ritual sacrifice of animals in *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*.<sup>9</sup> But Carter apparently would go further. He would also invalidate some government actions with a disproportionate adverse effect on religious practice, regardless of intent (p 132-33). Thus, Carter implies that he would have granted the free exercise claims of Yurok, Karok, and Tolowa Indians in *Lyng v Northwest Indian Cemetery Protective Association*<sup>10</sup> against federal logging and road building in a national forest area that they used for sacred rituals (pp 131, 269).<sup>11</sup>

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<sup>9</sup> 113 S Ct 2217 (1993). The *Lukumi Babalu Aye* case is noted at p 124 n 45, and discussed approvingly in Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 Harv L Rev 118, 123-26 (1993).

<sup>10</sup> 485 US 439 (1988).

<sup>11</sup> See also Carter, 107 Harv L Rev at 130 (arguing that "the test of government motivation is no better for assessing free exercise claims than for evaluating charges of racial discrimination," and therefore that, "if the state knows in advance that its logging

Carter likewise favors "a wider set of religious exemptions from laws of general application" than the Supreme Court currently recognizes (pp 125-26). While preferring political accommodations where possible, he recognizes that legislatures are unlikely to accommodate politically marginal religions, and thus favors a stronger constitutional role for courts (pp 128-29). He strongly implies that he would have allowed Air Force Captain (and ordained rabbi) S. Simcha Goldman to wear his yarmulke despite military headgear regulations in *Goldman v Weinberger*<sup>12</sup> (pp 12, 132, 269). He also apparently would have come out the other way in *Employment Division v Smith*,<sup>13</sup> which allowed Oregon to deny unemployment compensation to Native Americans who lost their state jobs for ingesting peyote in violation of state drug laws (see pp 126-33).

Carter chooses similar sides in other recent controversies yet unconsidered by the Supreme Court. He expresses strong support for allowing a landlord to refuse on religious grounds to rent to an unmarried couple (pp 137-38, 144-45), and for allowing the Ancient Order of Hibernians to refuse to let an Irish gay group march in a St. Patrick's Day parade (pp 33-34, 148-49). State antidiscrimination or public accommodation laws, he suggests, ought to yield to conscientious religious objections to being associated with the sins of fornication and homosexuality.

Carter similarly writes that "parents should be entitled to broad rights to exempt their children from educational programs to which they raise religious objections" (p 174). Such opt-out rights preserve the "epistemological diversity" that enables religions to serve as buffers between individuals and the state (id). This suggests that he would allow fundamentalist parents to withdraw their children from reading classes where they believe "secular humanism" is taught, or Catholic parents to keep their children out of sex-education classes that distribute condoms but refuse to teach abstinence (see pp 171-72, 200-03). In the toughest test case of epistemological disagreement—the religious practitioner's refusal of life-saving medical treatment on religious grounds—Carter strongly implies (without quite declaring) that the state ought not compel the religionist to "save the (corporeal)

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and road building through sacred grounds may destroy the religious traditions of three Indian tribes, a mere showing that the policy was adopted in spite of, rather than because of, that effect should not be enough to save it").

<sup>12</sup> 475 US 503 (1986).

<sup>13</sup> 494 US 872 (1990).

life" of herself or her children at the expense of their "life eternal" (pp 219-24).

## II. RELIGION IN THE PUBLIC SQUARE

While politics should not infect religious judgment, Carter argues, religious judgment should freely enter into political debate. In his ideal state, religious intermediaries "would much influence government," although "government would little influence them" (p 150). Thus, Carter would reverse the direction of the "bracketing" he observes in the interaction between religion and politics. In his view, the faithful should bracket their political commitments more than they currently do when they are engaged in religious activity, but they should cease having to bracket their religious commitments when they participate in the public square.

In advocating greater open participation of religious communities in secular politics, Carter adds his voice to a growing chorus of religious commentators favoring the translation of religious commitments into public policy. Ruti Teitel labels this tendency (which she critiques) the "new engagement," and notes that it spans "religious [ ] communities from politically conservative evangelical [Protestant] churches to the politically liberal branches of the Catholic church."<sup>14</sup> Proponents of this greater religious engagement in politics, Carter among them, reject a rigid distinction between private and public, garden and wilderness, church and state.<sup>15</sup> They reject the separationist model, forged on theological grounds by the Protestant faiths dominant at the founding, that favors privatized religious life and the withdrawal of religion from public affairs.<sup>16</sup>

Carter thus fundamentally disagrees with liberal theorists who would require religious arguments to be translated into the terms of secular public reason before they are advanced in political debate (see p 230).<sup>17</sup> In his view, the state should not require

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<sup>14</sup> Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 Cornell L Rev 747, 760 (1993). See also *id* at 756-65.

<sup>15</sup> Leading manifestoes of the new engagement include Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (Eerdmans, 1984); Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (Oxford, 1991); and The Williamsburg Charter Foundation, *The Williamsburg Charter* (1988), reprinted in 8 J L & Religion 5 (1990).

<sup>16</sup> See Teitel, 78 Cornell L Rev at 762-63 & nn 48-51.

<sup>17</sup> For various versions of the argument that legislation must be either motivated or justified by secular objectives, see John Rawls, *Political Liberalism* 235-44 (Columbia,

that political arguments be secularly motivated, nor should it even demand that state action grounded on religious arguments be capable of an independently sufficient secular rationale. He sides with Michael Perry, who would allow religious citizens to make expressly religious arguments for political outcomes and who views lawmaking on openly religious grounds as properly justified.<sup>18</sup> Anything less forces religious citizens "to split off vital components of their personalities" (p 230), or even "to re-make themselves before they are allowed to press policy arguments" (p 56). This puts them at an unfair political disadvantage in relation to nonreligious citizens who do not face such psychic burdens.

Carter gives an extremely sketchy account of how such openly religious public dialogue would work, or how it would differ from current approaches. He says more about what we should not do than what we should. As a first principle, we should not rule out of bounds a religious motivation for an argument. If we wish to attack arguments made from religious premises, we should attack their substance, not the religious nature of their source (see pp 49, 229, 261, 266). Additionally, mere "tolerance" of explicitly religious argument is inadequate, for it implies that those who do the tolerating are superior to those whom they suffer (see pp 92-96). Rather, there must be some kind of public embrace of "epistemic diversity," in which the political sphere "accepts whatever form of dialogue" the "religiously devout . . . member of the public offers" (p 230).

Carter suggests that such religious arguments—without translation into secular terms—may rightfully be the basis for laws. He suggests that it is futile to argue that religious individuals ought not impose their moral judgments on others through law, for "society imposes moral judgments all the time," and those judgments are already pervasively "informed by religious belief" (p 256-57). Carter would simply let these religious underpinnings be openly exposed.

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1993); Bruce A. Ackerman, *Social Justice in the Liberal State* 3-30 (Yale, 1980); Bruce A. Ackerman, *Why Dialogue?*, 86 J Phil 5, 17-18 (1989); Kent Greenawalt, *Religious Convictions and Political Choice* 50-51, 145-52 (Oxford, 1988); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 Phil & Pub Aff 259, 277-90 (1989). But see Paul J. Weithman, *The Separation of Church and State: Some Questions for Professor Audi*, 20 Phil & Pub Aff 52, 58-65 (1991). See also Joseph Raz, *Facing Diversity: The Case for Epistemic Abstinence*, 19 Phil & Pub Aff 3 (1990); John Rawls, *The Idea of an Overlapping Consensus*, 7 Oxford J Legal Stud 1 (1987).

<sup>18</sup> See Perry, *Love and Power* at 83-127 (cited in note 15).

In what ways would Carter change Establishment Clause doctrine in order to increase freedom for religious participation in public life? Surprisingly few, given the long windup. For example, Carter supports the Supreme Court's decisions barring organized prayer in public schools (pp 188-89)—although he might go the other way in *Stone v Graham*,<sup>19</sup> which barred a classroom posting of the Ten Commandments (see p 189). He would go even less far than the Court in permitting public symbolic religious displays: he views publicly funded creches as wholly impermissible, and so seems to view *Lynch v Donnelly*<sup>20</sup> as wrongly decided (see pp 94-95, 113-14).

As Carter necessarily acknowledges, the Supreme Court has already permitted considerable freedom for religious engagement in politics by reading the establishment bar narrowly. For example, he notes that the Court has declined to hold restrictive abortion laws invalid as establishments merely because they "coincide with the religious tenets of the Roman Catholic Church" (p 255).<sup>21</sup> And the Court has permitted religious organizations substantial access to public programs and facilities on the same terms as nonreligious participants.<sup>22</sup>

In the end, Carter finds only two major sticking points in current Establishment Clause doctrine. First, he argues, contra *Lemon v Kurtzman*,<sup>23</sup> that secular motivation should not be necessary to defeat an Establishment Clause claim (p 113). Thus, in his view, *Edwards v Aguillard*,<sup>24</sup> which invalidated a requirement of equal time for the teaching of creationism in public schools, reached the right result but for the wrong reason: the problem with the law was not religious motivation but "bad sci-

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<sup>19</sup> 449 US 39 (1980).

<sup>20</sup> 465 US 668 (1984).

<sup>21</sup> Citing *Harris v McRae*, 448 US 297, 320 (1980).

<sup>22</sup> The Court has found no impermissible establishment in the inclusion of religious organizations in some public programs. See, for example, *Bowen v Kendrick*, 487 US 589 (1988) (upholding a grant of federal funds for adolescent sex education to religious organizations preaching abstinence). The Court has also found exclusion of religion from some public forums to be a violation of First Amendment guarantees of free speech. See, for example, *Widmar v Vincent*, 454 US 263 (1981) (invalidating the exclusion of worship groups from public university facilities open to extracurricular use by social or political student groups); *Lamb's Chapel v Center Moriches Union Free School District*, 113 S Ct 2141 (1993) (invalidating the exclusion of an evangelical group's film about the family from an evening film series open to secular organizations). In each of these cases the Court rejected the government's claim that the exclusion was compelled by the Establishment Clause.

<sup>23</sup> 403 US 602 (1971).

<sup>24</sup> 482 US 578 (1987).

ence" (see pp 111, 161, 168-69). As Carter would still not change the outcome, though, one wonders how much his approach would mollify creationists.

Second, he hints that he might find vouchers or other public financial support for religious schools constitutional. Here too, however, he hedges his position carefully and confines himself to stating only that if vouchers were allowed for nonreligious private schools, then religious schools should not be excluded (p 194).<sup>25</sup> Other than these two points, his prescriptions for increasing religious participation in public life appear to be more cultural than legal.

### III. ARE RELIGIOUS AUTONOMY AND PARTICIPATION COMPATIBLE?

The two strands of Carter's argument, once disentangled, appear to be in considerable tension. On the one hand, he wants religions to be more autonomous from dominant political and moral conceptions in order to increase epistemological diversity and check the power of the state. On the other hand, he wants religions to enter actively into political debate and contribute to forging state policy. These two roles for religion, however, might well be incompatible.

Carter's position lies uneasily between two logically coherent positions on the interaction between religious autonomy and political participation. The first is the separationist position prevalent in preconstitutional American thought<sup>26</sup> and dominant in

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<sup>25</sup> Carter appears to read *Mueller v Allen*, 463 US 388 (1983) (permitting parents to deduct parochial school tuition, textbook, and transportation expenses from their income taxes), as entailing that including religious schools in voucher programs would not necessarily violate the Establishment Clause. See p 194 ("[I]f voucher programs are established, the Supreme Court was right to hold that religious schools *can* be included as a constitutional matter . . .").

In fact, this is far from clear. True, since *Mueller*, the Court has upheld some additional instances of financial aid to students attending parochial schools. See *Witters v Washington Department of Services for the Blind*, 474 US 481 (1986) (upholding the payment of vocational-education funds to a blind student studying for the ministry at a Christian school); *Zobrest v Catalina Foothills School Dist*, 113 S Ct 2462 (1993) (upholding the public funding of a sign-language interpreter for a deaf student attending a Roman Catholic high school). But, in making those rulings, the Court continued to emphasize facts that might not be present in voucher schemes, especially the minimal financial benefit conferred upon the religious school. See Ira C. Lupu, *The Lingering Death of Separationism*, 62 Geo Wash L Rev 230, 263-64 (1994) ("How the tension between neutrality and separationism will work out in the field of educational finance, in which the roots of separationism are deepest, remains an open question.").

<sup>26</sup> See Teitel, 78 Cornell L Rev at 756-59 (cited in note 14) (summarizing sources).

the Supreme Court's Religion Clause jurisprudence from roughly the 1940s through the 1970s.<sup>27</sup> The second is the assimilationist approach that has prevailed on the Court more recently.

The separationist view of the Establishment Clause is encapsulated in the oft-quoted dictum in *Everson v Board of Education*: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'<sup>28</sup> The "wall" privatizes religion by dividing the kingdom of God, in which religious practice is to be voluntary and free from government regulation, from the affairs of the secular state.<sup>29</sup>

The separationist view dictates strong prohibitions on state involvement in or aid to religion.<sup>30</sup> As a corollary, it excludes religion from the political fray—government shall not participate in religious affairs and *vice versa*. But separationism is entirely compatible with strong free exercise rights, including compelled religious exemptions from general laws.<sup>31</sup> Free exercise autonomy compensates for the exclusion of religion from directly shaping political outcomes. As I have argued elsewhere in support of a version of separationism, the price of the Establishment Clause is the banishment of religion from the civil public order, but the reward should be that religious subcultures may withdraw from public regulation insofar as compatible with that civil order.<sup>32</sup> Precisely because religious imperatives are disabled from driving

<sup>27</sup> See Lupu, 62 Geo Wash L Rev at 233-37 (cited in note 25).

<sup>28</sup> 330 US 1, 16 (1947) (upholding public expenditures for the transportation of students to parochial schools).

<sup>29</sup> See Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 5-18 (Chicago, 1965).

<sup>30</sup> See *Everson*, 330 US at 16 ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."). As the result in *Everson* illustrates, however, what constitutes a forbidden public subsidy to religion is contestable, no matter how clear the principle against them.

<sup>31</sup> See Lupu, 62 Geo Wash L Rev at 236 (cited in note 25). But see Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U Pitt L Rev 673, 696-700 (1980). On the consistency of religious exemptions with the views of the Framers, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1410, 1511-13 (1990); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U Chi L Rev 1109, 1133-36, 1149-52 (1990).

<sup>32</sup> See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U Chi L Rev 195, 222 (1992). See also Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L J 1611, 1614-33 (1993).

secular law, religious communities must be afforded significant leeway for an exit from secular law's commands.<sup>33</sup>

While the separationist view entails strong judicial policing of both establishment and free exercise, an opposite but equally logically coherent position would call for weak judicial intervention under both clauses. This view assimilates religion into politics. Religious entities may freely participate in politics alongside other competitors, and bring home their share of the spoils. When they do, the Establishment Clause will not stop them, so long as religious beneficiaries are treated no better than others. On this view, government neutrality toward religion is recast from a requirement that religion be withdrawn from the public sphere to a requirement that it be equally treated there.

This assimilationist view arguably best describes the trend in the Supreme Court's Religion Clause jurisprudence since the 1980s.<sup>34</sup> The Court has relaxed Establishment Clause barriers to religious participation in public programs, upholding a variety of distributive schemes in which religious beneficiaries receive benefits on an equal footing with nonreligious beneficiaries.<sup>35</sup> The Court has also rejected the Establishment Clause as a basis for excluding religious organizations from equal access to public forums open to speech by nonreligious groups.<sup>36</sup> Thus the Court has quite literally let religion into the supposedly naked public square.<sup>37</sup>

Religion's full and open participation in politics, however, attenuates the case for compelled free exercise exemptions. On the assimilationist view, religious communities that have an equal shot at influencing political outcomes *ex ante* should not be heard to complain of sour grapes *ex post*. If you have voice, who

<sup>33</sup> On this point, Carter misapprehends my position. He claims that I "suggest that a religion should *not* be allowed to opt out of generally applicable secular regulations" (p 41) (emphasis added). In fact, I suggest exactly the opposite, cautioning only that religionists should not be allowed to withdraw from support of the civil public order through taxation. See Sullivan, 59 U Chi L Rev at 220-22.

<sup>34</sup> See Lupu, 62 Geo Wash L Rev at 237-67 (cited in note 25) (labelling this approach the "neutrality" position).

<sup>35</sup> See, for example, *Zobrest*, 113 S Ct 2462 (sign-language interpreter for deaf parochial high school student); *Witters*, 474 US 481 (vocational education grant to blind chaplaincy student); *Kendrick*, 487 US 589 (involvement of religious organizations in federally funded adolescent sexuality and pregnancy program); *Mueller*, 463 US 388 (income tax deductions for parochial school tuition, textbook, and transportation expenses).

<sup>36</sup> See *Lamb's Chapel v Center Moriches Union Free School District*, 113 S Ct 2141 (1993); *Widmar v Vincent*, 454 US 263 (1981).

<sup>37</sup> See Neuhaus, *The Naked Public Square* at 211 (cited in note 15).

needs exit? Religious equal opportunity in politics should lead to deference to antireligious results.

Thus, on the assimilationist view, the Court decided *Smith*<sup>38</sup> correctly. The political safeguards for religious freedom are enough. Political redress is available to religious communities seeking exemption from the drug or other general laws. Indeed, religionists had widely succeeded in obtaining such exemptions in states other than Oregon before *Smith*,<sup>39</sup> as they did in Oregon after *Smith*.<sup>40</sup> Nor are religious communities necessarily discrete and insular minorities. Fringe religions often have powerful allies in the mainstream religions who unite to guard vigilantly against any infringement of the interests of institutional religion as a whole. The ultimate illustration of the power of this ecumenical religious lobby to protect its interests in politics was the passage of the Religious Freedom Restoration Act of 1993.<sup>41</sup> To an assimilationist, the RFRA, by purporting to overrule *Smith*, paradoxically illustrates that the *Smith* Court's premises were correct.

As between these two coherent positions—banish religion from politics but protect its right to flourish freely behind the garden wall, or let religion enter into politics but make it take its lumps—Carter chooses neither. He chooses instead a position in between: weak on establishment but strong on free exercise anyway. From either of the two perspectives just described, this looks like having one's cake and eating it too, but it might not work that way in practice.

In several ways, religious participation in politics along the lines Carter suggests might well undermine his vision of religious autonomy. First, Carter's theory, if internalized by religious practitioners, might alter their self-conception. His theory of the worth of religion in democracy is instrumental; it asks not what religion can do for you but what religion can do for your country. Conceiving of religion instrumentally, as a mediating institution on par with political parties and trade associations, would arguably diminish the sense of its intrinsic worth.<sup>42</sup> This in turn

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<sup>38</sup> 494 US 872 (applying deferential rationality review to claimed free exercise exemption from drug laws).

<sup>39</sup> See *id.* at 912 n 5 (Blackmun dissenting).

<sup>40</sup> See Or Rev Stat § 475.992(5) (1993) (exempting from drug laws the use of peyote "in connection with the good faith practice of a religious belief").

<sup>41</sup> Pub L No 103-141, 107 Stat 1488, codified at 42 USC § 2000bb-4 (1993).

<sup>42</sup> For an extended critique of Carter's instrumental conception of religion in favor of a Free Exercise theory of religion's intrinsic worth, see Scott C. Idleman, *The Sacred, the Profane, and the Instrumental: Valuing Religion in the Culture of Disbelief*, 142 U Pa L Rev 1313, 1348-59, 1367-79 (1994).

would diminish religion's capacity to serve as an autonomous source of values, standing apart from and potentially against the state.<sup>43</sup> The paradigmatic instances of religious resistance that Carter celebrates—from Martin Luther to Martin Luther King, Jr.—do not square with the image of clerics celebrating at a bill-signing. God as a lobby might well be worse for religion than “God as a hobby”;<sup>44</sup> at least the latter preserves a sense of religion as a distinctive pursuit.

Second, conceiving of religion as a democratic intermediary might have a homogenizing effect on differences among sects, diminishing the epistemic diversity that is the key to Carter's political theory of religion in the first place.<sup>45</sup> As a practical matter, for religions to have any influential effect on politics and still speak in a distinctively religious voice, they will have to establish alliances that crosscut their heterogeneous creeds. At best, greater explicit religious representation in politics would require aggregating and trading off theological differences among religious constituents. The more religions minimize their differences by scaling back to their common denominators, however, the more epistemic commonality they will express. At some point, religious expression of this kind might become difficult to distinguish from the “overlapping consensus” among moral views that the liberals whom Carter criticizes find compatible with a separationist state.<sup>46</sup>

At worst, this process would be not only homogenizing but exclusionary. Some faiths will not make it into the mix. For example, some religious communities reject, on religious grounds, Carter's conception of religious communities as mediating institutions.<sup>47</sup> Consider, for example, the separationist Old Order Amish who were granted an exemption from compulsory schooling in *Wisconsin v Yoder*,<sup>48</sup> or the Satmar Hasidim whose self-

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<sup>43</sup> See *id* at 1355-58 (describing the adverse cultural consequences of instrumentalism).

<sup>44</sup> The latter is Carter's term for the trivialization of religion. See pp 22, 23.

<sup>45</sup> Compare Federalist 51 (Madison), in *The Federalist Papers* at 324 (cited in note 7) (“In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . .”).

<sup>46</sup> The term “overlapping consensus” is Rawls's. See Rawls, 7 Oxford J Legal Stud at 1 (cited in note 17). See also Teitel, 78 Cornell L Rev at 787 (cited in note 14) (“Common or shareable tenets will be those aligned with the norms of the political majority.”).

<sup>47</sup> See Idleman, 142 U Pa L Rev at 1351-52 (cited in note 42); Teitel, 78 Cornell L Rev at 809-11 (cited in note 14).

<sup>48</sup> 406 US 205 (1972).

segregation was at issue in *Board of Education of Kiryas Joel Village School District v Grumet*.<sup>49</sup> Other religious communities might accept the possibility of public participation, but refuse to tone down messages rooted in absolute religious commands ranging from "abortion is murder" to "infidels must die." Carter makes the sectarian bias of his model apparent when he condemns as "scary" or "outrageous" religions that preach messages he himself condemns as sinfully intolerant.<sup>50</sup> The exclusion of such messages would defeat the "epistemic diversity" of the project; inclusion, however, raises the prospect of impasse with non-believers. Epistemic diversity and religious political efficacy thus might not both be possible at once.

### CONCLUSION

Stephen Carter's dual recommendations for religious empowerment are on a mutual collision course. Autonomy and epistemic diversity impede meaningful religious participation in general politics, and vice versa. Treating religion as fungible with other moral or philosophical strands in politics is likely to yield only bland and minimal religio-moral consensus that pleases no sect. But allowing religions to speak in politics with their distinctive voices might yield irreducible conflict and impasse. Carter downplays, and perhaps underestimates, our potential for religious strife (see, for example, p 140), and, ultimately, gives too little consideration to the possibility that it is at least partly our separationist culture that distinguishes us from Belfast, Sarajevo, or Beirut.

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<sup>49</sup> 114 S Ct 2481 (1994) (holding the creation of a public school district coextensive with a Satmar Hasidim community an unconstitutional establishment of religion, despite the Hasidim's contention that the district was a necessary accommodation of the religion's distinctive and insular way of life).

<sup>50</sup> See text following note 3. For a similar critique of the "ecumenical politics" advocated by Michael Perry in *Love and Power* (cited in note 15), see Sanford Levinson, *Religious Language and the Public Square*, 105 Harv L Rev 2061, 2073-76 (1992) (arguing that Perry's model is implicitly sectarian in favoring the approaches of "fallibilist" sects over "conservative" sects).

