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CAN THIS CULTURE BE SAVED? ANOTHER AFFIRMATIVE ACTION BABY REFLECTS ON RELIGIOUS FREEDOM


W. Burlette Carter*

Trading on a number of attractive myths, in the fall of 1993, Stephen Carter1 produced one of the more celebrated books written by a law professor in recent memory. In The Culture of Disbelief, Carter charges the American legal and political culture with trivializing religious devotion to such an extent that today, religion is not an acceptable subject of discussion in public fora.2 Accordingly, says Carter, religious discourse is discouraged in public discussions while other types of discourse are welcomed, and religious behavior in public life is viewed as suspect because it is religious.

The award-winning book generated a virtual cottage industry of news articles and other media coverage on its subject.3 Shortly after Culture's

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2. Some of the basic themes Carter trumpets in Culture have been previously explored by him in other publications and speeches. He notes in his acknowledgements two articles in particular: Evolutionism, Creationism, and Treating Religion as a Hobby, 1987 Duke L.J. 977 (pp. vi, vii); The Inaugural Development Fund Lectures: Scientific Liberalism, Scientific Law, 69 Or. L. Rev. 471 (1990). See also Stephen L. Carter, The Separation of Church and Self, 46 SMU L. Rev. 585 (1992) (arguing that liberal political theory's image of ideal public citizen fails to preserve place for religious expressions); Stephen L. Carter, Religion Doesn't Have a Prayer, Legal Times, July 23, 1990, at 28 (arguing that, according to courts, the Establishment Clause mandates that "God's word may not be taken seriously in public affairs"). Because Culture's primary readership—the general public—does not have the benefit of Carter's prior works, and because Carter himself describes these earlier explorations as part of an "intellectual odyssey" (p. vi) (thus suggesting that Culture represents the most current manifestation of his views), my comments here are based solely upon Culture of Disbelief unless otherwise stated. In making these comments, I take into account the fact that a book for the general public does not lend itself to the same degree of thoroughness allowable in a law review publication.
release, political and religious leaders across the country took to citing it from platforms or waving it from pulpits. Indeed, President Clinton publicy praised *Culture* as recommended reading and chose to have himself depicted in a portrait holding a copy of the book. *Culture* was widely acclaimed as a significant contribution to our understanding of religion in America. With few exceptions, the public responses to the book were positive.

This Review is more critical of *Culture*’s approach. I contend that *Culture*’s trivialization thesis lacks support and is inherently defective as a starting point from which to fashion a workable theory of freedom to engage in public religion. I argue that *Culture*’s approach does not adequately consider minority group religious freedom rights. Moreover, it yields to the inevitable search for audience appeal, *Culture* ends up trivializing the very religious concerns that it set out to highlight.

Part I provides a basic outline of the trivialization theory. Part II examines some of the evidence that Carter presents to support this thesis, focusing primarily on his argument that the law trivializes religion. There I argue that *Culture* exaggerates the examples of alleged trivialization that it provides. Relying heavily upon overstatement, *Culture* perpetuates a mythology of oppression and undermines its primary objective of establishing that religious points of view should be taken seriously in public debates.

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6. In June of 1994, Carter was awarded the Louisville Grawemeyer Award in Religion for *Culture*. He was reportedly the first nontheologian to win the prestigious award. See Judith L. Howard, Stephen L. Carter, Dallas Morning News, June 12, 1994, at 1J. The following month the American Bar Association awarded a Certificate of Merit recognizing *Culture* as making a noteworthy contribution to public understanding of the American legal system. See ABA Announces Media Winners in Gavel Awards Competition, P.R. Newswire, July 8, 1994, available in LEXIS, News Library, Cur news File.

Part III discusses how *Culture*’s approach trivializes the concerns of religions and cultures outside the mainstream. In the first section of Part III, I argue that while *Culture* purports to represent the interests of all religions and to seek the best interests of all Americans, in fact faiths and cultures outside the mainstream are shortchanged in its analysis. *Culture* considers its theme solely from the perspective of majority religions and cultures, even when it purports to address minority concerns. Adopting this perspective, *Culture* minimizes the impact of race and culture on religious freedom debates and minimizes the need for the law to play the role of mediator between majority and minority religions. In the second section of Part III, I demonstrate that *Culture* expressly trivializes specific religious expressions that are outside the mainstream. There I discuss *Culture*’s passing reference to liberation theology and its discussion of political preaching, and I show that *Culture* itself rejects religious discourse that is inconsistent with its author’s own theological and political assumptions, even as it argues for a broader embrace of religious discourse.

Part IV argues that the attitude that Carter describes as our culture’s approach to “religion” instead reflects our general approach to perspectives that are not those of the relevant majority. I argue that *Culture* itself falls prey to our cultural tendency to assume that the majority’s perspective reflects the perspective of all groups within the culture, i.e., what holds true for the religious majority must be true for other groups as well. The result of such erroneous assumptions is that the concerns of those outside the majority are trivialized. *Culture*’s analytical approach fails to recognize this problem, and in the end, in blaming the “culture” for our own “disbelief,” *Culture* advocates a definition of religious faithfulness and religious freedom that is a dangerous embrace for those who purport to take law or religion seriously.

I. **The Trivialization Thesis**

Religiosity, according to Stephen Carter, is resurgent in America and indeed has always been a strong part of American life (pp. 4, 8, 15, 20, 186–87). But today, he claims in *Culture*, persons who proclaim their faith by word or deed in the public square are subject to criticism, ridicule, and embarrassment, or they simply are not taken seriously.

*Culture* applauds the principle of the separation of church and state (p. 3). But it argues that we have taken the concept of separation too far and have created a society that “exerts pressure to treat religion as a hobby,” discouraging the faithful from engaging in “God-talk”—public discussion in explicitly religious terms—and from following the rules of their faith if those rules require behavior that secular society considers

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8. Carter defines “public square” for his readers as “the arena in which our public moral and political battles are fought” (p. 51).
objectionable (p. 29). Even within the acceptable mainstream, argues Carter, Americans seem most comfortable with those who limit their religious observances to a few sessions of private worship and prayer but who are "too secularized to let their faiths influence the rest of the week" (p. 29). Carter notes that this discomfort with expressly religious discourse is heightened when the faithful not only refuse to keep quiet about their beliefs, but also act on belief in ways contrary to the dictates of secular society (pp. 8, 29).

Carter claims that American culture treats religion as an inferior basis for decisionmaking in the public arena (pp. 15, 16). In this "Culture of Disbelief," the selective rejection of religiously-based opinions occurs not because of the listener's disagreement with the cause espoused, but rather because the religiously-based viewpoint is not viewed as rational. He claims that American culture, buttressed by liberal political theory, has made rationality a nonnegotiable prerequisite for discourse in the public square (pp. 42–43, 54–56). But this requirement ignores the

9. Carter defines religion as a "tradition of group worship (as against individual metaphysic) that presupposes the existence of a sentence 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" (p. 17). Carter expressly recognizes that some will criticize his definition of religion as underinclusive (p. 18).

10. Carter uses the terms "mainstream" and "mainline" to refer to Protestant, Catholic, and Jewish religious traditions. In context, the term appears to connote a degree of political acceptance and political power (e.g., p. 29–32). I will use the term to refer to white Protestants and Catholics only, unless otherwise noted. I think that his inclusion of Judaism, while in some sense understandable, is subject too many conditions and, as I will explain later, cultural minorities who are Christian often have traditions that significantly distinguish them from majority Christians. For lack of a better term, I will use the term "minority" to refer to faiths outside the mainstream and "minority cultures" to refer to racial groups comprising persons of color.

11. Carter uses the term "liberalism" to denote "the philosophical tradition that undergirds the Western ideal of political democracy and individual liberty". He notes that conservatives as well as liberals often claim to represent the "liberal" tradition. Occasionally, he also uses the word liberal in its contemporary political sense, but he relies upon the context to indicate this use (p. 55 n.*).

12. Carter criticizes theorists who argue that individuals should attempt to justify their political choices in terms of rational speech rather than appeals to morality. See, e.g., Bruce Ackerman, Why Dialogue?, 86 J. Phil. 5, 16–18 (1989) (cited at pp. 54–56). Frederick Mark Gedicks, another critic of the trend, has explained the point in a helpful way. He says that underlying liberal political theory is the Lockean notion that there exist (1) an inviolable private sphere of individual rights that government cannot touch and that is freely subject to both rational thought and passion, and (2) a public sphere controlled by government which, because it must balance the various and sometimes conflicting interests, must rely solely on rational thought in attempting to reach a common good. Under this view, "rational" discourse is necessary in the public sphere, in order that government remain "neutral" in its decisionmaking. See Frederick M. Gedicks, Public Life and Hostility to Religion, 78 Va. L. Rev. 671, 674–76 (1992); see also Michael J. Perry, Love and Power: The Role of Religion and Morality in American Politics 10, 15 (1991) (arguing that approaches excluding religious dialogue are not neutral and that the only truly neutral/impartial practice of political justification is to let everyone rely upon their relevant convictions) (cited at p. 56). The complaint that religion is improperly shut out
fact that religion is, by definition, a different way of knowing the world (p. 43). According to *Culture*, despite the fact that religious reasoning may differ from secular reasoning, religious reasoning ought to be respected as an acceptable form of public discourse (pp. 42–43, 230–36).

In making its case for more respect for religion, *Culture* advances the familiar but controversial point that the original purpose behind the Establishment and Free Exercise Clauses contained in the First Amendment was to protect religion from government, not to protect government from religion (pp. 105–06, 115–20). *Culture* thus takes on those

of the public arena has been echoed by scholars who also argue for greater public accommodation of religious activities. See, e.g., Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 126 (1992). Others argue that these accommodationists place too little weight on the Establishment Clause and erroneously focus primarily upon the Free Exercise Clause. See, e.g., Ira C. Lupu, The Trouble with Accommodation, 60 Geo. Wash. L. Rev. 743, 747–48 (1992) (pro-accommodationists frequently collapse the two religion clauses but Establishment Clause must be given its due); Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 197 (1992) (Establishment Clause operates to end the war between the sects as part of a social contract).

13. Carter points out that for the religious person, what some might see as irrational passion is in fact rational behavior by the standards of the religion (p. 217).

14. Carter says that "toleration" of religious viewpoints is not enough. Using Christianity's relationship to other faiths as an example, he argues, "Tolerance without respect means little; if I tolerate you but do not respect you, the message of my tolerance . . . is that it is my forbearance, not your right, and certainly not the nation's commitment to equality, that frees you to practice your religion" (p. 93; see also p. 230). It could be argued that Carter's separation of the idea of toleration from the idea of respect is inconsistent with the concept of toleration in some liberal political theory. See, e.g., John Rawls, *A Theory of Justice* 211–21 (1971) (tolerance emerges from the concept of justice as fairness and is necessitated by the principle of equality). To the extent that by "respect" Carter means an acknowledgement of the inherent validity of the religious point of view, Carter also may be asking secularists to do the impossible. Responding to Carter, Sanford Levinson has commented that a secularist cannot accept the argument that "God requires X"; indeed, it is the rejection of that very approach that makes the person a secularist. Levinson, supra note 5, at 1879.

15. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. 1.

16. But see, e.g., Laurence H. Tribe, American Constitutional Law § 14-3, at 1158–59 (2d ed. 1988) (comparing views of Thomas Jefferson, James Madison, and Roger Williams, and arguing that history of the religion clauses reflects not one but three views: (1) concern that religion must be protected from corruption by government (Williams); (2) concern that government and private secular interests must be protected from corruption by religion (Jefferson); and (3) concern that both religion and government would be best advanced through separation (Madison)); see also Arlin M. Adams & Charles J. Emmerich, A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses 21–31 (1990) (identifying three different approaches and stating that "[a]ny attempt to reduce the Founders' views to one position or to read the beliefs of certain Founders, no matter how prominent, into the First Amendment is apt to produce indefensible and culturally unacceptable results"). While Carter offers a passing reference
who wish to equate religious speech with other speech. It argues that religious devotion is not just ordinary speech under the First Amendment, nor are religiously-based actions just another matter of conscience (pp. 130–32). According to Carter, religion matters to adherents in ways that other speech and other matters of conscience do not, and, in his view, the religion clauses provide for unique protections (p. 35).17

Additionally, _Culture_ claims that religiously-informed viewpoints help preserve democracy in society. Citing de Tocqueville and others, Carter argues that "the very aspect of religions that many of their critics most fear—that the religiously devout, in the name of their faith, take positions that differ from approved state policy—is one of their strengths" (p. 37). In our pluralistic society, Carter says, the religions act against the threat of tyranny by offering alternative sources of moral understanding, and by splitting off the allegiances of citizens, pressing them toward views that differ from those of the state (pp. 35–37).18

_Culture_ also stresses the need for the religions to maintain their autonomy from the state. It warns that through increasing reliance upon the state's largess, the religions threaten their independence, and thus, the essential freedom of each religion to determine the content of its own theology.19

to some dissent on the issue of Jefferson's views, ("[s]ome scholars argue that Jefferson believed that religion had no role in government" (p. 117)), he discounts such dissent quickly and proceeds to recount the history of the religion clauses as if there can be no serious debate about his point, and even refers to that history as "unambiguous" (p. 119).

17. Carter's concern hearkens to an ongoing debate in academia over what accommodations government should make for religious speech. Carter sides with accommodationists who favor broad governmental support and encouragement of religious expressions in the public sphere. See, e.g., McConnell, supra note 12, at 126. At the other end of the spectrum are those who claim that the Constitution requires that the state neither encourage nor condemn religious speech. See, e.g., Lupu, supra note 12, at 771–81; Sullivan, supra note 12, at 202–08. As Carter notes, some religious persons respond that the latter approach, sometimes referred to as "neutrality" to religion, is actually hostility toward religion (p. 51), and some even claim the approach indeed serves to promote state-chosen "religions" such as secular humanism. See, e.g., Homer Duncan, Secular Humanism: The Most Dangerous Religion in America (1979). Carter says that he does not subscribe to the hostility thesis but says he understands why religious people might see it that way (p. 52).


19. Carter discusses Bob Jones Univ. v. United States, 461 U.S. 574 (1983), in which the Supreme Court held that the Internal Revenue Service could withhold tax-exempt status from educational institutions that discriminate on the basis of race. Bob Jones University unsuccessfully claimed a right to a religious exemption from the relevant IRS regulations (pp. 150–51). Carter states that

[one must be careful ... not to be so blinded by the immorality of racism that one misses the glaring problem for the religions that the Bob Jones case illustrates. By accepting the offer of special tax treatment, the religions themselves may have paved the way for a future in which they are told that they will lose their treasured tax status unless they reflect, in theology and practices, whatever the current government policy might be .... (Pp. 151–52.)
Culture rejects the notion that the presence of lively religious rhetoric in the political arena is evidence that public religious discourse is alive and well (pp. 44–45). Rather, it dismisses this “civil religion,” chiding those across the political spectrum who “treat Holy Scripture like a dictionary of familiar quotations” (p. 45). Practitioners of civil religion, says Carter, erroneously use God-talk to argue that God supports one or another political cause (pp. 45, 51–52). But Carter states that he is equally offended by suggestions that God-talk has no place in public discussions (p. 48).

While in much of Culture he defends religious speech, in a chapter entitled “Political Preaching,” Carter launches an attack against some of the faithful whom he says also trivialize religion. Thus, Culture condemns “political preachers” who, in Carter’s view, improperly attempt to use religion to bend their flocks to adopt certain political points of view. Culture argues that when politics and theology are always in sync, one has reason to suspect the validity of the theology (pp. 67–82). According to Carter, then, political preachers are not much different from the practitioners of civil religion (p. 81).

Culture asserts that the denigration of public religious discourse that we are now witnessing is a relatively new phenomenon, at least among liberals who, he claims, embraced religious rhetoric as a part of the social gospel. Culture thus argues that the openly religious rhetoric that characterized the Civil Rights Movement presents a “dilemma” for liberals and liberal philosophers who now complain when conservatives engage in God-talk (pp. 19, 227). According to Carter, “liberal philosophy’s distaste for explicit religious argument . . . cannot accommodate the openly

20. Kathleen Sullivan has stated that, although such evidence is not alone conclusive, it suggests that “if the Court was in the business of wholesale secularization, it has not succeeded.” Sullivan, supra note 12, at 196.


22. For example, he notes President George Bush’s 1992 State of the Union Message in which Bush stated that “by the grace of God, America won the cold war” (p. 45). Carter analyzes the line in this way:

With these five short words, a politician conveys the sense of a people specially favored by the Almighty—quite flattering to one’s constituents. At the same time, one wraps the mantle of godliness around one’s policies. The message is not only that our faith in God helped us, but that God is on our side. We won the cold war not simply by God’s grace, but by God’s will; we won not only because God was with us, but, in effect, because God is one of us. The message, at bottom, is that God is an American—and maybe even a Republican. (P. 45.)

23. From the context, it appears that Carter intends the word “liberal” to be understood in contemporary political terms. See supra note 11. In addition to citing the religious rhetoric of the Civil Rights movement, he also cites with less flourish the support of Christian evangelicals for Jimmy Carter and the anti-war activities of some clergy during the Vietnam War (pp. 48–49, 60, 227–29).
and unashamedly religious rhetoric of the nonviolent civil rights movement of the 1950s and 1960s" (p. 227). Indeed, according to Carter, "there is much depressing evidence that the religious voice is required to stay out of the public square only when it is pressed in a conservative cause" (p. 64).

Carter says that he seeks to demonstrate how a discussion of controversial issues might proceed—"without . . . the antireligious fervor that often characterizes the liberal case" and "without resort to the sort of liberal-bashing that often characterizes the rhetoric of the religious right" (p. 15). Thus, he moves from the general topic of God-talk to discussing issues such as abortion, euthanasia, capital punishment, creationism, prayer in public schools, and subsidizing religious education. He informs readers that he is among the long list of scholars criticizing the rule in Lemon v. Kurtzman, in which the Supreme Court determined that, to pass Establishment Clause muster, (1) state action must have a secular legislative purpose, (2) its principal and primary effect must be one that neither advances nor inhibits religion, and (3) the action must not foster an excessive entanglement with religion. Criticizing the secular purpose arm of that test, Carter suggests that rather than looking to religious motivation, the courts should focus more upon whether the state action has the effect of promoting religion (p. 191).

Culture never completely answers the question of how the "Culture of Disbelief" came into being. It traces its beginnings to Roe v. Wade, in which the United States Supreme Court determined that a woman possesses a constitutionally protected right to have an abortion (pp. 56–58). But that explanation must be incomplete, given that Carter notes that "[t]here is little evidence to support the idea that most Americans prefer to think of the religions as remaining outside the public square" (pp. 15, 119). In fact, citing surveys, he suggests that the majority of Americans are religious (pp. 4, 8, 111, 119, 137, 240). Culture makes vague references to "opinion leaders," "opinion makers," "well-educated professionals," "guardians of the public square," and "the legal culture that guards the public square," (pp. 4, 8, 23, 49, 54, 119), implying that these groups are responsible. Yet, Culture never explains why a religious majority would step so robotically to these clearly offbeat drummers.

24. The merits of these proposals are outside the scope of this Review, except to the extent that they relate to the trivialization thesis.
27. 410 U.S. 113 (1971).
28. Carter claims that Roe was like a "cold shower" for conservatives who were forced to come out of their "cocoons" of private religion and to take religion to the public square. He contends that liberals reacted to this conservative emergence by rejecting openly religious discourse (p. 58).
29. See infra text accompanying note 114.
30. Michael McConnell has maintained that there exists a "gulf between a largely secularized professional and academic elite and most ordinary citizens." McConnell, supra
Culture's dominant theme is the way we talk about religion. Carter alerts readers that "[t]his book is not about law, but about attitudes—the attitudes that we as a political society hold toward religion" (p. 15). He stresses that in the cited examples of trivialization, it is the "language chosen to make the points" that matters (p. 6). He offers that in each example, "one sees a trend in our political and legal cultures toward treating religious beliefs as arbitrary and unimportant, a trend supported by a rhetoric that implies that there is something wrong with religious devotion" (p. 6).

II. Culture's Trivialization of Law: Religious Liberties

In this section, I examine Culture's evidence that our legal culture trivializes religion. Here, I demonstrate that Culture greatly oversimplifies the examples it discusses, failing to mention to readers key facts that argue against the implications it draws from the case law. Rather than the evenhanded treatment of facts that we might expect from Stephen Carter, we are provided with selective reporting.

Carter tells his readers that the courts, and particularly the Supreme Court, have allowed the state to "run roughshod" over the religions (p. 38). But ironically, of the more than seventy cases mentioned in Culture, the large majority are offered merely for legal background. Far fewer are offered as support for Culture's thesis that the law trivializes religion, and the most significant cases Carter draws on involve minority faiths. Sadly, in discussing the alleged examples of trivialization in the case law that it cites, Culture repeatedly provides misleading glosses.

The point is illustrated by Culture's references to the United States Supreme Court's opinion in Wallace v. Jaffree,31 one of several decisions that Culture uses to critique the Lemon test.32 Carter informs readers that in Wallace the Court "struck down an Alabama statute allowing schools that so desired to set aside one minute for 'meditation or voluntary prayer.' " He states that the Justices argued that "the only purpose of the

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note 12, at 126. Carter does not draw the secularization line so clearly in Culture. He seems to suggest that religiosity and secularism exist at the same time across the culture. For example, he suggests that most members of Congress are religious (pp. 111, 240). Carter does not explain whether he would include them among the "opinion makers" or "opinion leaders," but it seems logical that he should, not only by virtue of the political positions they hold, but also by virtue of the financial resources and educational background possessed by most members. Similarly, in his examples of trivialization, he sometimes includes challenges to religious leaders. For example, he complains of an ordained minister who, being also a therapist, coauthored a book suggesting that one who gives up ties with family and material wealth in order to follow a religious community is suffering from a "toxic faith." Carter asks how Moses or Mohammed would be judged under this definition (p. 81). At another point, he criticizes the National Council of Churches for challenging what it considered to be improper invocations of God's name during the Republican National Convention (p. 50).

32. See supra text accompanying note 25.
legislation was a religious one," (i.e., the statute had no secular purpose within the meaning of Lemon), and the Justices reasoned that any student was free to pray even the absence of a statute (pp. 190–91). Thus, Carter tells the public that the Court's reasoning in Wallace "reflects a contemporary suspicion of [religious] accommodations" and asks, "[W]hy should it matter that some legislators hope that many students will pray?" (p. 191).

The Wallace Court considered the question of whether an Alabama statute providing for a moment of silence "for meditation and voluntary prayer" in public schools violated the Establishment Clause. At the time of that consideration, Alabama also had in force a statute providing for a moment of silence for "meditation." That statute predated the one before the Court. The question before the Court, then, was not, as Carter suggests, the choice between a meditation or prayer statute and no statute, but rather it was whether the new statute raised Establishment Clause problems. Moreover the context of Wallace cannot be ignored in interpreting its outcome. State actors took the view that the Constitution did not prohibit states from establishing a religion and there was evidence that some of these actors were doing more than simply affording time for voluntary prayer by students. 33

33. The term "accommodations" is used to refer to many different types of state action. One can seek accommodation by seeking exemption from generally applicable laws when application of those laws would effectively prohibit the exercise of religion. See, e.g., Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). See discussion infra text accompanying note 63. At the other end of the spectrum, state acknowledgement of religion or use of its symbols (as in the case of state sponsorship of a nativity scene in a public square during the Christmas season) has been mentioned in the accommodation context. See Lynch v. Donnelly, 465 U.S. 668, 673 (1984). Carter says that when he uses the term he means those accommodations that are constitutionally required (pp. 299–330). However, he notes that others use it to refer to permissible or discretionary accommodations as well.


35. The statute at issue was one of three passed by the state. In 1978, Alabama mandated a moment of silence for "meditation" in classrooms, and in 1981, it passed another statute permitting a teacher to announce a period of silence, not to exceed one minute, " for meditation or voluntary prayer." Wallace v. Jaffree, 472 U.S. 38, 40 (1985). Shortly thereafter, teachers in Alabama public schools, where three of Jaffree's young children were enrolled, began regularly leading their classes in vocal classroom prayers. See id. at 44. The defendants contended that these practices at the time they were undertaken were voluntary and not pursuant to any state statute or policy. See Jaffree v. Wallace, 705 F.2d 1526, 1529 (11th Cir. 1983). But see Brief of the American Civil Liberties Union, the Alabama Civil Liberties Union, and the National Coalition for Public Education and Religious Liberty as Amicus Curiae at 5–6, reprinted in 155 Landmark Briefs, supra note 34, at 402, 414 (quoting governor's answer as admission that the first and second statutes, as well as the "authority of God," authorized the prayer practices). Jaffree repeatedly informed school officials that he objected to these practices, but to no avail. See Jaffree v. Board of Sch. Comm'rs, 554 F. Supp. 1104, 1106–08 (S.D. Ala. 1983).
All of these facts and many others were before the Supreme Court and provided the context in which it determined the validity of the 1981 statute. *Culture* fails to mention any of them. Nor does it mention that among the strongest supporters of Ishmael Jaffree were the members of the American Jewish Congress and the National Jewish Community Relations Advisory Council.36

Thereafter, he filed a complaint seeking declaratory and injunctive relief against school officials, claiming that the prayer practices violated the Establishment Clause. At that time, he did not challenge the statutes themselves. See *Wallace*, 472 U.S. at 42.

In 1982, after learning of Jaffree’s lawsuit, Alabama’s Legislature passed a third statute permitting a teacher to “lead willing students in a prayer” and also providing the words to a specific prayer in which students should be led. In his second amended complaint, Jaffree challenged all three statutes and added the governor and other state officials as parties. See id. at 43. Subsequently, Jaffree abandoned his challenge to the first statute, see id. at 40 n.1; see also Brief of Appellees, Ishmael Jaffree, et al. at 2, reprinted in 155 Landmark Briefs, supra note 34, at 302, 306, but not before the district court upheld it. See *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982).

Throughout the litigation, defendants argued that contrary to established Supreme Court precedent, the U.S. Constitution does not prohibit the establishment of religion by a state. See, e.g., *Jaffree*, 705 F.2d at 1529; Jurisdictional Statement of Appellant George C. Wallace at 4, *Wallace*, 472 U.S. 38 (Nos. 83-812 & 83-929), reprinted in 155 Landmark Briefs, supra note 34, at 12. The Alabama district court agreed and observed that the Supreme Court “has erred in its reading of history.” *Board of Sch. Comm’rs*, 554 F. Supp. at 1128 (ruling prayer practices constitutional).

The court of appeals reversed the district court, finding that the prayer practices and the remaining two statutes were unconstitutional and in so doing, criticized the lower court for failing to follow the doctrine of *stare decisis*. See *Jaffree*, 705 F.2d at 1529–37. On review, the Supreme Court called the district court’s observation of its error “remarkable.” *Wallace*, 472 U.S. at 48.

On appeal, the Supreme Court summarily affirmed the court of appeals’ invalidation of the prayer practices and the 1982 statute authorizing a specific prayer. The governor then argued that the remaining meditation or prayer statute was a permissible accommodation of religion. See Brief of Appellant, George C. Wallace, *Wallace*, 472 U.S. 38 (Nos. 83-812 & 83-929), reprinted in 155 Landmark Briefs, supra note 34, at 182.

It is worth noting that Carter himself concedes the Founders’ generation probably did not intend to prohibit states from establishing a religion (p. 118). Yet, based on modern societal considerations, he agrees with the Supreme Court’s interpretation of the Fourteenth Amendment as requiring application of the Establishment Clause to the states, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940), although he warns of taking the modern requirements analysis too far (pp. 118–20). See also Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1157–60 (1991) (questioning *Cantwell* analysis).

Carter states that he generally agrees with the outcomes in the cases on prayer in public schools, including Wallace.37 Thus, his complaint seems based upon meaning that he reads into a questionable gloss of the Court's reasoning. But the facts he does not mention demonstrate that what was at issue in Wallace was considerably more than contemporary suspicion of religious accommodations or concern over the mere hopes of legislators.38

Even construing Carter's complaint as an attack on the Lemon test in general does not save it. Elsewhere, Carter admits that the courts tend to ignore the requirements of Lemon when applying the test stringently would prove too disruptive to mainstream religious interests (p. 113).39 At least where mainstream faiths are concerned, this abandonment of the Lemon factors argues against the pattern of legal disrespect that Carter discerns.40

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38. Surely, with respect to the first meditation statute, some of the legislators who voted for it hoped that students would pray.

39. Indeed, one commentator has opined, "To the extent that there remains a secular purpose standard, it is no longer meaningful." Ruti Teitel, A Critique of Religion as Politics in the Public Sphere, 78 Cornell L. Rev. 747, 769 (1993). Another has observed that it is not at all clear that Lemon does not permit a post hoc secular rationale in order to justify state action that was originally religiously motivated. See Sullivan, supra note 12.

40. In these discussions, Carter flips Lemon, suggesting that it invalidates state action any time there is a religious purpose, regardless of whether or not a secular purpose is also present. He notes that courts have "confus[ed] the political purpose for which the statute was enacted with the religious sensibilities of legislators or their constituents" and that Lemon would be workable if the courts accepted any legitimate political purpose (pp. 111-12).

In fact, the Court has at least given lip service to the claim that state action that is religiously motivated can pass Establishment Clause muster if it also has a secular purpose and the religious purpose is not preeminent. See Wallace, 472 U.S. at 56 (statute that is motivated in part by a religious purpose may still satisfy secular purpose test, but "must be invalidated if it is entirely motivated by a purpose to advance religion"). The problem is that examples of such cases involving state action on behalf of mainstream faiths are somewhat rare. Carter dismisses both Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding town sponsorship of nativity scene) and Marsh v. Chambers, 463 U.S. 783 (1983) (upholding prayers at the opening of legislative sessions) as isolated examples and yet inconsistencies that clearly demonstrate why Lemon is an unworkable test (pp. 113-14). But in some cases, the Court has also noted no Establishment Clause bar to the state's providing the same access to its largess as afforded secular groups, so long as there was no risk of excessive entanglement with religious interests. See, e.g., Kendrick v. Bowen, 487 U.S. 589 (1988) (approving inclusion of religious organizations in grants for sex and pregnancy education programs and noting that such inclusion was necessary for success of the program); Tilton v. Richardson, 403 U.S. 672, 687 (1971) (plurality opinion) (upholding inclusion of religiously sponsored colleges among institutions receiving federal
Carter’s references to the Tenth Circuit’s opinion in *Roberts v. Madigan*41 offer a different variation on the same theme. Of *Roberts*, *Culture* states:

> When citizens do act in their public selves as though their faith matters, they risk not only ridicule, but actual punishment. In Colorado, a public school teacher was ordered by his superiors, on pain of disciplinary action, to remove his personal Bible from his desk where students might see it. He was forbidden to read it silently when his students were involved in other activities. He was also told to take away books on Christianity he had added to the classroom library, although books on Native American religious traditions, as well as on the occult, were allowed to remain. A federal appeals court upheld the instruction, explaining that

grants for building academic facilities and noting facilities would be used solely for secular purposes and there was a low risk of entanglement; Waltz v. Tax Comm’n, 397 U.S. 664 (1970) (churches may be included among wide array of nonprofit groups doing work for public good and entitled to tax exemption); see also Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 115 S. Ct. 2141 (1995) (decided after *Culture* and granting religious groups the same access to public school premises as afforded secular groups does not violate the Establishment Clause). These cases indicate that it is too simplistic to suggest that the mere presence of a religious benefit constitutes an Establishment Clause violation under *Lemon*.

Carter’s attempt to demonstrate his point by using *Edwards v. Aguillard* is similarly hyperbolic. In *Edwards*, he claims the Court invalidated a law requiring schools to teach scientific creationism in public schools “because most of its supporters were religiously motivated . . . .” (p. 111). Carter contrasts his own view, saying that he agrees with the outcome because creationism is “bad science,” not because religion was an issue (pp. 161–62) and analogizes that the logic of *Edwards* would necessarily invalidate the teaching of evolution or a nuclear arms freeze if either were religiously motivated (p. 111).

Carter does not mention that in *Edwards* the state claimed that the avowed secular purpose of teaching creationism was to protect academic freedom and that the Court rejected this claim as a sham for a preeminent religious purpose. See id. at 94. Nor does Carter himself attempt to argue that the academic freedom position was not a sham, and indeed, he defends the result of *Edwards*, if not the alleged logic. Moreover, Carter fails to acknowledge that the teaching of evolution or of a nuclear arms freeze is not inherently religious. These subjects remain quite distinguishable from creationism and the logic supporting the exclusion of one, whether appropriate or not, does not necessarily compel the exclusion of the other.

It is worth noting that because mainstream religionists control both the state and private sector institutions, and thus can both satisfy their secular needs and have a reasonable chance at creating a religiously favorable climate for themselves through the exercise of that control, they face more difficulty than minority faiths and cultures in arguing that express recognition of religious activity serves some “secular” purpose. I would argue that the “motivation” behind the school prayer legislation in *Wallace* or the scientific creationism law in *Edwards* should be, for Establishment Clause purposes, distinguishable from the “motivation” behind legislation the majority passes to preserve minority religious or cultural rights. It is noteworthy that the American Indian Religious Freedom Act Amendments specifically state that “the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment.” See American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344 (Oct. 6, 1994) [hereinafter AIRFA Amendments].

41. 921 F.2d 1047 (10th Cir. 1990).
the teacher could not be allowed to create a religious atmosphere in the classroom, which, it seems, might happen if the students knew he was a Christian. (Pp. 11–12.)

At another point he says the Tenth Circuit:

held, . . . that a school district violated no religious freedom rights when it forbade a teacher to display his personal Bible where the students could see it, or to read it silently when his students were involved in work that did not require his direct supervision . . . . Indeed, the judges suggested, even had the district not implemented the ban, the Establishment Clause would probably have provided a basis for a court order including the same prohibition. (P. 189.)

In Roberts, a fifth grade public school teacher had set aside daily silent reading time, permitting students to bring their own books or select from a large classroom library comprised of books from the teacher's personal collection. Two of those books were The Bible in Pictures and The Stories of Jesus. During this period, the teacher would often silently read the Bible. The teacher had also put up a poster in the classroom that featured an outdoor scene and read, "You have only to open your eyes to see the hand of God." After a visiting parent complained, the school district required removal of the books and the poster and ordered Roberts to cease reading his Bible and keeping it on his desk during classroom hours. Roberts sued.

In that lawsuit, Roberts did not assert a free exercise claim. He claimed instead that the school district had violated his rights to free expression and academic freedom under the First Amendment. He also claimed that, in removing only the Christian books, the school district disfavored Christianity among the religions in violation of the Establishment Clause.43

42. Although Roberts is only a Tenth Circuit case, it is one of the more frequently mentioned cases in Culture (pp. 12, 57, 108, 172, 189).

43. Roberts argued that his purpose in reading the Bible was to set an example of an adult reading for his students. According to the district court, he compared his use of the Bible and religious material in class to the term "one nation under God" in the pledge of allegiance. See Roberts v. Madigan, 702 F. Supp. 1505, 1509 (D. Colo. 1989), aff'd, 921 F.2d 1047 (10th Cir. 1990). The majority addressed the complaint as Roberts characterized it. The dissent, while expressly noting that Roberts was not relying upon the Free Exercise Clause, nevertheless argued that the court should have treated Roberts's claim as if it were a free exercise claim, and thus required the state to show a "compelling interest" that required the burdening of Roberts's right to the assumed free exercise of his religion. See Roberts, 921 F.2d at 1060. The dissent did not explain why Roberts should not be held to his pleadings like any other plaintiff. See id. at 1059–64; see also discussion of International Soc'y for Krishna Consciousness, Inc., 112 S. Ct. 2701 (1992) infra note 46. The district court, while noting that Roberts did not raise a free exercise claim, stated, without the benefit of briefing or argument, that such a claim would not have altered its analysis. See Roberts, 702 F. Supp. at 1512.

Thus, ironically, Roberts's choice to couch his argument in secular terms allowed defendants to use religion offensively, i.e., as the reason why the Establishment Clause might be violated, and also permitted the court to consider his actions collectively (rather
The Tenth Circuit sustained the school district’s actions. In so doing, the majority concluded that the two Christian books in question were written primarily for the purpose of encouraging the acceptance of a particular faith and that, by contrast, the others were “about” religion.44

These facts are absent from Carter’s description. Had they been given their due, some readers might have concluded that the court was concerned about more than just what would happen if the students knew that Roberts was a Christian.45

Culture’s discussion of the Wallace and Roberts cases are not isolated examples of omissions. With troubling frequency, Culture glosses over key facts that if present, would weaken the positions it espouses.46 More-

than, for example, simply the Bible reading itself. Moreover, it also freed the court from considering the free exercise implications of his behavior. With respect to such litigation choices, should plaintiffs be heard to complain, “the culture made me do it”?

44. Reviewing their contents, the court distinguished these from the books on Native American religions and on the occult, as well as from the Bible itself, arguing that the latter books were about religion, while the former encouraged acceptance of a particular faith. The Tenth Circuit took pains to state, and Carter acknowledges (p. 207), that there is no ban against teaching about Christianity or about any other religion in the classroom. The court also expressly recognized that the Bible is both a religious text and otherwise a great work of literature. See Roberts, 702 F. Supp. at 1513. In fact, at Roberts’ request, the court ordered the school district to replace the Bible in the school’s central library after someone had removed it from the shelves.

It is worth noting that Roberts did not challenge the order to take down the poster. See Roberts, 921 F.2d at 1059. For this reason, the dissent complained that court should not have considered the poster in its analysis. See id. at 1059 n.1 (Barret, C.J., dissenting).

45. Building on this problematic interpretation of Roberts, Carter also offers other problematic hypotheticals. He asks, in effect, “what next?”

One wonders what the school, and the courts, might do if, as many Christians do, the teacher came to school on Ash Wednesday with ashes in the shape of a cross imposed on his forehead—would he be required to wash them off? He just might. Early in 1993, a judge required a prosecutor arguing a case on Ash Wednesday to clean the ashes from his forehead, lest the jury might be influenced by its knowledge of the prosecutor’s religiosity. (P. 12.)

Carter offers no support for his suggestion that the prosecutor’s personal religious convictions should automatically trump the constitutional right of a person accused of a criminal act to be tried before an impartial jury. He fails to explain why one should ignore Roberts’s decision to characterize his claim as a free expression case is not important nor does he tell us why the cumulative effect of Roberts’s actions should be ignored.

46. Consider the references to Lee v. International Soc’y for Krishna Consciousness, 112 S. Ct. 2701 (1992). Carter tells readers that the Supreme Court was “happy” to back airports that wanted to restrict solicitation by devotees of Krishna Consciousness merely because travelers found them irritating. The plaintiff society was composed of followers of Krishna Consciousness, a religion whose teaching required its adherents to venture into public places in order to proselytize, to distribute religious literature, to seek monetary and other support, and to provide information about their religion. The restrictions in question prohibited solicitation and distribution inside New York City airports (but not on sidewalks outside) and applied to all types of groups, religious and otherwise. Plaintiffs did not challenge the regulations as a violation of their free exercise rights, but rather claimed that the regulations violated civil rights laws and the right to free expression under the First Amendment. The Supreme Court settled the solicitation question by determining that the airports were not a public forum. However, in a companion opinion, the Court
over, with respect to the Supreme Court, *Culture* is quick to point out when the Court acts contrary to religion, but far less eager to inform its readers of favorable treatment.\footnote{47} It is silent on the pattern of sharp disa-


Building on this interpretation, Carter invites readers to "picture the response should the airports try to regulate the wearing of crucifixes or yarmulkes on similar grounds of irritation" (p. 9). But Catholics and Jews were covered by the statute and although Krishna Consciousness followers have a unique dress, religious dress restrictions were not at issue.

According to Carter, in Goldman v. Weinberger, 475 U.S. 503 (1986), the Supreme Court "shrugged" when a Jewish military officer challenged disciplinary action against him for wearing a yarmulke in violation of military regulations (p. 12). In fact, *Goldman* generated five separate opinions, and four justices dissented. Carter devotes no attention to the unique nature of the military environment and, in the end, concedes, as he must, that *Goldman* has been counteracted by legislation, at least insofar as it might affect the practices of mainstream adherents and religious Jews (p. 12).

He also tells readers that in Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989), the Supreme Court "warned . . . that the protection of religiously based refusals to work (at least on Sunday) might vanish if 'Sunday shopping, or Sunday sporting, for that matter, [would] grind to a halt" (p. 131) (quoting *Frazee*, 489 U.S. at 835). In fact, *Frazee* upheld a plaintiff's right to unemployment benefits even though he turned down a job offer because it required him to work on his Sabbath. In so holding, the Court quoted a passage from the opinion of the highest state court to reach the merits (which focused upon America's weekend way of life and suggested that massive movement away from Sunday employment would result if Frazee succeeded on his claim). The Court commented that there was no evidence in the record to support such arguments, and that while compelling state interests could override a legitimate free exercise claim, "[n]o such interest has been presented here." *Frazee*, 489 U.S. at 855. Still, Carter confidently tells readers that the Court issued a warning that shopping and sporting might take precedence over religion.

Witness too, Carter's complaint that the courts will sometimes order blood transfusions for children of Jehovah's Witnesses over their parents' religious objections (pp. 219–20) and his attacks on Justice Douglas's dissenting opinion in Wisconsin v. Yoder, 406 U.S. 205 (1972) (otherwise called "a rather spectacular victory" for religion (p. 130)).

Douglas argued that the views of the children should be solicited in deciding whether Amish parents have the right to take their children out of public school after completion of the eighth grade.

Carter claims that the problem in these cases is anti-religious animus. He ignores his earlier observation that were the practices noted above followed by mainstream adherents there would be little controversy (p. 128). He also ignores the question of the child's competing right, a question raised by a recent case in which a 15-year-old adherent to orthodox Judaism challenged his parents' custodial rights on the ground that they did not permit him to be as strictly observant of his faith as he would like. See Robert Hanley, *Jewish Teen-Ager Fights Return To His Parents*, N.Y. Times, Apr. 21, 1994, at B5. In fact, one could even argue that Douglas's approach in *Yoder* places a *higher* value on religious choices than does Carter's, because it suggests that even children have the right to make them.

\footnote{47} For example, in telling readers that the Court banned solicitation of money by the adherents in *Krishna Consciousness*, Carter does not mention that, in a companion case, the Court sustained plaintiffs' challenge to a related ban on distributing literature (as opposed to soliciting money) inside the same airport. Whether or not the linedrawing makes sense, the fact is that the Court sided with religious plaintiffs.

Interestingly enough, when Carter references the actions of Judge Brevard Hand, who ordered the removal from classrooms of forty-four books that he concluded promoted the
agreement among Justices which typifies decisions that reject religious rights claims. Even when majority opinions are favorable to religious litigants, *Culture* discusses concurring or dissenting opinions as support for the bias claim, although they are poor indicators of the Court's overall approach. *Culture* attacks the Court's own line drawing yet reveals no discernable bright line when it attempts the same.

Sometimes, *Culture's* eagerness to read meaning into language backfires, as Carter's own choice of words opens him up to the same criticisms he aims at others. And surprisingly often, Carter finds himself agreeing

religion of secular humanism, Carter does not point out that the case was actually a continuation of the *Wallace* saga (p. 171). See Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939, 942-44 (S.D. Ala. 1987), rev'd, 827 F.2d 684, 686-88 (11th Cir. 1987). After the Supreme Court's decision, intervenors in *Wallace* renewed an earlier motion before the district court for "alternate relief," seeking an order prohibiting the state school system from promoting "the religions of secularism, humanism, evolution, materialism, agnosticism, atheism, and others." Smith, 827 F.2d at 686. While noting that Hand was "quickly slapped down" by the court of appeals, Carter observes that Hand may have been on to something. Even if secular humanism is not a religion, he contends, it "might properly be labeled an ideology" (p. 171). This ideology, he asserts, is deeply alienating to some sincerely religious persons (p. 172). That one side is offended by another's expressions does not, ultimately, of course, control Establishment Clause or Free Exercise Clause question. Moreover, this subsequent history of *Wallace* further supports the notion that the Supreme Court's concern went beyond mere suspicion of motivations.

48. Cases concerning religious rights have a history of fracturing the Court. See, e.g., Lee v. Weisman, 112 S. Ct. 2649 (1992) (successful Establishment Clause challenge to invocations and benedictions at graduation ceremonies at public schools; four separate opinions, four dissenting Justices); Goldman v. Weinberger, 475 U.S. 503 (1986) (Jewish military officer prohibited from wearing yarmulke in violation of military regulations; five separate opinions, four dissenting Justices); Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (approving of denial of employment benefits to Native American churchmembers fired after drug tests revealed they used peyote, even though they consumed it in a bona fide religious ceremony; three separate opinions, four dissenting justices); see also discussion of Smith infra note 63.


50. Carter sanctions the Court in Lynch v. Donnelly, 465 U.S. 668 (1984) for its "ridiculous hemming and hawing" over whether a creche in a public holiday display has religious significance (saying that it clearly does and that the decision to permit the government-sponsored creche was wrong (p. 94)). At the same time he complains about a federal appellate court that banned what was, in Carter's view, a "rather bland 'Motorist's Prayer' to God that appeared on official state maps" (pp. 110–11, 123). See Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981).

51. In discussing *Estate of Thornton*, 472 U.S. at 711, Carter inadvertently demonstrates the difficulties of drawing nefarious meaning from language (p. 6). In that case the Court rejected under the Establishment Clause a Connecticut statute that gave an absolute right to sabbath observers not to work on their sabbath. Without challenging the outcome, Carter focuses on a phrase from the concurring opinion of Justice O'Connor in which she observes, "All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor." Id. at 711. Thus, Carter notes Michael McConnell's observation that religious Jews would be surprised to hear that they "select" their sabbath
with the various courts’ outcomes, thus raising the question of whether the legal and practical significance of his complaint is merely that Carter would prefer that the Court use different words.52

Three facts render Culture’s tendencies toward excess a particular point of concern. First, Culture purports to offer an objective view of the legal and political landscape (i.e., promising a more mature discussion about religion than that usually heard from liberals and conservatives).53 But Culture fails to deliver. Second, because Culture is a book directed to the general public, many in Culture’s audience are unfamiliar with legal analysis and the cases discussed. They are, thus, largely reliant upon the author for information about the courts’ approaches. Knowing more, some might feel that Culture betrays that trust.54 Third, Carter must ad-

since they have been under the impression for thousands of years that it was ordained by God (pp. 6–7) (citing McConnell, supra note 12, at 115)). But only pages later, discussing those Christians who believe in the exclusivity of Jesus Christ, Carter himself says that he believes that this approach betrays a lack of faith in God’s charity, “but everyone is entitled to choose a religious belief” (p. 90) (emphasis added). Could not one intent on finding ill will in Carter’s words charge him with religious disrespect by claiming that Christ’s exclusivity is ordained, and not the result of a choice?

52. As noted, Carter agrees with the Court’s outcome in the School Prayer Cases, see supra text accompanying note 38, and with the outcome in Yoder, 406 U.S. 205 (Amish parents have right to take children out of school after eighth grade) (p. 130). He also agrees with a New York district court’s decision that a Catholic group sponsoring the St. Patrick’s day parade had a First Amendment right to preclude gays from marching under a banner indicating that they are gay (pp. 33–34). See New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358 (S.D.N.Y. 1993).

53. See supra text accompanying note 24.

54. Unfortunately, the interpretive attitude described here is not limited to Culture’s discussion of case law. The very first reference in Culture takes the clear language of a letter-to-the-editor of Newsweek, and substitutes a new interpretation of the letter. The writer wrote to comment upon a cover story on prayer entitled “Talking to God.” Carter tells his readers that the “disgruntled reader . . . want[ed] to know why so much space had been dedicated to such nonsense” (p. 4). The letter stated the following:

“Talking to God” is a theocratic tract masquerading as a news article, a religious sermon touting prayer as a nostrum for all ailments. As in all such treatises, strange and marvelous happenings are attributed to supernatural causes without reference to alternate explanations. Surely there are scientists galore who will vigorously dispute the allegation that heart patients in a San Francisco hospital were magically healed by the prayers of strangers. And there must be sociologists eager to challenge Father Andrew M. Greeley’s more peculiar findings, such as his assertion that 20 percent of atheists and agnostics pray—presumably to a deity whose existence they deny. Your reporters unaccountably failed to solicit their views. The Newsweek I am familiar with publishes all sides of controversial issues and lets readers make up their own minds. What happened here?

Letter to the Editor, Newsweek, Jan. 27, 1992, at 10. While the letter writer clearly did not himself believe in prayer (which is, after all, his right), the letter objected to the form of the discourse, not to the discourse itself. Carter’s gloss only makes sense if one concludes that the letter writer said one thing, but really meant another.

Moreover, not all the printed letters were negative. Indeed, in an editors’ note, Newsweek commented that responses to the article “were as heartfelt as they were polarized” and that “[m]any praised our report for discussing the nonsecular.” But the note also stated that “many atheists and agnostics—who felt underrepresented in our
mit that at the heart of some resistance to religious speech is a fear that the devoutly religious will see the ends as justifying the means. *Culture*’s approach does not assuage that fear.

I believe that Stephen Carter is right to challenge those who think that God-talk has absolutely no place in the public square, although, as I will discuss later, I quarrel with his characterization of the problem. I also agree that religion is uniquely important speech to the speakers, although that does not necessarily render it reasonable to expect hearers to view it the same way. But despite these points of agreement, I cannot agree that the case law supports the broad generalizations that Carter makes, certainly not insofar as mainstream faiths are concerned. In the end, while complaining that the law trivializes religion, *Culture* itself trivializes the law,55 lulling its readers into a false sense that religious freedom claims are really quite simple; that the battle is between the religious on the one hand and the secular on the other. But anyone seriously concerned about these issues should be troubled by this model. In focusing on mainstream interests while purporting to offer universal observations, *Culture* glosses over serious differences in perspective between minority

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55. The difficulties of discerning a pattern of antireligious animus in the law is demonstrated by four recently decided cases which directly impact upon Carter’s thesis. In Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993), the Court held that a school district violated the free speech rights of a church when it refused to grant the church the same access to school premises as afforded other groups. The Court determined that the Establishment Clause would not be offended by the granting of such access. In Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993), the Court struck down a city ordinance banning animal sacrifice on the ground that the ordinance was specifically aimed at adherents to the religion of Santeria which employed animal sacrifice as one of its rituals in violation of the Free Exercise Clause. In Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993), the Court found that state provision of a sign interpreter to interpret in a mainstream parochial school in the same way that such interpreters are provided for children in public schools did not violate the Establishment Clause. On the other hand, in Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994), the Court held that the state of New York violated the Establishment Clause when it set up a separate school district for practitioners of a strict form of Judaism, even though the instruction in the district was entirely secular.

*Culture* includes a brief footnote about Lukumi Babalu, which was apparently decided at its press time, saying “Sometimes, of course, uncommon things happen” (p. 124 n.*). Carter addresses both Lamb’s Chapel and Lukumi Babalu more fully in Stephen L. Carter, The Resurrection of Religious Freedom?, 107 Harv. L. Rev. 118 (1993). He notes therein that these cases “suggest that the Justices may yet decide to rescue religious freedom.” Id. at 119. Prior to the Supreme Court’s decision in *Kiryas Joel*, Carter reportedly stated that that case was a good example of how the state can provide aid to private school students without violating the separation between church and state and that it offered the Supreme Court the opportunity to reverse decisions prohibiting governmental provision of remedial education on parochial school premises. See William H. Freivogel, Supreme Court Case May Punch Hole in Church-State Wall, St. Louis Post Dispatch, Mar. 28, 1994, at 4A.
and majority religious and cultural groups on the question of religious freedom. In the end, as I contend below, minority group perspectives are dangerously shortchanged.

III. Culture's Trivialization of the Concerns of Minority Faiths and Cultures

In this section, I contend that the most solid evidence Culture offers that religion does not receive its due is that involving minority faiths and cultures. But while Carter seems to express genuine concern for the protection of these groups, in focusing on mainstream perspectives, he fails to adequately describe minority group concerns or to offer a workable model for religious respect that protects their interests.

I also provide a specific example of how Carter's mainstream focus leads him to trivialize the concerns of nonmainstream groups when I consider his comments in a chapter called "Political Preaching." There, too, I show that his conclusions emerge out of his own theological and political assumptions, assumptions that are not universal. Carter ends up committing the very crime he condemns.

A. Which Culture?

Culture expressly recognizes that nonmainstream religions are most in need of accommodations (pp. 125–35). Unfortunately, Culture never attempts an analysis of the concerns of these groups that is distinct from that which it has done for mainstream faiths and peoples. By characterizing the problem as "religion," Culture offers a "one-size-fits-all" analysis that is ill-suited for many minority faiths and minority cultures.

Culture's discussions of Employment Division, Department of Human Resources of Oregon v. Smith56 and Lyng v. Northwest Indian Cemetery Protective Assoc.57 illustrate my point. In Smith, the Supreme Court permitted a state to deny unemployment compensation to two members of the Native American church58 who had been fired from a drug rehabilitation center after they had tested positive for peyote, a hallucinogen the use of which was prohibited by state law. The members claimed that they had used peyote as part of a bona fide religious service.59 The Smith majority held that because the law prohibiting the use of peyote was a generally applicable one, the state need not meet the "compelling interest" test, that is, it

59. Under Oregon law, violation of the state's drug laws constituted work-related misconduct that barred an award of unemployment benefits. See Smith, 494 U.S. at 874.
need not show some compelling interest that justifies the burdening of the religious practitioners' free exercise right. Many believe that in so holding, the Court failed to distinguish this case from prior cases in which it had applied the compelling interest test to state burdens on religious exercises.60

In *Lynx*, the Court permitted the government to build a road through federal lands even though all sides agreed that these operations would render impossible the performance of certain necessary religious practices and rituals by Native Americans living in the vicinity of the land (who had, of course, inhabited the land long before the federal government came).

*Culture* dutifully describes *Smith* and *Lynx* as cases involving religious traditions outside the mainstream (p. 126). Thus, Carter tells his readers that such religions as these are most in need of "accommodations"—in this case, exemptions from generally applicable laws to enable the free exercise of religious rights (p. 128). Referencing *Lynx*, he invites the readers to consider the uproar if New York City tried to take St. Patrick's Cathedral by eminent domain or, considering *Smith*, if a state were to outlaw the religious use of wine instead of peyote (p. 9). But after spinning out such hypotheticals, he correctly observes that they are just that: hypothetical cases (pp. 9, 128). Indeed, as *Culture* notes, such actions would not likely occur because they affect the interests of the mainstream and that the mainstream "will not countenance a state effort to shut down their religious observances; indeed, the state would never try" (p. 128). Thus, *Culture* argues that accommodations are needed for minority religious groups because, citing Frederick Mark Gedicks, "'Without exemptions, some religious groups will likely be crushed by the weight of majoritarian law and culture'" (p. 129).61

One can appreciate *Culture*'s attempt at including minority faiths in its efforts to vindicate religious rights. But *Culture*’s description of these cases simply in terms of "religion" is misleading. *Smith* and *Lynx* involved not just religions outside of the mainstream, but *Native American* religions. By presenting these cases to readers in terms of a *degree of religious* bias, *Culture* translates them into "majority speak" and, at the same time, strips them of their racial and cultural context, a context that is essential to a full appreciation of both the deprivation of the right and to prescribing the necessary remedy. In dealing with both mainstream and minority faiths, *Culture* separates the inseparable—race, culture and religion. It thus moves racial and cultural oppression to the periphery ("majority speak") as if what defines the religious experience of Native Americans—

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60. See infra note 63.
61. Carter is quoting Gedicks, supra note 12, at 690.
or other groups that have suffered historically from racial or cultural oppression—is plain vanilla religious disrespect.\textsuperscript{62}

The danger in an approach that ignores how issues of race and culture affect religious freedom debates is revealed in Justice Scalia's now famous lines of \textit{Smith} in which he tells members of the Native American Church, and others like them, that they have to rely upon the political process to protect their rights to practice their religion.\textsuperscript{63} While Carter disagrees with both the logic and outcome of \textit{Smith}, Culture's approach

\begin{quote}
62. Such an approach cannot be justified by the reply that we should highlight our similarities rather than our differences. Where ignoring differences merely serves to advance the interest of the dominant group, the approach must be rejected.

63. Declining to apply the compelling interest test, Justice Scalia viewed the issue as follows:

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. . . . [M]any laws will not meet the test. Any society adopting such a system would be courting anarchy, \textit{but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.}

* * *

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. . . . [citations omitted] [T]o 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. \textit{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.}

Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 888, 890 (1990) (emphasis added). Justice Scalia's express tying of the danger of anarchy to society's toleration of diversity of religious beliefs should lead one to wonder what other types of toleration of diverse expression or diversity in general would be viewed as courting anarchy.

\textit{Smith} generated three separate opinions. Justice Blackmun, joined by Justices Brennan and Marshall dissented, accusing the majority of "mischaracterizing this Court's precedents." Id. at 908. Justice O'Connor, while concurring in the outcome, called the majority's logic a dramatic departure from well-settled First Amendment jurisprudence and "incompatible with our Nation's fundamental commitment to religious liberty." Id. at 891. All four of these justices would have applied a compelling interest test; however, in so doing, O'Connor would have reached the same outcome as the majority, viewing the state's war against drugs as a compelling interest despite the fact that many states had exempted religious use of peyote from drug laws. See id. at 904–05. More recently, in \textit{Lukumi Babalu}, Justice Souter spent most of his extensive concurring opinion pleading with the Court to reverse \textit{Smith} and explaining why that could be done consistent with the doctrine of stare decisis. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2240–49 (1993) (Souter, J., concurring).
does not provide much more assurance. Carter observes that "the political process will protect only the mainstream religions, not the many smaller groups that exist at the margins" (p. 28), but he fails to acknowledge that where the religions are concerned, size does not define political power. With respect to the economic resources of the members of a given religion and thus the religion's political power, the correlation between religion and the race of the members of the religion is quite significant (p. 128).64

Having defined the issues presented in Smith and Lyng solely in terms of religion, Culture then uses Smith and Lyng to prop up the mainstream claim of religious disrespect, which absent cases such as these, would be leaning at a very precarious angle. And so, Culture explains:

Smith shows clearly just where the current Court's Free Exercise jurisprudence is heading: toward a clear separation of church and self, a world in which citizens who adopt religious practices at variance with official state policy are properly made subject to coercive authority of the state, which can, without fear of judicial intervention, pressure them to change those practices. (P. 127.)65

I would venture a guess that from the perspective of most Native Americans concerned about Smith, the case did not show where Free Exercise jurisprudence is heading; rather, it confirmed where Free Exercise jurisprudence has always been.66

In fact, while Culture relies heavily upon Smith and Lyng to support its thesis that American culture is suspicious of religion, these cases tend to challenge rather than support the mainstream's case of religious trivial-

64. The point is recognized in Barry A. Kosmin & Seymour P. Lachman, One Nation Under God: Religion in Contemporary American Society (1993), which reports polling information from over 113,000 Americans, purportedly the largest and most comprehensive study ever done on religious loyalties in America. The authors point out that the religions are social and cultural groups as well as religious groups. See id. at 264. They also noted that, among Protestants and Catholics, an important factor in determining the "social status" of a given religious group as a whole was the presence of African Americans, Latinos, and Asians within the group, since race affects the members' education and economic opportunities. See id. at 264–69. In the case of the Native Americans, their ability to call upon political power is further complicated by the political relationship between the Indian nations and the federal and state governments.

65. When the religious are required to abandon religion in the public square, Carter says that a separation of religion from "self" occurs (p. 127).

66. Justice Blackmun compared the sacramental use of peyote by the Native Americans to the use of wine in a Catholic communion. He noted that during Prohibition the federal government exempted the use of wine for sacramental purposes from its ban on alcohol possession and use. "However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion." Smith, 494 U.S. at 913 (Blackmun, J., dissenting). It is also worth noting that at the time that the AIFRA was passed, the sacramental use of peyote was a crime in 22 states. See AIRFA Amendments of 1994, supra note 40. The sacramental use of wine was a crime in none.
ization. As *Culture* concedes, before the ink on the *Smith* opinion had dried, many in mainstream America railed against its logic (pp. 127, 130).67 In fact, as Carter also acknowledges, the uproar against the reasoning of *Smith* (if not the outcome) was so significant that Congress passed and the President signed the Religious Freedom Restoration Act ("RFRA") which, by its terms, restored the compelling interest standard rejected in *Smith* (p. 269).68

Ironically, while the triumph of the RFRA may have resolved the uncertainty that *Smith* created for mainstream Christians and Jews, it did not provide adequate assurances needed by adherents to Native American religions who were, after all, at the center of the *Smith* case. In fact, Justice O'Connor had hinted in *Smith* that even under a compelling interest test, Native Americans who used peyote in religious ceremonies would lose.69 But contrary to the suggestion in Culture's analysis, they would lose *not* because their claims were *religious* in nature. These adherents would lose because they are not in the *majority* culture and consequently they do not have the political and economic resources to incorporate their cultural or religious ideals into the relevant law. Furthermore, they would lose because the majority culture has yet to place the same value upon those adherents' right to religious freedom as they place on their own.

Relief for some Native American religionists came in the fall of 1994, when Congress passed and the President signed the American Indian Religious Freedom Act of 1994 ("AIRFA").70 However, that Act was limited to preserving the right to the sacramental use of peyote. At the time this Review went to press, efforts to seek broader legal protections for Native American religious activities, such as the protection of sacred sites sought in *Lyng*, had been unsuccessful.71 The difference in the public


69. See Employment Div., Dept' of Human Resources of Oregon v. Smith, 494 U.S. 872, 904–06 (1990) (O'Connor, J., concurring) (arguing that state has compelling interest in prohibiting the possession of peyote by its citizens and finding that exempting religious peyote use would interfere with that interest).

70. Pub. L. No. 103-344.

71. The Senate Judiciary Report on the Act specifically noted that the RFRA was not intended to address the government's use and management of federally owned lands
outcry over Smith (whose broad language, theoretically, raised a serious threat of overlap with mainstream interests) and that over Lyng (which approved complete destruction of the religion of several tribes of Native Americans but did not threaten such overlap) is telling.\textsuperscript{72}

The legislative events that followed Smith demonstrate that the issues that the minority and the majority face in protecting religious freedom rights are really quite different. For example, the House version of the RFRA introduced by Representative Charles E. Schumer had 170 cosponsors; the Senate version, sponsored by Senators Edward Kennedy and Orrin Hatch, had at least 58 cosponsors. The AIRFA, sponsored by Representative William B. Richardson (D-NM)\textsuperscript{73} had two cosponsors. This difference cannot be explained by any difference in the power of the convictions of those holding the religious claims. Minority religious groups and cultures inevitably must rely upon either their own economic power or having something in common with the dominant group so that in advancing their own interests, the dominant group indirectly advances, at least in part, the interests of the minority group.

The events surrounding passage of the RFRA and the AIRFA make clear that one cannot assume that a model based solely upon the majority's experience will suffice for the minority or even be consistent with their varied interests. Culture never confronts the possibility that its model is inappropriate for nonwhite or non-Christian religious groups. The experiences of members of minority religions and minority cultures considered sacred sites by Native American religious adherents. See S. Rep. No. 103-111, 103d Cong., 1st Sess. 9 & n.19.

In April of 1994, President Clinton signed a memorandum that recognized the sacred place of eagle feathers in Native American culture and religious practices and directed federal executive agencies to work with tribal governments to seek opportunities to accommodate Native American religious practices by providing easier access to scarce eagle carcasses and parts. See Memorandum on Distribution of Eagle Feathers for Native American Religious Purposes, April 29, 1994, 17 Weekly Comp. of Pres. Doc. 935 (May 2, 1994). The Native American Cultural Protection and Free Exercise of Religion Act, S. 2269, 103d Cong., 2nd Sess. (1994) sponsored by Senator Daniel K. Inouye (D-HI) did not emerge from committee (see S. 2269, available in LEXIS, Legis Library, Bltrck File). That Act would have provided for the legalization of sacramental use of peyote (now accomplished by the AIRFA), access to eagle feathers and ceremonial plants, the preservation of religious rights of Native American prisoners, and restrictions on federal land use when Native American religious use of sacred sites might be jeopardized.

72. In response to a news article that suggested Smith was a case with limited impact, Michael McConnell pointed out that the broad language of Smith might authorize restricting the right to choose priests and ministers, permitting dry counties to ban the use of communion wine, permitting the state to force changes in kosher food preparation or requiring students to take sex education classes over their parents' objections. See Michael W. McConnell, Religion's Privileges Have a Solid Basis in the Constitution, Legal Times, Sept. 7, 1992, at 27 (letter to the editor); see also W. John Moore, Religious Rights In The Balance, Nat'l J., Aug. 11, 1990, at 1981 (speculating that Smith theoretically could authorize government curtailment of circumcision of newborn boys or ritual slaughter needed for kosher foods).

merely serve to buttress the claim that the barriers to religious freedom could be removed if only we overcame our suspicion of any viewpoint that is religiously informed. Rather than playing a meaningful part in the religious freedom analysis, those outside the mainstream are relegated to stage hands in a majority play of religious oppression.

The point is further demonstrated by Culture's failure to give any substantial attention to the law's role as a mediator between religions, a point which concerns minority religions regardless of the race of their adherents. Often, it is the law that stands between a minority faith or culture and that faith or culture's extinction by the majority. Instead of focusing upon the law as protector, Culture consistently characterizes the law as an offender of religion. Culture urges restraint and respect for minority faiths by the mainstream. But Culture's arguments for the preservation and protection of minority religions from the tyranny of the majority are legally anemic. Carter urges the dominant groups to avoid the secular grasp for power and advises that "one must be prepared to acknowledge the evil done in the name of faith, to beg forgiveness for it, and to examine the message with care, in order to understand why and how the followers of the message went so far astray" (pp. 89–90). As a religious person myself, I think that Carter's advice is sound. But Culture offers no advice to those whose lives and religion have been wrecked in the name of faith. What are these people supposed to do while the dominant group is reexamining its message with care? Such post hoc prescriptions may purge the majority of its sin, but they will not, unfortunately, remedy the lingering effects of a past oppression caused by these ill-conceived grasps at power, nor will they provide reliable assurance that the same, or even worse, oppression will not recur in the future. Some minority

74. See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah, 115 S. Ct. 2217, 2222 (1993) (rejecting state statute prohibiting animal sacrifice that was essential practice in minority group faith ritual).

75. Those who err on the side of separation rather than accommodation in the Establishment Clause/Free Exercise Clause balancing act often make this point. I am not, however more comfortable with the analogies of Kathleen Sullivan who has described the Establishment Clause's relationship to the Free Exercise Clause in terms of a social contract to end "the war of all sects against all." According to Sullivan, the Establishment Clause "entails the establishment of a civil order." She continues, "Public affairs may no longer be conducted as the strongest faith dictates. Minority religions gain from the truce not in the sense that their faiths now may be translated into public policy, but in the sense that no faith may be." Sullivan, supra note 12, at 198. The social contract metaphor assumes agreement that the war between sects (and between sects and the world) is bad and should be ended as well as agreement that the ceding of power to the state to mediate is the best way to accomplish this goal. Ultimately, whether or not one views the analogy as appropriate depends upon one's interpretation of the constitutional contract as well as on whether one's religion acknowledges an end to the war—even if one's religion loses—to be a valuable result. If one perceives religion as offering only two options—a religious "win" or a fight to the finish—it is hard to understand how the religious person would ever be deemed to have agreed to give up the right to recognize religious authority as higher than the state. By insisting that religion by its very nature answers to a higher authority (pp. 41–43), Culture indirectly underscores the problem with such a social contract
faiths and cultures may well wish to give the law the credit for the major-
y’s respect and restraint.

Because of its narrow focus, Culture often seems oblivious to the fact
that the positions it takes, while advancing mainstream interests, may be
antithetical to the interests (religious and otherwise) of minority faith
groups or minority cultures. For example Culture attacks the purpose
arm of Lemon, claiming that it promotes suspicion of religious motivation.
Carter proposes instead that the courts focus upon whether the state ac-
tion has the effect of promoting religion. In so doing, Culture gives no
consideration to the practical impact that abandoning a “purpose” test
and adopting an “effects” test would have upon the freedom of minority
faiths and cultures. Would not such an approach have the effect of shift-
ing the burden of proof from the state (to prove a secular purpose in
response to a prima facie case) to members of minority faiths and cultures
or others who challenge the action under the Establishment Clause (to
prove a promotional effect)? Is such a result good for religion overall or
is it simply good for the dominant religions? Does not the secularist’s
challenge, in effect, often vindicate the rights of minority faiths and cul-
tures? Moreover, what is the practical effect of such a test? No doubt
the adoption of an “effects” test would require a more substantial factual
investigation than is currently required by the secular purpose standard,
which relies heavily upon legislative history. Since the cultural and re-
gious mainstream controls the arms of the state and is more likely to be
the beneficiary of any religiously favorable legislation (or at least is less
likely to suffer significant negative effects), could not one argue that both
concerns for plurality and efficiency suggest that the state should bear the
burden of establishing a secular purpose? Does this allocation of the bur-
den necessarily amount to a suspicion of religion?

analysis. As its starting point, the analysis requires an assumption that settling for the
existence of the state without change is better than courting its destruction through
resistance intended to generate change.

The social contract analysis has to be viewed with some suspicion by minority faiths
and cultures that believe that (1) they have not had the opportunity to participate fully in
the contractual negotiations, (2) their interests were not and are not otherwise
represented at the bargaining table, and (3) their interests are not represented among the
contract interpreters. Such an analysis could be devastating to minority group rights and
interests by counseling restraint with no assurance that the defects in the contract
formation process and the resulting inequities will ever be acknowledged or rectified. A
“contract” arising out of (or shall we say imposed under) such nonparticipatory conditions
might well be viewed as null and void by those excluded.

Finally, too often a majority’s perception of “order” is a minority’s view of chaos. The
act of spreading the chaos around in violation of the majority’s alleged social contract has,
in some circumstances, been proven to have significant value as a catalyst to social contract
modification.

76. See supra text accompanying notes 25–26.
77. The fact that many challenges are brought by secularists does not resolve the
question in favor of accommodationists like Carter. Indeed, given the limited resources of
many minority faith groups, the secularists’ challenge may well serve the important
purpose of indirectly vindicating the rights of religionists in minority faiths and cultures.
Similarly, in hearkening to the original intent behind the religion clauses as support for his call for more public religion (pp. 105–06, 115–20), *Culture* does not sufficiently consider the fact that at the time those clauses were enacted, many racial and cultural groups were not among those whose free exercise rights—or other rights—were originally intended to be protected. Pure original intent cannot be the basis for their free exercise claims.78

78. In the context of considering whether states are free to establish a religion, Carter concedes that relying on original intent alone would not provide the assurances of pluralism that he believes the Fourteenth Amendment was meant to ensure (pp. 118–119). He thus looks beyond original intent and argues that, in this context, the religion clauses must be construed in light of subsequent constitutional amendments and contemporary societal concerns. See supra note 35. *Culture* does not, however, attempt to apply a similar argument to the question of whether the Thirteenth or Fourteenth Amendments, the Fifth Amendment, or other constitutional provisions should be read to prohibit religiously motivated racial discrimination. Instead, Carter relies upon the traditional compelling interest analysis. He vigorously argues for religious autonomy but concludes that the country’s commitment to eliminating racial discrimination is surely a compelling enough interest to justify the *Bob Jones* outcome (p. 151).

But the framing of a right to be free from racial discrimination in terms of a state interest may be offensive to some even if suggested by the compelling interest standard. The compelling interest test as traditionally framed may well have the indirect and perhaps unintended effect of dimming the lights on rights of constitutional stature whenever they are balanced against religion, even when those rights may themselves be essential to the freedom—religious or otherwise—of the group suffering from the discrimination. This denigration of other rights is often accentuated by the fact that the state is often a reluctant defender of those rights.

The *Bob Jones* case demonstrates these points. See Bob Jones Univ. v. United States, 461 U.S. 574 (1983). In *Bob Jones*, the Department of Justice originally took the position that the IRS had authority to deny tax-exempt status to religious schools that practiced racial discrimination, but it later reversed course under the Reagan Administration. The Supreme Court then invited William T. Coleman, Jr., a prominent attorney to appear as amicus and to defend the position abandoned by the Justice Department. See, e.g., *A True Friend of the Court*, N.Y. Times, April 21, 1982, at 22. Coleman, an African American, argued, inter alia, that the granting of tax-exempt status would constitute significant state aid to an organization that practiced racial discrimination in violation of the Fifth Amendment and contrary to the Court’s holding in Norwood v. Harrison, 413 U.S. 455 (1973), a non-free exercise case in which the Court held that the Fourteenth Amendment prohibited state provision of free textbooks to racially discriminatory elementary schools. See Brief of Amicus Curiae in Support of the Judgments Below, reprinted in 136 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law: 1982 Term Supplement 402–08 (1984) [hereinafter 136 Landmark Briefs].

In contrast to Coleman’s approach, amici composed of predominantly white mainstream religious groups took advantage of the opportunity to couch the state’s interest in terms of “policy” and argued that “the wrongness of racism cannot be the real issue in this case” because “the very existence of a religious organization was at issue.” See, e.g., Brief of the American Baptist Churches in the USA and the United Presbyterian Church in the USA, *Bob Jones*, 461 U.S. 574 (Nos. 81–1 & 81–3), reprinted in 136 Landmark Briefs, supra, at 7–9, 14 (arguing that the IRS had exceeded its authority on “public policy grounds”).

*Bob Jones* also underscores the problems minority groups face in embracing an original intent approach. Coleman’s cornerstone case, *Norwood*, involved state action and the
The perspective offered by *Culture* as evidenced by the discussion above is consistently culturally and religiously mainstream. In fact, had *Culture* given significant independent consideration to the unique interests of minority groups, the result would not necessarily have been contrary to the view that religion should be accommodated. For example, it might have noted that religious organizations may be the primary political and social institutions to which certain cultural groups have access; thus, a strict separationist/anti-accommodationist policy could effectively bar attempts by these groups to gain the same access to the state's largess that is regularly afforded to other groups. In other words, either in essence or by necessity arising out of minority group exclusion from secular institutions, for the respective cultural minority groups in which they arise, religious institutions are often an indispensable source of information about the larger world and an indispensable public voice on issues deemed by the outside world to be purely secular. The African-American Church provides such an example.\textsuperscript{79} In some cultural communities, reli-

\textsuperscript{79} African-American churches and mosques have long been at the center of religious, political, and cultural life for that community as is witnessed by the number of African-American educational institutions that found their beginnings in religious organizations, the number of African-American political leaders that have emerged from religious groups, and the involvement of African-American religious groups in "political" affairs, including the Civil Rights movement. (The "Brown" in Brown v. Board of Educ., 347 U.S. 483 (1954) was the Reverend Oliver Brown). Malcolm X also noted the beginnings of the Black Muslim movement as a religious movement which evolved into a "religious-political hybrid" after some in orthodox Islam rejected the Black Muslims as true practitioners and outsiders attempted to argue that the movement was political rather than religious "so that they could charge us with sedition and subversion." Malcolm X: The Last Speeches 174–75 (Bruce Perry ed., 1989). He further noted that "we wanted our religion" but "[w]e realized at the same time we had a problem in this society that went beyond religion." Id. at 173–74. The fact is that the "church" is the only organization that African Americans have historically been permitted to control. See generally C. Eric Lincoln & Lawrence Mamiya, The Black Church in the African American Experience 200–01 (1990) (noting that religion was the only institutional area where slaves were able to exercise some degree of freedom). Thus, the church fulfilled needs that were not being
gion may be so inseparable from the ethnic and political culture of the community itself, that a policy against accommodation may have implications for the minority culture beyond those that it would have for the majority culture. Such a policy may in fact threaten the very existence of the minority culture. One might consider, for example, Lyng’s discussion of religion’s central role in the cultural life of the various Native American communities. The problem with arguments such as these is that they cannot be made by mainstream communities—and, if made too loudly, they might even be opposed by them.

B. Political Preaching vs. Politically Correct Preaching

Nowhere is Carter’s mainstream focus more apparent than in a chapter called “Political Preaching,” in which he criticizes the political activism of some religionists. According to Carter, “political preachers” are “spiritual leaders who try to explain to their flocks what God wants them to do in the political world” (p. 70). Carter fully agrees that religion should inform politics (p. 80). However, in this chapter he complains of “[t]he seeming unwillingness of politically active religionists to accept the possibility that their religious traditions might correctly teach a word of God contrary to their secular predilections” (p. 68).

Bemoaning the prevalence of such preachers, Carter notes:

[A]s the servant of politics [,] religion is very much in the public square. . . . By calling upon the word of God in service of every known cause, our society diminishes the weight and the force of

met by the larger community and still does. Conversely, one could argue that political control such as that exercised by white Protestants over the society at large provides fertile ground for what is perceived as a privatized view of religion where politics and religion occupy separate spheres. See, e.g., Teitel, supra note 39, at 763 & nn.50–51. A policy that prohibits any state involvement with religious organizations necessarily embraces the privatized model, and a model that assumes political power without explanation as to why it is the appropriate model without acknowledging that it is based upon an assumption that there are no significant barriers to cultural integration into the secular world, and without acknowledging that cultural integration may indeed threaten the existence of some minority religious communities.

Every debate about the separation of church and state must begin from a theological assumption about what religion is. For quite a long time assumptions on the topic have been based upon a model that is inappropriate for groups who do not share the attributes of this country’s dominant cultural and religious groups.


81. It should be noted that Carter sanctions conservatives and liberals in this chapter although I would argue that liberals bear the brunt of his criticisms.
religious belief. Indeed, by readily supposing that the word of God is so malleable that it can (by coincidence) support every cause that one's politics also happen to support, we undermine the idea of faith as a source of moral guidance. (P. 80.)

The problem with political preaching, according to Carter, is that the political preacher allows politics to guide theology, rather than vice versa (pp. 67, 70). Significantly, *Culture* concedes that political preachers may be sincere in their proclamations, that they may well "believe that the political positions they press are the positions that God would want them to press" (p. 70). But *Culture* argues that "the political preacher's sincerity is not enough to save political preaching" (p. 70).

Carter contends that these religionists, i.e., political preachers, hurt the cause of "restoring religion to the place of honor that it deserves" (p. 68). Indeed, according to Carter, they themselves trivialize religion.

This chapter demonstrates strikingly the inherent inconsistencies in Carter's approach and the extent to which his views are rooted in cultural and theological assumptions that are not universally held. In earlier chapters he has informed us that the devoutly religious have difficulty separating their religious selves from their public selves (p. 8). But here he tells us that we should be suspicious when one's politics and one's theology always match up. In the prior chapters, he has argued that the religious must be free to dictate their own theology (p. 34). But here he offers readers what comes across as a litmus test for theologically sound religious discourse:

Matters become troublesome . . . when one's theology always ends up squaring precisely with one's politics. At that point, there is a reason to suspect that far from trying to discern God's will and follow it in the world, the political preacher is first deciding what path to take in the world and then looking for evidence that God agrees. (P. 70.)

Lurking behind this statement appears to be an assumption that it is a universal dictate that one's political views and one's theological views should occupy completely distinct spheres. As in the case of *Culture*'s discussions of the *Lyng* and *Smith* opinions, here again *Culture* speaks to a particular theological viewpoint, one that is uniquely mainstream. Cer-

82. "Political Preaching," says Carter, is the "flip side" of the trivialization of religion, but here, the religiously faithful are the trivializers (pp. 67-68). This point suggests that the trivialization of religion of which Carter originally spoke was being done by the "nonfaithful," and seems to conflict with his earlier statement that the faithful are a majority in America and even a majority in Congress and that this majority is being forced to abandon its religious self.

83. One wonders whether it is appropriate for the political to be very religious—but not for the religious to be very political. Carter recognizes what he describes as a contemporary trend in hermeneutics—that interpreters get out of the text only that which they put into it—Carter rejects the view as too "nihilistic" for the faithful who take divine guidance seriously, as Carter certainly does (p. 73).

84. Such a view, Carter says, is problematic because diversity is not acknowledged (p. 71). Incorrect political views are seen as indicating a lack of commitment (p. 71).
tarily, Carter must be right that religion is serious business. But Carter's formula for religiously correct discourse is flawed, particularly when applied to those outside the mainstream.

The problem with Carter's approach is strikingly revealed by his casual and haphazard half-sentence reference to liberation theology:

This is the essence of the problem of political preaching, as I have named the effort to use God's name to bend one's flock to the correct political view. It is the problem with George Bush's effort to link God to America's victory in the Cold War, and it is the problem with much that passes for liberation theology. To insist that God is, in effect, one of us—that He is our person, instead of we being His people—is not much different from the trivialization inherent in the rather offensive slogan that occasionally adorns the bumpers of cars from North Carolina, where a minor form of godhead is conferred upon the University of North Carolina's blue-suited basketball team, the Tar Heels. Says the bumper sticker, "IF GOD ISN'T A TAR HEEL, THEN WHY IS THE SKY CAROLINA BLUE?" God, it seems, not only roots for the right countries and the right ideologies, but for the right basketball team as well. (Pp. 81–82) (emphasis added.)

Much that passes for liberation theology? No doubt many of Carter's readers have not the faintest idea of what liberation theology is. Of course, now they need not find out because by placing a half-sentence reference to "much" of it between a politician's empty incantation and a basketball fan's bumper sticker, Culture tells them that it is not important.

In fact, liberation theology is an umbrella term for a wide-ranging and varied scheme of theological efforts to refashion the traditional Eurocentric image of God that has dominated Christian religious discourse and practice. In its various forms, it claims that Christianity's true essence is the alleviation of suffering and oppression. It also claims that, contrary to this purpose, traditional religious discourse and doctrine have been used as instruments of the state, preserving the power structures within the status quo contrary to God's will.

The theme of liberation within Christianity has been raised by many. For example, in Latin America, oppressed communities challenged the

85. Carter's citation of the ailment with liberation theology—its claim that God is one of us rather than we are one of God's—would be objected to by many liberation theologians who would argue that they make both assertions. Furthermore, his frontal attack on the lighthearted Tar Heels slogan demonstrates the extent to which Culture is trapped in Carter's personal vision of what religion ought to be and how the "religious" ought to conduct themselves, and displays a revealingly Northeastern failure to appreciate the slogan's Southern context.

86. See, e.g., Liberation Theology: A Documentary History xiii–xiv (Alfred T. Hennelly ed., 1992) ("[L]iberation theology ... integrate[s] ... the struggle for justice as an essential feature of every method, theme, and context of theology ... [and] unmask[s] ... oppressive ... attitudes in both society and the Christian churches.")
established religion of the conquerors as employing Christianity as a justi-
fication for oppression.\footnote{In Latin America, liberation theology was largely a critique of traditional Roman Catholic doctrine which was the dominant religious heritage of the conquerors. The forerunners of formal liberation theology dated back to the time of the Spanish conquest and its resulting massive enslavement and oppression of Amerindians by conquistadors. See Liberation Theology, supra note 86, at xvii.}

In 1971, Peruvian theologian Gustavo Gutiérrez explained the phe-
nomenon as it had been revealing itself over a number of years in Latin America. In so doing, he addressed the concerns of those who argued that liberation theologians were straying from the language of traditional theology in their insistence that Christianity had a message about political life.

To place oneself in the perspective of the Kingdom means to 
participate in the struggle for the liberation of those oppressed 
by others. This is what many Christians who have committed 
themselves to the Latin American revolutionary process have 
begun to experience. If this option seems to separate them from 
the Christian community, it is because many Christians, intent 
on domesticating the Good News, see them as wayward and per-
haps even dangerous. If they are not always able to express in 
appropriate terms the profound reasons for their commitment, 
it is because the theology in which they were formed—and 
which they share with other Christians—has not produced the 
categories necessary to express this option, which seeks to re-
spond creatively to the new demands of the Gospel and of the 

But Gutiérrez did not believe that the fact that the expressions of 
those involved in the struggle for liberation arose out of political need 
rendered the theology thus formed invalid.

[I]n their commitments, and even in their attempts to explain 
them, there is a greater understanding of the faith, greater faith, 
greater fidelity to the Lord than in the 'orthodox' doctrine . . . 
of reputable Christian circles. This doctrine is supported by au-
thority and much publicized because of access to social commu-
nications media, but it is so static and devitalized that it is not 
even strong enough to abandon the Gospel. It is the Gospel 
which is disowning it.\footnote{Id.}

In this country, the theme of liberation was also present in Christian 
expressions by slave communities deprived of their right to practice an-
cestral religions.\footnote{See Albert J. Raboteau, Slave Religion 218–19 (1978); Gayraud S. Wilmore, Black Religion and Black Radicalism 37 (1972). The theme of liberation is evident in Negro spirituals and gospel songs. See, e.g., Lincoln & Mamiya, supra note 79, at 346–81}

87. In Latin America, liberation theology was largely a critique of traditional Roman Catholic doctrine which was the dominant religious heritage of the conquerors. The forerunners of formal liberation theology dated back to the time of the Spanish conquest and its resulting massive enslavement and oppression of Amerindians by conquistadors. See Liberation Theology, supra note 86, at xvii.


89. Id.

90. See Albert J. Raboteau, Slave Religion 218–19 (1978); Gayraud S. Wilmore, Black Religion and Black Radicalism 37 (1972). The theme of liberation is evident in Negro spirituals and gospel songs. See, e.g., Lincoln & Mamiya, supra note 79, at 346–81
the liberation theme is a dominant one in the work of Dr. Martin Luther King, Jr.91 But the term “liberation theology” became a term of art in this country when academic voices adopted the term. The formative voice was that of James Cone who published Black Theology and Black Power in 1969, and then, in 1970, his classic work, A Black Theology of Liberation. In 1986, he described his approach to writing the latter book:

I was completely unaware of the beginnings of liberation theology in the Third World, especially in Latin America. Neither did I know much about the theme of liberation in African-American history and culture. Unfortunately, my formal theological and historical knowledge was primarily limited to the dominant perspectives of North America and Europe [emphasis added]. But, despite these limitations, I was determined to speak a liberating word for and to African-American Christians, using the theological resources at my disposal. I did not have time to do the theological and historical research needed to present a “balanced” perspective on the problem of racism in America. Black men, women, and children were being shot and imprisoned for asserting their right to a dignified existence. Others were wasting away in ghettos, dying from filth, rats, and dope, as white and black ministers preached about a blond, blue-eyed Jesus who came to make us all just like him. I had to speak a different word, not just as a black person but primarily as a theologian. I felt then, as I still do, that if theology had nothing to say about black suffering and resistance, I could not be a theologian.92

Cone thus argued, as did Latin American liberation theologians, that “[t]here can be no Christian theology that is not identified unreservedly with those who are humiliated and abused.”93 For Cone, as a black Amer-

91. See James H. Cone, Martin Luther King, Jr., Black Theology-Black Church, in Martin Luther King, Jr. and the Civil Rights Movement 409, 412 (David J. Garrow ed., 1989); Cornel West, Black Theology of Liberation As Critique of Capitalist Civilization, in Black Theology, A Documentary History 410; infra note 95 (tracing history of black theology of liberation and noting King’s contribution).
92. James H. Cone, A Black Theology of Liberation: Twentieth Anniversary Edition xii (3rd ed. 1990) [hereinafter Cone, A Black Theology]. Cone and other liberation theologians were influenced by numerous African-American predecessors as well as by European writers such as German theologians Jürgen Moltmann and Johannes B. Metz. See James H. Cone, God of the Oppressed, 126–32 (1975) [hereinafter Cone, God of the Oppressed].
93. Cone, A Black Theology, supra note 92, at 1. For example, using scripture, Cone argued that God selected the Israelites to be his people because of their oppressed condition, and that throughout the Bible, scripture’s prevailing theme is God meeting the oppressed and liberating them from their oppression. See id. at 1–4.
ican who began his quest to redefine theology during the Civil Rights era, the community of the oppressed was epitomized by black America. Cone's critique was harsh (some might prefer "honest") and sent white theologians and a considerable number of African-American ones into fits.

Out of these early developments emerged a virtual explosion of political action, scholarship, and change challenging traditional Eurocentric notions of Christianity and insisting on revisions to the predominantly European version of Christianity's history and its present purpose. Soon, other communities that viewed themselves on the underside of political and theological life in this country began to reexamine the relevance of traditional Western Christian doctrine to their own lives (pp. 77-78).

Today, there is not a prominent mainstream seminary in the country that does not at least recognize the themes of liberation theology as worthy of

94. Cone has critiqued his own early work, identifying a number of weaknesses, including a failure to incorporate a gender analysis, a negative overreaction to white racism (as if "the sole basis for Black Theology were racism among whites"), a failure to incorporate a social and economic analysis, and a lack of knowledge of the struggles in Latin America. See James H. Cone, For My People: Black Theology and the Black Church 78-98 (1985); Cone, A Black Theology, supra note 92, at xv-xix.

95. A sampling of readings under the black theology umbrella (in addition to the material previously cited) is found in Black Theology: A Documentary History (James H. Cone & Gayraud S. Wilmore eds., 2d ed. 1993) (Two volume set containing writings from 1966 to 1992 and including writings by African-American Women. The set also includes an extensive bibliography).


An excellent sampling of the writings tracing the development of liberation theology in Latin America is found in Liberation Theology: A Documentary History, supra note 92. One can also look under the names of noted Latin American liberation theologians, including Leonardo Boff (Brazil); Miguez Bonino (Argentina); Paulo Freire (Brazil); Gustavo Gutiérrez (Peru); Juan Luis Segundo (Uruguay); Jon Sobrino (El Salvador). For other non-American perspectives, see, e.g., Aloysius Pieris, An Asian Theology of Liberation (1988) (Sri Lanka).

The vast body of scholarly work that falls under the "liberation theology" umbrella, not to mention pulpit preaching that carries on the liberation tradition, demonstrates the problems with Culture's reference.
study, and many seek to represent the perspectives of liberation theologians on their faculty.\textsuperscript{96}

Carter's complaint—that one should be suspicious when politics and theology match up—cuts to the heart of "political" theology. By contrast, without apology, James Cone traced the birth of Black Theology directly to the African-American church's involvement in the Civil Rights Movement:

When King and other black church persons began to relate the Christian gospel to the struggle for racial justice in American society, the great majority of white churches and their theologians denied that such a relationship existed. Conservative white Christians claimed that religion and politics did not mix. Liberal white Christians, with few exceptions during the 1950s and early '60s, remained silent on the theme or they advocated a form of gradualism that denounced boycotts, sit-ins, and freedom rides.\textsuperscript{97}

He continued:

Contrary to popular opinion now, King was not well received by the white American church establishment when he inaugurated the civil rights movement with the Montgomery bus boycott in 1955. Because blacks received little or no theological support from white churches and their theologians (who were preoccupied with Barth, Bultmann, and the death-of-God controversy!), blacks themselves had to search deeply into their own history in order to find a theological basis for their prior political commitment to liberate the black poor.\textsuperscript{98}

It would not be hard to see how liberation theologians might view \textit{Culture}'s singular reference to liberation theology as an insulting one. The very brevity of the reference speaks volumes about the focus of \textit{Culture}.

While Carter says one should be suspicious when politics and religion match up, theologians who see liberation and justice as the essence

\begin{itemize}
\item \textsuperscript{96} It should be noted that not every tradition that embraces a liberation theme also embraces the "liberation theology" label. In the African-American church, the label is more easily embraced in the North than in the more conservative churches of the South. See Lincoln & Mamiya, supra note 79, at 178–82. However, Lincoln and Mamiya claim that the theme of liberation (or the "prophetic" theme) as demonstrated in the work of Martin Luther King, Jr. is present to some degree in all predominantly African-American churches. See id. at 12. Since Carter references liberation theology as an "ideology" (p. 81), the extent to which his comments on political preaching as a whole would also negate the less academic tradition of prophetic preaching is unclear. Also, more recent scholarly manifestations of black theology have been criticized as far too subdued in their criticisms when compared to the scholarship of the '60s and '70s. Noting that "[t]he anger of oppressed young Blacks is conspicuously absent from [much of recent Black theology]," Cone has asked, "[i]s it because [African-American academic] theologians have moved into a White academic suburb and thereby have lost touch with ordinary people?" James H. Cone, General Introduction, in 2 Black Theology: A Documentary History, supra note 95, at 1, 9.
\item \textsuperscript{97} Cone, supra note 94, at 7.
\item \textsuperscript{98} Id. (emphasis added) (footnotes omitted).
\end{itemize}
of Christianity's message and who perceive a diversion away from that message in traditional mainstream theology might argue that it is when theology and politics do not match up that one should be suspicious. Indeed, did not the theology of Martin Luther King seem always to square precisely with his politics? Should we then conclude that King first decided what path to take and then looked for evidence that God agreed with him? And even if we do so conclude, does that finding invalidate his theology? Carter does not intend to include King in his critique (pp. 38, 41)—but how does one tell the difference between appropriate and inappropriate theology?

And what of Carter's defense in a prior chapter of Operation Rescue's right to call upon religion as an appropriate basis for political action against abortion (pp. 41, 234)? Why is not that same defense available to liberation theologians who call upon religion as the basis for social action or to others who Carter lumps together as political preachers? And finally, what of his past cry of trivialization? How can it be justified against his slicing reference to liberation theology or the passage in Culture that excoriates a young female preacher whose sermon addressed the civil strife in El Salvador and Nicaragua? It is difficult not to won-

99. Cone has warned that theology is created by human beings with reference to particular places and times. There is, according to Cone and other liberation theologians, a truth to be discerned, but the process of discernment is flawed with human error, with the necessary result that human expressions of theology must often be reassessed and redefined. See Cone, God of the Oppressed, supra note 92, at 39.

100. Ironically, Carter dismisses the sincerity of the political preacher, but he is willing to consider sincerity when dealing with Dr. Martin Luther King, Jr. In a different chapter he states:

Certainly King and other religious leaders showed no reluctance to claim for their positions an "exclusive alignment with the Almighty." Nor is there any reason that they should have been reluctant, provided that they had come in a prayerful way to a sincere belief that they had discovered the will of God. (Pp. 48–49) (emphasis added.)

Of course, one might well ask how Carter or any of us can discern that an admittedly sincere preacher has not come in a prayerful way to the belief that he or she has discovered the will of God. Compare here Carter's favorable report of the story of white feminist Gloria Steinem being asked how Judaism led her to feminism and Steinem's reply that it was the other way around (p. 59).

101. Carter describes in mocking terms a first time visit to a church and a fledgling female preacher's attempt to deliver a message in which she attempted to tie the political situation in Nicaragua and El Salvador to a vision of God's plan (pp. 69–70). At the time, both countries were caught in the grip of civil war and the preacher was apparently suggesting that God favored one side of that conflict. Carter refers to the preacher as "a sort of left-wing Oliver North," calls her sermon "no masterpiece of coherence," and says, "She wanted to set us straight on Central America because, she feared, many among us were misunderstanding God's plan and therefore falling into sin" (p. 69). Having thus ridiculed the young preacher (for no apparent useful purpose), Carter provides his readers with a psychological profile informing us that "the preacher in question had no conception of the possibility of a faith not guided by her prior political commitments." Says Carter, "For her, politics should lead faith . . ." (p. 69). Apparently, this profile was based upon the twenty minutes or so that Carter listened to the preacher's sermon.
der whether Carter disagrees with the approach of political preachers merely because he disagrees with the points of view they espouse.

Carter’s failure to recognize the difficulty in the passing reference or in applying his faith formula reflects the same trend present in his discussions of the Smith and Lyng cases. Culture’s focus is upon the majority religions and cultures.\textsuperscript{102} Thus, he ignores the political and social context in which liberation theologians believe they operate. Indeed, when liberation theology is stripped of its cultural and political context — as in the case of Smith and Lyng — something significant is lost in the translation. And it is this something — political and cultural context — that Carter repeatedly ignores.

It is this mainstream focus that leads Carter to slip into criticizing approaches that differ from the Eurocentric model of what “preaching” should be. Certainly, the question that Culture poses is not which theology is right or which theology is politically correct. Rather, Carter purports to argue for maximum freedom for sincere religionists to speak about God. He concedes that many political preachers are sincere. If the question is access to the public square, then the theology of these liberation theologians—or of other sincere political preachers—deserves no less respect than Carter’s own theology.

Thus, Carter accomplishes in his chapter on “Political Preaching” something curiously similar to that for which he criticizes liberals throughout the rest of his book. He argues against the use of certain God-talk in the public square because it is God-talk.\textsuperscript{103} He imposes a standard that restricts public religious expressions to particular topics. These are odd statements in a book whose theme is the celebration of public discourse about religion. Carter’s vigorous attack on liberals in prior chapters is interesting irony in light of his willingness to equate the claims

\textsuperscript{102} Consider the words of Alistair Kee concerning Christian theology that bears a political message:

[T]he most obvious characteristic of political theology is that it is biased. For most of its history theology has been biased toward the political right: nor was this challenged. Political theology is biased toward the left: why should that be challenged? But there is more to it than a simple choosing of political allegiance. In the gospels Jesus is biased towards the left: he takes his place with those who are certainly not the king’s men. He associates with the poor and despised rather than with the rich and influential. . . . He takes sides apparently because God has taken sides. . . . Political theology is biased because Jesus was biased.

Alistair Kee, Preface to A Political Reader in Theology xi (Alistair Kee ed., 1974).\textsuperscript{103} Cornel West has cited Black Theology’s claim that God is aligned with the oppressed as one of the most positive aspects of Black Theology. See Cornel West, Black Theology of Liberation as a Critique of Capitalist Civilization, in 2 Black Theology: A Documentary History, supra note 95, at 410, 416.

\textsuperscript{103} It cannot be that only a fellow religionist has standing to issue critiques of the religious and that therefore Carter has unique standing.
of liberation theologians to a claim that God supports the New York Mets.104

In short, Culture evinces a tendency to view the world solely through the lens of the dominant groups in our religious and political culture, while purporting to represent the interests of all. Unfortunately, that lens automatically brings to the foreground those images that are consistent with and affirming of the dominant group’s life experiences. At the same time, the lens merges into the background all images that are foreign to and critical of the dominant group’s perspective. Using this lens, Culture is far too preoccupied with not offending the sensibilities of liberals and conservatives in the book-buying marketplace to help its audience appreciate the legal compromises that must be obtained when balancing rights in a diverse culture. Thus, Culture plays to a mainstream audience eager to champion their own causes—and to blame external forces for their woes—but far less willing to conduct self-examination or to confront the difficult issues that underlie debates over the proper line of separation between church and state.

IV. CULTURAL MYTHS AND TELEPHONE FAITH

In earlier sections I noted the weakness of Culture’s dominant theme—that the religious are prohibited from engaging in God-talk in the public square. I also noted that to strengthen its case, Culture resorted to trivializing the law and inadvertently, to trivializing religious traditions that are outside its own vision of what religion should be.

In this section, I further address the problems with the theme, considering as examples two myths that Culture uses to support its theory of exclusion. The myths are 1) that in the past, liberals embraced the Civil Rights Movement and that now they engage in hypocrisy when they criticize conservatives’ God-talk; and 2) that today the religionist is treated worse than other previously excluded groups in the public square. I argue that these myths confirm the reality of a particular slice of America, but that close examination reveals that they are problematic as a basis for a formula to preserve religious freedom because they do not incorporate

104. Interestingly enough, in the footnotes at the end of the book, Carter cites the work of some feminist theologians as he discusses internal battles over the status of women in the Episcopal church. He does not identify these persons to his readers as “liberation theologians,” but he accepts some of these scholars’ challenges to the traditional interpretations of the Biblical book of Genesis that ascribe hierarchy of Adam over Eve. At the same time, Carter argues that other scriptural passages are not so easily subject to reinterpretation (pp. 289–91 & n.11). Since most view feminist theology as fitting under the liberation theology umbrella, see supra note 95, one might ask why Carter did not take more care to link the references. It is also significant that Carter was willing to devote a page-and-a-half long footnote to illuminating his discussion of the majority’s gender critiques of the Christian church but very little time to the racial and class critiques of the church’s approaches that other liberation theologians have made. I do not ascribe any ill intent on his part, but I view it as just another example of his focus, which reflects the perspective and interests of the majority.
the perspectives of minority groups. I demonstrate again that *Culture* continues a trend of defining a particular vision of the world—the vision of the majority—as a universal truth.

Secondly, I consider an inherent conflict within the trivialization thesis: that the faithful care about religion, but they do not express their faithfulness in public. I argue that a theory of religious freedom that hangs upon this precipice raises dangerous concerns for both law and religion.

A. Cultural Myths

*Culture* uses the Civil Rights Movement to buttress the argument that we have moved away from God-talk. It claims that liberals embraced the religious rhetoric of the Civil Rights Movement (pp. 60, 64–65, 227–30), an observation that enables Carter to argue that liberals are now being inconsistent when they complain about conservative God-talk. The claim of liberal embrace is presented as if it is a well accepted truth in need of no substantiation (pp. 60, 64–65, 227–30). Of course, whether or not one accepts Carter’s point as gospel depends on one’s perspective. Carter restricts the religious language in the movement to the early moderate approach of King. Even in hindsight, one must admit a far different reaction to the religious language found in the arguments of the Black Muslims, or even to Christian approaches like James Cone’s.105 There is another less laudatory view of white liberal receptiveness to religious language within the movement and to its message.106

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One might wonder why the distinction between “toleration” and “respect” that Carter insisted upon in earlier chapters, see supra note 14, is not drawn upon as Carter claims that liberal whites hypocritically accepted civil rights religious language. In other words, was the alleged liberal acceptance mere tolerance or was it the “respect” that Carter earlier insisted upon? And if it was only tolerance, then how is that approach inconsistent with the alleged treatment of conservative religionists today? In both cases, the value of religion is measured by its usefulness as a tool for secular service.

106. Martin Luther King, Jr. himself often complained that the white liberals or moderates were not supporting the movement in significant enough numbers.

For example, in 1964 he noted the silence of “moderate” and “decent” whites in Birmingham. See Martin Luther King, Jr., Why We Can’t Wait, in A Testament of Hope: The Essential Writings Of Dr. Martin Luther King, Jr. 518, 528 (James M. Washington, Jr. ed., 1986) [hereinafter Testament of Hope]. He also noted the “estrangement” of white liberals from the movement and a paternalism that made them uncomfortable with playing a secondary role. See Martin Luther King, Jr., A Testament of Hope, in Testament of Hope, supra, at 313, 316. Of white northern liberals he complained:

[T]here is a dire need today for a liberalism that is truly liberal. What we are witnessing today in so many northern communities is a sort of quasi liberalism which is based on the principal of looking sympathetically at all sides . . . . It is a
Even if one were to agree with Carter’s version of history, the claim of hypocrisy by liberals falters for yet another reason. It is indisputable that the language of the Civil Rights Movement was not exclusively religious. Indeed, King and others used both the secular language of reason and religious authority to make their arguments, even though, certainly, in King’s private view, the religious mandate alone was sufficient. King frequently cited secular reasons for the outcomes he sought and often relied upon the Constitution, the Declaration of Independence and other acts of the state as support for his cause.107 The language of the liberalism that is so objectively analytical that it is not subjectively committed. It is a liberalism which is neither hot nor cold but lukewarm.

Martin Luther King, Jr., Give Us The Ballot – We Will Transform The South, in Testament of Hope, supra, at 197, 199.

In his Letter from a Birmingham Jail, King responded to an open letter from Protestant, Catholic, and Jewish clerics in Birmingham calling on blacks to cease their peaceful demonstrations and to obey the police and the courts. See Birmingham News, April 13, 1963, at 2. Although he noted that he rarely responds to criticism, he indicated that he was responding in this case because he believed the writers to be “men of genuine good will.” King expressed his anguish over those who complained that civil rights questions were “social issues with which the gospel has no real concern.” Martin Luther King, Jr., Letter from a Birmingham City Jail, in Testament of Hope, supra, at 289, 299. He stated further:

In the midst of blatant injustices inflicted upon the Negro, I have watched white churches stand on the sideline and merely mouth pious irrelevances and sanctimonious trivialities.

* * *

I have traveled the length and breadth of Alabama, Mississippi and all the other southern states . . . . Over and over again I have found myself asking: “What kind of people worship here? Who is their God?”

* * *

Yes, I see the church as the body of Christ. But, oh! How we have blemished and scarred [the body of Christ] through social neglect and fear of being nonconformists.

* * *

The contemporary church is often a weak, ineffectual voice with an uncertain sound. It is so often the arch-supporter of the status quo. Far from being disturbed by the presence of the church, the power structure of the average community is consoled by the church’s silent and often vocal sanction of things as they are.

Id. at 299–300.

King certainly acknowledged that there were outstanding examples of whites who offered aid in the struggle, but the large majority of liberals and moderates seemed either uninterested or unwilling to risk the ostracism that would follow from open support of the movement.

107. See, e.g., Martin Luther King, Jr., I Have a Dream, in Testament of Hope, supra note 106, at 217 (referring to the Constitution and Declaration of Independence as part of “a promissory note to which every American was to fall heir” and noting a “dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal”).

King was indeed fortunate that he shared in common with the founding fathers a religious concept of a creator that permitted him to manipulate the secular language of reason so that it confirmed the values in the language of his religion—and that he had the talent to perform this translation. Would one whose culture or religious tradition diverged
Civil Rights Movement was not, then, exclusively religious language, although it was heavily religious. An assumed liberal acceptance of Civil Rights religious language does not prove or disprove the case for acceptance of arguments based on religious authority alone.

Another cultural myth is found in the argument that the religionist is treated worse than other groups in terms of access to the public square. Here Culture appears to create a hypothetical generic religious person. Then, Carter asks us to compare that person's freedom to speak with the freedom experienced by other groups.

If [a public] school's teachings are offensive to you because you are gay or black or disabled, the chances are that the school will at least give you a hearing and, if it does not, that many liberals will flock to your side and you will find a sympathetic ear in the media. But if you do not like the way the school talks about religion, or if you believe that the school is inciting your children to abandon their religion, you will probably find that the media will mock you, the liberal establishment will announce that you are engaged in censorship, and the courts will toss you out on your ear. (P. 52.)

Either Culture is speaking only to white, nondisabled, heterosexual religionists or Carter actually believes that this question is an easy call. The request that I, as an African-American religious person, weigh my

to a greater degree from that of the mainstream (or one with less talent than King) be able to find a similar secular or religious translational hook?

Interestingly, with respect to the hypocrisy claim, John Rawls argues in Political Liberalism, published after Culture went to press, that his theory of liberalism would not eliminate the heavily religious discourse of the civil rights or abolition movements from public debates. See John Rawls, Political Liberalism 250 (1993). Religious language would be acceptable to the extent that it affirmed public values of justice. Rawls states that abolitionists who argued on religious grounds against the institution of slavery "supported the clear conclusions of public reason" as found in principles of justice. Id. at 249-50. According to Rawls, the same is true of the language of Martin Luther King, Jr. "except that King could appeal—as the abolitionists could not—to the political values expressed in the Constitution correctly understood." Id. at 250. "Religious doctrines clearly underlie King's views and are important in his appeals. Yet they are expressed in general terms; and they fully support constitutional values in accord with public reason." Id. at 250 n.39.

Carter might still complain that Rawls's approach places religious autonomy at the mercy of secular predisposition. On the other hand, Carter clearly concedes a need to curb some religious behavior that is determined to have a negative societal impact (p. 30).

108. At a different point in Culture, Carter acknowledges that, despite the "culture of disbelief," African Americans are quite open in their religious declarations (p. 60).

Carter deals with this paradox with the vague suggestion that liberals (read whites?) have a "blind spot" when it comes to the religiosity of African Americans (p. 60) and that the media accept God-talk from personalities they "like" such as Jesse Jackson or Martin Luther King, Jr. (pp. 59-60). But why must we credit liberal permission to speak and not minority group insistence on speaking? Without liberal permission would Martin Luther King, Jr. have given up on citing God and begun quoting The New York Times instead? Is it possible that white God-talk is so new a public phenomenon that what some religionists say they are experiencing now is simply another revolutionary process in which a group that desires to speak has to insist on being heard?
freedom as a black person against my freedom as a religious person is a curious one. That these passages gave me pause tells me that my balancing act, even if I could perform it, would not result in the outcome Carter declares. Moreover, if there was a purpose to these comparisons—other than arguing that the white religionist has less access to the public square than members of these groups—it was not obvious to this reader. In another context, Carter warns that while it is appropriate to speak of oppression as being unique, and therefore in demand of different solutions, "we enact a terrible threat to unity of humanity when we construct a hierarchy of suffering, by arguing that one oppression is

109. My reaction is triggered by Carter's obviously intentional choice to take a comparative approach in his diversity arguments and to blur the key distinctions, rather than permit the majority's case to stand on its own. The essence of his argument is captured in his statement that "people whose contribution to the nation's diversity comes from their religious traditions are not valued unless their voices are somehow esoteric" (p. 57). He offers the Roberts case as an example of what he means:

One thinks, for example, of the Colorado school district . . . that ordered, with federal approval that the Bible and books on Christianity be removed from a classroom, while books on Native American religious traditions—and for that matter, on the occult—were allowed to remain. (P. 57.)

"Esoteric" is not defined, but I presume that Carter means a voice that differs from that usually associated with the cultural and religious mainstream.

Also revealing is the following comment:

Considering the fact that for all the calls for diversity in the hiring of university faculty, one rarely hears such arguments in favor of the devoutly religious—a group, according to survey data, that is grossly underrepresented on campus. (P. 57) (footnote omitted.)

Carter seems to attempt to advance the ball for mainstream religionists by suggesting that their views ought also to be viewed as "diverse". From the perspective of minority groups, it would seem that he suggests that if the reason for recognizing the faiths of minority groups is merely because they are different from the mainstream—and not because they are religious—we somehow trivialize the religious content of the recognized speech. In this way, Carter shoehorns the minority experience into the majority model (disproving once again his claim that the mere presence of religiosity always disqualifies speech). The questionable proposition underlying this is that providing special treatment for mainstream religious speech will result in a net increase in respect for minority religious speech, or at least not be detrimental to the various interests of minority faiths and cultures.

Culture gives only superficial recognition to the contextual nature of religious freedom in a pluralistic society. Moreover, it does not explain how a state recognizing a minority religion for reasons of its contribution to diversity within the culture might go further to recognize the "religiosity" of that religion without running afoul of promoting a particular faith or, for that matter, how more recognition of the views associated with the mainstream would result in a fairer juggling of all faith group rights, minority and majority alike. Moreover, in a political context, Carter's analysis might suggest that state action supportive of minority religions for pluralism reasons would have to be matched by a similar effort on behalf of the dominant religious groups who make the same pluralism claims. Again, such an approach ignores the important differences between the majority's and the minority's access to power as well as the obvious argument that since they control the culture, the mainstream necessarily is already included—and indeed control their own degree of inclusion—to a far greater extent than other groups.

110. Was gender omitted for fear of offending the wrong group?
worse than another” (p. 95). In light of these observations, Carter’s comparisons here are odd.

As best I can discern, the reason that Culture goes astray here is the same reason that its discussions of the Smith and Lyng opinions failed and the same reason that it so casually treated the subject of liberation theology. Culture’s “objective” model is the experience of white America and mainstream religionists. From that model, it attempts to extract universal principles, utilizing assumptions that are heavy in mainstream appeal but featherweight in logic or scholarly support. The unfortunate result is that though subject to some criticism, each side of the white mainstream gets a reward in Culture. White liberals can bask in the glory of their civil rights accomplishments and conservatives can moan that King had help from liberals but they have no one. Meanwhile, important viewpoints lie trampled in their service.111 Personally, I am convinced that the white mainstream religionist does not stand alone in the shadow of the public square. Indeed, Culture’s own careful dance around the issues of race and culture provides the clearest evidence against its own argument of an open public square on such issues. While Culture’s assumptions may well be palatable to picket fence readers, they raise suspicions that Culture has weighed more heavily the political sensitivities and buying power of the majority than the importance of a thoughtful and inclusive debate on its central theme.

At the risk of sounding more harsh than I mean to, I cannot help but confess that when the packaging is discarded, Culture looks curiously like a pitch for an affirmative action plan for white mainstream religionists, the need for which completely escaped this reader. If the point of view of this group is so grossly underrepresented as Carter suggests, it would be helpful to have more of that viewpoint represented in public debates. But if they’re out there, I cannot understand why they just don’t speak up. If the recent public political activity of conservative Christians constitutes their speaking up, why then, is Carter complaining that they cannot speak? If religionists as a group face economic barriers to making themselves heard and to being included in society as do many of the other

111. Culture’s use of mainstream assumptions as its starting point is particularly troublesome to those who don’t share those assumptions. The majority as a group has the power to transform a particular observation reflecting its own group perspective into what is perceived as universal truth among most within the culture, irrespective of whether the observation is based on reliable information or research and irrespective of the fact that the observation does not take into account perspectives of those outside that majority. These assumptions need not be proven to be viewed as universal truths; they are legitimized by the fact that (1) they reflect the majority’s perspective, which is the dominant one, and therefore, most within the majority (and those who identify with the majority) have never thought to question them; (2) the small number of persons within the majority who have questioned whether their own perspective is correct would rather devote their energies to topics that affirm rather than challenge their reality; and (3) the minority as a group does not have the resources to formulate or to launch an effective rebuttal. These assumptions are often translated into law and public policy.
groups to which Carter so casually compares them, I am not aware of these barriers.

Religious speech is different. Indeed, it is for that reason I believe that significant danger lurks behind Carter's complaint. As I argue below, it is exactly because religious speech is different from other speech that appeals for public approval must be viewed very skeptically by those who take religion or law seriously.

B. Telephone Faith

There is an internal inconsistency in Culture's thesis that should be obvious to anyone not intoxicated by the praise that immediately followed its publication. Relying largely on self-identification surveys, Carter repeatedly reminds us of the much-heralded religiosity of Americans: "strong majorities of [Americans] tell pollsters that their religious beliefs are of great importance to them in their daily lives" (p. 4); "better than nine out of ten Americans believe in God," "some four out of five pray regularly" (p. 149); and "[a]s many as 82 percent of Americans believe Hell to be a real place" (p. 137). Moreover, Culture informs us that religiosity is not limited to those outside the political elite. Says Carter, "unless we dismiss as hypocritical cynics the entire Congress of the United States," we should believe the over 90% of members of Congress who "say that they consult their religious beliefs before voting on important matters" (pp. 111, 240). Indeed, Carter says, "[w]e are one of the most religious nations on earth, in the sense that we have a deeply religious citizenry" and moreover, "religion matters to people, and matters a lot" (pp. 4, 8).112 Thus, on the one hand, we are to believe that the majority of Americans are religiously faithful (pp. 4, 8, 20).113 On the other hand, we are to believe that we do not hear much from that majority in public because the "culture" discourages them from being themselves. If only society would change, the story goes, this faithful majority would publicly proclaim their presence and purpose without fear and America would be all the better for it.

But this picture is difficult to square with logic or faith. If the faithful are a majority, then who is silencing them? Following Carter's thesis to its inevitable conclusions, either the majority is caught in a cycle of self-contradiction and self-hatred or the majority is following lock-step, a small, unidentified, sacrilegious elite as if entranced. Are we asked to believe that a mainstream majority with a mandate from an authority they deem


113. I accept Carter's implicit assertion that faith is a universal concept that has a consistent meaning, i.e., commitment throughout religious cultures. However, in terms of how faith is demonstrated, contextually speaking, his conclusions about faith are rooted in both Christian and majoritarian assumptions.
higher than the Supreme Court declines to speak or act for fear that people might ridicule them or not take them seriously.114

Culture's argument—that the faithful do not speak because religious speech is viewed as unacceptable—has a dangerous underlying premise: that faithfulness should be determined by secular rules. At the slightest incremental increase in inconvenience, the balance tilts in favor of blaming someone else for the faithful's failure to acknowledge their sentence in public.115 Proceeding on this premise, Culture undermines what could have been its most important contribution to the religion debate. That contribution would have been that religion matters. But how can anyone seriously say that a faith that cannot withstand verbal opposition "matters" to its adherents? How can such a "faith" sincerely claim, as Culture does, distinction from "ordinary" speech under the First Amendment?116

Moreover, the number of religious persons is not relevant to Culture's analysis. In other words, if the numbers of religiously devout are actually lower than Carter suggests, even much lower, theoretically speaking, would their rights to religious freedom under the Constitution be any less important? But without serving up such numbers, would Carter have been able to get a broader public's attention?

By buying into marketplace economics, Culture avoids facing some hard facts. The first is that now that religion and the state have been disentangled, now that the state does not compel or explicitly encourage a particular faith choice, or even a faith choice at all, large numbers of

114. Carter himself notes, "Anyone who believes deeply is a potential martyr, for belief always entails a bedrock principle that will not yield" (p. 42).

115. For a Judeo-Christian view, see, e.g., Exodus 16:28 ("If long will you refuse to keep my commands and my instructions?"); Exodus 20:3 ("You shall have no other Gods before me."); Leviticus 26:14-46 (punishment that will come to Israel for disobedience); Psalm 81:13-14 ("If my people would but listen to me, if Israel would follow my ways, how quickly would I subdue their enemies..." ); Jeremiah 2:1-25 (lamenting Israel's abandonment of God); Mark 7:8 ("You have let go of the commands of God and are holding on to the traditions of men."); Luke 9:26 ("If anyone is ashamed of me and my words, the Son of Man will be ashamed of him when he comes in his glory and in the glory of the Father and of the holy angels."); Luke 12:9 ("But he who disowns me before men will be disowned before the angels of God."); 2 Timothy 1:8 ("So do not be ashamed to testify about our Lord..." ) (New International).

116. Even the polls relied upon by Carter, which are, of course, dominated by participants adhering to white mainstream faiths, raise similar questions. For example, 100 Questions and Answers: Religion in America noted that of the Christians or Jews polled, only four in ten reported attending religious services regularly. See Gallup & Jones, supra note 112, at 72, 120. While one could argue that attendance should not be a litmus test, such evidence certainly would support a conclusion of religiosity. Furthermore, the authors reported that knowledge of the Bible among self-described Christian participants was "meager." Id. at 42 (only 42% could name five of the ten commandments, only 46% could name first four gospels in New Testament and only 42% knew that Jesus delivered the Sermon on the Mount). In 1987, only 18% of Americans across age and sex lines were willing to state that the term "religious person" was a perfect description of themselves. Id. at 182. One must be careful not to overlook the questions raised by such inconsistencies. See id. at 42.
the mainstream faithful who holler out "religious!" in private responses to computer-generated telephone calls strike a secular pose in public when not accompanied by a crowd. These telefaithful jettison religion publicly and sometimes privately in the face of opposition or inconvenience. Given a choice between the rewards of "Godliness" and the rewards of worldliness, the telefaithful are in a quandary. They want both.117 That choice is the religious person's right, indeed, that right is protected by the First Amendment, but each such choice narrows any practical distance that exists between religious speech and other speech. One cannot claim in private that religion matters, act in public as if it does not, and then blame the culture for one's transgressions. In the end, it is not the culture of disbelief that Carter describes but rather the culture of comfort.118

On the other hand, it would be wrong to charge publicly faithful religionists with vicarious liability for how the telefaithful behave. Whether or not liberals previously accepted God-talk does not matter. Whether the number of the publicly religious is two thousand or two hundred million should not matter. They have a right to speak. But that right does not preclude opposition and, certainly where mainstream faiths are concerned, much of what Carter defines as trivialization is, in

117. At least two studies published about the same time as Culture have suggested in the face of criticism that claims of religiosity are poor predictors of practice. A research group from New York University tested the oft-reported thesis that 40% of Americans attend church weekly, comparing claims against actual attendance. They concluded that among Protestants and Catholics church attendance is roughly one-half of the levels reported by Gallup and other polls. See C. Kirk Hadaway et al., What the Polls Don't Show: A Closer Look At U.S. Church Attendance, 58 Am. Soc. Rev. 741, 742, 748 (1993). Focusing on one Ohio county for Protestants and 18 Catholic dioceses, the NYU study lacked the geographical diversity that would provide assurance of the national applicability; nevertheless, the authors viewed the uniformity of the results found in the selected areas as significant. See id. at 750.

A second recently published study surveying 4,001 Americans concluded that, using fairly stringent tests, only about 19% of adult Americans regularly practice their religion. In evaluating Protestants, for example, the study considered church attendance, membership in denominations, frequency of prayer, belief in life after death, and ranking of the importance of religion in their lives. The study also found that levels of religious commitment made a difference in viewpoints on moral issues but resulted in less differences in social issues. See Kenneth L. Woodward, The Rites of Americans, Newsweek, Nov. 29, 1993, at 80, 82.

Hadaway, Marler and Chaves noted "social desirability" factors as one possible reason for the wide gap found in reporting and attendance. "If survey respondents view regular church activity as normative or view infrequent church attendance as deviant, they may be inclined to overreport their attendance." Hadaway et al., supra, at 748–49. They noted a parallel to the inflation found in self-identification studies on voting. Habitually, the number of persons who identify themselves as having voted significantly outdistances the number that in fact did vote. See id.

118. Arguably, many members of minority groups would also take a less active approach to religion if their secular situation was transformed such that they were comfortably and securely assimilated as a group into the majority and supported as a group by the state.
the case of mainstream groups, simply the expression of an opposing point of view. The religious are not suffering a special oppression. Rather, they finally have something in common with other "minority" groups who seek to redefine the dominant language of the public square. However, unlike many of the other groups, mainstream religionists possess the cultural integration and the economic and political resources (and Carter even claims the numbers) to make their dreams a reality. What is the point of *Culture*?

*Culture* missed a great opportunity to emphasize for us that it is no coincidence that increased recognition of our religious and cultural diversity has been accompanied by increased challenges to what had been traditionally accepted as legitimate government accommodation of mainstream faith practices. Religion, race and culture are inseparable. The religions, like other groups in society, bear the burdens and reap the benefits of the hierarchy of human beings that is our past and present as a nation. Historically, religious groups whose religious and secular needs were protected by the state perceived no need to rock the political boat. Their members celebrated a private faith made possible by a state that provided them comfort and affirmed their reality, often excluding the reality of others. Thus, they labeled religious activity that challenged that state as "politics" and not "religion."119 It is, in fact, this ongoing relationship with the state that has led one Native American commentator to claim that "without a favored position in the secular world and its political and economic structures, most of what we now know as American Christianity would not and could not exist."120

Had market forces not been so compelling, *Culture* might also have suggested that while the "religious" are waiting for someone to tell them where their "freedom" to engage in God-talk in public went, they might scan a page from the histories of those groups that have not had and still do not have the political capital to make their speech, religious or otherwise, "convenient" in the public square—or those whose right to speak, religious or otherwise, was not included among the religious freedoms that the "Founding Fathers" sought to protect—or of those within the mainstream, who do not view convenience—or permission—as a prerequisite to God-talk. It might have suggested that what the religiously devout are experiencing now is not the defining moment in the history of American religious discourse; at best, it is merely another minute among millions of minutes. Had *Culture* done this, perhaps then, both the

119. Thus, one commentator has argued that many in the religious community have forgotten that neither politicians nor constitutional lawyers imposed the separation model on churches. Rather, it was derived from preconstitutional religious traditions. The current discomfort with the church/state balance is, "in great part, an attack on their earlier vision of a privatized religious life and attitude of 'forbearance' – or withdrawal from the political sphere." Teitel, supra note 39, at 763 (footnote omitted). The notable exceptions were the abolitionists and civil rights movements. See id.

120. Deloria, supra note 80, at 216. This is an updated version of Deloria's classic work. See Vine Deloria, Jr., *God Is Red* 245 (1973).
telefaithful and the publicly faithful, who find consolation in Carter's book, might have discovered that the resurrection of religious freedom begins where the need for secular approval of such speech comes to an end. *Culture* suggests that religions cannot perform their necessary functions within a democracy unless they are independent of the state and resisting. But if those in the religious and cultural mainstream cannot be faithful without approval from the larger society, then they are neither independent nor resisting.

IV. **Conclusion**

A key point *Culture* urges is that attacks on religious speech are based upon the fact that the speech is religious, rather than upon disagreement with the viewpoint expressed. But *Culture* offers precious little evidence to support this claim. While complaining about an elite that silences religious discourse, ironically, in the end, *Culture* fails by virtue of its own elitism.

But can nothing in this *Culture* be saved? The one useful point that does emerge from *Culture* is the seriousness of the injury to the individual and to society at large when one is prohibited from pursuing the tenets of one's faith. While *Culture*'s attempt to explain the uniqueness of the religious commitment should be applauded, its mainstream focus leaves us wondering what an attempt at a truly inclusive analysis might look like. I do not suggest that I know the answer to that question. Every scholar's analysis is both driven and limited by her own experiences and the extent to which, by choice or by necessity, she has been exposed to the experiences of those different from herself.

This fact is an important concern for scholars who would shun the position that viewpoints should be ignored if they are not held by the dominant group.121 When isolated members from a minority group find acceptance within majority culture, their degree of acceptance is very much tied to their willingness and ability to assimilate and to accept the preconstructed assumptions. The same culture that frowns on white mainstream dissent from that reality greatly rewards minorities who can affirm the approach of extrapolating its constructed reality onto minority culture.

I would contend that a scholarly approach to problem-solving (as opposed to a political one) requires that one take seriously the effect of policies arising out of majority assumptions of minority rights. The result

121. Cultural and political dissent, whether religious or otherwise, often challenges the self-affirming reality created by the relevant majority and a recognition of the worth of a particular dissent requires listeners in the dominant group willing to make themselves individually uncomfortable in exchange for a perceived larger good that might flow from a listening.

In both its observations and its omissions, *Culture* underscores the need to have a critical mass of scholars from nonmainstream races and cultures in a position to contribute effectively to debates on our constitutional freedoms.
of such an approach does not have to be acceptance of what might be revealed as a distinctively minority position, but it cannot help but result in a truer understanding of the compromises involved and the effect of the choices made. In no area is such an approach more important than the First Amendment—unless, ultimately, we really do believe that individual constitutional rights assured by the Constitution should be determined by whomever has the most power.

Stephen Carter’s perspective is certainly as legitimate for him as mine is for me. It is indeed, refreshing to find an African-American scholar who has managed to escape the majority’s stereotypical limitations on writing by African Americans.

And so, in the end, both the legal and the faithful must reject the explanation for the current status of public discourse about religion that Culture puts forth. Certainly, a part of me would actually like to believe much of what Culture says about the religious devotion of Americans as a whole. The picture it paints, of an America that takes its religion seriously, held captive by a culture that so grossly trivializes religious devotion that even stout-hearted people do not dare declare their faith, is very inviting. Such a story, if true, would comfortably explain to me those times in which the world-famous religiosity of Americans does not manage to make its way into public discourse or public policy. Even my own secular missteps in a personal journey of faith could be shined up and displayed proudly in a new light. A part of me would like to believe that what Stephen Carter says about America is true. But I do not believe it. Not for one minute. For me, the most convincing evidence that Culture does little to advance the ball beyond where we are is its amazing popularity, despite its gaping logical chasms. We are conformists looking for easy, convenient, answers. The Culture of Disbelief gives us just that.