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## Review Essay: The Challenges of Religious Neutrality

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## REVIEW ESSAY

### THE CHALLENGES OF RELIGIOUS NEUTRALITY

*THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE.* By Frederick Mark Gedicks. Durham: Duke University Press, 1995. Pp.196.

*Reviewed by Samuel J. Levine*<sup>†</sup>

Among the major developments in legal scholarship in the last few decades, an emphasis on critical reexamination and reevaluation of some of the fundamental assumptions underlying legal doctrine has proved highly influential. Proponents of such movements as critical legal studies, critical race theory, and feminist jurisprudence have aimed at demonstrating that a proper understanding of the law must acknowledge that legal rules are typically premised upon a particular set of norms not shared by all members of society.<sup>1</sup> Indeed, scholars in these areas have shown that the law frequently reflects majoritarian world views, failing to incorporate the perspectives of those who are often disadvantaged as a result of social structures.<sup>2</sup> Thus, rejecting the notion of law as merely a

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<sup>†</sup> Law Clerk to the Honorable David N. Edelstein, United States District Court for the Southern District of New York. I thank Marie Failingier for providing me the opportunity to write this essay, Kent Greenwalt, Judith Hagley, and Howard Vogel for helpful comments, and the St. John's University School of Law summer stipend program for financial support.

1. See, for example, Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L J 1329, 1361 (1991) ("As feminist scholars have pointed out, everyone has a gender, but the hidden norm in law is male. As critical race theorists have pointed out, everyone has a race, but the hidden norm in law is white"). I have suggested elsewhere that "[s]imilarly, everyone has a religious viewpoint, but the hidden norm in law has been based upon those viewpoints familiar to American religious sensibilities." Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 Wm & Mary Bill Rts J 153, 160-61 (1996).

2. See, for example, Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 Colum J Gender & L 1, 11 (1992) ("[C]ertain groups historically have been unrepresented in law and their exclusion has led to biases—an incompleteness or deficit in contemporary legal analysis and institutions . . . historically excluded groups have different, perhaps unique, views and experiences that are relevant to the issues and circumstances regulated and controlled by law"). See also Martha Minow, *Making all the Difference: Inclusion, Exclusion, and American Law* 51 (Cornell U Press, 1990) ("Unstated norms may express the

set of neutral principles,<sup>3</sup> these scholars have looked behind and beyond legal doctrine in an effort to uncover some of the societal,<sup>4</sup> rhetorical,<sup>5</sup> and conceptual<sup>6</sup> assumptions that have helped shape the legal system.

The very title of Professor Fred Gedicks' insightful, ambitious, and sometimes provocative book, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence*, suggests an intellectual debt owed to these academic movements. At the outset of his discussion, Gedicks notes the difficulty one faces in critically engaging Supreme Court decisions in the area of church and state law.<sup>7</sup>

experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others").

3. See, for example, Fineman at 10 (cited in note 2) at 10 (challenging "the traditional notion that law is a neutral, objective, rational set of rules, unaffected in content and form by the passions and perspectives of those who possess and wield the power inherent in law and legal institutions").

4. See *id.* at 11 ("Law is not only something 'out there'—an independent body of principles—but a product of society, acted upon and responsive to political and cultural forces. For this reason it is as essential to understand societal and cultural forces as it is to decipher doctrine in order to understand 'the law'").

5. See, for example, Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v Hardwick*, 79 Va L Rev 1805, 1811 (1993) (rejecting the "orthodox view of the relation between legal discourse and legal doctrine," which "viewed the rhetoric of the Supreme Court analysis and argument mainly as a tool for communicating rules of constitutional law, which are taken to be separate and distinct from that rhetoric itself," and endorsing "recent writing on the theory and practice of legal interpretation [that] undermines the idea that the content of legal doctrine is separable (even in principle) from its discursive form").

Compare Levine at 162 n 36 (cited in note 1) (a careful look at the various [Supreme Court] opinions often demonstrates the majority's inability or unwillingness to acknowledge realistically the needs of religious minorities . . . the Court's very failure to give adequate expression to religious minority perspectives in written opinions has the effect of improperly limiting the significance accorded these perspectives in legal thought).

6. See, for example, Mark Kelman, *A Guide to Critical Legal Studies* (Harv U Press, 1987).

7. Gedicks begins his Introduction with the observation that "[d]ocumenting the inconsistency of the Supreme Court's religion clause decisions is a virtual cliché in constitutional scholarship." Frederick Mark Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* 1 (Duke U Press, 1995) [hereinafter Gedicks].

According to Professor Tom Berg, "[t]hat the Supreme Court has made a mess of this area is agreed to by most everyone including many of the justices themselves," and "[a]s a result, in recent years Religion Clause theory has sprouted up all over the place. Several justices and scores of commentators have proposed 'rethinking' the Religion Clauses all the way down to their historical and theoretical roots." Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L Rev 693, 693 (1997). See, for example, Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U Pa L Rev 1559 (1989); Rodney J. Blackman, *Showing the Fly the Way Out of the Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U Kan L Rev 285 (1994); Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 Nw L Rev 347 (1995); John H. Garvey, *Is There a Principle of Religious Liberty?*, 94 Mich L Rev 1379 (1996) (book review); John H. Garvey, *The Architecture of the Establishment Clause*, 43 Wayne L Rev 1451 (1997); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup Ct Rev 323 (1996); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L J 1611 (1993); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 Harv CR-CL L Rev 503

Gedicks goes on to premise his analysis on the identification of “competing rhetorical discourses of church-state relations,”<sup>8</sup> through which he attempts to “organize virtually all of religion clause doctrine.”<sup>9</sup> Without express reference to the critical legal scholars that have preceded him, Gedicks shares with these scholars a reliance on the work of such postmodern thinkers as Stanley Fish, Thomas Kuhn, Michel Foucault, and Jaques Derrida, whom he credits with “the recognition that the knower cannot be separated from the known, that the nature of the object one studies is inextricably bound up with the nature of the subject who studies it.”<sup>10</sup> Gedicks applies this phenomenon, which he terms “discourse,” to church and state law, declaring that “[e]ach church-state discourse includes a normative conception of how church and state should interact and that therefore determines how these interactions in the phenomenal world are, and are to be, understood.”<sup>11</sup>

In Chapter 1, Gedicks sets forth his depiction of the two competing discourses. The first, “religious communitarianism,” incorporates “interdenominational conservative religious beliefs and practices,” holding that religion is the “principal, if not the exclusive, source of values and practices that lie at the base of civilized society.”<sup>12</sup> On a political level, “[r]eligious communitarianism permits and even demands that government exercise its power to influence citizens to adopt the foundational morality of conservative religion to guide their choice in private life.”<sup>13</sup>

In opposition to religious communitarianism, Gedicks identifies “secular individualism,” which argues that “it is never acceptable for

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(1992); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 Geo Wash L Rev 841 (1992); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L J 43 (1997); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 Ford Urb L J 85 (1997); Ira C. Lupo, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U Pa L Rev 555 (1991); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 Geo Wash L Rev 685 (1992); Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in City of Boerne v Flores*, 39 Wm & Mary L Rev 819 (1998); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U Chi L Rev 115 (1992); Michael W. McConnell, *The Origins and Original Understandings of Free Exercise of Religion*, 103 Harv L Rev 1409 (1990); Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W Res L Rev 795 (1993); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford U Press, 1995).

8. Gedicks at 9 (cited in note 7).

9. Id.

10. Id at 10.

11. Id.

12. Id at 11.

13. Id.

government to defend its actions with a religious justification.”<sup>14</sup> Instead, “religious belief is a choice in private life that is insulated from government influence and control,” while “public religion is only acceptable to the extent that it falls within broader secular categories of public life.”<sup>15</sup> Thus, according to secular individualism, government must “remain neutral between religious sects and between religion and nonreligion generally.”<sup>16</sup>

It is the challenge of religious neutrality that serves as the central issue in the next two chapters of the book.<sup>17</sup> As Gedicks observes, “[t]o measure whether government has violated the neutrality principle, one must have a starting point that defines neutrality; departure from this point would therefore constitute a violation of the principle.”<sup>18</sup> Again echoing the thoughts of critical legal scholars, and relying on a number of prominent scholars in church and state law,<sup>19</sup> Gedicks poses a fundamental question: “How does one identify the baseline measure of religious neutrality?”<sup>20</sup> The problem is particularly vexing because

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14. Id at 12.

15. Id.

16. Id.

17. Compare Karst (cited in note 7) at 529. ([T]he main source of doctrinal incoherence is the First Amendment itself, which seems to command a neutrality that lies beyond anyone's power to achieve. No bright-line rule will do all the work that needs to be done in protecting both the value of religious freedom and the value of inclusion).

18. Gedicks at 57 (cited in note 7). As Professor Cass Sunstein has explained, in a different context, According to the Supreme Court of the early twentieth century, the government must be “neutral” in general, and between employers and employees in particular. Neutrality was defined by reference to existing distributions, or to what people currently had. Government departures from existing distribution signaled partisanship; government respect for those distributions signaled neutrality. A violation of the neutrality requirement, thus understood, would count as a violation of the Constitution. Cass R. Sunstein, *Democracy and the Problem of Free Speech* at 29 (Free Press, 1993). See also Minow (cited in note 2) at 42. (Neutrality as a solution to the dilemma of difference is the elusive goal that itself may exacerbate the dilemma, especially when the government is the decision-maker. Governmental neutrality may freeze in place the past consequences of difference, yet any departure from neutrality in governmental standards uses governmental power to make those differences matter and thus reinforces them. If the government delegates discretion to employers, legislators, and judges, it disengages itself from directly endorsing the use of differences in decisions but still allows those other decision-makers to give significance to differences); Ronald F. Thiernann, *Religion in Public Life: A Dilemma for Democracy* 42-94 (Georgetown U Press, 1996) (describing the “myth of neutrality” in religion clause issues).

19. See Gedicks at 57, 158 n 73 (cited in note 7) (citing Marc Galanter, *Religious Freedom in the United States: A Turning Point*, 1966 Wis L Rev 216, 289; Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal L Rev 817, 828 (1984); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L Rev 993, 1005 (1990); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L Rev 311, 355 (1986)).

20. Id at 57.

baselines are themselves often dependent on the perspective of the observer.<sup>21</sup>

Indeed, in Chapter 2, Gedicks suggests that each of the competing discourses envisions its own normative universe. Looking at the same set of facts through different perspectives, then, the discourses “organize disagreement and discussion about church-state infractions by identifying what the ‘important’ questions are, and regulating what can count as an answer to these questions.”<sup>22</sup> Thus, “adherents to each discourse still see (and fail to see) certain aspects of the world that seem absent (or present) in the experience of adherents to the other discourse.”<sup>23</sup> Specifically, “secular individual discourse locates the boundary between public and private life in a different conceptual place than does religious communitarian discourse.”<sup>24</sup> As a result, the same government action “which clearly appears to the religious communitarian as an unacceptable act of religious discrimination is defended by the secular individualist as simple neutrality between religion and secularism.”<sup>25</sup> The sharp difference in perspectives and perceptions “explains why, all too often, religious organizations and individuals experience the Supreme Court’s religion clause jurisprudence as oppressive and alienating at the same time that others sincerely believe it to be neutral.”<sup>26</sup>

Tracing the history of Religion Clause jurisprudence, Gedicks argues that the Court has adopted secular individualism as the discourse governing church-state law, “caus[ing] religious communitarian discourse to disappear as a realistic and coherent alternative.”<sup>27</sup> Gedicks criticizes this policy as “an act of power that can plausibly be defended as religiously neutral only if religion is presented as a ‘naturally’ private activity, excluded from public life.”<sup>28</sup> In response, Gedicks suggests that “[s]ubverting the natural appearance of privileging secular individualist discourse over religious communitarian discourse opens a critical distance from the Court’s religion clause jurisprudence which enables analysis and criticism of it from a perspective outside of secular

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21. See note 1.

22. Gedicks at 26 (cited in note 7).

23. *Id.* at 26-27.

24. *Id.* at 27.

25. *Id.*

26. *Id.* Compare Kelman at 29 (cited in note 6) (stating that critical legal theory identifies “a set of paired rhetorical arguments that both resolve cases in opposite, incompatible ways and correspond to distinct visions of human nature and fulfillment”).

27. Gedicks at 42-43 (cited in note 7).

28. *Id.* at 43.

individualism.”<sup>29</sup>

In Chapter 3, Gedicks continues his critique of both secular individualism and the very concept of religious neutrality, through an analysis of Supreme Court decisions in parochial school aid and equal-access cases. With regard to financial aid, Gedicks argues that the question of government neutrality must be viewed against the baseline of government aid to public schools. On a broader societal level, Gedicks claims that

[i]n the modern welfare state that the contemporary United States has become, government aid to both individuals and organizations is widespread and pervasive. Since in the United States most persons and entities are entitled to some kind of government aid, religious neutrality would generally seem to require that this aid not be denied to otherwise qualified recipients simply because they are religious.<sup>30</sup>

Finding, therefore, that “the no-aid baseline is implausible in the late twentieth century as a measure of neutrality of government action,”<sup>31</sup> Gedicks applies an alternate baseline to school aid cases. He concludes that “neutrality between parochial schools and public schools clearly requires that parochial schools be apportioned a share of these tax dollars; if most schools receive government aid, then religiously neutral finding requires that parochial schools be eligible to receive it, too.”<sup>32</sup> Similarly, in the case of school access, Gedicks posits that “[g]iven the tremendous extent to which government is permitted to shape the preferences of children through secular public education, one could argue that neutrality requires some compensating or balancing action by religious groups in the form of access to the same value-shaping mechanism.”<sup>33</sup>

Thus, Gedicks emphasizes the need to reexamine church-state doctrine through a realistic assessment of American society. Closing the chapter, he argues that

[d]enying government aid to parochial schools is neutral only if one assumes that government funding of elementary and

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29. *Id.* Thus, Gedicks’ methods echo those of “outsider jurisprudence,” which “is hostile toward false pretensions of universality and neutrality.” See Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 Cornell L Rev 43, 44-45 (1994). See also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 Mich L Rev 2320, 2323-26 (1989).

30. Gedicks at 57 (cited in note 7).

31. *Id.* at 58.

32. *Id.* at 59.

33. *Id.* at 59 and 60.

secondary education is insignificant. Similarly, denying religious groups access to the facilities or curriculum of public education is neutral only if one assumes that public education itself plays an insignificant role in shaping the values of schoolchildren. Neither has been the situation in the United States for many years.<sup>34</sup>

In the next two chapters, Gedicks continues to uncover some of the contradictory and unrealistic attitudes he finds latent in current Religion Clause doctrine. One such contradiction lends Chapter 4 its title, "The Religious as Secular." Gedicks observes that since 1961, the Supreme Court has upheld Sunday closing laws,<sup>35</sup> legislative prayer,<sup>36</sup> religious holiday displays,<sup>37</sup> some forms of direct aid to religious colleges and social service auxiliaries,<sup>38</sup> and religious property tax exemptions.<sup>39</sup> According to Gedicks, "the Court has generally defended these practices by reference to the secular individualist value of neutrality between religion and nonreligion rather than the religious communitarian value of encouraging socially valuable religion."<sup>40</sup> Ironically, he continues,

[t]he only way one can defend with secular individualist discourse practices that clearly and disproportionately benefit religion is to argue that these practices are not really religious. This forces the Court into the awkward position of arguing the secularity of activities that seem indisputably religious, such as Sunday closing laws and the public display of religious symbols."<sup>41</sup>

It seems somewhat anomalous that "it is the separationist opinions that take the creche and the menorah seriously as *religious* symbols, and the accommodationist opinions that strive to empty them of their spiritual content and replace it with secular meaning."<sup>42</sup> Gedicks sees the accommodationists as "transform[ing] the creche and the menorah from religious symbols of deep spiritual significance into cultural artifacts."<sup>43</sup> In a sharply worded critique, he declares that

a depiction of the birth of the Christian savior becomes a symbol of good cheer and indistinguishable from Santa and his reindeer, and the symbol of the Jewish "Miracle of Lights" becomes a good-

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34. Id at 61.

35. Id at 63 (citing *McGowan v Maryland*, 366 US 420 (1961)).

36. Id (citing *Marsh v Chambers*, 463 US 783 (1983)).

37. Id (citing *County of Allegheny v ACLU*, 492 US 573 (1989); *Lynch v Donnelly*, 465 US 668 (1984)).

38. Id (citing *Bowen v Kendrick*, 487 US 589 (1988); *Hunt v McNair*, 413 US 734 (1973)).

39. Id (citing *Walz v Tax Comm'n*, 397 US 664 (1970)).

40. Id.

41. Id.

42. Id at 77.

43. Id at 79.



hearted pluralist alternative to all this secular cheerfulness. Only if the religious can be made secular is a defense available within secular individualism.<sup>44</sup>

In Chapter 5, Gedicks levels a similar criticism against the Court's decisions upholding financial aid to religiously sponsored colleges. Here too, he writes, "the Court attempts to justify results that are possible only within one discourse with arguments that are coherent only within the other."<sup>45</sup> Specifically, "secular individualist discourse has no resources to defend the constitutionality of financial aid to religious institutions unless these institutions are recharacterized as secular."<sup>46</sup> As a result, Gedicks finds, "the Court must argue that the religious entities receiving direct aid are not really religious, appearances notwithstanding."<sup>47</sup> Likewise, Gedicks finds fault with the Court's "analytic preference for secular individualist discourse" in decisions allowing tax exemptions for religious organizations.<sup>48</sup> He is unconvinced by the "misleading suggestion that churches and other religious organizations are motivated to their good works by the same considerations that move the members of secular nonprofit organizations," a suggestion which he claims relegates "the motivations of faith to a mere afterthought."<sup>49</sup>

Finally, in Chapter 6, Gedicks extends his analysis to free exercise cases. Gedicks again illustrates the complexities inherent in attempting to identify a neutral baseline, this time through a focus on the free exercise burdens that continuously plague religious minority practice.<sup>50</sup>

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44. *Id.* at 80. Compare David M. Cobin, *Creches, Christmas Trees and Menorahs: Weeds Growing in Roger Williams' Garden*, 1990 Wis L Rev 1597, 1597 (stating that:

[t]he Court concluded that government display is permissible, so long as the religious symbols are "secularized" to avoid an endorsement of a particular religion or religion generally. While clearly intended to promote the Court's vision of the separation of church and state as prescribed by the First Amendment, the decisions are off the mark. Rather than discouraging governmental involvement in religion, the decisions merely encourage governments to display religious symbols in a manner that dilute them of their religious significance. While the Court views such state involvement as an attempt to enhance secular holiday celebration, the actual result is a weakening of religion).

45. *Gedicks* at 84 (cited in note 7).

46. *Id.* at 91.

47. *Id.* at 83.

48. *Id.* at 96 and 97.

49. *Id.* at 97.

50. See Levine at 184 (cited in note 1) (noting the Court's failure to appreciate the religious burden placed on the Orthodox Jewish businessman whom the State proscribes from working on Sunday, the Court's ignoring of the impact on Native American religious worship due to government destruction of sacred Indian land and its prohibition on peyote use, and the Court's approval of a regulation that prevented Muslim inmates from attending Jumu'ah[,] and that "in considering the wearing of yarmulkes by servicemen the Court ignored . . . the Orthodox Jewish perspective").

He observes, for example, that “[n]o Jewish, Muslim, or Native American plaintiff has ever prevailed on a free exercise claim before the Supreme Court”<sup>51</sup> and that “[f]undamentalist Christians and sects outside the so-called mainline Protestantism have had only mixed success in seeking exemptions.”<sup>52</sup> Gedicks argues that *Employment Division v. Smith*<sup>53</sup> “only made explicit what has always been the functional law of free exercise: whenever the religious action at issue is significantly out of step with majoritarian values and is not defensible by reference to secular principles of constitutional law, an exemption is not constitutionally required.”<sup>54</sup>

The problem for religious minorities is particularly acute, he continues, due to the emergence of secular individualism, which “does not provide a basis for relieving burdens on religious practice caused by government action that is facially neutral and fully justified on secular grounds.”<sup>55</sup> Viewing neutrality from a different baseline, however, may suggest that “judicial exemptions enhance neutrality, by giving to religious minorities the same protections from burdens on their religious practices that are available to religious majorities by virtue of their numbers.”<sup>56</sup> Gedicks argues that “government is permitted under the establishment clause to accomplish secular objectives in a manner that incidentally assists or accommodates majoritarian religious practices.”<sup>57</sup> Therefore, he contends, “genuine neutrality among religious sects requires that government restore the balance between majority and minority religions by making equivalent accommodations of the minority in the form of exemptions when majority preferences burden the minority.”<sup>58</sup>

Thus, in *The Rhetoric of Church and State: A Critical Analysis of*

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51. Gedicks at 116 (cited in note 7). See Levine at 184 (cited in note 1) (observing that “the Court occasionally has recognized a religious minority perspective” but that “it remains to be seen, however, whether the Court will continue to utilize and expand the type of religious minority perspective jurisprudence that is vital to ensuring protection of the free exercise rights of all religious minorities”).

52. *Id.* at 116.

53. 494 US 872 (1990).

54. Gedicks at 99 (cited in note 7).

55. *Id.* at 110.

56. *Id.* at 115. Compare Sunstein (cited in note 18); Minow at 43 (cited in note 2) (To be truly neutral, the government must walk a perhaps nonexistent path between promoting or endorsing religion and failing to make room for religious exercise. Accommodation of religious practices may look nonneutral, but failure to accommodate may also seem nonneutral by burdening the religious minority whose needs were not built into the structure of mainstream religions).

57. Gedicks at 115 (cited in note 7).

58. *Id.*

*Religion Clause Jurisprudence*, Professor Gedicks succeeds in his goal of providing a thoughtful look at many of the central issues in current church-state law “at a level deeper than doctrine.”<sup>59</sup> The book’s most important contribution may be its identification of competing discourses which see the relationship between church and state through different and somewhat incompatible world views. The different views not only shade the normative approaches of their proponents, but yield conflicting descriptive accounts as well. Thus, Gedicks produces an impressive list of scholars who “have contended that American politics and public life are hostile to religion,”<sup>60</sup> countered by an equally impressive list of scholars “baffled by the suggestion that American public life discriminates against religion.”<sup>61</sup> Gedicks suggests that “[t]hese conflicting claims are the result of seeing the American experience of church and state through the lenses of different discourses about their proper relationship.”<sup>62</sup> It may be ironic, then—though perhaps it is in fact fitting—that in his critique of secular individualism, Gedicks’ own approach at times seems to betray an inability or unwillingness to appreciate fully or depict fairly a world view different from his own.

Though he stops short of endorsing religious communitarianism, which he does not consider a viable alternative, Gedicks clearly favors an increased presence of religion in public life. As a result, it seems, his criticism of secular individualism appears at times to contain elements of overstatement and lack of balance, in both tone and substance. Gedicks writes of an “American cultural elite, who . . . have long thought that individuals should be shielded from the regressive and superstitious influence of traditional religious beliefs and practices.”<sup>63</sup> Gedicks does not identify this “cultural elite,” or explain the source of their power, despite his assertion that “the mainstream of popular American thought is far closer to the religious communitarian ideology espoused by religious conservatives than it is to the secular

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59. *Id.* at 7.

60. *Id.* at 27 (citing Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (2d ed 1986); Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Basic Books, 1993)). See also *id.* at 140-41 nn 15-20.

61. *Id.* at 27 and 28 (citing Mark Tushet, *Religion in Politics* (Book Review), 89 Colum L Rev 1131, 1134 (1989) (Reviewing Kent Greenawalt, *Religious Convictions and Public Choice* (Oxford U Press, 1988); Theodore Y. Blumoff, *Disclaim for The Lessons of History: Comments on Love and Power*, 20 Cap U L Rev 159, 186-87 (1991); Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U Chi L Rev 195, 195-96 (1992)). See also *id.* at 141-42 nn 22-27.

62. *Id.* at 28.

63. *Id.* at 119.

individualism of cultural elites.”<sup>64</sup> In any event, surely many advocates of substantial separation of church and state do not disparage religion or view it as regressive or superstitious. Rather, many separationists, among them religious adherents, may feel that the potential dangers posed by extensive government involvement in religion outweigh any detrimental effects that separation might have on religious practice.

Similar questions arise regarding Gedicks’ discussion of the Supreme Court’s decision in *Employment Division v Smith*.<sup>65</sup> Gedicks attributes to secular individualism, as well as to the Court, a view of religion as “a cynical, disintegrating force bent on subverting the dreadful majesty of ‘Law.’”<sup>66</sup> Certainly, Gedicks is not alone in his criticism of the Court’s ruling in *Smith*. An overwhelming and perhaps unprecedented coalition of scholars and organizations argued that *Smith* was wrongly decided.<sup>67</sup> Nevertheless, while these critics may consider the Court’s reasoning unwise and incorrect, a fair assessment of the decision does not necessarily reveal an insidious bias against the effects of religion on society.

In addition, the composition of the coalition that rallied against *Smith* apparently contradicts Gedicks’ depiction of powerful “cultural elites” bent on protecting society from the evils of religion. The organizations arguing against the Court’s decision in *Smith* included a number of groups that typically argue for the separation of church and state, including, among others, the American Civil Liberties Union, the American Jewish Congress, and Americans United for the Separation of Church and State.<sup>68</sup> That these organizations fight for free exercise rights while opposing government involvement in religion suggests not a hostility toward religion but a nuanced approach to complex issues of Religion Clause jurisprudence.

These and other aspects of Gedicks’ discussion of *Smith* seem to suffer from a tendency towards overstatement, similar to that which he identifies in the Court’s own opinion. Gedicks convincingly criticizes the Court’s extreme deference to notions of law and order in denying a free exercise exemption in *Smith*. As Gedicks observes, the Court’s “dire warnings of the dangers of free exercise exemptions are curious,

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64. Id at 120.

65. 494 US 872 (1990).

66. Gedicks at 38 (cited in note 7).

67. See *Petition for Rehearing, Employment Division v Smith*. When the Court denied a request for a rehearing, see *Employment Division v Smith*, 494 US 913 (1990), these groups successfully lobbied for the passing of the Religious Freedom Restoration Act, which has since been declared unconstitutional. See *City of Boerne v Flores*, 521 US 507 (1997).

68. See *Petition for Rehearing* (cited in note 67).

because life under the exemption doctrine abandoned by *Smith* had been hardly chaotic.”<sup>69</sup> Yet, in response, Gedicks offers an equally alarmist scenario that he claims could result from the lack of religious exemptions: “majoritarian dominance could radicalize some believers into destabilizing, antisocial activity, including violence.”<sup>70</sup> It seems somewhat troubling that, in an effort to dispel alleged conceptions of religious adherents as subversive, Gedicks himself raises the specter of religious violence as a real possibility. More profoundly, the gap between Gedicks’ responses and the exaggeration and overstatement he perceives in the Court’s approach exemplifies the gap that separates the competing views of church-state relations.

A similar dynamic emerges in Gedicks’ analysis of the debate over teaching evolution and creationism in public schools. Gedicks offers valuable insights into the Court’s attitudes, through a careful look at the rhetoric the Court employs. In declaring unconstitutional laws that mandate the teaching of creationism, the Court has stated that such laws “suppress” the teaching of the theory of evolution,<sup>71</sup> and may result in the “banishment” of the theory from public school classrooms.<sup>72</sup> Gedicks observes that the Court’s strong language may evoke disturbing images of intellectual intolerance.

Yet, again, Gedicks’ response appears overstated in its depiction of an opposing discourse. Gedicks not only attributes to the Court the harsh view that teaching creationism involves “despotic coercion.”<sup>73</sup> Gedicks goes further, describing “secular individualism’s nightmare of particularist religious beliefs subverting public life—the imposition of values by the irrational, passionate, and violent overthrow of rationality, reason, and peace.”<sup>74</sup> Having constructed such a nightmare in the minds of others, Gedicks then claims that

[t]he nightmare is powerful, of course, because it recalls vivid historical and cultural images in the post-Enlightenment West: religion as superstition that denies Reality and suppresses Truth, together with religion as fanaticism that causes its adherents to erupt into persecution, violence, and war against all with whom they disagree.<sup>75</sup>

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69. Gedicks at 38 (cited in note 7).

70. *Id.* at 40.

71. See *Edwards v Aguillard*, 482 US 578, 590 (1986) (quoting *Epperson v Arkansas*, 393 US 97, 109 (1968)).

72. *Id.* at 596.

73. Gedicks at 34 (cited in note 7).

74. *Id.*

75. *Id.*

It is again curious that Gedicks assigns to the Court a vision of religious adherents as violent revolutionaries, when it is in fact not secular individualists but Gedicks himself who has expressly warned of the potential for religious violence. Perhaps—and perhaps unavoidably—Gedicks' own perspective leads him, like many advocates, to perceive unintended and possibly nonexistent biases in opposing viewpoints.

Indeed, Gedicks' disapproval of the Court's acceptance of the scientific validity of evolution over creationism further illustrates what may be an unbridgeable chasm between discourses in some areas of church and state relations. Gedicks criticizes the Court for "suggest[ing] that evolution is a matter of objective fact, whereas creationism is a matter of subjective belief."<sup>76</sup> According to Gedicks, "[t]he more general subtext was that science is rational and real, whereas religion is irrational and imaginary."<sup>77</sup> Thus, Gedicks sees an unfair "privileging of secular knowledge as objective and [a] marginalizing of religious belief as subjective."<sup>78</sup> In contrast, Gedicks refers to creationism as the "intellectual competitor" to evolution,<sup>79</sup> adding in a footnote that his terminology rejects "the privileging of objectivity over subjectivity."<sup>80</sup> Stating categorically that "[t]here is no objective justification for privileging evolution over creationism," Gedicks claims that "[e]volution owes its status as the only 'factual' account of the origin of human and other life, not to objective reasoning and empirical observation, but rather to rules of scientific discourse that govern what does, and what does not, count as valid argument and proper evidence."<sup>81</sup>

As Professor Kent Greenawalt has observed, such challenges to the very foundations of scientific methods, and likewise to "any liberal principle of restraint[,] raise profound questions."<sup>82</sup> Greenawalt's response to Gedicks and others is particularly instructive in its sympathetic and favorable attitude toward religion, coupled with a nuanced analysis of the principles of liberal democracy. Like Gedicks,

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76. Id at 33.

77. Id.

78. Id at 32.

79. Id at 72.

80. Id at 164 n 60.

81. Id at 37.

82. Kent Greenawalt, *Private Consciences and Public Reasons* 102 (Oxford U Press, 1995). [hereinafter, Greenawalt, *Private Consciences*]. Elsewhere, Greenawalt responded more directly to Gedicks' arguments. See Kent Greenawalt, *The Lawyer's Bookshelf*, NY L J 2, (reviewing Frederick Mark Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (Duke U Press, 1995)).

Greenawalt rejects simplistic notions of neutrality, stating that “[n]o liberal principle of ‘neutrality’ is itself neutral; it requires some value judgment of its own that cannot be neutral.”<sup>83</sup> Moreover, far from according to secularist views an inherent superiority, Greenawalt concedes that [w]ithout a doubt, *some* secular philosophies have no stronger basis in interpersonal reason than do some religions.”<sup>84</sup> Therefore, he grants that “*unless* a special reason were adduced to exclude religious views, a plausible principle of restraint would have to reach many nonreligious views.”<sup>85</sup>

Nevertheless, Greenawalt argues, although “[s]ome claims about religion are based on standards of truth that are similar to standards of truth for some nonreligious moral and political claims,” a careful analysis should acknowledge that “some claims of truth are self-consciously less subject to interpersonal evaluation than are others.”<sup>86</sup> Greenawalt responds generously to claims founded on religious belief, allowing that “[i]f all the person presents is his experience of faith, his ‘competing paradigm’ is not absurd or illogical.”<sup>87</sup> Still, he insists, “[i]t is . . . less subject to interpersonal *reason*, indeed to interpersonal evaluation at all, than the conclusion based on” particular scientific methods.<sup>88</sup> Thus, it is less than fully accurate to claim, as Gedicks does, that Greenawalt finds “reliance on personal intuition, feeling, commitment, tradition, and authority”<sup>89</sup> to be “less reliable” than rational thinking.<sup>90</sup> Rather, as he explains in addressing issues of judicial decisionmaking, Greenawalt actually concludes that “the basic reason for preferring some premises and ways of reasoning over others is that they are shared in our political culture, not that they are *necessarily* a better way of knowing altogether.”<sup>91</sup>

Applying this framework to creationism and evolution, Greenawalt “emphasize[s] our culture’s shared ideas of rationality in science.”<sup>92</sup> He observes that “[b]elief in the literal truth of the account of creation in Genesis, assured by biblical infallibility, and belief in evolution, assured by science, are, without doubt, competing paradigms, but it does not

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83. Greenawalt, *Private Consciences* 102 (cited in note 82).

84. *Id.* (emphasis in the original).

85. *Id.* (emphasis in the original).

86. *Id.* at 102.

87. *Id.* at 103.

88. *Id.* (emphasis in the original).

89. Gedicks at 31 (cited in note 7).

90. *Id.*

91. Greenawalt, *Private Consciences* 146 (cited in note 82). See also Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J Contemp Legal Issues 473 (1996).

92. Greenawalt, *Private Consciences* 147 (cited in note 82).

follow that they are equally subject to validation by interpersonal reason.”<sup>93</sup> Moreover, Greenawalt posits, “if extremely little ordinary scientific evidence supports creation science . . . creation science rests on premises and ways of reasoning that many people reject. Evolutionary science, on the other hand, rests on methods of doing science that are widely accepted.”<sup>94</sup> In short, under this analysis, evolution “is supported by interpersonal reason in a way, and to a degree, that creationism is not.”<sup>95</sup>

Perhaps the most problematic element of Gedicks’ approach is his attempt to disprove the theory of evolution on its own terms. Gedicks raises the example of “the much discussed ‘gaps’ in the fossil record” as a challenge to evolutionary theory.<sup>96</sup> He counters that “[f]or creationists, however, the gap raises no problem.”<sup>97</sup> It is surprising that Gedicks seeks to support creationism by relying on scientific evidence which, on the whole, strongly contradicts literal creationist theory. More fundamentally, it seems both academically inappropriate and intellectually unwise for a law professor to dispute widely accepted scientific theory on the basis of a small minority of the scientific community.

Professor Stephen Jay Gould offers a caustic critique of such an attempt by another legal scholar, Robert Bork. Gould writes that “exhibiting as much knowledge of paleontology as I possess of constitutional law—that is, effectively zero—Mr. Bork cites as supposed evidence for Darwin’s forthcoming fall the old, absurd canard that ‘the fossil record is proving a major embarrassment to evolutionary theory.’”<sup>98</sup> In response, Gould cites “the abundant evidence we possess of intermediary transitions—mammals from reptiles, whales from terrestrial forebears, humans from apelike ancestors.”<sup>99</sup>

Professor Carl Feit provides a more gentle but no less compelling response to those who oppose the theory of evolution on religious grounds. Evolution, he writes,

is not a dead theory as some have claimed, but I believe it to be central to the whole enterprise of biology today. After one hundred years of the most intense analysis, debate and critical

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93. Id at 102.

94. Id at 146.

95. Id at 103. Compare Amy Gutmann, *Democratic Education* 102-03 (Princeton U Press, 1987).

96. Gedicks at 35 (cited in note 7).

97. Id.

98. Stephen Jay Gould, *Let’s Leave Darwin Out of It*, NY Times at A21 (May 29, 1998).

99. Id.



testing, the theory of evolution still stands as the central pillar of modern biology. It provides a way of explaining and predicting scientific results as any good theory should, with thousands of facts as its empirical base. At the moment, there is no alternative or competing scientific theory to explain the phenomena with which it deals. Although . . . all scientific theories are relative, the theory of evolution is a firmly rooted one, on the level of the theories of quantum mechanics, relativity, electricity and other well established ways of explaining reality. Indeed, the theory of evolution is *the* scientific theory of contemporary biology.<sup>100</sup>

Of course, Gedicks, in turn, might reject these responses as symptomatic of the hegemonic view of a scientific community that he criticizes for "plac[ing] science in the privileged public realm while relegating religion to marginalized private life."<sup>101</sup> Greenawalt poignantly observes that "[e]ven the believers in creation science do not reject [the] mainstream scientific methods for most purposes; they believe, however, that they have a higher source of understanding for the particular set of questions that creation science answers."<sup>102</sup> To the extent that Gedicks' world view privileges religious belief over other forms of knowledge, and therefore accepts a literal creationism in the face of contrary scientific evidence, it appears fundamentally irreconcilable with other world views.

As Gedicks convincingly illustrates throughout the book, it is the basic differences between discourses that make the pursuit of religious neutrality so elusive. The complexity is exemplified in Gedicks' assertion, based on his own perspective, that "[f]ailing to teach school children the scientific account of human origin may be bad education policy but does not seem to violate religious neutrality so long as religious accounts are also not taught."<sup>103</sup> Surely, Gedicks realizes that such an approach is faithful to religious neutrality only if, as he believes, creationism stands as an intellectual competitor to evolutionary theory. If, however, science supports the validity of evolution, then failure to teach this account to students, even in the absence of religious instruction, is justifiable only on religious grounds, and thus indeed violates religious neutrality.

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100. Carl Feit, *Darwin and Drash: The Interplay of Torah and Biology*, 2 *Torah U-Madda J* 25, 30 (1990). See also Carl Feit, Book Review, *Jewish Action*, Spring at 87 (1998) (reviewing Lee M. Spetner, *Not by Chance! The Fall of Neo-Darwinian Theory* (1997)); Lee M. Spetner, Carl Feit, *Reviewing the Review*, *Jewish Action* at 125 (Summer 1998).

101. Gedicks at 37 (cited in note 7).

102. Greenawalt, *Private Consciences* at 146-7 (cited in note 82).

103. Gedicks at 71 (cited in note 7).

Gedicks concludes the book with a call for a third discourse of church and state, one that could weave the threads of religion clause jurisprudence into a coherent whole and attract popular support, which secular individualism had failed to do, and which could also protect a meaningful measure of religious freedom and pluralism, which religious communitarianism would threaten.<sup>104</sup>

Though Gedicks does not identify such a solution, he acknowledges that, as his analysis often—though perhaps not always self-consciously—demonstrates, “since each of these discourses is antithetical to the other, efforts to mediate a compromise position between the two are doomed.”<sup>105</sup>

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104. *Id.* at 123.

105. *Id.*

