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REVIEW ESSAY

THE TRIVIALIZATION OF RELIGION

LESLIE GRIFFIN*

STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

The subtitle of Stephen Carter's *The Culture of Disbelief* accurately captures the essence of the work: "How American Law and Politics Trivialize Religious Devotion" encapsulates Carter's thesis of the trivialization of religion in American public life. According to Carter, the trivialization of religion is manifest in our society; the early chapters of the book are devoted to the identification of instances of trivialization. Carter argues that such trivialization is harmful, both to religious believers and to society as a whole, and in later chapters of the book suggests ways in which trivialization can be combatted.

The theme of trivialization is paramount, for the identification of the problem drives its proposed solution. Carter's general thesis, that religion is trivialized in American public life, is an important one. However, Carter at times misstates or overstates the problem of trivialization, which in turn weakens his proposed solutions. In both areas, the description of the problem and the choice of solution, Carter's analysis itself runs the risk of trivializing religion.

Carter combines many issues under the label of trivialization. For the sake of clarity, I will describe four types of trivialization that predominate in Carter's analysis. The first type of trivialization is our society's refusal to take religious discourse seriously. Carter's argument focuses on the anti-religious nature of our public rhetoric: "[O]ne 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

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is something wrong with religious devotion.”¹ This rhetoric dismisses religious beliefs as “fads” and discourages “serious” religious belief.² The analysis of rhetoric is central to the book as Carter strives to convey “the attitude that we as a political society hold toward religion.”³

Carter’s evidence supporting this anti-religious rhetoric is largely anecdotal. Certain anecdotes arise from social interactions. For example, Carter asserts that if a professional were to tell a group of well-educated professionals that she is committed to a political opinion because it is the will of God, the conversation would stop. This silence would occur because many Americans are uncomfortable with the open expression of religious belief in a professional setting. Other anecdotes display the contempt shown in the media toward advocates of religious belief, especially toward members of the Religious Right. Some anecdotes point to the ways in which the institutions of our society belittle religious belief, such as when public school teachers are prohibited from reading Bibles in their classrooms or when military personnel are not allowed to wear yarmulkes.

Carter’s initial description of religion’s trivialization in the public sphere demonstrates both the strengths and weaknesses of an anecdotal argument. The stories are calculated to lead the reader (at least the religious reader) to conclude that something in our society is indeed amiss. However, the anecdotal nature of his evidence for the trivialization of religion leaves Carter vulnerable to counter-anecdotes about religion’s pervasive influence in public life, in, for example, the language of our political campaigns and the speeches of our presidents. Not only Republican Presidents Bush and Reagan, but also Democratic Presidents Carter and Clinton openly relied upon religious language and symbolism during their tenure. One commentator on American religion has even attributed Dukakis’ loss to Bush in part to his failure to understand or capture the religious spirit of the American people.⁴ Carter confronts this argument that religion is pervasive, but ultimately dismisses it by concluding that much of our public religious discourse is itself trivial. Carter’s second type of trivialization, then, concerns the way in which our society’s use of religious language and imagery trivializes religion by treating “God as a hobby.”⁵ Politicians frequently

1. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 6 (1993).

2. *Id.* at 141.

3. *Id.* at 15.

4. See GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 51-61 (1990).

5. CARTER, *supra* note 1, at 23-43.

refer to God, but their language is not religiously serious. Carter accepts that religious rhetoric is ubiquitous. However, he concludes that

the seeming ubiquity of religious language in our public debates can itself be a form of trivialization—both because our politicians are expected to repeat largely meaningless religious incantations and because of the modern tendency among committed advocates across the political spectrum to treat Holy Scripture like a dictionary of familiar quotations, combing through the pages to find the ammunition needed to win political arguments.⁶

Such trivialization occurs, for instance, when politicians state that God supports their point of view, or when they assert that God brings the nation to victory in war. While Carter sees such rhetoric as harmful to our society, he also has serious religious reasons for opposing it: he “tremble[s] for [the] souls” of persons who so abuse religion.⁷

A third danger also confronts religion in the public arena: when the state has too much power over religion, religious belief is trivialized. One of Carter’s themes throughout the book is that religion must remain independent of the state; otherwise, it loses the prophetic voice that allows it to criticize secular power. Carter often cites David Tracy for the point that the purpose of religion is to embody the power of resistance.⁸ Religious witness is discredited when religion becomes the servant of politics. Trivialization occurs when the state becomes the final arbiter of religious matters, when the state oversteps its bounds and seeks to control religion. Thus trivialization may occur, not only in social and political settings, but when society’s institutions, especially the courts, attempt to control religious practice. “To insist that the state’s secular moral judgments should guide the practices of all religions is to trivialize the idea that faith matters to people.”⁹

This state control of religious institutions is Carter’s central concern; he devotes the second part of the book to an analysis of how this country’s legal institutions have contributed to the trivialization of religion. However, there is a final type of trivialization identified in the early chapters of the book. This fourth type of trivialization is not the result of journalists’, politicians’, judges’ or other citizens’ acts against religion. Instead, at times, “it is the religiously faithful who are the

6. *Id.* at 45.

7. *Id.* at 47.

8. *Id.* at 37, 41, 82, 142.

9. *Id.* at 38.

trivializers, in the relentless effort to demonstrate that the Word of God supports virtually every political cause.”¹⁰ In Carter’s view, trivialization occurs when believers look to political ideals as the source of their convictions, and then interpret the Word of God in light of these political commitments. Carter opposes this procedure; true believers begin with the Word of God, and then apply it. Their starting point must never be political conviction. The faithful trivialize religion when they use it as a prop for predetermined political positions. “If the role of the religionist is first to make up his or her mind about which political position to take and next to search for religious arguments to support the already selected view, the idea of faith as the *source* of moral inspiration is trivialized.”¹¹

The trivialization thesis, then, incorporates a broad array of concerns about religion. Carter’s description of the anti-religious tenor of our society’s rhetoric is in many ways accurate. One irony surrounding this book is that the reaction to its publication confirms some aspects of its trivialization thesis. Religious leaders and religious scholars have for years identified troubling attitudes toward religion in American public life. They have long decried a growing secularization that refuses to take religion seriously, and have offered numerous suggestions to infuse religion into the public square.¹² However, that thesis now appears to have gained credibility because it is enunciated by a Yale law professor; the book has received sustained attention in the media, as well as favorable publicity from another lawyer, the President of the United States. Perhaps religion appears less trivial when defended by graduates and faculty of the well-respected Yale Law School, but is suspect when a minister or theologian defends it.

Nonetheless, Carter has done a great service in provoking debate on this subject. While his anecdotes do not prove his case, they will resonate with the experience of many citizens. It is not surprising that a lawyer wrote this book, for any “religious” person who has inhabited the courtrooms, law firms, or law schools of this country will appreciate the force of Carter’s portrayal. His anecdotes capture an attitude that is indeed present in this society’s legal and political institutions.

10. *Id.* at 68.

11. *Id.* at 81.

12. *See, e.g.*, MICHAEL J. HIMES, FULLNESS OF FAITH: THE PUBLIC SIGNIFICANCE OF THEOLOGY (1993); MARTIN E. MARTY, THE PUBLIC CHURCH: MAINLINE, EVANGELICAL, CATHOLIC (1981); RICHARD P. MCBRIEN, CAESAR’S COIN: RELIGION AND POLITICS IN AMERICA (1987); CHRISTOPHER F. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION (1986); RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

However, Carter's treatment of religion is often inadequate, especially in the description of the third and fourth types of trivialization. As I have mentioned, Carter does not restrict his criticisms to the "unreligious": he criticizes religious believers for their trivialization of religion. He fears that religious believers trivialize religion when they become "political preachers." He worries that religion is trivialized when churches ally themselves too closely with the state. In each instance, Carter's analysis does not adequately address the complexity of the problems confronting the "serious" religious believer. This limitation runs the risk of trivializing religious discourse.

Carter devotes chapter four to this problem of "political preaching." Under the label of political preaching, Carter criticizes religious adherents who first decide their political convictions, and then express those convictions in religious language. He again uses anecdotes to make his point: he relates the stories of a Catholic priest who preaches against the ACLU and a divinity school student who preaches against American involvement in Central America. Carter worries that such preachers have "no conception of a faith not guided by [their] prior political commitments," and fears that the "political tail [is] wagging the scriptural dog," that "politics [is] masquerading as religion."¹³ Preachers of all ideologies, both right and left, are guilty of this sin; they are "sincere," but their sincerity does not excuse their conduct. Carter identifies the danger in this practice: the churches will reflect the values of their society instead of preaching the prophetic word of God. Instead, churches that heed the Word of God should make their members uncomfortable by challenging society's values.

Carter's solution to the problem of political preaching appears to be that believers should pay more attention to their foundational texts:

Ordinarily, a preacher concerned with the world can sensibly turn his or her attention to the relevant holy book and find guidance. Political preachers share this revealed guidance with their flocks. Matters become troublesome, however, when one's theology always ends up squaring precisely with one's politics. At that point, there is 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.¹⁴

13. CARTER, *supra* note 1, at 69.

14. *Id.* at 70.

Carter asks of religious believers that they discern, not create, the will of God. Numerous times throughout the chapter, he asks believers to consult the Word of God before they consult their political convictions. "For there is a vital difference between a political inspiration that is fired by one's deepest religious beliefs and a claim of religious belief that is fired by a preexisting political commitment."¹⁵

This conception of the relationship between religious faith and politics trivializes the complex faith of the believer. The weaknesses are clear from the chapter's opening anecdotes. What is wrong with the priest's and the student's sermons? On these facts, one cannot know whether the preacher's starting point was the Word of God or her political convictions. Moreover, it is not clear why one's political convictions may never serve as the starting point of an action undertaken from authentic faith. Carter's notion of political faith would exclude many committed Christians from the definition of serious believer.

Carter assumes that the believer can turn to Scripture, and find in it some neutral Word of God answering social and political questions. However, as centuries of Christian ethical reflection attest, the believer's moral life is not so simple. Scripture may not have the answer to a specific political question. Its insights on certain issues may be conflicting or contradictory. Different interpretations of Scripture may yield different ethical norms.¹⁶ Carter's description of simply turning to the Word of God does convey the experience of many religious believers in a variety of religious traditions. But this narrow interpretation of sincere religious belief excludes the experiences of many other believers who combine religious faith with political action in a different manner. For many Christians, the world is a place of revelation, where God communicates God's will to persons who seek to understand it. For example, Carter refers numerous times to Roman Catholic participation in politics, yet ignores the roots of that tradition in natural law theory. The natural law tradition asserts that God's will is inscribed in human nature, and is discerned by humans in the law of their own being and in their interactions with others. Thus, it is precisely through political events that one may learn something of God, and of

15. *Id.* at 80.

16. See generally BRUCE BIRCH & LARRY RASMUSSEN, *BIBLE AND ETHICS IN CHRISTIAN LIFE* (1989); CHARLES A. CURRAN & RICHARD A. MCCORMICK, *THE USE OF SCRIPTURE IN MORAL THEOLOGY* (1984); DAVID KELSEY, *THE USES OF SCRIPTURE IN RECENT THEOLOGY* (1975); WILLIAM C. SPOHN, *WHAT ARE THEY SAYING ABOUT SCRIPTURE AND ETHICS?* (1984); James F. Childress, *Scripture and Christian Ethics: Some Reflections on the Role of Scripture in Moral Deliberation and Justification*, 34 *INTERPRETATION* 371 (1980); James M. Gustafson, *The Place of Scripture in Christian Ethics: A Methodological Study*, 24 *INTERPRETATION* 430 (1970).

God's will for human beings.¹⁷ Political preachers, then, may in fact be extraordinarily attentive to the will of God.

Carter's treatment of the ordination of women in the Episcopal Church, his own religious tradition, illuminates his approach. Carter should be commended for his ability to display his own religious convictions as well as the tensions the believer may experience within his own community of faith. Carter supports the ordination of women, yet acknowledges the difficulties confronted by the church in the dispute over women in the priesthood and episcopacy. He concludes that the disagreement among Episcopalians

[i]s not a secular moral error and should not be described in secular moral terms—it is an error in theological understanding and should be described in theological terms. So if, as many deeply pained opponents charge, the church was wrong, the error was necessarily a misunderstanding of God's will; it would not be proper for those of us who support the ordination of women to say that the Bible cannot possibly wall off the priesthood from women simply because we do not want it to, for then we fall victim to the lure of political preaching.¹⁸

On this contested subject, then, “[t]he answer has everything to do with discerning and then enacting the will of God, and nothing to do with the rights of women.”¹⁹ Carter states that his convictions about secular equality are irrelevant to this question; it is what he believes as a Christian that counts. For some believers, that is true. But for other believers, the interaction between the world and the Word of God is far more complex; Carter appears to accuse them of trivializing religion. As Carter insists in later chapters, there are many misguided religious believers who do horrible things in the name of religion. But the “political preaching” decried by Carter is not necessarily a trivialization of religion.

Carter acknowledges the abuses enacted in the name of religion, and the dangers that arise from the exclusion of religion from public life. However, he does not complete the next and necessary stage of the argument: to emphasize that religion can and must learn from the moral

17. See generally THOMAS AQUINAS, *SUMMA THEOLOGIAE* 75 (Benzinger Bros. 1948) (question 94); CHARLES A. CURRAN & RICHARD A. MCCORMICK, *NATURAL LAW AND THEOLOGY* (1991); GENE H. OUTKA & PAUL RAMSEY, *NORM AND CONTEXT IN CHRISTIAN ETHICS* (1968); GENE H. OUTKA & JOHN P. REEDER, *PROSPECTS FOR A COMMON MORALITY* (1993).

18. CARTER, *supra* note 1, at 77.

19. *Id.*

insights of the so-called secular world. For example, although Carter does not discuss liberation theology in any detail, at one point he dismisses liberation theologians for their politicization of the Word of God.²⁰ Yet liberation theologians have identified the harm that comes to society when churches pretend that they are apolitical and in doing so support the unjust status quo. Moreover, it was a worldly insight—that the poor were suffering tremendous injustice—that galvanized liberation theologians to oppose poverty in the name of God.²¹ Many liberation theologians display the complex interaction between religious conviction and worldly action that Carter dismisses too rapidly as political preaching.

In addition to attacking political preaching, Carter argues that religion is trivialized when believers impose their political views on the state through the development of interest groups and through growth in political power. The result of this process, Carter fears, is religion's corruption. Religion may lose the power of resistance if it gains actual political power.

Again, religious treatment of this question is far more nuanced, and Carter once more runs the risk of belittling legitimate theological opinions. For example, the proper role of the Christian in politics has been a central question throughout the history of Christianity, and is still debated at length in contemporary Christian ethics. The "render unto Caesar" text has not rendered a definitive answer. The merits and demerits of the accession of the emperor Constantine to political power are still assessed, as Christians ask whether it entailed a corruption of the essential message of the Gospel, or was instead an appropriate interpretation of the Gospel in new times and new places.²² That discussion continues in the ongoing debate among Christians about the merits of pacifism and just war theory.²³ Christians have also disagreed about whether they should even participate in political life, a tension evident in the history of Evangelicals in the United States, who for years steered clear of politics but then turned to political activism out of religious conviction.²⁴

20. *Id.* at 81.

21. For the classic expression of these views, see GUSTAVO GUTIERREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS AND SALVATION* (1971).

22. *See, e.g.*, JOHN H. YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* (1984).

23. *See, e.g.*, DAVID HOLLENBACH, *NUCLEAR ETHICS: A CHRISTIAN MORAL ARGUMENT* (1983).

24. *See generally* DAVID O. MOBERG, *THE GREAT REVERSAL: EVANGELISM AND SOCIAL CONCERN* (1977); TIMOTHY L. SMITH, *REVIVALISM AND SOCIAL REFORM: AMERICAN PROTESTANTISM ON THE EVE OF THE CIVIL WAR* (1980).

Within the tradition of Christianity, there are constant disputes about the proper role of the Christian in politics. Carter does identify some of the dangers of political life. Yet his warnings against religious corruption would lead us to dismiss many believers who seek to combine religious faith and political action. Throughout his book, Carter criticizes liberal politicians and commentators for their anti-religious rhetoric, yet his argument would exclude liberal theologians from the ranks of serious believers.

This theological perspective also undermines Carter's analysis of the history of the religion debate in the United States. Carter identifies the liberal opposition to conservative criticism of *Roe v. Wade*²⁵ as a turning point in this country's treatment of religion. However, Americans have long disagreed about the role of religion in politics. Christians disagreed about the civil rights movement, as Carter acknowledges. Christian debate about nuclear arms has been vigorous, with positions ranging from nuclear pacifism to acceptance of the first strike. Carter tends to identify Catholics with the conservative side of abortion politics, but their bishops' letter on nuclear weapons was greeted with considerable dismay in conservative circles. The more accurate historical perspective would instead suggest, not that *Roe* has changed the discussion, but that citizens disagree about profound societal issues on both religious and political grounds. One might add a commonsensical thesis: As a general rule, individuals dislike the use of religion in political and legal argument when they disagree with the political or legal viewpoint expressed. Thus, conservatives oppose liberal religion, and liberals oppose conservative religion. Such a thesis finds support in surveys that suggest that there is more agreement between liberal Protestants and liberal Catholics, or between Evangelical Protestants and conservative Catholics, than there is across the spectrum of American Catholics or Protestants.²⁶

This broader commonsensical thesis about American religion would emphasize a question that Carter raises several times, but does not address in sufficient detail: How should the religious believer participate in American public life? Or to employ language consistent with the book: What is the solution to the problem of trivialization? The reader can glean some of Carter's views on this subject from his acceptance of fellow law professor Michael Perry's writings on religion and law,²⁷ but is left

25. 410 U.S. 113 (1973).

26. See, e.g., David Leage, *The Decomposition of the Religious Vote, 1960-1992* (Sept. 1993) (unpublished paper presented at the annual convention of the American Political Science Association).

27. CARTER, *supra* note 1, at 55-56 (citing MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* 72-73 (1988); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991)).

wishing to learn more of Carter's specific views on this difficult subject. Carter welcomes all religious voices into the American public square, and encourages expression of political and legal convictions in explicitly religious language.²⁸ Along with Perry, he worries that religious believers are asked to "bracket" their religious convictions when they enter the public sphere.²⁹ Such bracketing is unfair to religious believers because it asks them to exclude an essential part of their identities from the public square, an exclusion not demanded of non-religious citizens.

There are many possible solutions to this difficult problem of the role of the religious believer in the public forum. For example, John Rawls, in his recent book *Political Liberalism*,³⁰ argues that, for public matters, citizens should convert their religious beliefs into arguments that meet the criteria of public reason. While Carter does not address this particular Rawlsian argument, he would certainly oppose this suggestion as an inappropriate "bracketing" of religious belief, and would encourage believers to express their religious beliefs publicly in explicitly theological language. Carter believes that "all of these efforts to limit the conversation to premises held in common would exclude religion from the mix."³¹

Carter is certainly correct that many political and legal arguments do "exclude religion from the mix." For example, Ronald Dworkin's heralded book *Life's Dominion*³² (published contemporaneously with Carter's) addresses philosophical and religious arguments about abortion and euthanasia, topics important to Carter. Dworkin focuses on arguments about the "sacred," but his definition of sacred is at odds with its use by adherents of religion. Indeed, Dworkin redefines key moral arguments as *religious* in order to exclude them from the public square on First Amendment grounds.

Carter seeks to prohibit just such limitations on the participation of religious believers in public argument. However, if Dworkin allows too little religious argument into the public square, Carter may allow too much. There is some middle ground between Dworkin and Carter. If trivialization is to be avoided, then Carter would do well to ask of believers, not that they leap into the public arena proclaiming the will of God, but that their arguments about religion be rigorous, just as legal and political arguments must be rigorous.

28. *Id.*

29. *Id.* (quoting PERRY, MORALITY, POLITICS AND LAW, *supra* note 27, at 72-73).

30. JOHN RAWLS, POLITICAL LIBERALISM (1993).

31. CARTER, *supra* note 1, at 55.

32. RONALD DWORKIN, LIFE'S DOMINION (1993).

Carter may worry that a rigorous test of religious argument would exclude too much religion from the public conversation. Michael Perry has been accused of imposing such a rationalist requirement on religion by excluding non-rationalist or fideist approaches to religious faith from the public arena.³³ Carter may strive to avoid that problem. Nonetheless, there are good reasons to be rational about religion. Religious traditions may at times contain moral insight that “secular” reason ignores. For example, it is probable that the civil rights movement was originally rooted in Martin Luther King’s Christian faith, and not in a reasonable interpretation of the Constitution. Yet religions are also sources of division and discrimination, and at times defenders of immoral conduct. For that reason, approaches to religion and politics that encourage a mutual criticism—of religion by law and politics, and of politics and law by religion—are more promising than Carter’s uncritical encouragement of theological argument.³⁴ For example, Rawls does not ask religious believers to “bracket” their religious beliefs.³⁵ In contrast to Dworkin, he does not prefer philosophy to religion, but treats them both as comprehensive views of equal status. His “wide” view of public discourse is preferable to Carter’s “open” view because it encourages religious believers to be self-critical as well as critical of others. Carter’s open view may encourage, rather than discourage, trivialization.

The flaws in Carter’s solution to the problem of trivialization carry over into the legal chapters of the book. *The Culture of Disbelief* also assesses the place of religion in the American legal system. Here Carter’s analysis is most thorough, lucid, and interesting, but also most disappointing. He identifies the pressing issues in American jurisprudence on religion, and discusses them with clarity and rigor. Yet here he refrains from a normative conclusion when the reader is most eager for the law professor’s wisdom: with the exception of his Free Exercise Clause analysis, he does not explain how the courts can avoid the trivialization of religion.

Carter joins many scholars in criticizing the unsatisfactory condition of the Supreme Court’s First Amendment jurisprudence. He echoes a theme popular among American scholars of religion—that the First

33. Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2073-76 (1992) (book review).

34. See, e.g., Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 70, 86-88 (1990) (placing some restraints on “radically implausible” religious arguments, but encouraging a public philosophy that approaches disagreements with collective moral discussion, even about divisive religious and moral issues like abortion).

35. John Rawls, *The Idea of Public Reason: Further Considerations* (1993) (unpublished manuscript, on file with author).

Amendment's purpose is to protect religion from the encroachments of the state, and not to bar religion from the public square.³⁶

Carter first identifies the weaknesses of Supreme Court Establishment Clause cases. The jurisprudence is centered on the *Lemon v. Kurtzman*³⁷ test, a test that Carter calls a "lemon." To pass the *Lemon* test, "the statute in question must meet three criteria: 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.''"³⁸ Carter is critical of *Lemon*, but he does not explicitly propose an alternative standard. He does argue that the religious motivation of the legislator should not be significant for Establishment Clause analysis.³⁹ He faults the Court for at times taking religious motivation into consideration in its constitutional analysis.⁴⁰ The Court did so, for example, in *Edwards v. Aguillard*,⁴¹ when it struck down a law that required schools to teach creationism. Carter agrees with the result of *Edwards*, but not with the Court's reasoning that the statute was unconstitutional because its supporters were religiously motivated.⁴²

In fact, Carter does not explicitly adopt any of the tests proposed by scholars of Establishment Clause jurisprudence.⁴³ However, one can infer that he favors a coercion test, which would prohibit governmental action that coerces citizens into religious conduct. Carter supports the Court's school prayer decisions⁴⁴ and its invalidation of the creationism statute,⁴⁵ and opposes public funding of crèches.⁴⁶ He supports statutes that permit moments of silence in schools, presumably because they are not coercive. Carter draws the line at the prohibition of Bible reading or

36. See generally CHRISTOPHER F. MOONEY, *PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION* (1986); JOHN C. MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* (1960).

37. 403 U.S. 602 (1971).

38. CARTER, *supra* note 1, at 110 (quoting *Lemon v. Kurtzman*, 403 U.S. 602).

39. *Id.* at 112.

40. *Id.* at 191.

41. 482 U.S. 578 (1987).

42. CARTER, *supra* note 1, at 111.

43. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (proposing an endorsement test); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) (proposing a coercion test); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 175 (1992) (proposing a pluralist approach); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992) (contending First Amendment establishes a civil public order).

44. CARTER, *supra* note 1, at 108, 186.

45. *Id.* at 168-69.

46. *Id.* at 94-95.

display by teachers, on their own time, in public school classrooms.⁴⁷ Such conduct, he insists, does not violate the Establishment Clause.

Carter poses a test case designed to examine the role of religion in the welfare state under current Establishment Clause jurisprudence. The example involves a drug clinic director who is very effective in solving drug addiction, but who asks his clients to pray as part of their treatment. The drug clinic asks for government funding. Carter thinks that such funding would be unconstitutional under *Lemon*. Carter's own resolution of the problem is not clear. In another section of the book, he concludes that on the Establishment Clause he casts his lot with Harold Berman and so "would proscribe [state] establishments but would allow support on the same basis as other groups."⁴⁸ Both Carter and the Supreme Court leave us without clear alternatives to *Lemon*: despite predictions of its demise, *Lemon* remains the law of the Establishment Clause.⁴⁹

Carter offers important criticisms of Establishment Clause jurisprudence. He concludes that the interpretation of the Establishment Clause should

avoid the ahistorical conclusion that its principal purpose is to protect the secular from the religious, an approach that, perhaps inevitably, carries us down the road toward a new establishment, the establishment of religion as a hobby, trivial and unimportant for serious people, not to be mentioned in serious discourse.⁵⁰

However, he does not make clear how a change in this jurisprudence would solve, or at least ameliorate, the problem of trivialization. For example, Carter is critical of the Supreme Court for not clearly abolishing publicly funded crèches under the *Lemon* test. It is never clear exactly why this supporter of religion opposes the crèches so vigorously, although presumably it is due to an acceptance of the coercion standard. In this area, constitutional law professor Michael McConnell seems to get the better of the trivialization argument. In response to Court decisions that allow a nativity scene "surrounded by a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear,

47. See *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), cert. denied, 112 S. Ct. 3025 (1992).

48. CARTER, *supra* note 1, at 120.

49. The Court did not take the opportunity to overrule *Lemon* in *Board of Education v. Grumet*, 114 S. Ct. 2481 (1994), despite some speculation that it would do so.

50. CARTER, *supra* note 1, at 115.

hundreds of colored lights, a banner stating 'Season's Greetings,' and a talking wishing well," but prohibit a nativity "tastefully displayed with a backdrop of greenery and poinsettias,"⁵¹ McConnell concludes:

The Court appears to have arrived at the worst of all possible outcomes. It would be better to forbid the government to have religious symbols at all than to require that they be festooned with the trappings of modern American materialism. After all, no one's religion depends on whether the government displays the symbols of the Christian and Jewish holidays. But if there are to be religious symbols, they should be treated with respect. To allow them only under the conditions approved by the Court makes everyone the loser.

The religious symbols cases are themselves the perfect symbol of the Supreme Court's attitude toward religion. The Court does not object to a little religion in our public life. But the religion must be tamed, cheapened, and secularized—just as religious schools and social welfare ministries must be secularized if they are to participate in public programs that are supposed to be open to all. Authentic religion must be shoved to the margins of public life; even there, it may be forced to submit to majoritarian regulation.⁵²

McConnell's solution is to allow more public exposure to a variety of religious symbols.⁵³ This conclusion appears consistent with Carter's trivialization thesis, but is not the one that Carter recommends.

Carter is even more critical of the Court's Free Exercise decisions. He believes that a strong Free Exercise Clause is necessary, not only in an era of trivialization of religion, but in the era of the welfare state.⁵⁴ He joins the widespread criticism of the Court's decision in *Employment Division v. Smith*,⁵⁵ the Oregon peyote case. In *Smith*, the Court refused to grant an exemption to a state anti-drug law to Native American employees who wanted to use peyote in their religious rituals. In addition to *Smith*, Carter criticizes the *Lyng* case, in which the government passed a law to develop a road through sacred territory needed for worship.⁵⁶ The Court ruled for the government, based on its concern that the

51. McConnell, *Religious Freedom at a Crossroads*, *supra* note 43, at 126-27 (citations omitted).

52. *Id.* at 127.

53. *Id.* at 193.

54. CARTER, *supra* note 1, at 125-26.

55. 494 U.S. 872 (1990).

56. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

government would not be able to act if it were always paying attention to the religious needs of individuals.⁵⁷

In both cases, the Court ignored the needs of the religious believer, and so, Carter argues, defeated the purpose of the First Amendment. Many laws of general application have an impact on religious believers. Carter proposes a return to the compelling state interest test for these cases. "[T]he rule would be that the state, in trying to enforce a law impinging on the religion's ability to sustain itself, would be required to demonstrate a compelling interest in enforcement of the questioned statute."⁵⁸ The state would therefore have to show a compelling goal which it could not accomplish by less intrusive means. Exemptions for religious believers are especially important in this era of the welfare state, and Carter suggests that this compelling state interest test may be applied to grant exemptions for religious practices that run afoul of federal housing or discrimination law. Here he raises but does not resolve the case of a religious landlord who runs afoul of state anti-discrimination law when he declines to rent his apartment to a non-married couple because of his religious opposition to fornication.⁵⁹

In the Free Exercise area, Carter's argument about trivialization is clearest. Religion will be trivialized if government, especially the government of the welfare state, passes laws that erode the right of individuals to religious freedom. Carter is correct to emphasize that the minority religions are most endangered by the Court's reluctance to grant exemptions in its First Amendment jurisprudence.⁶⁰ And here, at least, one political institution agrees with Carter; the Congress recently passed the Religious Freedom Restoration Act.⁶¹ The Act seeks to re-establish the pre-*Smith* standard of *Sherbert v. Verner*,⁶² which dictates that the government may substantially burden religion only if it furthers a compelling interest and employs the least restrictive means.

In the final sections of the book, Carter mentions other areas of the law for which religion is important, namely euthanasia, abortion and capital punishment. Once again, while it is clear that religion has much to add to the public discussion of these issues, one looks in vain for suggestions about how the courts can resolve these issues in a way that does not trivialize religion. At times it is difficult to understand how these chapters connect to the earlier sections of the book.

57. *Id.* at 452.

58. CARTER, *supra* note 1, at 132.

59. *Id.* at 136-45.

60. *Id.* at 126-29, 131-32.

61. The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

62. 374 U.S. 398 (1963).

It is too much to demand of Professor Carter that he resolve, in one book, all the most complicated questions of our political and legal systems. It is noteworthy that the book, while not providing systemic resolutions to these difficult problems, offers a glimpse of one resolution of the complex interaction between religion and the law. That resolution is in the person of Professor Carter himself, who, in the midst of academic discussions of disputed points, reveals his own attempts to integrate his professional and religious life. In his discussions of his professional experience, his participation in the Episcopal Church, and most poignantly in the concerns he expresses about the education of his children, Professor Carter exemplifies the concerns of a serious religious believer who interacts with this society's legal and political institutions. It is the display of such wisdom in his own reflections on law, politics and religion that should leave readers anxious to hear in more detail the systemic solutions that Professor Carter advocates for the problem of trivialization.