MYSTERIZING RELIGION

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A mystery of faith is a truth of religion that escapes human understanding. The mysteries of religion are not truths that human beings happen not to know, or truths that they could know with sufficient study and application, but instead truths that they *cannot* know in the nature of things. In the Letter to the Colossians, St. Paul writes that as a Christian apostle, his holy office is to "bring to completion for you the word of God, the mystery hidden from ages and from generations past."[1] Note that Paul does not say that his task is to make everybody understand the Christian mystery, or to clarify it for ordinary human contemplation, but instead to complete or fulfill it. Similarly, in 1 Timothy, Paul writes: "Undeniably great is the mystery of devotion,"[2] so great that comprehension of it is not possible. But one of the most striking Biblical passages concerning the idea of mystery in Christianity is in the First Letter to the Corinthians, where Paul says:

> And my speech and my preaching was not in the persuasive words of human wisdom, but in shewing of the Spirit and power; That your faith might not stand on the wisdom of men, but on the power of God. Howbeit we speak wisdom among the perfect: yet not the wisdom of this world, neither of the princes of this world that come to nought; But we speak the wisdom of God in a mystery, a wisdom which is hidden, which God ordained before the world, unto our glory: Which none of the princes of this world knew; for if they had known it, they would never have crucified the Lord of glory.[3]

Here is a real division between human and divine understanding—between two different types of knowledge and ways of knowing—

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1 *Colossians* 1:25–26.

2 1 *Timothy* 3:16.

3 1 *Corinthians* 2:4–8.

the "wisdom of this world" and "the wisdom of God in a mystery."[4] Apart from these Biblical passages, the Catholic Church often refers to the sacraments as mysteries.[5] The lead-in to the Memorial Acclamation, a part of the Catholic Mass, includes the declaration, "[t]he mystery of faith," in reference to the Eucharist.[6] And other religious traditions refer to mysteries in their own respective systems of thought, worship, and practice.[7]

Religious mysteries tend to designate the unfathomable matters of religion, those that the merely human mind cannot grasp: the nature of God,[8] for example, or the nature of God's relations with human beings, or the nature of His providential order of creation. The mysteries of religion may be regarded by nonbelievers and religious skeptics as the clearest proofs of religion's fantastic, unreal, or irrational quality.[9] They are unreal because they are unverifiable, and what is unverifiable is a subjective delusion. Yet they will be looked upon by believers in precisely the opposite way: as evidence of the faith's reality. For the believer, the mysteries of religion are beyond human

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4 *Id.* at 2:6–7.

5 CATECHISM OF THE CATHOLIC CHURCH paras. 1092–1125 (2d ed. 1994). In Orthodoxy, the sacraments are called "the mysteries." TIMOTHY WARE, THE ORTHODOX CHURCH 274 (2d ed. 1997).

6 *See Texts for Order of Mass Settings*, U.S. CONF. OF CATH. BISHOPS, https://www.usccb.org/committees/divine-worship/policies/mass-settings-texts#tab—memorial-acclamations [https://perma.cc/3RZ8-78VX].

7 *See, e.g.*, *Deuteronomy* 29:29 ("The secret things belong to the LORD our God, but the things that are revealed belong to us and to our children forever, that we may do all the words of this law."); *Exodus* 33:17–23, in which Moses is invited to observe God only from behind because no man can see the face of God and live. As Judaism believes in God's incorporeality, the passage may be understood as referring to God's essence rather than to any visual image. See also the view in Hinduism that the Vedas are sacred texts that must be revered. *See* GAVIN FLOOD, AN INTRODUCTION TO HINDUISM 6 (1996).

8 Of the Christian mystery, "the Word became flesh," Cardinal Newman observes: "It is true that, so far as such statements of Scripture are mysteries, they are relatively to us but words, and cannot be developed. But as a mystery implies in part what is incomprehensible, so does it in part imply what is not so; it implies a partial manifestation, or a representation by economy." JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 97–98 (1845).

9 Again, Newman:

> [H]ad Tacitus, Suetonius, and Pliny, Celsus, Porphyry, and the other opponents of Christianity, lived in the fourth century, their evidence concerning Christianity would be very much the same as it has come down to us from the centuries before it. In either case, a man of the world and a philosopher would have been disgusted at the gloom and sadness of its profession, its mysteriousness, its claim of miracles, the want of good sense evident in its rule of life, and the unsettlement and discord it was introducing into the social and political world.

Id. at 240.

understanding. They transcend the earthly and the ordinary. For this reason, they are true.

In this short essay, I suggest that "mysterizing" religion may change the stakes in some of the most controversial contemporary conflicts in law and religion. To mysterize (not a neologism, but an archaism)[10] is to cultivate mystery about a subject, in the sense described above—to develop and press the view that a certain subject or phenomenon is not merely unknown, but unknowable by human beings. At the very least, such mysteries are unknowable by those human beings who have charge of the secular legal order of earthly human affairs, Paul's "princes of this world."[11] That is what I propose to do for religion in American law, and what may well alter the landscape of the conflicts between advocates of religious liberty and the forces opposing them. Fortunately, I have had some help. The mysterization of religion seems already to be well under way in American constitutional law. It is a central feature of the Supreme Court's current conception of religion. Religion's mysterization, therefore, may be as much an exercise in the description of portions of the law as it now is, as a prescriptive project about what that law should become.

The specific context I consider concerns the question whether the government may make public funds available to private schools—either directly or through mechanisms of independent, private choice—on condition that the schools accept and implement nondiscrimination rules regarding the sexual identity or conduct of their students and faculty. It is the question that the Supreme Court seemed to leave open in a footnote in *Carson v. Makin*:

> Both dissents articulate a number of other reasons not to extend the tuition assistance program to BCS and Temple Academy, based on the schools' particular policies and practices. . . . Maine rightly does not attempt to defend its law on such grounds, however, because the law rigidly excludes any and all sectarian schools regardless of particular characteristics.[12]

The question is acute because private *religious* schools that accept state monies on condition that they also accept nondiscrimination rules concerning the sexual identity and conduct of their employees

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10 The Oxford English Dictionary reports "mysterize" to be an "[o]bsolete" and "rare" word, whose two meanings from centuries past were "[t]o interpret mystically" and "[t]o make mysteries of things." *Mysterize*, OXFORD ENG. DICTIONARY, https://www-oed-com.proxy.library.nd.edu/view/Entry/124643?redirectedFrom=mysterize#eid [https://perma.cc/W6K3-RRQT] (Mar. 2019).

11 1 *Corinthians* 2:8.

12 Carson v. Makin, 142 S. Ct. 1987, 1998 (2022).

and students are likely to raise free exercise objections to such conditions.

The mysterization of religion probably alters the legal landscape by rendering the claim that conditions concerning the admission or hiring of LGBTQ persons interfere with religious free exercise stronger than it otherwise would be. And the argument for mysterization itself derives strength from the Supreme Court's own conception of religion as ineffable, unintelligible, and unevaluable, as well as from the Court's recent ministerial exception cases. The general view of religion that emerges from these cases creates a powerful argument that these conditional funding arrangements would, if implemented, be unconstitutional infringements on the free exercise of religion. Religious schools have many reasons to guard against cultural and social influences that aim to change their fundamental commitments on many matters, including those of sexual morality. But they should have little to fear, at least from the Supreme Court, on that score from the bare fact of accepting government monies on equal terms with everyone else.

I conclude by briefly reflecting on what the mysterization of religion may mean more generally for law and religion. It is not all good news for religion. In fact, upon closer inspection, it turns out that mystery in traditional religions like Christianity, conceptualized as a partial or incomplete apprehension of the transcendent, is quite different than mystery in the contemporary legal understanding of religion as psychological, interior, personal unfathomability. Almost its opposite.

I. THE DOCTRINAL LANDSCAPE

Two clusters[13] of doctrinal rules are relevant to the conditional funding question. The first—call it the "free exercise cluster"—includes the following:

1. While neutral and generally applicable laws are immune from free exercise challenge, the presence (real or theoretical) of exceptions to such laws in their text or administration will subject them to strict scrutiny.[14]

13 I am grateful to Nathan Chapman for thinking about this problem in terms of clusters of rules. *See* Nathan Chapman, *Constitutional Rules and the Political Economy of Character Formation: Conditions on Government Aid to Religious Schools as a Case Study,* in THE IMPACT OF POLITICAL ECONOMY ON CHARACTER FORMATION (Piet Naudé, Michael Welker, and John Witte, Jr. eds., 2023).

14 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1872 (2021).

2. Government need not subsidize private schools, but if it does, it may not exclude religious schools from the receipt of public funds, whether the exclusion depends on their religious status or (with one narrow exception) on the religious uses to which the funds will be put.[15]

3. Religious institutions (to include religious schools) have the right to hire and fire personnel whose role involves conveying the religion's message and carrying out the religious institution's mission, with considerable deference to the institution in defining this role.[16]

4. Government may not provide a benefit on the condition that the recipient give up a constitutional right, and conditions which "sufficiently interfere" with a recipient's "expressive" message are unconstitutional.[17]

On the other side of the controversy sits a smaller but perhaps more salient group of rules—the "nondiscrimination cluster." These are:

A. State universities may decline to recognize student groups as "registered student organizations"—thereby denying them certain benefits of a limited public forum—if those groups refuse to comply with the university's "all-comers" policy for group membership and leadership, the groups' claims of associational freedom notwithstanding.[18]

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15 *See Carson*, 142 S. Ct. at 2000. The exception concerns the pursuit of devotional degrees in higher education and has been explained on the historical ground that this particular practice was a disestablishmentarian concern. Locke v. Davey, 540 U.S. 712, 722–23 (2004).

16 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61 (2020). Though I am calling the ministerial exception part of the "free exercise cluster," the Court has grounded the exception in the Establishment Clause as well.

17 See *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 54, 64 (2006), where the Court held that there was no constitutional violation. Compare *FCC v. League of Women Voters*, 468 U.S. 364, 398–99 (1984), where a conditional grant specifically targeting expressive messages was struck down, with *Agency for International Development v. Alliance for Open Society, Inc.*, 570 U.S. 205, 218–19 (2013), where the Court held that a requirement that recipients of funds adopt a specific policy opposing prostitution and sex trafficking was an unconstitutional condition, inasmuch as Congress was "compelling a grant recipient to adopt a particular belief as a condition of funding." For a classic case obliquely implicating unconstitutional conditions in the free exercise area, see *Sherbert v. Verner*, 374 U.S. 398, 401 (1963), though the case was not analyzed this way.

18 Christian Legal Soc'y v. Martinez, 561 U.S. 661, 669 (2010). Note, however, that CLS's free exercise claim was rapidly dismissed by the Court in a footnote, relying on *Employment Division v. Smith*, 494 U.S. 872, 878–82 (1990). *See Martinez*, 561 U.S. at 697 n.27.

B. The federal government may withdraw tax exempt status from a private university when the university discriminates on the basis of race in forbidding interracial dating and marriage among the university population, its claims of religious free exercise notwithstanding.[19]

There are conceivably other constitutional rules in play that do not implicate religion as directly—those, for example, involving associational and speech rights, and those concerning prohibited discrimination, including religious discrimination, on the basis of the Fourteenth Amendment. But these two clusters map the basic doctrinal landscape of constitutional free exercise that would be relevant to conditional grants to religious schools dependent on their accepting a nondiscrimination policy as to the LGBTQ status or conduct of their employees and students.

As between the two clusters, which will control this approaching legal conflict? The free exercise cluster is generally of more recent vintage and contains a larger number of rules that curtail government interference with free exercise. But the nondiscrimination cluster seems to relate more centrally to the key question inasmuch as its rules deal with subsidies and other benefits the state can offer to private religious schools or groups on the condition that they refrain from otherwise prohibited discriminatory practices. No rule is a perfect fit. Rule (1) is about government regulation, not government conditions (though conceivably *Fulton* might be viewed as a conditions case, though the Court did not analyze it that way), and the latest case on Rule (2) seems to reserve the very question under consideration.[20] Rule (3) for the moment concerns only employees who perform specific functions, and it does not reach students.[21] Rule (4) is a confusing and unpredictable mess more than a doctrine, and the Court has used it primarily in the context of the freedom of speech, not the freedom of religion;[22] who knows whether the Supreme Court intends to address, let alone clarify, its application in the religious freedom area at all? Meanwhile, Rule (A) comes from a very closely divided case whose factual record was highly idiosyncratic, whose result did not concern free exercise proper, and which depended upon the Court's conclusion that alternative associational and expressive venues remained for

19 Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983).

20 *See Carson*, 142 S. Ct. at 1998.

21 *Our Lady*, 140 S. Ct. at 2064, 2069.

22 *See, e.g.,* Rust v. Sullivan, 500 U.S. 173 (1991); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006).

the organization.[23] Rule (B) is several decades old and was derived from a case involving tax exemption and race-based discrimination,[24] hardly an uncontroversial or direct analogy to the question here.

Doctrinally, at least, there seems to be a near equipoise as between these clusters. That balance could tilt one way or another on the basis of extra-doctrinal factors—the Court's current composition, for example, or its more recent preference for strongly protective free exercise outcomes. But at least one other important set of law and religion doctrines is likely to shape the landscape, and, indeed, ought to reform that landscape considerably, making it much more probable that the free exercise cluster would preponderate in the scales in a conditional funding case of this kind.

II. THE MYSTERIZED LANDSCAPE

That doctrine concerns religion's meaning in constitutional law. In a series of cases, the Court has held that religion is not merely an irreducibly complex and multivalent phenomenon, but that it is actually undefinable and unknowably ineffable. Once *Sherbert v. Verner* altered the free exercise test to require a burden-shifting analysis, it became necessary to confront just what a substantial burden on religion might be.[25] In its most important statement on the matter, the Court held that virtually anything someone might sincerely believe qualifies, and even sincerity is rarely questioned.[26] In *Thomas v. Review Board*, the Court stated that an individual who objected to building tank turrets on the basis of conscientious scruple was nevertheless entitled to unemployment compensation benefits after termination.[27] The Court was clear that religious exemption claimants need not hold beliefs that align with members of the religious groups with which they claim membership; indeed, even beliefs that run contrary to the groups with which claimants purport to be affiliated are entitled to religious legal status. "[R]eligious beliefs," the Court insisted, "need not be acceptable, logical, consistent, *or comprehensible* to others in order to merit First Amendment protection."[28] That conception of religion was reaffirmed in *Frazee v. Illinois Department of Employment Security*, where the Court claimed that it had "[n]ever" suggested that beliefs entirely disconnected from a "sect"—that is, stand-alone creeds of one, or, as

23 *See Martinez*, 561 U.S. at 668, 683, 690, 697 n.27.
24 *See Bob Jones*, 461 U.S. at 605.
25 *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).
26 *See* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 829–30 (1989).
27 450 U.S. 707, 720 (1981).
28 *Id.* at 714 (emphasis added).

sociologist Christian Smith has put it, "simply . . . the strange doings of odd people"[29]—could not qualify as "religious belief[s]."[30]

Elsewhere I have noted that religion as conceptualized in constitutional law is "individuated, private, balkanized, idiosyncratic, and virtually incomprehensible to anybody other than to the claimant (and perhaps not even to the claimant)."[31] While some have argued recently that there may still remain some vestige of a group or communal requirement for constitutionally protected religion, even these scholars concede that the language of *Thomas* and *Frazee* powerfully influences the American legal idea of religion.[32] The Justices continue to rely on this conception,[33] and the believer him- or herself need not understand the belief or be capable of articulating it. One might even say that this conception serves as the only authoritative definition of legal religion in the absence of any other statement by the Court on the subject. It is a conception that has rendered the law of religious liberty subject to not entirely unfounded complaints of incoherence or reducibility to other goods and rights.[34]

In fact, however, religion in American constitutional law is not so much incoherent as deliberately obscure. The issue is not an absence of definition, but instead a definition that depends upon religion's essential mystery. Indeed, the definition of religion in constitutional law is exactly that it is a phenomenon ungraspable by or incomprehensible to the human mind. That is a central part of what renders it beyond the regulation of the civil authority. It is the ground of religion's separateness from the "secular"—knowledge hidden from the princes of the world. The attempt to make it coherent, comprehensible, logical, consistent, and so on is seen to be a category mistake, a violation of religion's unknowability and its unmasterability by human ingenuity and design, as its very essence.

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29 CHRISTIAN SMITH, RELIGION: WHAT IT IS, HOW IT WORKS, AND WHY IT MATTERS 26 (2017). Smith criticizes this view of religion, and in doing so he seems also to be criticizing the Supreme Court's view. *See id.*

30 *Frazee*, 489 U.S. at 833.

31 Marc O. DeGirolami, *Establishment's Political Priority to Free Exercise*, 97 NOTRE DAME L. REV. 715, 741 (2022).

32 *See* Mark Movsesian, *The New Thoreaus*, LOY. L. REV. (forthcoming) (manuscript at 20–21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181953 [https://perma.cc/LXH9-C494] (relying on language in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for the view that religion is essentially collective in character).

33 *See, e.g.*, Dr. A. v. Hochul, 142 S. Ct. 552, 557–58 (2021) (mem.) (Gorsuch, J., dissenting from denial of injunctive relief) (quoting Thomas v. Rev. Bd., 450 U.S. 707, 714–16 (1981)).

34 *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2013); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

This is the mysterization of religion. Courts are often said to have reasons of incompetence and lack of jurisdictional authority not (overly) to entangle themselves in adjudicating theologically fraught or complicated matters.[35] But mysterization goes a good deal further. Full mysterization ought to disable courts and other civil authorities from any evaluation at all of a religious claim, exactly *qua* religious. Mysterization removes "religion" altogether from the permissible ambit of civil law and policy. A religious claim's mysterized quality by definition renders it categorically unevaluable by civil authorities, just in the way that the great mysteries of religion are categorically incomprehensible to the human understanding, and therefore unevaluable by it, rather than merely matters of jurisdictional separation. The rapid movement in those free exercise controversies that continue to employ the burden-shifting framework, from substantial burden—only very rarely the ground on which religious free exercise claims lose[36]—to an evaluation of compelling government interests and narrow tailoring, is itself an indication that courts have already internalized a mysterized model of religion. For if sincerity is anything more than a pro forma pleading requirement, then courts are intruding on what is forbidden holy ground and making judgments about a matter not merely beyond their competence, but outside their capacity to fathom.[37]

Does the mysterization of religion change the balance on the matter of conditional school funding and policies on sex and gender imposed by the government? It may, because many of the free exercise cluster doctrines discussed earlier depend upon a school's understanding of its own religious commitments, principles, practices, and mission. A religious school's view that a state interference with, or a state conditional grant dependent upon, believing, behaving, or identifying with a position on a contested question that it deems at the core of its own religious mission, may be rendered stronger under a mysterized conception of religion than it otherwise might be. Against the state's claim that a particular policy on sex and gender is neutral as to religion, the school may more powerfully argue that, to the contrary, such a policy in fact implicates the core mysteries of its religious identity and

35 See, for example, the ecclesiastical abstention doctrine, Watson v. Jones, 80 U.S. (13 Wall.) 679, 730–31 (1871), the ministerial exception, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012), and the last leg of the (now-defunct) *Lemon* test, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

36 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990).

37 The most eloquent formulation of this position in constitutional law is in Justice Jackson's dissent in *United States v. Ballard*, 322 U.S. 78, 92–95 (1944) (Jackson, J., dissenting).

mission. Against the state's claim that sundry school staff are not implicated in transmitting or carrying out the school's religious message, the school may contend that, to the contrary, on its apodictic understanding of religion, they are. Against the claim that a grant of funds conditional on the adoption of a policy on LGBTQ admission and hiring does not "sufficiently interfere" with the school's religious message to render it constitutionally problematic, the school may say that, to the contrary, it, not the government, is in the better position—indeed, the *only* admissible position—to determine what its own mysteries demand as an expressive matter on the subject of sex and gender. In all of these ways, religion's mysterization may alter the calculus, rendering the free exercise cluster of rules likely to govern this controversy more powerful than it otherwise might be.[38]

III. DESECRATING THE MYSTERIES?

All of this concerns whether a religious school may accept government monies while resisting conditions concerning policies about sex and gender. I have argued that current law, if it incorporates a mysterized conception of religion (as I believe it already does), suggests that it could do so and that it would likely prevail in a court challenge against those pressing the nondiscrimination doctrinal cluster. But should it do so? It is sometimes said that accepting money from the government tarnishes or corrupts religions and religious organizations, because it renders them dependent on and subject to the state's preferences and priorities. This is an idea with deep roots in James Madison's more Calvinist moments—whatever his real reasons for making the claim[39]—but it has lingered on in our decidedly post-Calvinist country. It is now pressed principally by liberal scholars.[40]

Whatever may once have been the case at a time of comparatively widespread religious faith and broad cultural entrenchment of formal religion, the corrosion argument has always seemed to me entirely out of place for religious institutions today. The notion that by refusing

38 Of course, this altered balance need not mean that the religious interests would always prevail. It is certainly possible that overriding state interests would still overbalance mysterized religious claims.

39 James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 298 (Robert A. Rutland, William M.E. Rachal, Barbara D. Ripel & Fredrika J. Tuete eds., 1973). See, for example, the language about accepting money as being "adverse to the diffusion of the light of Christianity." *Id.* at 303.

40 *See, e.g.*, Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009); *cf.* Perry Dane, *Prayer Is Serious Business: Reflections on* Town of Greece, 15 RUTGERS J.L. & RELIGION 611, 616–17 (2014).

state money—money granted on equal terms to everyone else—religious schools will somehow emerge stronger or purer is a kind of pietistic nonsense, or else urged on by those with quite other agendas than the strengthening of those institutions. Without resources, religious schools are likely to wither and die. That is what institutions with no resources do, religious or not. At least in this time, it is a fantasy to believe that the mission of any school can be preserved, let alone advanced, without adequate financial reservoirs or cultural strength. And it is an illusion to think that penurious and culturally alienated religious schools could compete for long against far better financed and culturally cushioned competitors.

One could say more, and I will. It is an insult to religious believers who suffer persecution in other lands to suggest that government resources and support for their religion (for example, in the form of money to maintain and preserve church buildings, personnel, infrastructure, and so on) are somehow corruptions, or that it is actually better for them to be so much worse off. Arguments about tarnishing the purity of religious schooling by accepting state funds are bound up with what Nicole Stelle Garnett has rightly called the "irrational, jerry-rigged apparatus" of American education and its "shameful history of anti-Catholicism (which cemented the practice of funding only government-operated schools in the nineteenth century)"—a practice that does not exist in other countries whose religious schools are, if not flourishing, at least in reasonable health, and that are, at last check, hardly theocracies.[41]

It is true that religious schools will need to guard against many internally corrupting influences—"corrupting" to be understood from within their own faith perspective. Any school that sets itself against the bedrock cultural commitments of the new establishment can expect not only substantial external resistance, as I have argued before,[42] but also concerted efforts toward internal subversion and change. Recent studies suggest that home-schooled and parochial-schooled students are as likely as students from any other school, public or private, to identify as LGBTQ or nonbinary, and it seems plausible that their experiences as students at parochial schools are not irrelevant to their

41 Nicole Stelle Garnett, *A Radical Step in the Right Direction*, CITY J. (Oct. 2, 2022), https://www.city-journal.org/arizona-embraces-universal-school-choice [https://perma.cc/NDU4-L4NT].

42 Marc O. DeGirolami, *The New Disestablishments*, 33 GEO. MASON U. C.R.L.J. 31 (2022).

identity formation.[43] But the mysterization of religion will go some distance to eliminating at least one external source of corruption: the states' tendency to gerrymander what counts as "religious" (or, the bad sort of religion, the "sectarian" kind) and "secular" for what are ideologically motivated reasons—for reasons of political powerplay and control.

In one of the more striking recent examples of this type of corruption, in *Carson v. Makin*, the state of Maine took it upon itself to make determinations about which schools were "religious" in a pejoratively "sectarian" fashion so as to warrant exclusion from its private school tuition funding program. At oral argument, Justice Alito asked counsel for Maine whether a school whose "religious beliefs are that all people are created equal and that nobody . . . should be subjected to any form of invidious discrimination and that everybody is worthy of respect and should be treated with dignity" would be excluded or not.[44] Maine's counsel answered that such a school would not be excluded because "that would be very close to a public school," to which Justice Alito replied that, in that case, the state seemed to be preferring religion that approximates Unitarian Universalism to other types.[45]

The external corruption, in this case, is the strategic deployment of the phrase "sectarian" to designate a civically malignant strain of the "religious," in order to prefer schools with particular ideological positions which the state seeks to promote and entrench, and to induce recalcitrant schools to alter their views. A mysterized conception of religion would render the sorts of discriminations Maine engaged in categorically impermissible. States could not select among preferred and disfavored religious positions, classifying this one as sectarian and therefore undeserving, and that one as acceptable and therefore fundable, because they could not say anything at all about religion. Government policies that trenched on the mysteries of private religious institutions would for that very reason encroach on constitutional no-fly zones.

As school choice programs gain traction throughout the country, and as privatized schooling generally becomes more popular,[46] the

43 *See* Eric Kaufman, *Diverse and Divided: A Political Demography of American Elite Students*, CTR. FOR STUDY OF PARTISANSHIP & IDEOLOGY (Oct. 3, 2022), https://www.cspicenter.com/p/diverse-and-divided-a-political-demography [https://perma.cc/88RF-E69K].

44 Transcript of Oral Argument at 63–64, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).

45 *Id.* at 64–65.

46 Garnett, *supra* note 41; *see also* Kaelan Deese, *West Virginia Supreme Court Strikes Big Win for School Choice*, WASH. EXAM'R (Oct. 6, 2022, 6:44 PM), https://www.washingtonexaminer.com/policy/courts/wv-supreme-court-allows-scholarship-funds-private-ed

mysterization of religion may well require states and the federal government to dismantle decades and even centuries-worth of educational jerry-rigging. Indeed, it may be that the fragmentation and polarization of the country more broadly will have similarly splintering effects on the very notion of a "common" school, a school that was designed historically to impart the sort of generic American civic values (and civil religion) that no longer exist. What the philosopher Chantal Delsol has described as the "insurrection of particularities"—a political culture in which the idea of the universal is extinguished, where all we feel loyalty toward are the claims of tribal "affinity" and "identity," and where, for example, religious exemptions are "less concessions than expressions of a transformed politics"—will come for education, too.[47] And when it does, religion's mysterization in law will abet it.

IV. MYSTERIZATION'S MYSTERIES

At first glance, this conception of religion in constitutional law might seem more or less continuous with mysterization as a central feature of ancient and enduring religious traditions including Christianity, Judaism, and others. There is a kind of parallelism in the unknowability and unintelligibility of religion's deepest truths and realities sitting at both its theological and legal or constitutional core.

Upon closer inspection, however, one might wonder whether these conceptions of mysterization are really describing the same phenomenon at all. Indeed, there seem to be a host of long-term problems in mysterized religion if it is thought to define American constitutional religion. There are radical differences between the mysteries of, for example, Christianity or Judaism, on the one hand, and the mysterization of religion in American law, on the other, differences that might even herald the eventual unraveling of religious liberty as a constitutionally protected right. Differences that go to the heart of what mysterization once was, and no longer is.

One critical distinction between, for example, the Christian mysteries and mysterization in American constitutional law, as I have

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[https://perma.cc/A7LL-YFTA]; Anya Kamenetz, Cory Turner & Mansee Khurana, *Where Are the Students? For a Second Straight Year, School Enrollment Is Dropping*, NPR (Dec. 15, 2021, 5:35 AM), https://www.npr.org/2021/12/15/1062999168/school-enrollment-drops-for-second-straight-year [https://perma.cc/9YMB-UP2L].

47 Chantal Delsol, L'insurrection des particularités, ou comment l'universel se défait, *translated as* The Insurrection of Particularities, or, How the Universal Comes Undone, CTR. L. & RELIGION: L & RELIGION F. (July 8, 2022), https://lawandreligionforum.org/2022/09/06/delsol-the-insurrection-of-particularities-or-how-the-universal-comes-undone/ [https://perma.cc/V88V-WXWC].

described it, involves the question of the source of the mysteries that are religion's deepest grounds or constituents. In the Christian mysteries, the source is God, the all-powerful transcendent, and what is greater than and external to human beings—what is higher than the realm of ordinary human experience and understanding. To be a Christian is, at least in part, to be a member of a group of believers in the superhuman truths of Christianity that lie beyond this world, truths that can be identified but never understood, let alone mastered or controlled. In fact, it is the division between human and divine knowledge that makes sense of mysterizaton. But mysterization in the American legal view of religion is very different. It locates the source of the mysteries in the human psyche, in a conception of individual interiority and autonomous choice as their ultimate source.[48] It merges the divine and the human, erasing the separation that gave mysterization its sense. It makes mysterization humanly accessible—or perhaps better, humanly generated.

The psychic interiority of contemporary religious mysterization illuminates two further differences between religious mysteries as they once were and religious mysteries as they now are: their manipulability and what I will call their fractalization.

Religious mysteries are today highly manipulable inasmuch as rather than being permanently real and fixedly true, they are impermanently real and changeably true. Carl Trueman has observed of the uses of modern technology that "we all live in a world in which it is increasingly easy to imagine that reality is something we can manipulate according to our own wills and desires, and not something that we necessarily need to conform ourselves to or passively accept."[49] Trueman's focus is on the historical transformation in ideas of the self and its effect on the "social imaginary" that governs contemporary views of human sexuality and identity, but analogous points may be made about religion.[50] A technological civilization signals the end of a civilization of transcendent truths and the transition from illumination through the outer light of divine reason to illumination through the inner light of human reason. As Augusto Del Noce once put it: "[N]obody can fail to observe that the progressive diffusion of the technological

48 The observation is not new. The locus classicus for the coming of the self's modern primacy is Charles Taylor's work. *See, e.g.*, CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989); CHARLES TAYLOR, A SECULAR AGE (2007). For development of some of these themes in law, see STEVEN D. SMITH, PAGANS & CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC (2018).

49 CARL R. TRUEMAN, THE RISE AND TRIUMPH OF THE MODERN SELF 41 (2020).

50 *Id.* at 37–38.

mentality has been accompanied by the disappearance of the words true and false, good and bad, even beautiful and ugly . . . . They have been replaced by the words 'original,' 'authentic,' 'fruitful,' 'efficient,' 'meaningful[]' . . . ."[51]

Religion's mysterization in American law entrenches a conception of religion in which "transcendent purpose collapses into the immanent and in which given purpose collapses into any purpose I choose to create or decide for myself"[52]—an extreme version of the world of Charles Taylor's "immanent frame"—in which traditional religion and its institutions must be conformed to the requirements of psychological religion. American legal religion is a matter of self-creation and the inward quest for psychological fulfillment, a quest that is completed when the identity constructed by the self is recognized by law. Indeed, recognition of one's religion by law is the moment at which the state confers a kind of dignitarian status on religion, much as it has been said to confer dignity in other identity-based contexts.[53] But the conferral of dignitarian recognition becomes more difficult when religion's mysteries are as manipulable, changeable, and impermanent as are the flights of human invention and desire. Something similar may be said of the transformation of dignity itself in contemporary American law. We have detached dignity from its transcendent anchor—that all have inherent and equal dignity because all are "made in the image of God"— and reconnected it to the incoherent chaos of changeable, consumer taste and individual preference. Small wonder that legal arguments ostensibly grounded in human dignity have become so thoroughly unpersuasive to anyone not otherwise committed to the result for which they are enlisted.

The other consequence of the interiorization of religious mystery in American law is not merely fracture but fractalization, a tendency toward reduction to smaller and smaller units, or fracture upon fracture, in repeating patterns.[54] Religious groups and hierarchies within

51 AUGUSTO DEL NOCE, *Technological Civilization and Christianity*, *in* THE AGE OF SECULARIZATION 68, 75 (Carlo Lancellotti ed. & trans., 2017).

52 TRUEMAN, *supra* note 49, at 42.

53 *See* Obergefell v. Hodges, 576 U.S. 644, 666 (2015).

54 My colleague Christopher Borgen calls my attention to literature in comparative politics and public international law concerning breakaway movements, where Group A's secession from a larger group results in a cascade of ever-smaller secessions from within the same group unit, from Group A into Group B, from B into C, and so on. One could call this vertical fracture or "matryoshka doll fracture." But one might also see a different sort of fracture, where the tendency of Group A to secede stimulates other groups unassociated with Group A also to desire secession. This is horizontal fracture. In "fractalization," I intend to designate an analogous process of splintering on these various axes and perhaps others.

those groups, and any residual sense of differential recognition for such groups and their hierarchies, seem to require shattering. They are inauthentic inasmuch as they suppress the primacy of the individual and the individual's right to recognition on equal terms with every other individual, committed (for the moment, at least) to his or her sacred mysteries. The inexorable movement in the legal conception of religion is toward ever more fragmentary expressions of it, generating ever more personalized and à la carte mysteries. The progress of individualized religion is a process of involution, and religious movement, like political movement, is no longer "eschatological, as in modernity, but archeological[,]" for post-modernity.[55]

The confluence of the manipulability and fractalization of religion creates a serious problem for mysterized religion in American law. It is not a sustainable project, at least in the long run, in practice or in theory. In practice, as my colleague, Mark Movsesian has pointed out, the pressures likely to be exerted in the coming decades by the most rapidly growing group of American religious, the religiously unaffiliated or "Nones," are considerable.[56] One possible, perhaps likely, course, at least in the short term, is that courts will generally deny the religious freedom claims of the Nones, even as their share of the law and religion docket increases, without explaining just how it is that a mysterized conception of religion does not plainly include them. That has been the usual solution in law and religion when such problems arise—that the legal theory is "good enough for government work," in Paul Horwitz's clever phrase, but that it is best not to ask too many difficult questions of it.[57]

But it is an approach that does exacerbate the problems of incoherence that presently plague the law of free exercise. In particular, a theory of religious freedom that adopts a mysterized conception of religion, but whose selective application depends on the religious claimant or group that comes to court, is open to powerful criticism. It suggests either that a new conception of religion is necessary, or that religious liberty's time as a distinct constitutional right may have passed with religion's own transformation in post-modernity. These are the darkest, and most difficult, mysteries of religion's mysterization.

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55 Delsol, *supra* note 47.

56 *See* Movsesian, *supra* note 32 (manuscript at 12–20).

57 PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION 99 (2010).