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Caesar's Faith: Limited Government and
Freedom of Religion in *Bruker v. Marcovitz*

The Supreme Court of Canada has long pursued the view that our law is somehow an expression and repository of what it terms "Canada's fundamental values." In Bruker v. Marcovitz, the Court added to the catalogue of these judicially decreed and enforced values one concerning religion, namely, the protection of Canadians against the arbitrary disadvantages of their religions. This comment argues that the Court's judgment in this regard constitutes a fundamental threat to religious liberty inasmuch as it subordinates religious belief and practice to state values by making the legal acceptability of the former turn on their conformity to the latter.

La Cour suprême du Canada est depuis longtemps d'avis que notre droit est, en quelque sorte, à la fois l'expression et le dépositaire de ce qu'elle qualifie de « valeurs canadiennes fondamentales ». Dans l'arrêt Bruker c. Marcovitz, la Cour a ajouté au répertoire de ces valeurs définies et appliquées judiciairement une valeur qui a trait à la religion, c'est-à-dire la protection des Canadiens contre les désavantages arbitraires de leurs religions. L'auteur prétend que l'arrêt de la Cour à cet égard constitue une menace fondamentale à la liberté de religion dans la mesure où il assujettit les croyances et la pratique religieuses à des valeurs de l'État en statuant que l'acceptabilité légale des croyances et de la pratique religieuses est fonction de leur conformité aux valeurs de l'État.

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[P]olitics and the pulpit are terms that have little agreement. ...The cause of civil liberty and civil government gains as little as that of religion by th[eir] confusion Those who quit their proper character to assume what does not belong to them are, for the greater part, ignorant both of the character they leave and the character they assume.

– Edmund Burke¹

Introduction

In *Bruker v. Marcovitz*,² the Supreme Court of Canada had before it two issues of much and enduring moment to the conduct and character of limited government. The Court had first to decide when a liberal state might properly claim, through its judicial branch, sovereignty over matters involving or affecting religion. It had then to decide how the judicial branch ought properly to exercise that sovereignty, on what grounds and towards which ends. I say that these issues—the one concerning justiciability and the other judgment—have wide and lasting significance to liberal governance just because religious liberty is itself so essential and foundational a part of the scheme of ordered liberty. For freedom of religion, along with the

1. Edmund Burke, *Reflections on the Revolution in France*, ed. J.G.A. Pocock (Cambridge: Hackett Publishing Co., 1987) at 10-11.

2. *Bruker v. Marcovitz*, 2007 SCC 54 (Deschamps and Charron JJ. dissenting) [*Bruker*].

freedom of the family,³ is the seat and source of the moral independence, personal and institutional, which is the mark, measure, and meaning of limited government. It will be my purpose in this too brief comment to persuade that the Court's judgment on these matters in *Bruker* constitutes a grave threat to religious liberty and with that, to freedom under and through law more generally. I shall argue that this is so because *Bruker* subordinates religion to the state in a fashion and by means heretofore unthinkable. To be precise: *Bruker* threatens to make conformity to state values the measure of the acceptability at law of the faith of individuals and communities; it does so by rendering the state's values—what I have here dubbed Caesar's faith—superior to the precepts and practices of faith; and in this, as I shall later argue, totalizing fashion, it so turns the “precious achievement”⁴ of religious liberty upside down and inside out, that little may remain of it beyond state sufferance.

Before pursuing this argument, I should make clear that my sole concern in this comment is the Court's understanding of the relationship that properly obtains between state and religion. I do not here therefore engage many of the issues⁵ with which the Court tangled. My rationale is simple enough: though *Bruker* is indeed a complicated and complex judgment, its sense, its outcome, and especially its importance, in my view, all finally reside in the Court's theory of the relationship between the state and religious practice. That said, I shall proceed as follows. After rehearsing the facts and reviewing the judgments of the trial and appellate courts, one and all so important here, I shall analyze Justice Deschamps's dissent (Charron J. concurring) that offers a tightly reasoned presentation of the standing view of the state's proper relationship to faith. I shall then pursue my argument against the content and consequences of Justice Abella's majority judgment (McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, and Rothstein JJ. concurring).

3. A few comments towards its conclusion aside, this comment is not the place to defend or to explore either the place of the family in the scheme of ordered liberty or the relationship between religious liberty and liberty of the family. Concerning the former matter, see for example, Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, MA: Harvard University Press, 2006); Jennifer Roback Morse, “No Families, No Freedom: Human Flourishing in a Free Society” (1999) 16:1 *Social Philosophy & Policy* 290.

4. Jurgen Habermas, “Notes on a post-secular society” (18/06/2008), online: Sign and Sight <<http://www.signandsight.com/features/17114.html>>.

5. About which, see *infra* note 82.

I. *Preliminaries*

1. *Facts*

The issues in *Bruker* arose from a sad and rather sordid tale of contemporary marriage and divorce. Stephanie Bruker was a twenty-year-old university student and Jason Marcovitz was a thirty-two-year old divorcé when they married in 1969. Both were (vaguely on the facts reported) observant Jews, he Orthodox and she Conservative. Because Ms. Bruker was unable to conceive, the couple adopted two girls, one born in 1976 and the other in 1978. In April of 1980, Ms. Bruker initiated divorce proceedings. During the marriage and unbeknownst to Mr. Marcovitz, she was involved in an extra-martial affair with a former college sweetheart, who also was Jewish, by whom she did become pregnant. She terminated the pregnancy in July 1979.

By July 1980, the parties with the assistance of their counsel had amicably settled on a number of corollary matters including child custody and support, the occupation and sale of the matrimonial home, and a lump-sum payment of spousal support to Ms. Bruker. This "Consent to Corollary Relief," subsequently twice ratified judicially, also contained a paragraph, Paragraph 12, that stipulated as follows:

The parties appear before the Rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious Get, immediately upon the Decree Nisi of divorce being granted.

A Get is a divorce under Judaic law. Though it is supervised by a Rabbinic court, called a Beth Din, divorce like marriage is consensual under Judaic law: as it is the parties (and not the Rabbi) who marry themselves, it is the parties (and not the Beth Din) who divorce themselves. Since the Get must be consensual on both sides, where one party refuses, the two remain married under Judaic law despite the wishes of the party who wants the marriage dissolved and despite the status of the marriage under state law. However, because under Judaic law the husband only can initiate a divorce (and he may do so for any reason or for no reason at all) and because the wife can neither prevent him from so doing nor force him so to do, the Jewish rules of divorce, beneath their consensual surface, impact women in a special way. If a husband refuses to initiate a religious divorce on marriage breakdown, the wife becomes an agunah (she is chained to a dead marriage) and she can either accept her agunah status or accept the consequences of her refusal to do so. The consequences are substantial in religious terms. Not only is the wife forbidden ever to marry another man, but should she couple with one, she becomes an adulteress and should she

bear a child, the child is declared a mamzer (bastard) who may within the faith marry only another mamzer or a convert to Judaism. Viewed from this vantage, then, the Get is really a permission, the sole source of which is the husband, which allows Jewish women to remarry and bear children within their faith.⁶

In *Bruker*, the decree nisi was granted in October 1980. However, by that time relations between the parties had deteriorated and in consequence, Marcovitz refused to comply with the Paragraph 12 agreement to appear before the Beth Din to consent to a Get. From there, matters deteriorated still further. Numerous proceedings—including an attempt by Bruker to have Marcovitz cited for contempt (it was dismissed)—ensued. Marcovitz complained about Bruker's frustrating access to the children, and Bruker complained about his failure to pay child support. In 1989, Bruker moved from Montreal to New York City where she claimed her agunah status prevented her from successfully pursuing marriage with a Conservative Jewish man. During this time, Bruker became estranged from her daughters, one of whom indeed was taken from her and placed in foster care.

In July 1989, Bruker sued Marcovitz for damages in the amount of \$500,000 for his failure to comply with Paragraph 12 of the Consent. She proceeded in this fashion, it should be noted, because the *Divorce Act* does not contemplate actions in damages or specific performance for an alleged breach of an order issued under the *Act*.⁷ This amount was calculated as follows: \$200,000 "for having been restrained from getting on with her life since the Decree Nisi"; \$200,000 "for having been restrained to remarry according to the Jewish faith"; and \$100,000 "for having been restrained of having children." Marcovitz defended the action on a number of grounds including that Bruker too failed to honour parts of the Consent and that his refusal to honour Paragraph 12 was a matter of religious conscience.

For reasons not entirely certain, on 5 December 1995, Marcovitz finally, some fifteen years late, appeared before the Beth Din in Montreal and the rabbis issued the Get. Bruker was then forty-seven years old and Marcovitz sixty-three. This turn of events did not however lead her

6. See Irwin H. Haut, *Divorce in Jewish Law and Life* (New York: Sepher-Hermon Press, 1983), Part I; Irving A. Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Westport: Greenwood Press, 1993) at c. 1.

7. See *Divorce Act*, R.S.C. 1985, (2nd Supp.), c. 3, s. 17 which permits only their variation, rescission or suspension. See also Hilton J.A.'s commentary in *Marcovitz v. Bruker*, [2005] R.J.Q. 2482 at paras. 39, 84 (Que. C.A.) and Deschamps J.'s dissent in *Bruker*, *supra* note 2 at paras. 158-161.

to abandon her action in damages. Instead, in June 1996 she amended her claim by increasing the amount to \$1,350,000 to account for a new head, loss of consortium, which she valued at \$750,000. Marcovitz in turn amended his defense. The action, he thenceforth claimed, should be dismissed because, *inter alia*, Paragraph 12 is an unenforceable moral obligation, the action violates his freedom of religion and conscience, and Jewish divorce is a religious matter in all respects beyond the reach of civil courts. It was those amended pleadings that found their way first to the Quebec Superior Court and subsequently to the Quebec Court of Appeal and to the Supreme Court of Canada.

2. *Prior proceedings*

a. *Quebec Superior Court: the alchemy of form*

Mass J. is quick and succinct:

Defendant claims that he had a religious obligation, not a civil one, and thus this dispute cannot be adjudicated before a civil court. However, once the Defendant signed a civil contract, agreeing to appear immediately before Rabbinical authorities, this obligation moved into the realm of the civil courts, and the religious obligation became embedded in a secular agreement. Consequently, the Defendant had a clear and unequivocal civil law obligation to appear “immediately” before the Rabbinical authorities. He did not appear, however, for 15 years. Once there is a civil contract, even if its object relates to religious obligations, it is justiciable and within the jurisdiction of the civil court. ...

Simply put, a valid civil obligation with religious undertones was created. Since Defendant breached this obligation, Plaintiff is entitled to seek damages before a civil court.⁸

In the judge’s view those “religious undertones” do not mean much. The issue here, “the assessment of damages due to Defendant’s long delay in granting the Get,” he says, “raises no issues of enforcement of a religious obligation.”⁹ On the contrary, “the pith and essence of what is being asked for in this case is not religious. ... [A] Get is not being asked for, rather the case is an assessment of damages stemming from a factual situation which involves Jewish parties and Jewish institutions—but principles of Jewish law do not have to be examined in depth.”¹⁰

This is to affirm both that contractual form has preeminence at law over religious content and that contractual form serves to empty at law otherwise religious matters of their religious significance. Both propositions are,

8. [2003] R.J.Q. 1189 at paras. 19-20.

9. *Ibid.* at para. 25.

10. *Ibid.* at para. 30.

without very much more, risible. The first would have us believe that any religious matter is justiciable provided only that it is clothed in contract. But, were that a principle of our law, judges would be authorized in family law matters to assess damages for breach of a wide range of religious undertakings, such as a promise to raise children in a particular faith or the promise to act as a model of religious devotion for them, provided only the promise appears in a Consent to Corollary Relief. Nor of course is the silliness confined to the family law context. Suppose I undertake as part of a contract of sale, for example, of your family business, to quit the Catholic Church and to become a congregant of the First Assembly of Christ. On the Judge's view of matters, my breach of those undertakings is without more justiciable just because of their contractual form and the only question for the court is whether you the vendor can make out damages (and judging by the trial result in *Bruker*—about which more in a moment—that should not be too onerous a burden).

The second proposition requires that we suspend judgment. Here, our judgment *must* tell us that both the matter and consequences of which *Bruker* complained were wholly religious in nature. The promise after all was to attend at a religious ceremony concerning the dissolution of a religious marriage, the threshold to both of which, the ceremony and the outcome alike, was a religious intention by the parties, including notably their not having bound themselves previously either to attend or on the outcome.¹¹ And the consequences too were wholly religious, both in kind and by cause. That this is so is reflected, remarkably, in Mass J.'s damages award.

The Judge dismissed both the first and last head of damages (loss of consortium).¹² His dismissal of the first head, those flowing from Ms. *Bruker* "having been restrained from getting on with her life since the Decree Nisi of Divorce," is especially telling. As put by Mass J.:

From the evidence brought before the Court, Plaintiff's enjoyment of life was in no way diminished by her failure to obtain her Get. Indeed, she testified that during the relevant period, she had many male lovers, many friends, an active social life and engaged in various business activities. While the various medical records produced show she was going through some emotional turmoil during the relevant period, such turmoil was to a large part due to her self-questioning, her seeking to satisfy her sexual appetites and needs, and her role in society generally.¹³

11. About which see Hilton J.A.'s judgment in *Bruker*, *supra* note 7 at paras. 46-47.

12. The judge dismissed damages for loss of consortium on grounds that "Plaintiff did not refuse any offer of marriage" on account of not having a Get: *supra* note 8 at para. 53.

13. *Ibid.* at para. 44.

Having thus dismissed the *secular* consequences, the judge sets his sights on the *religious* consequences. As regards damages flowing from her “having been restrained to remarry according to the Jewish faith,” he offers the following marvel of curial meddling in religious affairs:

While there is no evidence that any suitor broke off his relationship with Plaintiff because of her inability to marry him before a Rabbi ...—indeed there is no evidence of any offer to marry at all—Plaintiff was nevertheless entitled to exercise her freedom of religious choice as she alone determined it. ... Matters of religious conscience must be left to the adult parties invoking them and not be imposed by others. Plaintiff has satisfied the Court that despite her many deviations from the doctrines and precepts of the Orthodox Jewish Community—her abortion, extra-marital affairs, use of contraceptives, etc.—Plaintiff was and remained a member of the Orthodox branch of the Jewish community, that she therefore had the right to remarry before a rabbi of that community and to do so, would have needed a Get from a Beth Din recognized by such a community.¹⁴

So religious consequences there only are and the Court will manage these as it sees fit (by *inter alia* disregarding religious law and declaring religious absolution and standing) in service to awarding civil damages. Finally as regards damages flowing from “her having been restricted of having children,” the Judge first admits that since Plaintiff “failed to adduce any evidence that any relationship which could have led to marriage foundered on her not having a Get, she was not prevented from having [a religiously legitimate] child with such a partner.”¹⁵ Yet, he then concludes that damages nonetheless properly sound because, under Judaic law, “she was generally unable to have ... a legitimate child” and because that “affected her choice of male companions and lovers.”¹⁶ Mass J. awarded \$37,500 for restriction of religious remarriage (\$2,500 for each of the fifteen years Marcovitz refused to cooperate in obtaining the Get) and \$10,000 for restriction of having those spectral, religiously legitimate children.¹⁷

All of which is to say, whatever consequences Marcovitz’s failure to live up to Paragraph 12 had for Bruker, those consequences were religious in origin and in kind: though her civic personality remained completely intact—under Canadian law, as a divorced person, she was free, just like

14. *Ibid.* at paras. 46-47. Incidentally, despite his meddling in affairs religious, the judge got his facts wrong: Bruker, as the Quebec Court of Appeal would later note, was not an Orthodox Jew, she was a Conservative Jew.

15. *Ibid.* at para. 51.

16. *Ibid.* at para. 52.

17. *Ibid.* at paras. 49, 52, 62.

everyone else so situated, to remarry and have children without legal restriction—her private devotional self suffered the religious consequences of her devotion to Conservative Judaism.

We shall see next that neither the Quebec Court of Appeal nor the Supreme Court of Canada was fooled by the Superior Court's spurious defense of its judgment to sanction Marcovitz and to reward Bruker. However, whilst the Court of Appeal simply declared the defense "erroneous"¹⁸ and overturned the result, a majority at the Supreme Court sought that something more that would make sense of a result it endorsed. This it did by articulating a way to tame the judicial supervision of religious undertakings that the trial court let loose on our law. We shall see too, alas, that the Court's solution is more dangerous still.

b. *Quebec Court of Appeal: substance rules form*

On appeal, Marcovitz sought the reversal of Mass J.'s judgment and the dismissal of Bruker's action. In cross-appeal, Bruker sought an increase of the damages award to the \$1,350,000 amount claimed in her 1996 amended claim. In allowing the appeal, Hilton J.A. (Dutil and Bick JJ.A. concurring) ruled that religious substance, and not the happenstance of secular form, is determinative.

Hilton J.A. puts the issue thus: "does Mr. Marcovitz's refusal to respect the agreement ... mean that he has exposed himself to damages, or, does the nature of the obligation stray into the domain of religion that is normally beyond the ken of the secular courts?"¹⁹ His answer is elegant:

Although one cannot help but be sympathetic to the plight of a Jewish woman whose former husband delays or denies her a ghet ..., I have concluded that the substance of the former husband's obligation is religious in nature, irrespective of the form in which the obligation is stated, and accordingly, that an alleged breach of the obligation is not enforceable by the secular courts to obtain damages or specific performance.²⁰

In support of this ruling, Hilton J.A. offers a rewarding analysis of the nature of religious liberty and of the relationship that properly obtains between the state and religion. He first identifies the twofold obligation of the judicial branch in matters involving or respecting religion: on the one hand, courts must distance themselves "from becoming involved in

18. *Supra* note 7 at para. 82.

19. *Ibid.* at para. 49.

20. *Ibid.* at para. 76. See also para. 83 ("the substance of the obligation was religious and not secular with religious undertones, as the trial judge held") and para. 88 ("the most that can be said from a civil law perspective of the obligation ... is that it is a moral obligation").

disputes between parties that are internal to their religions” and on the other hand, they must “respect the fundamental principles of freedom of religion and the exercise of religious conscience.”²¹ From the first obligation flows the commandment that governs in matters such as those at play in *Bruker*:

Manifestly, it is not the role of the secular courts to palliate the discriminatory effect of the absence of a *ghet* on a Jewish woman who wants to obtain one, any more than it would be appropriate for secular courts, in an extra-contractual context, to become involved in similar disputes involving other religions where unequal treatment is the fate of women in terms of their access to positions in the clergy, or as we have seen recently in other contexts, the fate reserved for same-sex couples being denied the right to marry in religious ceremonies of some religious faiths.²²

Which is to say, it does not fall to the courts to imprint upon religion the values, legal equality especially, that the state, so far as public affairs are concerned, properly exists to serve. Applied here, this commandment means precisely what the judge says it means: “If there is any relief available to Ms. Bruker, it is in a religious forum, not a secular one.”²³

The second obligation, to protect freedom of religion, is the ultimate source of this prohibition. This is so because freedom of religion is a *negative* liberty, a liberty *from* state interference and coercion, the sole focus and meaning of which is to prohibit the state’s doing things to religion, to religious conduct and conscience.²⁴ Or so the Court seems, rightly, to think. Hilton J.A. puts it this way:

The purpose of freedom of religion or the exercise of religious freedom should not be interpreted as having a coercive component. In essence, freedom of religion is a fundamental personal right. Canadian courts do not have the protection of religion per se as part of their mission. Rather, recourse can be had to Canadian courts to ensure that individuals can act in accordance with their religious beliefs, subject to laws of general application that satisfy provisions such as section 1 of the *Canadian Charter*.²⁵

21. *Ibid.* at para. 77. See also para. 50.

22. *Ibid.* at para. 76.

23. *Ibid.* at para. 90.

24. John Finnis has recently put the matter nicely: religious liberty, he says, is “an *immunity*, of individuals and groups, from *coercion* ... in respect of religious belief, and all those expressions of religious belief, or other acts of putting one’s religious belief into practice” Nice too is his statement of the implication: “So state governments and legal systems have a negative duty: not to coerce religious acts” See: John Finnis, “Religion and State: Some Main Issues and Sources” (2006) 51 *Am. J. Juris.* 107 at 117, 124.

25. *Supra* note 7 at para. 78.

Applied here, this conception of negative religious liberty casts Bruker's claim and Marcovitz's position in stark jurisprudential relief. As regards Bruker, the Court concludes that she "does not seek the Court's protection for the exercise of her freedom of religion. Instead, she seeks to be indemnified for Mr. Marcovitz's failure, from her perspective, to perform a religious act that the evidence shows he could not [under Judaic law] be compelled to perform and could only perform voluntarily, despite a pre-existing undertaking to do so."²⁶ In consequence—and this surely is the root and leaf of it—"[t]o condemn Mr. Marcovitz to pay damages in such circumstances would be inconsistent with the recognition of his right to execute his religious beliefs or duties as he sees fit without curial intervention."²⁷ It would, that is, violate his right to be left alone by the state in matters of his religious life.

It was with this thoughtful and respectful judgment that the Supreme Court of Canada chose subsequently to contend. We shall see that the majority simply side-stepped it, and that the dissent insisted, often scathingly, on its wisdom.

II. *At the court*

That leave was granted in *Bruker* was perhaps an early signal that something momentous was in the offing.²⁸ This is certainly the way things worked out. The Court had at hand the poorly constructed judgment of the Superior Court and Hilton J.A.'s solidly reasoned redaction of the jurisprudence and tradition of religious liberty. Unhappily, the Court largely ignored the latter and set itself instead to salvaging the credibility of the former.²⁹ This it did by means both novel and devastating and in disregard of the warning of the dissenting justices.

26. *Ibid.* at para. 79.

27. *Ibid.* at para. 80.

28. Bruker filed for leave on 18 November 2005, just short of two months after the Quebec Court of Appeal handed down its judgment (20 September 2005). Leave to appeal was granted 28 April 2006 (coram: Binnie, Deschamps and Abella JJ.) on the following issue: "whether secular courts are precluded from adjudicating a breach of a [religious] obligation agreed to in a civil contract." See: Supreme Court of Canada, Bulletin of Proceedings, "Judgements on Applications For Leave" (28 April 2006) at 591, online: <<http://scc.lexum.umontreal/en/bulletin/2006/06-04-28.bul.wpd/06-04-28>>. The Court heard argument on 5 December 2006, and delivered its judgment on 14 December 2007. Marcovitz subsequently filed a motion for a re-hearing which was dismissed on 10 March 2008: Supreme Court of Canada, Bulletin of Proceedings, "Motions" (20 March 2008) at 465, online: <<http://scc.lexum.umontreal.ca/en/bulletin/2008/08-03-20.bul/08-03-20.bul.pdf>>.

29. The majority devotes a scant three paragraphs to the latter, none of which exceeds mere reportage: *Bruker*, *supra* note 2 at 36-38.

1. *The dissent: shield not sword*

Straightaway, Deschamps J. casts the issue in *Bruker* against the tradition of religious liberty as a negative freedom: “The question before the Court is whether the civil courts can be used not only as a shield to protect freedom of religion, but also as a weapon to sanction a religious undertaking.”³⁰ She then adds that whilst “many would have thought it obvious in the 21st century, the answer is no,” the majority’s conclusion “amounts to saying yes.”³¹ After this happy beginning Deschamps J. devotes the remainder of her dissent to a defense of the traditional view of the matter and to criticism of the majority’s reasoning. I shall pause briefly on each aspect.

Though marred by her preoccupation with multiculturalism³² (and more on this matter when we come to the majority), her defense of religious liberty as negative liberty begins where it ought, with the state’s proper relationship to religion. Deschamps J. puts this simple matter—which at one point she terms, “this principle of non-intervention in religious practices”³³—simply: “the state is neutral where religion is concerned”³⁴ and “the courts” must therefore “remain neutral where religious precepts are concerned.”³⁵ This “‘negative’ view of freedom of religion”³⁶ does not mean “a court is ... barred from considering a question of a religious nature.”³⁷ It does, however, mean that the judicial branch is only properly seized of authority in such matters when “the claim is based on the violation of a rule recognized in positive law,” public or private, since that alone provides “a neutral basis for distinguishing cases in which intervention is appropriate from those in which it is not.”³⁸ Neutrality, then, is a fundamental (and in her view, “deeply rooted”³⁹) limitation on curial meddling in religious affairs since courts are thereby “limited to ensuring that laws are constitutional and, in the case of a private dispute, to identifying the point at which rights converge so as to ensure respect for freedom of religion.”⁴⁰

30. *Ibid.* at para. 101.

31. *Ibid.*

32. *Ibid.* at paras. 102, 103, 120, 181.

33. *Ibid.* at para. 131.

34. *Ibid.* at para. 120.

35. *Ibid.* at para. 102.

36. *Ibid.* at para. 121.

37. *Ibid.* at para. 122.

38. *Ibid.*

39. *Ibid.* at para. 127.

40. *Ibid.* at para. 126.

It is this understanding of religious liberty and the state neutrality that it commands that compel the dissent's rejection of Bruker's appeal. As put by Deschamps J.:

In the instant case, the appellant has not argued that her civil rights were infringed by a civil standard derived from positive law. Only her religious rights are in issue, and only as a result of religious rules. Thus, she is not asking to be compensated because she could not remarry as a result of a civil rule. It was a rule of her religion that prevented her from doing so. She is not asking to be compensated because any children she might have given birth to would not have the same civil rights as 'legitimate' children. In Canadian law..., all children are equal whether born of a marriage or not.⁴¹

In consequence, the obligation created by Clause 12 of the Consent "[can] at most be considered a moral undertaking"⁴² that "may not be enforced civilly."⁴³

This understanding and this result compel the dissent's wholehearted condemnation of the majority. First, if this result is correct as a matter of law, then the majority's judgment in this matter "is not authorized under either public law or private law."⁴⁴ Second, if this understanding of religious liberty is correct jurisprudentially and culturally, then the majority's lawlessness is "a first"⁴⁵ that carries profound consequences.⁴⁶ For by allowing the appeal, the majority is allowing "the state," through its own judicial office, "to promote a religious norm,"⁴⁷ namely, "the undertaking to appear before rabbinical authorities for a religious divorce."⁴⁸ And there resides the rub: "the role of the courts cannot be altered without calling into question the foundations of the relationship between state and religion."⁴⁹ In the minority's view, that is, it puts at issue the very "neutrality of the state in Canadian law."⁵⁰ Nor, finally, is the minority seduced by the majority's

41. *Ibid.* at para. 131.

42. *Ibid.* at para. 176.

43. *Ibid.* at para. 175.

44. *Ibid.* at para. 103.

45. *Ibid.*

46. Deschamps J. in fact calculates the consequences at both the retail and wholesale level. Only the latter concern me here. Regarding the former, see *ibid.* at paras. 106 (where she condemns the majority for misconceiving the issue), para. 171 (where she accuses it of misunderstanding the civil law of contract) and paras. 104-105 (where she criticizes it for misrepresenting the significance of s. 21.1 of the *Divorce Act* and running roughshod over the record).

47. *Ibid.* at para. 132.

48. *Ibid.* at para. 175.

49. *Ibid.* at para. 182.

50. *Ibid.* at para. 184.

soft-sell apologetic of “proceeding on a case-by-case basis”: the issue now open is so large and so deep to make of that “a short-sighted approach.”⁵¹

2. *The majority: protecting citizens from their religion*

a. *Content*

Though the majority judgment is an untidy and in consequence somewhat tricky affair, everything finally turns on the Court’s view that it falls to the judicial branch “to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion.”⁵² At the retail level, this astounding and novel view arises from the Court’s attempt to salvage the result at trial. This it did, as mentioned previously, by seeking to tame, or so it apparently thought, the scope of judicial meddling in religion permitted by the trial court’s reasoning. According to the majority, in fact scenarios like *Bruker*, not only must the religious undertaking be clothed in contract (and thus the Court endorses the alchemy of form),⁵³ the breach of it must not offend “Canada’s fundamental values”⁵⁴ (and if it does, judicial sanction will, as here, necessarily⁵⁵ follow). At the wholesale level, this view of judicial obligation and permission expresses, in my view, the Court’s utter misunderstanding of religious liberty. And it is here, much more so than in its salvaging of the trial result, that the importance of *Bruker* resides. For the Court’s misconception of the point of religious liberty leads it first to discover the curious obligation of saving citizens from the arbitrary disadvantages of *their* religions and then to articulate a meter of disadvantage that awards the state, through its judges, sovereignty over religion. Together these matters—the Court’s notion of the origin and content of freedom of religion and its claim of sovereignty to combat disadvantage—provide the gist and, as we shall see, the threat of its precedent-setting judgment in *Bruker*.

The Court tips its hand on the origins of religious liberty with Abella J.’s opening declaration. “Canada,” we are told, “rightly prides itself on its evolutionary tolerance for diversity and pluralism.”⁵⁶ She continues:

51. *Ibid.* at para.182.

52. *Ibid.* at para. 19.

53. *Ibid.* at paras. 48-64 where Abella J. finds Paragraph 12 a binding contract under the civil law of Quebec. For what is in my view an overwhelming critique of the majority’s understanding and application of the civil law of contract, see Deschamps J.’s dissent at paras. 162-180.

54. *Ibid.* at para. 2.

55. I say necessarily because if a fundamental Canadian value is offended, harm by definition ensues: see *infra* notes 74 –75 and accompanying text.

56. *Bruker*, *supra* note 2 at para. 1

This journey has included a growing appreciation of *multiculturalism*, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.⁵⁷

This is to say, of course, both that religious liberty is a derivative right and that it is properly derived from values—here multiculturalism—which the state endorses. Both of these proposals stand in starkest contrast to the standing view of religious liberty. According to that understanding, freedom of religion, like the right to bodily security and property and contract rights, is a *natural* right in the sense that it exists prior to and independently from the state.⁵⁸ So viewed, religious liberty is necessarily a negative liberty that forbids the state predatory management of the religious conduct and conscience of its subjects. The state is not the author of the right but its custodian, and its role is to acknowledge and to honour religious life that, like persons and property, exists beyond the state and for the protection of which the state exists. Now, as witness the judgments in *Bruker* at the Quebec Court of Appeal and by the minority at the Supreme Court, this does *not* mean that the state must honour and protect all religious conduct. Clearly, where religious conduct violates rights of the person (and sometimes, though less clearly, property or contractual rights)—or as the Quebec Court and the dissent put it, where such conduct violates a legitimate rule of positive law—religious liberty does not immunize the

57. *Ibid.* (emphasis added).

58. That this is so has long been recognized in the Court's own jurisprudence. In *Saumur v. City of Quebec & A.G. Quebec*, [1953] 4 D.L.R. 641 at 670, Justice Rand put the matter thus (emphasis added):

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are *original freedoms* which are at once necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law resides in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them: the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like and the punishments of the criminal law. ... Civil rights of the same nature arise also as protection against the infringement of these freedoms.

conduct from curial supervision.⁵⁹ But, and this is the point, that this is so in no way renders religious liberty a state-derived right any more than does punishment for sexual assault or murder render the right to bodily security a derivative right. Just the contrary: as we punish the offender in order to acknowledge the supremacy and independence of the right to security, we may sanction rule-violating religious conduct to acknowledge the supremacy and independence of the right to religious liberty. That this is so is no more mysterious than Mill's harm principle, which is to say, not at all. Nor is it at all foreign to the Court's own jurisprudence on religious liberty. Indeed, it was perfectly and succinctly put by Dickson J. in *R. v. Big M Drug Mart Ltd.*:

The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.⁶⁰

However, if religious liberty is, as the majority has it, a derivative right, then an entirely different relationship between state and religion emerges. Abella J. puts the matter thus:

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with *Canada's fundamental values* and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based upon difference must yield to *a more pressing public interest* is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity *for the protecting the evolutionary integrity of both multiculturalism and public confidence in its importance*.⁶¹

So not only is religious liberty derived from state values, its content, at any given point in time, depends upon how pressing is the state value that any assertion of the right might engage. According to the majority, it

59. Finnis puts this limitation as follows: the religious act or belief must be "compatible with laws motivated exclusively by concern to uphold a just public order, that is, ... the rights of others, public peace and public morality": *supra* note 24 at 117.

60. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 346. In *Bruker*, the majority appears to think that the "*inter alia*" provides license to its derivative notion of religious liberty. It is clearly wrong in this. When elsewhere in his judgment Dickson elaborates, the indicia of limitation he mentions—"subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others": *ibid.* at p. 337—in no fashion supports either the majority's derivative notion or the expanded state surveillance to which it leads. Those indicia rather merely restate the standing view that religious liberty is subject to constitutionally legitimate laws.

61. *Bruker*, *supra* note 2 at para. 2 (emphasis added).

falls to the judicial branch both to divine which of “Canada’s fundamental values” any claim of religious liberty engages and then to balance the claim against that value. Included in the former are “our laws, policies, and democratic values”⁶² and mandated by the latter is judicial accounting of “the particular religion, the particular religious right, and the particular personal and public consequences, of enforcing that right.”⁶³

This foundation laid, the Court proceeds to disclose the values at play in *Bruker* and then to adopt and apply a balancing test fit to the case. It turns out that Marcovitz’s claim to religious immunity for his default on Paragraph 12 of the Consent involves a veritable cascade of values expressive of “the wider public interest.”⁶⁴ First and foremost among them is of course that “members of the Canadian public are not arbitrarily disadvantaged by their religion.”⁶⁵ But that does not nearly empty the Court’s value larder. Engaged as well (it turns out as indicia of disadvantage) are: “our approach to marriage and divorce and our commitment to eradicating gender discrimination”⁶⁶; “Canada’s approach to religious freedom, to equality rights, to divorce and marriage generally”⁶⁷; “our commitments to equality, religious freedom and autonomous choice in marriage and divorce”⁶⁸; “the right of Canadians to decide for themselves whether their marriage has irretrievably broken down” and our “attempt to facilitate, rather than impede, their ability to continue their lives, including with new families”⁶⁹; our view that “marriage and divorce are available equally to men and women”⁷⁰; and “the public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations.”⁷¹ The Court may fairly be said to have simply discovered these values since, with one unhappy exception, it credentializes none of them, either generally or as regards their propriety in matters of religious liberty. The exception is “the dignity of Jewish women in their independent ability to divorce and remarry” which it founds on s. 21.1 of the *Divorce Act* and the Parliamentary addresses of two, now long-departed

62. *Ibid.* at para. 62.

63. *Ibid.* at para. 18.

64. *Ibid.* at para. 19.

65. *Ibid.*

66. *Ibid.* at para. 16.

67. *Ibid.* at para. 63.

68. *Ibid.* at para. 80.

69. *Ibid.* at para. 82.

70. *Ibid.*

71. *Ibid.* at para. 92.

Ministers of Justice (Doug Lewis and Kim Campbell).⁷² But, as the Court of Appeal and the minority was each quick to point out, s. 21.1 has, by its own terms, nothing whatsoever to do with the facts in *Bruker*.⁷³

These then are the state values against which, in this case, religious liberty is to be balanced. As mentioned, the Court felt moved to adopt a test, beyond its general prescriptions on balancing,⁷⁴ suited more specifically to the facts in *Bruker*. This it found in Freedman C.J.M.'s dissent in *Re Morris and Morris*, a 1973 judgment of the Manitoba Court of Appeal.⁷⁵ In *Morris*, an ex-wife sought to have the Court compel her ex-husband to grant a Get based upon his undertaking in the Orthodox Jewish marriage contract of Ketubah. The Manitoba Court of Queen's Bench granted an order declaring the ex-wife's right to a Get and an order of *mandamus* compelling the ex-husband to institute proceedings for the Get.⁷⁶ Four of the five-member panel of the Court of Appeal reversed the trial court and refused to grant either a declaration or mandamus on grounds, *inter alia*, that absent a violation of a civil right, the courts have no jurisdiction over matters religious.

Abella J. for the majority instead finds Freedman C.J.M.'s dissent "compelling" and adopts the following passage as expressing both the proper judicial countenance on and the proper judicial test regarding the reach of law over religion⁷⁷:

That the [marriage] contract is deeply affected by religious considerations is not determinative of the issue. That is the beginning and not the end of the matter. Some contracts rooted in the religion of a particular faith may indeed be contrary to public policy. Others may not. Our task is to determine whether the rights and obligations flowing from the ... contract—specifically, the husband's obligation to give and the wife's right to receive a *Get*—are contrary to public policy.

I find difficulty in pin-pointing the precise aspect of public policy which the agreement [to provide a *get*] may be said to offend. The attack upon it is on more general grounds. *It appears that the real basis on which the enforcement of the contract is being resisted is simply that it rests on religion, and that on grounds of public policy the Court should keep*

72. *Ibid.* at paras. 7, 8, 81.

73. For the Court of Appeal, see *Bruker*, *supra* note 7 at paras. 24, 29. For the dissent's commentary, see *ibid.* at paras. 104, 105, 148.

74. *Ibid.* at paras. 2, 18, 19, 20.

75. *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550 (Man. C.A.). For contemporaneous commentary on the case—commentary that would have served the majority well as regards the problems with Freedman C.J.'s dissent—see D.P. Jones & A. Bissett-Johnston, "Re Morris and Morris: A Case Comment" (1977) 23 McGill L. J. 110.

76. *Re Morris and Morris* (1973), 36 D.L.R. (3d) 447 (Man. Q.B.).

77. *Bruker*, *supra* note 2 at para. 46.

out of that field. But the law reports contain many instances of Courts dealing with disputes having a religious origin or basis. ... In each case some temporal right confronted the Court, and it did not hesitate to adjudicate thereon.⁷⁸

Freedman C.J.M.'s dissent is then an early and happily unsuccessful attempt to shed the constraints imposed on the state and its judges by the tradition of religious liberty. He wishes not to be kept out of the field of religion and in order not to be, he, like the majority in *Bruker*, misconceives the tradition and the jurisprudence that expresses both its content and limits.⁷⁹

With constraint thus put paid and with the mass of sacred state values marshalled against him, Marcovitz was fated to lose in the Court's game of balancing. And so it was. First, Abella J. opines, "Mr. Marcovitz, it seems to me, has little to put on the scales."⁸⁰ Then, in restoring Mass J.'s judgment, she concludes that the consequences of Marcovitz's failure to honour Paragraph 12 "represented an unjustified and severe impairment of [Bruker's] ability to live her life in accordance with this country's values and her Jewish beliefs."⁸¹ And with that, for the Court, the matter was ended.⁸²

b. *Consequences*

Several passages in the Abella J.'s judgment give the impression that the majority thought the decision in *Bruker* a matter of no great moment, not perhaps as a one-off, but nonetheless as not terribly novel or exciting. At one point, for instance, the Court describes *Bruker* as "yet another

78. *Re Morris and Morris*, *supra* note 75 at pp. 559-60 (emphasis added).

79. For the purposes of this comment, I have considered just the former and what I take to be the Court's misunderstanding of the tradition of religious liberty. It has however in my view mangled just as badly the jurisprudence of religious liberty which stands for the proposition re-proclaimed by the Quebec Court of Appeal and the minority, namely, that absent a violation of a constitutionally legitimate rule of positive law, the state has no business in the churches, mosques and temples of the nation. On the mangling, see for instance Abella J.'s altogether remarkable failure to understand Dickson J.'s judgment in *R. v. Big M Drug Mart Ltd.: Bruker*, *supra* note 2 at para. 72 and *supra* note 53.

80. *Ibid.* at para. 79.

81. *Ibid.* at para. 93.

82. Along the way (and besides the aforementioned excursion into the civil law of contract: *supra* note 53), the Court paused to consider the matter of religious liberty in the context of the Quebec *Charter of Human Rights and Freedoms* (*supra* note 2 at paras. 65-80), and to bolster its findings through a review of foreign law on "courts protecting Jewish women from husbands who refuse to provide a religious divorce" (*ibid.* at paras. 83-90). The judgment is messy because the arguments and propositions that count—and these are my concerns here—are haphazardly strewn among these parts. As indicated earlier, it is not my purpose to deal with this structure, though as regards the majority's go at comparative law, I would commend Deschamps J.'s devastating deconstruction of the case law upon which the majority relies: *ibid.* at paras. 134-155.

case” and opines “no new principle emerges from the result in this case.”⁸³ And at other points, it seeks carefully to distance itself from the religious aspects of the case.⁸⁴ For example, early along, it declares that its decision “is not, as implied by the dissent, an unwarranted secular trespass into religious fields, nor does it amount to judicial sanction of the vagaries of an individual’s religion.”⁸⁵ If these passages truly reflect the majority’s view,⁸⁶ then its understanding of the matters at play in *Bruker* is so woefully wrong that it might be said of these judges that they knew not what they do.

Writ large, *Bruker* stands for the proposition that the state is properly possessed of a *weltanschauung*—the state’s “fundamental values”⁸⁷—to which the conduct and projects of its subjects, including their religious conduct and projects, are properly held to judicial account. Now, this might be—and of course has been—true of certain kinds of states. But it has never been true, nor can it ever be, of liberal states. This is so because liberal states are, by definition and aspiration both, *limited* states. And states of that kind and character—Rule of Law states or constitutional states: call them what you will—are not in the business either of constructing values—including, as here, nationalistic values— independently from the *security* interests of their subjects or of forcefully declaring those values as the core morality of the communities they serve. Nor therefore are they in the business of surveilling the lives of their subjects, including especially their religious lives, for their comportment with state values. Nor, in particular, is it their business to save their subjects safe from the disadvantages, arbitrary or otherwise, that their religious affiliations may carry for them. Just the contrary: in societies governed by states of that limited sort, which is to say, in free societies, people do that for themselves, should they so wish, by acts of reformation or of apostasy.

83. *Ibid.* at para. 20

84. *Ibid.* at paras. 18, 47.

85. *Ibid.* at para. 18.

86. I believe they do and not merely because the alternative—that they were merely seeking to persuade in a soft-sell sort of way—is so unhappy. Rather, in my view, the Court is so ideologically uniform and so enraptured of its curious tale (and more on this in a moment) of the Constitution and, as here, of the law more generally, as a repository and expression of Canadian values that the matter and decision in *Bruker* most probably did appear to the majority as just another stop along the path of articulating, defending and imprinting the state’s values. Certainly, so far as the Chief Justice is concerned, her extra-judicial writing seems to clinch this understanding. See for example, Beverley McLachlin, “Freedom of Religion and the Rule of Law: A Canadian Perspective” in D. Farrow, ed., *Recognizing Religion in a Secular Society* (Montreal & Kingston: McGill-Queens University Press, 2004) 12 at 22 (where she argues that religious liberty derives from multiculturalism: “in Canadian society there is the value we place on multiculturalism and diversity, which brings with it a commitment to freedom of religion”).

87. *Bruker*, *supra* note 2 at para. 2.

This peculiar, state-values-centred deformation of liberal constitutionalism has been growing for sometime at the Supreme Court, and I cannot here trace its jurisprudential path.⁸⁸ What I can very briefly do is first to explain the deformation and then to explore the significance of its extension in *Bruker* to religious matters.

Constitutionalism is the child of the Western Legal Tradition's understanding of the necessity of law and of the dangers posed by law.⁸⁹ The story is as simple as it is true. On the one hand, we humans⁹⁰ need law just because we are constituted the way we are. We are by nature vulnerable beings—vulnerable to death at a time we know not when and vulnerable to others in our bodies and in our projects. In order, therefore, to survive and to flourish, we turn to law's protection, to its rules of ordered existence and freedom from harm.⁹¹ On the other hand, law by *its* very nature threatens the good of ordered liberty that it exists to deliver. We invest law with authority in order to serve our interests in living our lives in relative freedom, secure in our bodies, in our resources, and in our relations with others. But the state is an all too human institution, and it

88. Though a path there surely is: see for example, *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 92 (“the *Charter* represents a restatement of the fundamental values which guide and shape our democratic society”). And just as surely, the path continues: see for example, the Court's judgment in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27 at para. 81 (for the Court's latest list of the core communal values expressed and enshrined in the *Charter*, namely, “[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy”) and paras. 39-41, 66, 68, 86 (where on grounds of those Canadian values, the Court threw over its prior jurisprudence and constitutionalized collective bargaining). Indeed, constitutionalism as the articulation and consolidation of state values has become, in my view, an *idée fixe* at the Supreme Court, and it deserves serious scholarly interrogation, not least because the notion that the constitution is an expression of the community's values proceeds from the profoundly mistaken and painfully anti-democratic view that a proper state is a *Kulturstaat*. For a happy historical dissent from this view, see Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal: McGill-Queens University Press, 2007). For what appears to be the commencement of a metaphysics of the Court's jurisprudence on state values and religion, see Benjamin L. Berger, “The Cultural Limits of Legal Tolerance” (2008) 21 *Can. J. Law & Jurisp.* 245; Benjamin L. Berger, “Law's Religion: Rendering Culture” (2007) 45 *Osg. H. L.J.* 277.

89. For the best account of the origins and content of the Western Legal Tradition: see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) and Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2003). For a convenient overview, see also Philippe Nemo, *What is the West?* trans. Kenneth Casler (Pittsburg, PA: Duquesne University Press, 2006).

90. “Human,” which is to say, creatures who, unlike the rest, can acknowledge and reflect and act upon their nature culturally.

91. Herbert Hart's philosophical anthropology is the best modern exposition of the natural necessity of law: see H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) at 192-199. Along with human vulnerability, Hart lists “approximate equality,” “limited altruism,” “limited resources,” and “limited understanding and strength of will” as “some very obvious generalizations—indeed truisms—concerning human nature and the world in which men live.”

may be moved to act against our interests. This it may do in either of two ways.

First, a state might articulate values independent and separate from the protection interests of its subjects and then seek to impose those values on them. This it will do, at least in the context of liberal governance, when it mistakes liberal political morality as properly prescribing a way of life for individuals (and not merely and only as prescribing an institutional life for political community)⁹²; and when it makes that mistake, it will feel compelled to require the forms of life of its subjects to conform to the view of proper life its values express and support. Second, a state might differentiate between its subjects in ways that make the quality of law's protection depend upon the class in which the state has placed any one of its subjects. These two possibilities of law-legal imperialism (or as it is sometimes styled, "civic totalitarianism")⁹³ and legal discrimination-are, in our tradition, the foundational problems of law.

Constitutionalism is the Western Legal Tradition's answer to the riddle born of the coupling of necessity and menace. The answer resides in two propositions: that the only legitimate state is a limited state; and that states are properly limited by certain institutional forms and commitments.⁹⁴ Chief among the latter are the division of life between the public and the private and the view that private life is prior and superior to public life. From this division and understanding descends the threshold condition to limited government: states only have authority over public matters and they are therefore forbidden authority over private matters.⁹⁵

92. Dworkin puts the difference more succinctly than most: "the liberal conception of equality is a principle of political organization that is required by justice not a way of life for individuals." See Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) at 203. See also John Finnis, "On 'Public Reason'" (April 2006) Notre Dame Legal Studies Paper No. 06-37; Oxford Legal Studies Research Paper No. 1/2007 at 6 (available at SSRN: <<http://ssrn.com/abstracts=955815>>): "The proper function of the state's law and government is limited. In particular, its role is not (as Aristotle had supposed) to make people integrally good but only to maintain peace and justice in inter-personal relationships. In this respect, the public realm, the *respublica*, is different from certain other associations, such as family and church, associations which, albeit with limited means, can properly aspire to bring it about that their members become integrally good."

93. See for example Stephen Macedo, *Diversity and Distrust* (Cambridge, MA: Harvard University Press, 2000) at 130.

94. These institutional investments-the distinction between public and private life, the separation of powers, and rule governance (and all that each requires)-together constitute the Rule of Law, the ideal and practice of liberal constitutionalism.

95. Incidentally, the prohibition does not, as is oftentimes claimed, work in the other direction, that is, limited government does not require prohibiting the institutions of private life from seeking to influence the state, provided only that the influence does not subvert political morality and most especially legal equality. Nor, that caveat once again observed, does it prevent public officials from relying on the commitments of their private lives in carrying out their public duties.

I mentioned in opening this inquiry the sanctity of religion and family in our political and legal affairs. This special and elevated position has two aspects. First, the prohibition against state sovereignty over private life reaches its apotheosis in its application to faith and family. This is to say that, in our tradition, only if faith and family are secure from state management and predation is a state a constitutional state. Second, this is so because our tradition understands family and religious life as the sites in which men and women most directly and importantly make their lives their own. Rawls famously contrasts the public reason of constitutionalism with what he terms comprehensive doctrines.⁹⁶ The concern of the former is “the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary).”⁹⁷ Comprehensive doctrines reside in “the culture of the social, not the political”⁹⁸ and it is in their engagement with and allegiance to those doctrines—and the “conceptions of what it is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit of our life as a whole”⁹⁹ that those doctrines alone properly prescribe—that men and women make a way of life for themselves. Because it concerns the meaning of life *tout court*, religion is the most comprehensive of doctrines. Because family is the practice through which comprehensive doctrines, religion not only included, are first adopted and transmitted, family is the foundry both of the traditions of life well and properly lived and, in *its* independence from the state, of personal and social liberty.

Conclusion

So we come to the significance of the Court’s judgment in *Bruker*. I want first to propose that by extending the neo-constitutionalism of its self-conceived *Kulturstaat* to religion and to family on the facts there before it—to a private matter involving both faith and family and their relationship both to one another and to the state—the Court has put in jeopardy of expanded state colonization those practices that are most dear and meaningful to those whose liberty and forms of life it is pledged by constitutional principle and tradition to serve and protect. That is to say, the judgment in *Bruker* discloses a Court so convinced of and so committed to the righteousness of imprinting its understanding of state values on the life-world that in the wake of this judgment, it is difficult to discern anything, logic and principle

96. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

97. *Ibid.* at 13-14.

98. *Ibid.* at 14.

99. *Ibid.* at 13.

alike, that might ever convince this Court to cease its totalizing impulse. In consequence, we may, I think, expect no relief from the Court's relentless march towards the subordination of private life, its values, practices and traditions, to the sovereignty of judicially-manufactured state values. That the substance of this disclosure is the Court's transmutation of religious liberty from a negative freedom to be let alone to a state-centred positive liberty not to be "arbitrarily disadvantaged"¹⁰⁰ by religion leaves the matter of liberty under and through law in all the more precarious a position. For in this facile paternalism resides a pernicious message. It informs that the loss of *real* liberty is yet a good since, in the Court's view, it is a foundational good of our law that the law's subjects be relieved through law of the burdens and responsibilities of their private lives.

100. *Bruker*, *supra* note 2 at para. 19.