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Governance and the Religion Question: Voluntaryism, Disestablishment, and America's Church-State Proposition

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The quandary over how to structure the relationship between religion and the civil state is an ancient one. From the perspective of political philosophy this is the religion question, and events over many centuries have proven that the answer is easy to get wrong. Religion, by its very definition, is the fixed point from which all else is surveyed. It is about ultimate matters, both micro and macro. Hence, religion addresses the irreducible core of personhood and its meaning, while at the same time religion embraces a worldview that transcends and encompasses everything else. Religion generates intense emotions that when acted upon can breach the peace, and religion forms deep loyalties that can rival the patriotic ties that bind citizens to their nation-state. Religion is simultaneously individualistic, about highly personal beliefs and acts of humble piety growing out of those beliefs, while at the same time religion is nearly always manifested in the form of a sacred group or institution that knits together those of like-minded faith in local, national, and even transnational churches, temples, and mosques.

THE CAUSE OF CONSCIENCE

Primary to governance and the religion question is the matter of individual conscience, that is, religiously informed conscience. So far as the positive law is concerned, individuals can hold

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privately any religious belief they want. After all, even if it wanted to, the state is ill-equipped to police the inner precincts of the mind. When religious folk act on their beliefs, however, then the civil and even criminal law takes note. A basic duty of any state is to maintain the public peace, thus the law is there to protect persons and their property. Religious practices, however sincere, cannot be allowed to go beyond a point where others are directly and palpably harmed or the enjoyment of their property materially diminished. Accordingly, actions by the conscience-driven believer can be accommodated by the positive law, but only "so far."

Determining "how far" is the common starting point in puzzling out the various facets of the religion question. In the West, nation-states shifted first from religious conformity to religious tolerance. Tolerance is when a state condescends to allow religious conduct which it has the lawful power to prohibit. Later, there was a shift from tolerance to recognition of a rights-based claim to follow one's religiously informed conscience. This rights-claim has its origin, in part, in the belief that for law to intervene too soon works to stifle people in their most basic of religious practices, namely obeying God as called (by their lights) to do so. Open societies in the West justly took pride in permitting the spirit-moved conscience of citizens considerable breathing room to follow God's plan (as they understand it) for their life. As James Madison wrote in his *Memorial and Remonstrance*, revered as the single most important American writing on religious freedom, "This duty [to the Creator] is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[1]

While a modern spirit of liberality now attends and shapes the "how far" question in ways favorable to religion's unfettered exercise, lines still must be drawn that account for modern societal complexities such as human health and safety. Short of preventing violence or other direct harm to third parties, the question devolves to asking whether there are times when the state may justly abridge actions (or refusals to act) of individuals that are lodged in their religiously informed conscience. Examples familiar to the generation present at the American founding are Quakers refusing to heed a call to serve in the military and Mennonites declining to swear an oath when asked to give court-compelled testimony. Under what circumstances may the religiously motivated conscience suffer direct coercion because faith's call to obedience, if multiplied by similar acts of

1. James Madison, Jr., "A Memorial and Remonstrance Against Religious Assessments," ¶ 1 (1785), in *The Papers of James Madison*, ed. Robert A. Rutland, et al. (Chicago, Ill.: University of Chicago Press, 1973), 8: 299.

disobedience, would seriously impede, even destabilize, the nation-state? A contemporary example is a religious objector to an ongoing war refusing to file a federal income tax return.

Early suggestions for gauging "how far" were to narrow the definition of protected religion or, contrariwise, to sharply curtail the scope of legitimate state power. For example, John Locke is read by modernists to have confined unfettered religion to thoughts bearing on the life hereafter and little else, whereas early Anabaptists disavowed most civic duties with respect to all the works and ways of government. But these models were either too extreme or too simplistic, and, in any event, neither the religious authorities nor government officials were willing to be confined to the definitional boxes constructed by these social philosophers.

Legal disputes over the cause of conscience typically involve small sects whose religious practices are out of step with the dominant culture. America today enjoys a large and stable civil society, and thus is able to absorb much in the way of countercultural religious exercise. Nonetheless, there is in the nation's past heavy-handed dealings concerning polygamy among nineteenth-century Mormons, the suppression of Jehovah's Witnesses as a result of their aggressive proselytizing and pacifism in the midst of the twentieth-century world wars, and more recently the prosecution of sacramental peyote ingestion by members of the Native American Church. In each of these instances, and others, a believed need for law and order prevailed over religious exercise. The initial instinct of law enforcement was that the public peace was dangerously breached and thus the limits of accommodation had been crossed. These law enforcement interventions had popular backing when first taken, but that support has since ebbed as the perceived danger has receded with time.

Although their first inclination is to let religious people alone, present-day Americans are not unaware of the increasing intensity of various religious faiths and the societal decentering that has accompanied religious pluralism. Daily news reports remind us of global terrorism by Islamic extremists. Thus, there is much ambivalence with respect to how the domestic law should adjust to acts of religious conscience. As a people, Americans both celebrate the principle of religious liberty while nodding in grudging agreement with Justice Antonin Scalia who, writing for a majority of the United States Supreme Court, stated that special deference for religious exercise is a destabilizing plea for a "private right to ignore generally applicable laws."[2]

2. *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990) at 886.

CHURCH-STATE RELATIONS

The foregoing gives shape to the religion question insofar as the juridical task is to say "how far" with respect to relations between government and individual religious adherents. That is the first half of governance and the religion-question puzzle. The second half of the religion question is quite different. It is to ponder how best to structure relations between the civil state and organized religion, that is, between the organs of government and the church and related religious groups.[3] This is the task of surveying the metes and bounds of what is prohibited (and permitted) in the interaction between church and state.

Almost without fail religion is a communal affair. People of like-minded faith pull together—voluntarily for the most part, but typically urged, if not commanded, by their religion to do so. There are, of course, several churches rather than one. Indeed, America has many religious organizations, both church and para-church, and many organized religions—Christianity, Islam, Judaism, Buddhism, Hinduism, and so forth. But, for ease in writing, this structuring-of-a-relationship task is conventionally labeled as the matter of church-state relations, and it is to be distinguished from the aforementioned relationship between state and individual adherents.

This second half of the religion question has proven to be the more difficult. It is one thing to ask of the positive law to draw a line ("how far") with respect to the countercultural practices—typically nonviolent—of individual religionists. It is quite another to ask of civil law to first define, and then to fairly mediate in the judicial courts, the relationship between these two centers of authority: state and church. In one respect this is similar to a separation of powers problem familiar to constitutional law. The juridical task is to police a boundary—often disputed and, in close cases, a barely distinct line—between the state's jurisdiction or competence and the province or purview of organized religion.

CO-OPTING THE STATE

Churches, as noted above, are not merely local organizations, but are often national and even transnational. In some instances, the religious body in question pre-existed the civil state and might well outlast it. Churches thereby hold considerable

3. By "organized religion" is meant not only churches and other religious groups, but also identifiable systems of religion such as Christianity, Judaism, Islam, Hindu, Buddhism, and the like, as well as their subdivisions such as Presbyterian, Catholic, Reformed Judaism, and Sunni.

authority and thus can openly challenge or otherwise confront the state. An opposite and more common tendency of organized religion is to try to co-opt the state. An individual—at least an individual of serious faith—holds allegiance to God and country, sort of dual citizenship so to speak. There is an unfortunate tendency to confuse the two. This is to be expected, for it is human nature not to live a dichotomy, but to seek an integrated world and life view. However, to radically conflate God and country, to uncritically make sacred the politics and temporal aims of the civil state, has proven dangerous. The state as "chosen nation," "redeemer republic," or "new Israel" has not worked out well in practice, being harmful to the religiously pious as well as destructive of just government. A just government is one actively aware of its limited authority and thereby ever mindful that its writ has no competence with respect to matters within the purview of the church. Accordingly, even when a transient majority of a state's citizens support given legislation or favor a particular policy, the subject of which lies entirely within the sphere of organized religion, a properly conceived state has a duty to resist the popular majority and decline to exceed its jurisdictional constraints.

A simple illustration will draw out the point. In Western experience, it has proven destructive of both state and church to require by law regular church attendance. Attendance at worship services is a subject matter understood to be wholly within the purview of the church. Lapsed laity is a matter for pastoral visits and perhaps sanction as a result of church discipline, not the criminal courts. If such a statute were to be enforced by civil officials, soon the citizenry would be embroiled in a debate over the necessity of collective worship and how one keeps the Sabbath holy. That would disrupt and divide the body politic over purely religious matters. Of course, civic debate is commonplace and protected as a matter of free speech, but here the political dispute involves questions that are entirely about one's duty to God. The outcome may affect the status of one's soul but it ought not to affect the status of one's citizenship. The church likewise is harmed by this legislation because a forced attendance at worship services would, in the scheme of our underlying sensibilities, produce an insincere and false faith. At the same time, and without contradiction, it is common for the state to enact programs that aid the poor and needy, and for the church to advocate and affirm such social-service programs with respect to the proper role (as the church views it) of a just government. Such public welfare laws are not thought to breach the line between state and church; rather, both entities are seen as acting within their proper, albeit overlapping, spheres of power. Taking the illustration one step further, we could fashion

a third law whereby city police deputize church leaders, vesting them with power to arrest for trespass unauthorized users of a center-city parking lot owned by the local church. The unacceptability of transferring the power of arrest to church officials is more than apparent to American sensibilities.[4]

Obviously there is jurisdictional line-drawing going on in this three-part illustration. We have little problem saying that the first law involves inherently religious subject matter and thus is outside the state's sphere of competence, whereas the second law is a proper object for involvement by both state and church. However, it is axiomatic that government retains a near monopoly on lawful violence, thus the third law is an improper delegation of the state's sovereign power. It is unavoidable that these three judgment calls—with respect to the church-state boundary—are made with implicit reference to an experience rooted in Western civilization. Accordingly, defining this boundary between church and state—thus answering the second half of the religion question in a multiplicity of circumstances—is to make value-laden judgments. Whether realized or unconscious, these line-drawing judgments are rooted in Western sensibilities about limits on the jurisdiction of the civil state and its duty to resist co-optation by the church and to resist intruding into matters in the purview of organized religion.

CIVIL RELIGION

History also shows that churches and like organizations can be threatened by the state and in two ways: by suppression and by capture. In that vein, to establish a church is not only to officially suppress all other religious bodies, but establishment also brings intense resentment against, and eventual decline of, the official church. As the United States Supreme Court observed in one of its early modern cases:

> The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.[5]

Contrariwise, disestablishment not only relieves the discriminatory treatment suffered by all other religious bodies,

4. Although such cases are rare, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), is an example of government unconstitutionally delegating its sovereign power to a religious body. In *Larkin*, the Court struck down a municipal ordinance which gave churches the power to veto the issuance of a liquor license to nearby restaurants and taverns.

5. *Engel v. Vitale*, 370 U.S. 421 (1962) at 431 (footnotes omitted).

but it deregulates, and thereby liberates from state capture, the formerly established faith. Justice William Brennan observed how an established church can become an unfortunate captive of the state in this way: "[One] purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials."[6] When a church is disestablished, no longer is its order of worship (liturgy and prayer books) regulated by law, no longer are ecclesiastical appointments subject to state approval, and no longer are its clerics taken for granted as chaplains to the temporal power.

Republics need broad consent (or acquiescence) from the people to initially constitute a body politic, and thereafter to remain unified and thus endure. Just how deeply held must these consensual ties be for a state to remain legitimate? Out of self-preservation, even liberal republics tend to err on the side of forming strong patriotic and even nationalistic ties that will hold the allegiance of its citizens. A state may seek to reinforce these citizen-unifying principles by appropriating widely held religious propositions for its own. With this in mind, suppose a nation-state were to recite on ceremonial occasions the ecumenical prayers of its majority faiths and invite the public's voluntary participation. This surely burdens minority religious, but only indirectly. After all, there is no coercion of conscience with respect to the public prayers, because the members of minority faiths (or of no faith) retain the freedom to simply not participate. But state-recited prayers can cause feelings of alienation, even spawning resentment and division along religious lines. Moreover, the state-recited prayers can, with repetition, be harmful as well to the majority faiths. Government officials are composing the prayers and rendering them nondenominational (*i.e.*, inoffensive) for the masses. This waters down the theological content of the prayers and lessens their spiritual efficacy.

In a worse-case scenario, this harm ripens into civil religion, which is a culturally captive faith that confuses genuine religion with a love of country, a pride in national traditions, and entrance into full acceptance as a citizen of the republic. The harm of civil religion, while not coercive of conscience, is that religious belief is not arrived at freely and without cultural conformity, and it soon turns insincere, eventually corrupting both laity and church. From the perspective of the church, civil religion is a form of soft idolatry. Gary Wills, in a biting commentary that leaves no doubt

6. *Marsh v. Chambers*, 463 U.S. 783 (1983) at 803-04 (Brennan, J., dissenting) (footnotes omitted).

as to his disdain for civil religion, surveyed the American landscape with these words:

[R]eligion plays a very political role here. By acquiescing in the standards of our rulers, the churches give them tacit endorsement . . . .

. . . Thus is religion trapped, frozen, in its perpetual de facto accommodation of [governmental] power. It becomes a social ornament and buttress, not changing men's lives, only blessing them . . . . Religion is invited in on sufferance, to praise our country, our rulers, our past and present, our goals and pretensions, under the polite fiction of praying for them all. The divine is subordinated to the human—God serves Caesar. This is what Americans quaintly call "freedom of religion," and what the Bible calls idolatry.[7]

Whether one agrees with Wills' depiction of the degree to which civil religion holds sway in America, he starts to lay bare one of two extremes. Both extremes are answers—wrong answers—to the second half of the religion question. One is that God serves Caesar (autocracy) and the other is that God is Caesar (theocracy). Both extremes lead to religious persecution. In milder forms, the two tendencies still result in a loss of religious freedom. In blurring the line between religion and the state, it is genuine religion, observed Justice Brennan, that is every bit as likely a loser as civil liberty: "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."[8]

VOLUNTARYISM

The task of governance is to answer this second half of the religion question with balance as between these two extremes, even in their milder forms of civil religion and of established religion. Once again, James Madison's *Memorial* helps to point the way:

If "all men are by nature equally free and independent," all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. . . . Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.[9]

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7. Garry Wills, *Bare Ruined Choirs: Doubt, Prophecy, and Radical Religion* (New York: Dell Publishing Co., 1972), 259-60.

8. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) at 259 (Brennan, J., concurring) (footnotes omitted).

9. James Madison, Jr., "A Memorial and Remonstrance Against Religious Assessments," ¶ 4 (1785), in *The Papers of James Madison*, ed. Robert A. Rutland, et al. (Chicago, Ill: The

This is the principle of voluntaryism: religious belief is best arrived at voluntarily, without the active assistance of government, and this is equally so for everyone.[10] Church membership and financial contributions would likewise follow the voluntary principle. Following a period of state-by-state disestablishments during the years 1776 to 1833, the American church-state proposition came to subscribe to voluntaryism as desirable for stabilizing republics as well as desirable for liberating organized religion. The new American republic, filled as it was with both religious fervency and religious pluralism, was thereby made more commodious both to the faith of religious minorities and to that of the previously established majority. No longer was a person's position on purely religious disputes also a prerequisite for enjoying the full rights of citizenship. This expanded civil liberty. At the same time, voluntaryism reinvigorated organized religion in the early national period, with explosive growth among Methodists, Baptists, Presbyterians, the upstart Campbellites, and others.[11] Henceforth, a church grew (or not) based on persuasion and its appeal to the people.

It follows that established churches, once the props of government had been removed, would suffer an initial decline. This is because under even mild establishments some individuals joined the church to avoid official discrimination or to gain political advantage. This resulted in spiritual shallowness. Madison, in a letter written in 1819, made note of this with respect to the disestablished Anglican—now Episcopalian—church in Virginia:

> [B]uilt under the establishment at the public expense, [they] have in many instances gone to ruin, or are in a very dilapidated state, owing chiefly to a transition of the flocks to other worships. . . . [Whereas concerning the evangelicals,] on a general comparison of present and former times the balance is certainly and vastly on the side of the present, as to the number of religious teachers, the zeal which actuates them, the purity of their lives, and the attendance of the people on their instructions.[12]

University of Chicago Press, 1973), 8: 300-01, (quoting from the Virginia Declaration of Rights, adopted in 1776).

10. The use of the older spelling of "voluntaryism" is intentional. It serves to remind the reader that voluntaryism is a particular insight from a period of time in Western religious and American political thought. See Sydney E. Ahlstrom, *A Religious History of the American People*, 2nd ed. (New Haven, Conn.: Yale University Press, 2004), 379-84.

11. Roger Finke and Rodney Stark, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy*, 2nd ed. (New Brunswick, N.J.: Rutgers University Press, 2005), 55-116; see generally Mark A. Noll, *America's God, From Jonathan Edwards to Abraham Lincoln* (Oxford: Oxford University Press, 2002); John H. Wigger, *Taking Heaven by Storm: Methodism and the Rise of Popular Christianity in America* (New York: Oxford University Press, 1998).

12. Letter from James Madison to Robert Walsh (2 March 1819), *Letters and Other Writings of James Madison, Fourth President of the United States* (Philadelphia, 1865), 3:

Concerning the consequences, civil and religious, of disestablishment and the resulting revivals in Virginia and elsewhere, Madison gave his opinion in correspondence sent in 1822:

> The example of the colonies, now States, which rejected religious establishments altogether, proved that all sects might be safely and advantageously put on a footing of equal and entire freedom. . . . [I]t is impossible to deny that [in Virginia] religion prevails with more zeal and a more exemplary priesthood than it ever did when established and patronized by public authority. We are teaching the world that great truth that governments do better without kings and nobles than with them. The merit will be doubled by the other lesson: that religion flourishes in greater purity without than with the aid of government.[13]

Left to the people the entrepreneurial faiths flourished, while those unable to adjust quickly to a free-market approach struggled.

As previously noted, a feature of the second half of the religion question is that churches and other religious communities can rival and even threaten the state. Such rivalry has proven bad for civil liberties when organized religion successfully co-opts the state by seizing temporal power. Conversely, rivalry between church and state has proven good for civil liberties when religious bodies are free to call into question and check a government that has authoritarian pretensions, has taken up a misguided policy, or is beset with corruption. History is marked with incidents, from Poland to the Philippines, where the church was the last remaining institution able to speak truth to the power of a hegemonic state. Less drastic, but more common to our American setting, is that religious bodies frequently raise up what they call their "prophetic voice" and criticize officials and their policies of state. Contrariwise, where churches are too beholden to government, the pulpits are likely to stand silent in the face of official wrongdoing.

RELIGION'S EXCEPTIONALISM

At this juncture it can fairly be asked why the civil law regards organized religion as exceptional. Just how is it that this particular relationship, state and church, calls for special treatment by the law? Groups, all private-sector groups, are aggregates of individuals in voluntary association. But religious organizations are regarded by the judicial courts as different. As Justice Brennan astutely observed, "Such a community

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124-25.

13. Letter from James Madison to Edward Livingston (10 July 1822), *Letters and Other Writings of James Madison, Fourth President of the United States* (Philadelphia, 1865), 3: 273, 275-76.

represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[14] Churches are ontological entities, not mere creatures of the state. They possess a life of their own not reducible to the sum of their member's individual rights, and Western civilization has so acknowledged.

In the West, since the fourth century, relations between state and church have been aptly characterized as a dual-authority pattern.[15] In that century, the Edict of Milan (A.D. 313), issued by Constantine as Western Roman Emperor, directed that Christianity was no longer illegal but to be tolerated. Favoritism soon followed which eventually gave way to Emperor Theodosius I's edicts in 380-81, establishing the Christian church to the exclusion of all other religions. This transition period, however, was not without conflict between the two powers. For example, Hosius, Bishop of Cordova, wrote the Emperor Constantius around 350 about his conception of church and empire as follows:

> Do not interfere in matters ecclesiastical, nor give us orders on such questions, but learn about them from us. For into your hands God has put the kingdom; the affairs of his Church he has committed to us. If any man stole the Empire from you, he would be resisting the ordinance of God: in the same way you on your part should be afraid lest, in taking upon yourself the government of the Church, you incur the guilt of a grave offense. "Render unto Caesar the things that are Caesar's and unto God the things that are God's." We are not permitted to exercise an earthly rule; and you, Sire, are not authorized to burn incense.[16]

In 358, Emperor Constantius attempted to unite Christians in opposition to the Nicene Creed. His attempt soon drew this rebuff from Athanasius, the powerful bishop of Alexandria and a supporter of the creed: "When did a judgement of the church receive its validity from the Emperor?"[17]

This vigorous sparring over the boundary of authority between state and church did not end with the formal establishment of Christianity. Writing to the Byzantine Emperor Anastasis I in 494, Pope Gelasius I explicitly laid out the dual-authority relationship: "Two there are, august Emperor, by

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14. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) at 342 (Brennan, J., concurring).

15. See John F. Wilson & Donald L. Drakeman, *Church and State in American History*, 3rd ed. (Boulder, Colo.: Westview Press, 2003), 1-10.

16. Henry Bettenson, ed., *Documents of the Christian Church*, 2nd ed. (New York: Oxford University Press, 1990), 19.

17. *A Lion Handbook: The History of Christianity*, rev. ed. (1990), 144. Athanasius went on, albeit not entirely accurate as to his history, "There have been many councils held until the present and many judgements passed by the church; but the church leaders never sought the consent of the Emperor for them nor did the Emperor busy himself with the affairs of the church." Ibid.

which this world is ruled on title of original and sovereign right—the consecrated authority of the priesthood and the royal power."[18] Gelasius proceeded, however, to argue for a vision of the dual order where the papal office was superior to that of the emperor.[19]

Things change, of course, with state and church constantly adapting and making adjustments. Western political theory and ecclesiology, existing side by side in the same time and space, competed, and their devotees brought to bear ideological and (at times) even military pressure on the other. As a result, the exact placement of the line between nation-state and church has shifted over time, first in Western Europe and then in America. Lecturing on international comparative law, Roscoe Pound, then dean at Harvard Law School, was identifying those received precepts, those assumed starting points, those presuppositions from which judges unconsciously draw to reach a result that is reasonable and just. One such fundamental principle is that church and state have long been regarded as distinct centers of authority:

> In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of temporal sovereign, that is, of a politically organized society, was fundamental. It [is] natural and inevitable to have church courts and state courts, each with their own field of action and each, perhaps, tending to encroach on the other's domain, but each having their own province in which they were paramount . . . .[20]

While the exact location of this boundary remains contested, all agree that there is a line. Those who dispute the proper location of the line (including most readers of this essay) nonetheless presuppose the existence of the dual-authority pattern, state and church, each with its sphere of proper jurisdiction and each with some sovereignty held to the exclusion of the other.

This dual-authority pattern is so taken for granted in the West that it goes unnoticed, much like a fish is unmindful of the water in which it swims. Bernard Lewis, an expert in Islam and Middle Eastern Studies, reminds us that vast societies can and have arranged themselves in very different ways. Comparing Western civilization as shaped by Christianity with the Middle East as formed by Islam, he writes:

> Nowhere are these differences more profound . . . than in the attitudes of these two religions, and of their authorized exponents, to the relations between government, religion, and society. The Founder of Christianity bade his followers "render unto

18. John Courtney Murray, "The Freedom of Man in the Freedom of the Church," in *Modern Age* (Chicago, Ill.: Foundation for Foreign Affairs, 1957), 134, 137.

19. *Lion Handbook*, 151, 200-01.

20. Roscoe Pound, "A Comparison of Ideals of Law," *Harvard Law Review* 47 (1933): 1, 6.

Caesar the things which are Caesar's; and unto God the things which are God's." . . . The dichotomy of *regnum* and *sacerdotium*, so crucial in the history of Western Christendom, had no equivalent in Islam. During Muhammad's lifetime, the Muslims became at once a political and a religious community, with the Prophet as head of state. . . . For the formative first generation of Muslims, whose adventures are the sacred history of Islam, there was no protracted testing by persecution, no tradition of resistance to a hostile state power. On the contrary, the state that ruled them was that of Islam, and God's approval of their cause was made clear to them in the form of victory and empire in this world.

In pagan Rome, Caesar was God. For Christians, there is a choice between God and Caesar, and endless generations of Christians have been ensnared in that choice. In Islam, there was no such painful choice. In the universal Islamic polity as conceived by Muslims, there is no Caesar but only God, who is the sole sovereign and the sole source of law.[21]

Lewis goes on to point out the inherent conflict between Islam being true to its historic authority structure, on the one hand, and unmoderated Islam operating peacefully within the international (and increasingly globalized) community that assumes a Christian-like demarcation between the political state and religious organizations.

DISESTABLISHMENT

In the New World, increasing liberality with respect to religious freedom, unlike church-state relations in Western Europe, took an additional step, namely, a state without any established church. Disestablishment is America's unique contribution to political philosophy.[22] It meant that religion was deregulated, a modern phrase but one which aptly emphasizes that, ironically, disestablishment was religion being set free from the state.[23] The promise of disestablishment was two-fold. First,

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21. Bernard Lewis, *The Crisis of Islam: Holy War and Unholy Terror* (New York: Modern Library, 2003), 5-7. Lest Westerners jump to wrong conclusions, Lewis goes on to refine his description of historic Islam using Western terminology:

> From the lifetime of its Founder, and therefore in its sacred scriptures, Islam is associated in the minds and memories of Muslims with the exercise of political and military power. Classical Islam recognized a distinction between things of this world and things of the next, between pious and worldly considerations. It did not recognize a separate institution, with a hierarchy and laws of its own, to regulate religious matters.
>
> Does this mean that Islam is a theocracy? In the sense God is seen as the supreme sovereign, the answer would have to be yes indeed. In the sense of government by a priesthood, most definitely not. The emergence of a priestly hierarchy and its assumption of ultimate authority in the state is a modern innovation and is a unique contribution of the late Ayatollah Khomeini of Iran to Islamic thought and practice.

Ibid., 20.

22. Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: The MacMillan Co., 1902), 2.

23. Max L. Stackhouse notes just how remarkable was the American church-state

disestablishment meant that churches and other religious bodies became autonomous with respect to matters within their province, such as doctrine, polity, and ecclesiastical administration. Second, doctrinal disagreements within the body politic were now of private relevance only, such debates having nothing to do with one's standing in the political community.[24] Of course, disputes over religious doctrine did not go away; disestablishment simply moved their resolution to arenas (*e.g.*, seminaries, pulpits, Sunday school classrooms) having only nongovernmental salience.

A UNITARY IDEA

As the foregoing indicates, the religion question is particularly vexing, in part, because it has to be addressed at two levels: (1) the relationship between government and individual adherents; and (2) the relationship between government and organized religion. With respect to the first relationship, the proposition of Western liberalism was to safeguard an individual's religiously informed conscience from state coercion. With respect to the second relationship, the uniquely American proposition was to embrace the unitary idea of voluntaryism and disestablishment. Voluntaryism is not merely the absence of government-imposed coercion when performing acts of religious conscience. Nor is it merely the absence of civic disabilities based on one's faith, such

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proposition in that a government should go beyond the protection of free-exercise rights of individuals and to limit its sovereignty by acknowledging another center of competence when it comes to matters of spiritual cognizance:

> [The First A]mendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself . . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This is not only an affirmation of the freedom of individual belief or practice, not only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.

See Max L. Stackhouse, "Religion, Rights, and the Constitution," in *An Unsettled Arena: Religion and the Bill of Rights*, ed. Ronald C. White, Jr. & Albright G. Zimmerman (Grand Rapids, Mich.: Wm. B. Eerdmans Publishing Co., 1990), 92, 111.

24. Divisiveness within the body politic over a myriad of social, moral, and economic issues is inevitable in an open democracy; indeed such debate is healthy and protected as a matter of free speech. Instead, it is religious doctrine and other inherently religious issues more narrowly to which the government is barred from taking sides. The restraint is on government, not the private sector. This is desirable so as to not divide the civic polity over purely religious questions.

as a religious test for holding public office.[25] For example, a mild establishment, such as in the United Kingdom today, does not use force against dissenters and tolerates all faiths, and yet such an establishment falls short of the voluntaryist ideal. Instead, voluntaryism is when the government refrains from seeking to influence its citizens concerning those inherently religious beliefs and practices of organized religion. Such beliefs and practices are to be supported voluntarily, if at all, by the nongovernmental sector. Voluntaryism is thereby a value-laden idea, as the Supreme Court acknowledged in *Wallace v. Jaffree*:

> [T]he Court has unambiguously concluded that the . . . First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .[26]

Those religious faiths ("beliefs worthy of respect") subscribed to and supported wholly apart from the government's influence are, in this one sense, acknowledged as both religious tenet and legal principle.[27]

Like voluntaryism, disestablishment was about freedom. But it is the sort of freedom that is the off-shoot or consequence of limited government. This is because disestablishment was, in the first instance, about deregulating the officially preferred religion. It was not thought paradoxical for people of the large faith groups to have worked, as many did, for disestablishment. They believed, and their experience had shown, that an established church is a captive church, one where the form of worship, content of prayers, clerical appointments, and ecclesiastical

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25. Nor is voluntaryism where government extends assistance to all religious organizations without discrimination, a principal properly called "nonpreferentialism." See Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, 2nd ed. (Chapel Hill, N.C.: University of North Carolina Press, 1994), 112-45; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), 211-15.

26. *Wallace v. Jaffree*, 472 U.S. 38 (1985) at 52-53 (footnotes omitted).

27. The overlap of a rule of law with a religious tenet does not, without more, make the enforcement of the legal rule a violation of the Establishment Clause. *McGowan v. Maryland*, 366 U.S. 420 (1961) at 442. Nonetheless, the formidable Jesuit, John Courtney Murray, criticized voluntaryism as a Protestant reading of the First Amendment rather than, as was his view, the amendment being a mere article of peace between multiple sects. John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1964), 58-72; see William Lee Miller, *The First Liberty: Religion and the American Republic* (New York: Knopf, 1986), 134-35, 218-21. However, Fr. Murray's role in Vatican II suggests that he came to see considerable merit in the American church-state proposition and he successfully worked to have the Roman church move closer to the American view. See John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Berkeley, Calif.: University of California Press, 1998), 331-53.

administration are interfered with by the state.

Today the combined outworking of voluntaryism and disestablishment is commonly known as the "separation of church and state." [28] Philip Hamburger's work properly brings caution to the use of the phrase separation of church and state.[29] When used to convey the same ideas as those underlying disestablishment, the phrase is useful and accurate. When separation of church and state is taken to mean a socially or juridically enforced separation of religious values from public affairs and law formation (*i.e.*, the privatization of religion), then the concept has no antecedent in the early American states. In the new republic, religion was widely expected to serve as a seedbed of civic virtue, from which a people acquired the knowledge to properly exercise the office of citizen and the self-restraint to not let liberty careen into license. James H. Hutson, Chief of the Manuscript Division at the Library of Congress, nicely summarizes the unofficial role that religion was to play in the new nation as "the privatization of character building."[30] It worked, as the ever quotable Alexis de Tocqueville observed during his American travels in the 1830s:

> Religion in America takes no direct part in the government of society, but it must nevertheless be regarded as the foremost of the political institutions . . . . I do not know whether all the Americans have a sincere faith in their religion; for who can search the human heart? but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation, and to every rank of society.
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> . . . .
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> The Americans combine the notions of Christianity and of liberty so intimately in their minds, that it is impossible to make them conceive the one without the other . . . .

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28. Some religious conservatives are fond of pointing out that the First Amendment text does not have the phrase "separation of church and state." That is true, of course, but given intervening events the point proves far less than these religious conservatives imply. It is sufficient here to note that disestablishment (or "separation of church and state," rightly understood) triumphed in state after state of the early American republic.

29. Philip Hamburger, *Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2000). Professor Hamburger shows that the phrase "separation of church and state" had no or little use until well after the nation's founding, and thereafter the phrase was at times code for discrimination against Roman Catholics. Of course, the phrase is in wide use today and has lost its anti-Catholic taint. Nevertheless, Hamburger's central concern is valid. He notes modern secularists twisting the phrase "separation of church and state" to mean a separation of religious values from public debate and lawmaking. The aim is to privatize religion. Accordingly, there is some risk in substituting the more ambiguous "separation of church and state" for disestablishment. On the other hand, the phrase is in common use today and resonates with a broad cross-section of the American public. The phrase, rightly understood, will be used here.

30. James H. Hutson, *Religion and the Founding of the American Republic* (Washington, D.C.: Library of Congress, 1998), 111.

. . . .

Upon my arrival in the United States, the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more did I perceived the great political consequences resulting from this new state of things, to which I was unaccustomed. In France I had almost always seen the spirit of religion and the spirit of freedom pursuing courses diametrically opposed to each other; but in America I found they were intimately united, and that they reigned in common over the same country. My desire to discover the causes of this phenomenon increased from day to day. In order to satisfy it, I questioned the members of all the different sects . . . . I found that [Catholic clergy] . . . mainly attributed the peaceful dominion of religion in their country, to the separation of church and state. I do not hesitate to affirm that during my stay in America, I did not meet a single individual, of the clergy or of the laity, who was not of the same opinion upon this point.[31]

Like voluntaryism, disestablishment is a value-laden idea. The accumulated experience in America was that it is almost impossible to build a just society whenever the church is an arm of the state or the state is an arm of the church. Moreover, and importantly, this experience was not gained at the national level. Rather, the American disestablishment was entirely a state-law affair with each state proceeding at its own pace between 1776 and 1833. Thus disestablishment neither culminated with the adoption of the Establishment Clause as part of the First Amendment (1789–1791), nor was it hastened along by that clause. That is, contrary to widely held belief, the Establishment Clause did no serious work whatsoever in the furtherance of the American disestablishment. The reason, in large measure, is simple enough. It was known and appreciated in the early republic that the Establishment Clause (along with the entire Bill of Rights) was applicable only to the national government, hence not binding on the states.[32]

At the level of each state—where the hard work of disestablishment did take place—the vast numbers of Americans pushing for it were not doing so out of Enlightenment-rationalism or secularism. Nor were they primarily motivated, because of America's diverse Protestant groups and its growing Catholic immigration, to grant religious freedom to all as the price of obtaining it for themselves. Instead, these American dissenters (*e.g.*, Isaac Backus and John Leland) were religious people who primarily sought disestablishment for (as they saw it) biblical reasons. They were allied in this effort by certain well-placed statesmen, most notably James Madison,[33] and together sought two corrections. First, they decried the state establishments as interfering with organized religion, corrupting the role

31. Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (London: J. & H. G. Langley, 1841), 1:334-35, 337.

32. The Supreme Court so noted in *Barron v. City of Baltimore*, 32 U.S. 243 (1833).

33. See Miller, *The First Liberty*, 77-150; Noonan, *Lustre of Our Country*, 59-91.

of clergy and the church. Second, they saw a state that took sides in disputes over creeds and forms of religious observance as unnecessarily roiling the body politic. They believed that these inherently religious questions were never properly within the jurisdiction of government. By deregulating religion, the alliance sought a more limited state, one with no power over church doctrine, forms of observance, selection of clergy, and church administration. To be sure, disestablishment presumed a unifying civil compact but at a more modest level of consensus, namely agreement on the moral principles by which the civil polity was to make political decisions.[34]

For an extended period of almost sixty years, the common efforts of these Protestant dissenters and American statesmen sought to usher in a juridical disestablishment in those states where Anglicanism or Congregationalism still had a hold (9 of the original 13 states, plus Vermont and Maine). Both parties to this common cause were essential to its success.[35] Their efforts first succeeded in the Anglican South and only much later in Puritan New England. Anglicans sought to hold on in the South by enlarging the establishment to embrace all Christian denominations. This was unsuccessful. In New England, the Congregational Church continued to receive financial support as late as 1832-33. The funding was assessed locally by majority rule, with increasing availability of exemptions for nonconformists. Nevertheless, New England supporters of the Standing Order denied that they had an "establishment" as such, whereas dissenters knew it to be an establishment in all but name, albeit very differently structured from the top-down Church of England in Great Britain.

Those against religious establishment were for religious voluntaryism, hence the unity of the two ideas. Disestablishment came in the midst of the Second Great Awakening (1780s–1830s). In a sense this new wave of revival finished the work started by the First Great Awakening (1720s–1740s), changing how Americans thought about religion.[36] Religion

34. See Murray, *We Hold These Truths*, 80 ("Granted that the [American] commonwealth can be achieved in the absence of a consensus with regard to the theological truths that govern the total life and destiny of man, it does not follow that this necessary civic unity can endure in the absence of a consensus more narrow in its scope, operative on the level of political life, with regard to the rational truths and moral precepts that govern the structure of the constitutional state, specify the substance of the common weal, and determine the ends of public policy.").

35. Sidney E. Mead, *The Lively Experiment: The Shaping of Christianity in America* (New York: Harper and Row, 1963), 34-35, 38, 42-45, 51-52.

36. These two periods were not spontaneous, intercontinental, unexplained outpouring of religious interest. Rather, these two "awakenings" were a cluster of small, regional events, all quite intentional, well-planned, and carefully executed. The revivals were planned urban

became more personal and emotional, less authoritarian, more decentralized, and it focused more on guidance in daily living and less on abstract doctrine. A top-down rule by a professional class of ecclesiastics was at odds with the growing American ethos of liberty and individualism and a leveling of social classes.[37]

By 1833, religious voluntaryism had prevailed over the last remaining establishment, that of Massachusetts. The Supreme Court, later summarizing the general common law in the states, set out the rule of limited civil jurisdiction over organized religion, and hence the line between church and state, as it had developed by mid-nineteenth century:

> [A court has no authority] where a subject-matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action.[38]

The opposition (sometimes called "civic republicans"[39]) did not go away, of course. It continued to assert whenever possible the use of government to endorse the majority Protestant faith (of a general, nondenominational sort). As this could no longer be achieved with financial support for religion, the civic republicans bargained for symbolic affirmation and other tacit endorsements by the government, such as ceremonial prayer on civic occasions. This was more successful in local communities with a fairly homogeneous Anglo-Saxon Protestantism than it was in major cities, which were busy absorbing immigrants of diverse

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events, whereas the camp meetings of the nineteenth century were held in rural settings. Finke & Stark, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy*, 2nd ed., 88-99.

37. There are scholars who believe that the manner in which the American setting changed the Protestant faith during the early republic had some unfortunate features. The decreased emphasis on doctrine was anti-intellectual, and the diminished role of professional clergy and the institutional church made Christian faith less grounded. See, e.g., Noll, *America's God*, 443-45. Perhaps this is so, but it does not negate that the period was good for the cause of voluntaryism and disestablishment.

38. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872) at 733.

39. The general tendency of "civic republicans" was to place substantial trust in an educated ruling class that functioned as an ongoing deliberative community seeking wise and far-sighted policymaking. Religion was thought by civic republicans to be essential to (and nurturing of the next generation in) needed civic virtues. Because such virtues were essential to sustaining a republic, the republic/state had a vital interest in (indeed, its very survival) religion. Thus, for civic republicans the state should support (even establish) religion. The circle was thereby complete: religion taught civic virtue, civic virtue was needed to sustain the republic, and thus the republic supported religion. The emergent disestablishmentarians agreed with civic republicans, except with respect to the desirability of the state actively supporting religion. Disestablishmentarians believed that a deregulated religion would be revitalized, and that such a renewed and independent-sector religion would in turn nurture the needed civic virtues supportive of the republic.

faiths, most prominently Catholics.[40] So it must be conceded that the practice of voluntaryism and disestablishmentarianism, that is, the separation of church and state, occasionally lagged behind the principle. Nevertheless, for more than a century, the matter of keeping church and state within their proper spheres was the near exclusive province of the several states.

THE MODERN COURT

In the 1940s and 1950s, the United States Supreme Court was in the vanguard of the rights revolution. Clause by clause, many provisions of the federal Bill of Rights were "selectively incorporated" through the Fourteenth Amendment and made binding on the states. When the Establishment Clause was incorporated in 1947 by *Everson v. Board of Education of Ewing Township*,[41] the Supreme Court faced something of a paradox. Unlike previously incorporated clauses from the Bill of Rights, the Establishment Clause text did not read as a rights-based clause but, instead, spoke to the negation of federal power with respect to religious establishment. This meant that the clause worked, in part, as a federalism provision restraining the national government from interfering with how the states handled the sensitive matter of religion.[42] For example, if Connecticut wanted a state church, Congress had no authority to stop it. And, indeed, Connecticut did not stop funding the Congregational (Puritan) Church until 1818. Thus, incorporating the Establishment Clause in *Everson* destroyed the clause's role as a restraint on national power to oversee the states. That left a clause emptied of much of its original purpose, a vessel needing to be filled with new meaning about relations between government and church at the state and local level. For that meaning the Supreme Court drew upon the period (1776-1833) of the ascendance of voluntaryism and America's state-by-state disestablishment (especially that of Virginia, 1776-1786).

This was a judicial novation, simultaneously aggressive and bold.[43] It was aggressive because the Supreme Court expanded

40. Finke & Stark, *The Churching of America, 1776-2005: Winners and Losers in Our Religious Economy*, 2nd ed., 117-55.

41. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947) at 13-16.

42. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, Conn.: Yale University Press, 1998), 32-45. The Establishment Clause also worked to restrain the national government concerning laws respecting a national establishment, both in the central government's own internal administration and when meeting its national responsibilities.

43. Neither attribution is necessarily a compliment or a criticism. It depends on one's view of the authority of the U.S. Supreme Court in "overcoming" federalism and bringing about economic modernization and national uniformity.

federal judicial power to include policing state and local governments when and where they touched religion—which happens often and nearly everywhere. The new and expanded task of the federal judiciary, in church-state relations, was to restrain the exercise of civil power in matters specifically religious, whether that power was being utilized to help or hinder organized religion. The adoption of the legal fiction of taxpayer standing in *Flast v. Cohen*,[44] permitted the Court to police the church-state boundary even in the absence of a complainant suffering coercion of conscious (religious burden), showing just how determined was the Court to enforce voluntaryism and disestablishmentarianism.

While bold, it was a legal development that Americans have, since *Everson*, lived with now for sixty years. Like Henry Higgins's regard for Eliza Doolittle in *My Fair Lady*, we have simply grown accustomed to having *Everson* around. To be sure, there are voices on the right that still call for placing the springs of government behind their Christian faith—albeit in a noncoercive and nondenominational manner. And there are voices on the left seeking to work the levers of government to deny equal access for traditional religion in social and political debate. Both these efforts will be spurned, or should be, because the American proposition has proven best for organized religion and best for a government commodious to participation by those of all faiths or none. Despite its maddening complexity and occasional inconsistency, in the main the American electorate senses this is so.

As the American church-state proposition continues to be worked out in new and untried settings, many tensions remain. Religious Americans often insist that their rights are God-given or "endowed by their Creator." It is therefore impossible, within such framework, for these rights to be denied by the actions of government officials (said to be, as they phrased it, "unalienable").[45] Other Americans argue that fundamental rights, at least positive-law rights—indeed, the authority of the civil state in its entirety—are derived ultimately from "the people" or the ongoing consent of the governed.[46] When America was a new nation, these two groups were very much one

44. *Flast v. Cohen*, 392 U.S. 83 (1968). The Court in *Flast* held that even in the absence of actual "injury in fact," federal courts have standing to hear federal taxpayer claims brought under the Establishment Clause where it is alleged that congressional appropriations are being wrongly channeled to religion.

45. Those making this argument typically reference the first, second, and closing paragraphs of the 1776 Declaration of Independence.

46. Those taking this position typically point to the lack of references to God in the 1787 Constitution of the United States and the 1791 Bill of Rights.

and the same, thus these two views on the ultimate origin of fundamental rights caused little disagreement in church-state relations. But today the origin and immutability of rights are the cause of major disagreement. The conflict is most easily seen in hot-button questions such as eliminating "under God" from the Pledge of Allegiance or "In God We Trust" from our money, as well as removing the Ten Commandments from courthouse squares and capitol lawns.

Still others maintain that there is substantive moral content to a modern democracy that is centered on individual autonomy in social and sexual relations—not just a promise of fair process to the exclusion of ends. And, they say, future Americans should draw legal guidance from this rule of autonomous choice. Perhaps this works with respect to some legislative concerns, but matters become heated when the claim is that this is how an unelected federal judiciary should read the U.S. Constitution. One has to strain to leverage into the constitutional structure and text such a radical individualism. All oxymoronic talk of a "living constitution" aside, constitutionalizing values not remotely attributable to the founding jeopardizes the security of a government bound in perpetuity, hence limited, by a written document. That is, to admit that there is an American constitutional order is to necessarily deny that an elite bevy of judges, charged by *Marbury v. Madison* with husbanding the Constitution, get to "make it up" as time goes on.

CONCLUSION

Talk of culture war is all around. James Davison Hunter, a sociologist of religion, classifies those with traditional beliefs as "orthodox," and the theologically liberal groups as religious "progressives."[47] The meaningful division, he argues, is now orthodox (Protestant, Catholic, and Jew) versus progressives (Protestant, Catholic, and Jew). Hunter explains that the religiously orthodox (or "traditionalist") are devoted "to an external, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." Religious progressives are declining, whereas the energetic traditionalists are increasing and now comprise the largest group of religious Americans.[48] There is a

47. James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991), 42-48.

48. Finke & Stark, *The Churching of America, 1776-2005*, 235, 244-53, 267-81. Outside of the United States the largest and fastest growing religion is Christianity. See Philip Jenkins, *The Next Christendom: The Coming of Global Christianity* (New York: Oxford University Press, 2002). The expansion within world Christianity is among those churches holding

third group on the rise in America: secularists (and those who, having only a private faith, function as such) who hold to no serious theistic belief. Many of them profess an interest in spirituality but not in religion (by which they mean orthodox religion). Although they do not total even half the number of religious traditionalists, these secularists disproportionately hold positions of influence and power, well-placed in academia, government, business, media, and popular entertainment. Thus what we observe around us today as culture war is less a clash of religious traditionalists with religious progressives, and more a clash of religious traditionalists with these secularists.

Given these two complex realities, state and church, a continuous dialog must proceed to enable those needed adjustments in their interrelationship to meet new and unforeseen situations. The dialectic is often disharmonious and inches forward with denials and affirmations, charges and recrimination, reconstructions and compromise. Neither state nor church will come to a resting place that will not provoke a new rejoinder. Yet it is possible to discern some order in this multiplicity, to stop the dialogue, as it were, at certain formative points in Western civilization, and to say this is the path upon which we as a society have embarked. For America, this formative period occurred as the newly constituted states, united in a nascent federal republic, slowly shifted from a privileged Protestantism to a state-by-state deregulation of a preferred church. This went beyond the protection of religiously informed conscience (the first half of the religion question) to the unitary concept of voluntaryism and disestablishmentarianism (the second half of the religion question).

What, then, was America's answer to governance and the religion question? It was, first, a generosity toward the cause of conscience and, second, the promise of free churches in a limited state. These, then, are the rational political principles of the nation when it comes to ordering church-state relations. They have proven an overall good, one empirically demonstrable. As Justice Sandra Day O'Connor recently wrote: "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so

traditional biblical doctrines and morally conservative views, as well as preferring a Pentecostal worship style.

poorly?" [49]

49. *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. ___, ___, 125 S. Ct. 2722 (2005) at 2746 (O'Connor, J., concurring).