RELIGION AND LIBERTY IN THE EARLY REPUBLIC: CONSTITUTIONAL ISSUES

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Abstract: Religious liberty in America is commonly thought to be secured by a constitutional "wall of separation" between church and state. Its character, however, is best understood in the context of an original Protestant Christian cultural consensus which underlay the plurality of competing sects, some of which still enjoyed exclusive legal privileges in some states. During the early republic, American law and custom preserved some elements of an early state-church tradition despite the historical coincidence between the framing of the Constitution and the rejection of any establishment of religion at the federal level. Among other things, the First Amendment to the 1787 Constitution was also designed to prevent any interference with church-state relationships at the state level. This article is drawn from chapter six, "Early Constitutional Issues," of the author's 1984 doctoral dissertation, *Crossed Swords: Entanglements between Church and State in America.*

LIBERTY OF CONSCIENCE

The historical norm in the relationship between church and state is some kind of union or accommodation. The concept of a strict separation may be no older than the country that first gave it substance. But its origin is religious rather than secular. The religious dissident, Roger Williams, coined the phrase "wall of separation" long before Thomas Jefferson penned his famous letter to the Danbury Baptist Association or Justice Hugo Black equated it with the First Amendment guarantees. In a letter to John Cotton written in 1644, several years after Williams had been banished from Massachusetts, he criticized the establishment concept, citing as proof against it

> . . . the faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type, and the church of the Christians under the New Testament in the antitype, were both separate from the World; and that when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick,

> and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto his church or garden.[1]

The image of a wall of separation (Ezek. 42:20) is comparable to the motif of a hedge protecting the church from the wilderness (Ps. 80:12; Isa. 5:1-9; Ezek. 22:30), which was common to Puritan thought. The difference is that Williams believed a strict separation was necessary to preserve the purity of the church, while Cotton – probably with the example of Nehemiah in mind – believed that the erection and maintenance of the wall was the work of the Christian magistrate. For the leaders of Bay Colony, church and state were properly enclosed within the wall rather than separated by it.[2]

This disagreement involved – and continues to involve – a basic difference of theology. A century later, Isaac Backus, a Baptist leader who fought the church establishment of Massachusetts during the War for Independence, endorsed Williams as a herald of religious liberty and portrayed him as a victim of religious persecution. Although this view prevails in the standard histories, it appears to be based on a doubtful correlation of this incident and the "Antinomian controversy." Indeed, Williams himself denied that religious persecution was a factor in his banishment.[3]

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[1]Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: The University of Chicago Press, 1965), pp. 5-6, quoting Perry Miller, Roger Williams: His Contribution to the American Tradition (New York: Atheneum, 1966), p. 98.

[2]Peter N. Carroll, *Puritanism and the Wilderness: The Intellectual Significance of the New England Frontier, 1629-1700* (New York: Columbia University Press, 1969), pp. 87-90, 109-14. The "wall" is variously used as a metaphor for the Christian magistrate or the state itself.

[3]Regarding the banishment of Roger Williams, Henry Martyn Dexter, the foremost nineteenth century Congregationalist historian, wrote that "the weight of the evidence is conclusive to the point that this exclusion from the colony took place for reasons purely political, and having no relation to his notions upon toleration, or upon any subject other than those, which, in their bearing upon the common rights of property, upon the sanctions of the Oath, and upon due subordination to the powers that be in the State, made him a subverter of the very foundations of their government, and – with all his worthiness of

It is Thomas Jefferson's use of the phrase "wall of separation," however, that has received the most attention. In his 1802 letter to the Baptists of Danbury, Connecticut, President Jefferson wrote:

> Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[4]

Edward S. Corwin's comment on the phrase and its use by Justice Black in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), sheds some light on the political considerations – Jefferson's as well as the Court's – that have affected its interpretation.

> The eager crusaders on the Court make too much of Jefferson's Danbury letter, which was not improbably motivated by an impish desire to heave a brick at the Congregationalist-Federalist hierarchy of Connecticut, whose leading members had denounced him two years before as an "infidel" and "atheist." A more deliberate, more carefully considered evaluation by Jefferson of the religion clauses of the First Amendment is that which occurs in his Second Inaugural: "In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government." In short, the principal importance of the amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion, rather than in its bearing on the question of the separation of church and state.[5]

It is ironic that this letter is taken as an expression of the intent of the framers of the Constitution and the Bill of Rights. At the time of the Constitutional Convention and

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character, and general soundness of doctrine – a nuisance which it seemed they had no alternative but to abate, in some way safe to them, and kindest to him!" Henry Martyn Dexter, *As To Roger Williams, and His 'Banishment' from the Massachusetts Plantation* (Boston: Congregational Publishing Society, 1876), pp. 79-80.

[4]Americans United for Separation of Church and State, *Basic Documents Relating to the Religious Clauses of the First Amendment* (Washington: Americans United, 1965), p. 19. Jefferson's use of the phrase "sovereign reverence" here is puzzling. The word "sovereignty" is absent from the Constitution and is only attributed to states in the Articles of Confederation. See note 29 below.

[5]Edward S. Corwin, *American Constitutional History: Essays*, ed. Alpheus Mason and Gerald Garvey (New York: Harper and Row, 1964), pp. 204-05.

the first session of Congress, Jefferson was serving as minister to France. He returned only after the Bill of Rights had been sent to the states for ratification late in 1789. Instead, it was James Madison who drafted the amendments and successfully steered them through Congress, even though he did so with some reluctance because he believed "the rights in question are reserved by the manner in which the federal powers are granted.[6] While Madison conceded that a "properly executed" bill of rights might guard against ambitious rulers, he warned that

> . . . there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.[7]

Madison's reservations about specifying these rights found practical expression in the provisions against a narrow construction of these rights in the Ninth Amendment and against a broad construction of the granted powers in the Tenth Amendment. In any event, the religion clauses that were added to Article VI and the First Amendment, like Jefferson's later comments, do not indicate a climate of opinion hostile to cooperation between church and state so much as they reflect the lengthy, often bitter struggle for disestablishment that had only recently been waged in Virginia and was continuing in other states. They were understood as precautions against a national establishment of religion – however "tolerant" it might be – rather than as a disavowal of the fundamentally biblical, and largely Christian, principles on which the constitutional

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[6]Alpheus Thomas Mason, *Free Government in the Making: Readings in American Political Thought*, 3rd ed. (New York: Oxford University Press, 1965), p. 320, quoting a letter of Madison to Jefferson dated 17 October 1788. See Irving Brant, *The Bill of Rights: Its Origin and Meaning* (New York: New American Library, 1965), pp. 51-57.
[7]Ibid., p. 320.

system was based. Yet the Supreme Court has resisted this understanding, as Mark DeWolfe Howe observed:

> A frank acknowledgment that, in making the wall of separation a constitutional barrier, the faith of Roger Williams played a more important part than the doubts of Jefferson probably seemed to the present Court to carry unhappy implications. Such an acknowledgment might suggest that the First Amendment was designed not merely to codify a political principle but to implant a somewhat special principle of theology in the Constitution – a principle, by no means uncontested, which asserts that a church dependent on governmental favor cannot be true to its better self. . . . It is hard for the present generation of emancipated Americans to conceive the possibility that the framers of the Constitution were willing to incorporate some theological presuppositions in the framework of federal government. I find it impossible to deny that such presuppositions did find their way into the Constitution. To make that admission does not seem to me to necessitate the concession which others seem to think it entails – the concession that the government created by that Constitution can properly become embroiled in religious turmoil.[8]

Indeed, this "somewhat special principle of theology" may have involved not only Roger Williams' wall of separation against political corruption of the church but also the Puritan leaders's hedge of protection against religious corruption of the Christian polity. Although the restriction of suffrage to church members had disappeared by then, similar precautions – such as the use of religious tests – were still common. It was only with the assurance – however unrealistic – that religious liberty was compatible with this principle that such restrictions were abandoned.

DISESTABLISHMENT

Religious liberty was seen by some of the founders as a means of strengthening Christianity through sectarian competition while still promoting an essentially biblical standard of law and justice. Even the most latitudinarian of the founders were unwilling

[8]Howe, *Garden and Wilderness*, pp. 7-8.

to disavow ethical standards that the Bible makes binding on all times and all nations. A century or more was to pass before religious liberalism began to successfully challenge traditional Christianity in regard to law and morality.

Virginia

Prior to 1776, attempts to obtain toleration for religious dissenters in Virginia had largely failed. A number of Baptist preachers were beaten and jailed. James Madison was prominent among those who protested against these persecutions in the name of "liberty of conscience." Following the Declaration of Independence, a state convention was held to organize a new government and draft a constitution. Petitions from dissenting churches called for freedom of worship, exemption from religious assessments, and disestablishment of the Church of England. George Mason submitted a bill of rights that included a provision for religious toleration written by Patrick Henry. Madison objected to the word "toleration" because of its implication that liberty is a matter of grace, not right. He proposed that the wording be changed to guarantee "the full and free exercise of religion, according to the dictates of conscience," although he added a restraining clause: "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."[9]

It took time to work out politically the practical implications of religious liberty. Among the first concessions were the admission of dissenting chaplains to the army

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[9]Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: The Macmillan Company, 1902; Burt Franklin, 1970), p. 492. Elsewhere, Madison wrote that "Conscience is the most sacred of all property. . . ." Verna M. Hall, comp., *The Christian History of the Constitution of the United States of America: Christian Self-Government, American Revolution Bicentennial Edition*, ed. Joseph Allan Montgomery (San Francisco: Foundation for American Christian Education, 1975), p. 35.

and the suspension of church rates. While general assessments were ended in 1779, the establishment remained. The following year, the validity of marriages performed by dissenting ministers was recognized and responsibility for overseeing the poor passed from the church vestries to a state office.[10]

Meanwhile, churches of all denominations were being devastated by the war. Numerous church building were destroyed and congregations were deprived of their clergy.[11] In response to this situation, the legislature, which was still predominantly Episcopalian in its sympathies, passed an act to incorporate the Protestant Episcopal Church, then quickly repealed it. The repeal was soon followed by an act annulling all laws favoring the Church and dissolving its ties with the state. But Patrick Henry sponsored a "Bill Establishing a Provision for Teachers of the Christian Religion" which won the support of George Washington, Richard Henry Lee, and John Marshall. It appeared close to passage when Madison motioned for a postponement of the final vote until the next session so that public opinion could be registered. During the interim he wrote his famous "Memorial and Remonstrance against Religious Assessments" in which he observed:

> The same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians in exclusion of all other sects, and the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.[12]

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[10]Ibid., p. 492. See Edward Frank Humphrey, *Nationalism and Religion in America, 1774-1789* (Boston: Chapman Law Publishing Company, 1924), pp.380-84.
[11]Robert Baird, *Religion in the United States of America* (Glasgow: Blackie and Son, 1844; reprint ed., New York: Arno Press, 1969), p. 248.
[12]Leo Pfeffer, *Church, State, and Freedom*, revised ed. (Boston: Beacon Press, 1967), p. 112.

"Establishment," for Madison, clearly meant direct tax support for churches. Madison's campaign succeeded. The assessment bill was defeated the following autumn and Jefferson's Bill for Establishing Religious Freedom, first introduced in 1779, was passed in January 1789. The last vestige of the old establishment – the glebe lands which supported the clergy – did not finally pass away until 1840.[13]

Massachusetts

Much the same pattern of disestablishment was followed in other states, although at a slower pace. In Massachusetts, Isaac Backus argued for religious liberty as early as 1774 on the same principle of "no taxation without representation" that his fellow patriots used in arguing for political liberty, claiming that the legislators

> . . . never were empowered to lay any taxes but what were of a civil and worldly nature; and to impose religious taxes is as much out of their jurisdiction, as it can be for Britain to tax America. . . .
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> That which has made the greatest noise, is a tax of three pence a pound upon tea; but your law of last June laid a tax of the same sum every year upon the Baptists in each parish, as they would expect to defend themselves against a greater one. And only because the Baptists in Middleboro have refused to pay that little tax, we hear that the first parish in said town have this fall voted to lay a greater tax upon us. All America are alarmed at the tea tax; though, if they please, they can avoid it by not buying the tea; but we have no such liberty. We must either pay the little tax, or else your people appear even in this time of extremity, determined to lay the great one upon us. But these lines are to let you know, that we are determined not to pay either of them; not only upon your principle of not being taxed where we are not represented, but also because we dare not render that homage to any earthly power, which I and my brethren are fully convinced belongs only to God. We cannot give in the certificates you require, without implicitly allowing to men that authority which we believe in our consciences belongs only to God. Here, therefore, we claim charter rights,

[13]Ibid., pp. 113-14. See Cobb, *Religious Liberty*, p. 36.

> liberty of conscience. And if any still deny it to us, they must answer to Him who has said, 'With what measure ye mete, it shall be measured to you again.'[14]

Backus's plea to the Massachusetts legislature in December 1774 was unavailing, as was his earlier appeal to the Continental Congress in October. Legal oppression of dissenters had long been forbidden by law and, although the form of an establishment remained, dissenters could direct their church rates to the churches of their choice. Still, this law gave opportunity for harassment and was greatly resented. Backus continued his campaign, first proposing a bill of rights for Massachusetts in 1783 and later approving the prohibition of religious tests in the U.S. Constitution.[15] But the establishment held out until 1833.

The Dedham Case

Changes began with the Massachusetts Constitutional Convention of 1820 and the Dedham Case of 1818-1821. An effort to dissolve the establishment had failed but concessions were made at the Convention. But it was a court ruling in favor of a political takeover of the First Church of Dedham that finally laid the axe to the root of the Congregationalist establishment. After the pastor of the church left in 1818 to assume the presidency of a college, a faction of Unitarians obtained the support of a majority of voters in the parish to elect a recent graduate of Harvard Divinity School. The school had been Unitarian since the board of Harvard had been taken over in 1805.

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[14]Edwin S. Gaustad, ed., *A Documentary History of Religion in America: To the Civil War* (Grand Rapids: William B. Eerdmans Publishing Company, 1982), pp. 255, 256.

[15]William G. McLoughlin, *Isaac Backus and the American Pietist Tradition*, The Library of American Biography (Boston: Little, Brown and Company, 1967), pp. 231-33, contrasts the motives of Jefferson and Backus: rationalism and evangelicalism. See also Pfeffer, *Church*, p. 100. Gaustad, *Documentary History*, pp. 268-70, reprints Backus's bill of rights proposal.

A majority of the church members refused to accept the new pastor and, after the parish – which included non-members – installed him anyway, complained to officials about the takeover. A committee dominated by Unitarians was called to investigate and decided in favor of the parish, claiming that the veto power by the church majority was established in custom rather than law. The Trinitarian majority then bolted the church and took the records, communion service, and trust deeds with them. The Unitarian faction retaliated by excommunicating them for "disorderly walking and schism," then sued them for return of the property. The case eventually went to the Massachusetts Supreme Court. Chief Justice Isaac Parker, who wrote the unanimous opinion in *Baker* v. *Fales*, 16 Mass. 487 (1820), was a leader of the Federalist-Unitarians. William McLoughlin believes he was motivated by a belief that only a broad Erastian policy that allowed majority rule within the parishes could preserve the old establishment. But the effect of the ruling was to put Trinitarian Congregationalists into the position of a dissenting minority.[16]

> What struck the Trinitarian majority in Dedham even harder was the court's claim that once they had seceded from the parish they ceased to exist, at least in the

[16]William G. McLoughlin, *New England Dissent, 1630-1883: The Baptists and the Separation of Church and State*, vol. 2 (Cambridge: Harvard University Press, 1971), pp. 1189-95. Such a procedure and rationale set a pattern for the subsequent takeover of congregations and even entire denominations by theological modernists or liberals in the twentieth century. See Raymond B. Culver, *Horace Mann and Religion in the Massachusetts Public Schools* (New Haven: Yale University Press, 1929), p. 17: "The results of the decision were far-reaching. Parish after parish throughout the eastern part of the state called Liberal ministers, and one after another there began to appear 'second churches' founded by the Orthodox groups whose loyalty to their faith led them to secede. . . . Dr. Joseph S. Clark, writing in 1858, stated that by 1836 eighty-one churches had been divided, and 3,900 evangelical members had withdrawn, leaving property valued at $608,958 to be used by the 1,282 Unitarian members who remained. . . . In 1840 the total number of Unitarian churches was one hundred and thirty-five, of which twenty-four had been founded by Unitarian enterprise; the Orthodox Congregational churches numbered four hundred and nine." Meanwhile, liberal ministers and laymen who had been disfellowshipped by the orthodox organized as a sect, adopted the name Unitarian at the urging of William Ellery Channing, and founded the American Unitarian Association in 1825. See also Charles Beecher, ed., *Autobiography, Correspondence,* etc*., of Lyman Beecher, D.D.*, vol. 2 (New York: Harper & Brothers, 1865), pp. 109-12; Anson Phelps Stokes, *Church and State in the United States*, vol. 1 (New York: Harper & Brothers, 1950), pp. 763-64.

> eyes of the law (a view consistent with the old view that unincorporated religious congregations had no legal standing). Starting from the assumption that "Churches as such, have no power but that . . . of divine worship and church order and discipline" in any parish, the court went on to declare "The authority of the church" is "invisible" and "as all to civil purposes, the secession of a whole church from the parish would be an extinction of the church; and it is competent of the members of the parish to institute a new church or to engraft one upon the old stock if any of it should remain; and this new church would succeed to all the rights of the old, in relation to the parish." Somehow the Congregational churches had become nothing but the creatures of the majority of qualified voters in the parish. This would have shocked the founders of the Bay Colony.[17]

In the end, disestablishment in Massachusetts came about, as it did in Virginia half a century earlier, because of the intrusion of public policy considerations into church affairs to a degree that even offended many members of the establishment itself. The Standing Orders of Massachusetts were suspended by constitutional amendment in 1833. The ecclesiastical historian E. R. Norman concluded:

> Even this victory would not have been so easily accomplished had not many of the Congregational meeting-houses passed into the hands of Unitarian pastors and so offended orthodox Trinitarians that they would rather have the churches disestablished than countenance the propagation of error out of public funds.[18]

The establishment principle, however, was not yet dead in Massachusetts: only dormant. Four years later the Unitarian-dominated legislature, led by Senate president Horace Mann, established a state Board of Education and common schools along the lines of the Prussian state school system. Mann then resigned from the legislature and became the Board's first secretary in order to promote, to use his own words, "faith in the improvability of the race, -- in their accelerating improvability."[19] In his study of the

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[17]Ibid., p. 1193. For a contemporary comment, see *Spirit of The Pilgrims*, 2 (July 1829): 370-73.

[18]E. R. Norman, *The Conscience of the State in North America* (Cambridge: Cambridge University Press, 1968), p. 45.

[19]Samuel L. Blumenfeld, *Is Public Education Necessary?* (Old Greenwich, Conn.: The Devin-Adair Company, 1981), p. 188, quoting Mary Tyler Peabody Mann, *Life of Horace Mann* (Boston: Lee and Shepherd, 1891), p. 80.

origins of the early American public education movement, Samuel Blumenfeld comments:

> If the American public school movement took on the tone of a religious crusade after Mann became Secretary of the Board of Education, it was because Mann himself saw it as a religious mission. He accepted the position of Secretary not only because of what it would demand of him, but because it would help fulfill the spiritual hopes of his friends. They had faith that Mann could deliver the secular miracle that would vindicate their view of human nature and justify their repudiation of Calvinism.[20]

This new establishment was by far a more subtle one but still noticeably religious in character. It came complete with a system of secular seminaries called normal schools and was later reinforced by compulsory attendance laws. The expressly "non-sectarian" religious purpose of the schools helps account for the opposition from many orthodox Christian pastors and school masters as well as the controversy among various religious traditions – both pro and con – it generated throughout the remainder of the century.[21] If the practice of intruding politics into religion was simply a matter of habit, it was certainly proving to be a difficult one to break.

INFLUENCE OF BIBLICAL THEISM

In a manner of speaking, the habit of intruding politics into religion – or religion into politics – is not only a difficult one to break but impossible. A religiously or politically neutral – or purely objective – standard of law and government is as

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[20]Ibid., p. 185.

[21]Ibid., pp. 233~47. See generally, Rousas John Rushdoony, *The Messianic Character of American Education: Studies in the History-of the Philosophy of Education* (Nutley, N.J.: The Craig Press, 1963); Zach. Montgomery, *Poison Drops in the Federal Senate: The School Question From a Parental and Non-Sectarian Stand-Point* (Washington, D.C.: Gibson Bros., 1886).

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unimaginable as it is impracticable. This is not to say that, by itself, any particular system of belief legally qualifies as a religion or even plays the role of one. For example, the Supreme Court has wrestled for years with the problem of defining religion so as to include some non-theistic systems of belief while not wishing at the same time to give credence to every pretense, prejudice, or preference that calls itself a religion. The Court conceives religion at once too broadly and too narrowly. The point is that any belief assumes a complete cultural or ideological ensemble of which it is only one artifact. It is this ensemble that represents the kind of "ultimate concern" that Paul Tillich identified as religious. "Every law order is an establishment of religion," as R. J. Rushdoony repeatedly emphasizes.[22] "The point is this: all law is enacted morality and presupposes a moral system, a moral law, and all morality presupposes a religion as its foundation."[23]

The maintenance of some kind of standard is unavoidable. Religion is not the end of all rational inquiry – the convenient *deus ex machina* designed to squelch further argument by appealing to a higher court – but the beginning of it. One religious viewpoint or another will set the terms of debate. Greg Bahnsen believes, for example, that the epistemologically self-conscious Christian – what Bahnsen here refers to as a presuppositionalist – "must challenge the would-be autonomous man with the fact that only upon the presupposition of God and His revelation can intelligibility be preserved in his effort to understand and interpret the world."[24] Accordingly, the effort to understand

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[22]Rousas John Rushdoony, "The Freedom of the Church," *Chalcedon Position Paper No. 16* (Vallecito, Cal.: Chalcedon, 1980).
[23]Rousas John Rushdoony, *Law and Liberty* (Fairfax, Va.: Thoburn Press, 1977), p. 2
[24]Greg L. Bahnsen, "Socrates or Christ: The Reformation of Christian Apologetics," in *Foundations of Christian Scholarship: Essays in the Van Til Perspective* (Vallecito, Cal.: Ross House Books, 1976), p. 234.

and interpret the world is fundamentally religious. The practical consequence is simply this: any system of law or morality will tend to either reinforce or contradict a given religion. In America, the religion in question is predominantly Christian.

Assuming that law is an establishment of religion, it is proper to ask: what set of religious presuppositions is embodied in the Constitution or – even more fundamentally – in western culture? M. Stanton Evans restates what is often obvious only to outside observers and adherents of other religions: it is biblical theism that undergirds the constitutional tradition.

> Even on a brief recapitulation, it should be evident that we have derived a host of political and social values from our religious heritage: Personal freedom and individualism, limited government-constitutionalism and the order-keeping state, the balance and division of powers, separation of church and state, federalism and local autonomy, government by consent and representative institutions, bills of rights and privileges. Add to these the development of Western science, the notion of progress over linear time, egalitarianism and the like, and it is apparent that the array of ideas and attitudes that we think of as characteristically secular and liberal are actually by-products of our religion. It may be said, indeed, that the characteristic feature of liberalism, broadly defined – classical as well as modern -- has been an attempt to take these by-products, sever them from their theological origins, and make them independent and self-validating. On the whole, it has not been a successful experiment.[25]

Biblical theism desacralizes – or secularizes – the natural order. Some religions begin with a multitude of fickle deities that man must propitiate or attempt to control through iconic or symbolic magic. The Bible begins with one transcendent God who creates the world and places man within it as his steward. Liberty is possible because all creation is governed by God's law. Otherwise, there is no security short of total control and politics becomes a matter of conquest rather than consensus.

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[25]M. Stanton Evans, "Toward a New Intellectual History," *Modern Age*, 25 (Fall, 1981): 364-68

While the assumptions behind American constitutional law are secular in their expression, many – if not most – of their guiding principles are derived primarily or secondarily from biblical religion. The absence of an express statement of religious purpose or even an acknowledgment of divine blessings has been the subject of controversy over whether the Constitution is a "secular" or "godless" document.[26] While the religious references it does contain are too oblique to satisfy critics who lament its "political atheism,"[27] other critics are equally offended by any expression of public religiosity, regarding it as "religious treason" or as "an establishment of religion."[28] But the earlier colonial charters and state constitutions were similarly guided by practical considerations and were likewise sparing in their religious references. The customary invocation of divine favor or acknowledgment of God's blessings, usually found in the preambles of state constitutions, is generally a later development inspired by the New England covenants.

But the argument from silence is not a very satisfactory approach to the question. The Constitution is also silent about the question of sovereignty.[29] The issues which prompted the calling of the Philadelphia Convention related to the strengthening of an already existing "perpetual Union" under the Articles of Confederation rather than the creation of an altogether new political system. The assumption that the founders

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[26]Sidney E. Mead, "The Nation with the Soul of a Church," in *American Civil Religion*, ed. Russell E. Richey and Donald G. Jones (New York: Harper & Row, 1974), p. 55. See E. R. Craven, "Religious Defect in the Constitution of the United States," *Studies in Christian Citizenship*, 25 (n.d.): 1-16, originally given as an address to the National Reform Convention in New York, February 26-27, 1873.

[27]See Schaff, *Church and State in the United States; or The American Idea of Religious Liberty and Its Practical Effects*. Papers of the American Historical Association. Vol. 2,no. 4 (New York: G. P. Putnam's Sons, 1888), pp. 38-43, a section entitled "The Charge of Political Atheism;" Baird, *Religion*, pp. 259-62.

[28]See, for example, Franklin Steiner, *Religious Treason in the American Republic* (Chicago: The American Rationalist Association, n.d.). This was published circa 1926.

[29]See the discussion by Alexander Hamilton in Federalist, no. 83, in Hamilton, Jay, and Madison, *The Federalist*. https://founders.archives.gov/documents/Hamilton/01-04-02-0246

radically departed from earlier principles and precedents is unnecessary, particularly considering the attention they paid to the rule of law and the limitation of power. It is more logical to assume a continuity of purpose.

With the exception of an incidental mention of religion and a brief reference to "the Great Governor of the world," the Articles were similarly silent on the subject of religion. Yet the retention by the states of "every power, jurisdiction and right" not "expressly delegated to the United States" did not prevent Congress from exercising its customary religious functions. Congress issued proclamations of fast days and thanksgivings. It employed chaplains, directed the importation of Bibles from Europe in 1777, and endorsed the publication of the first American edition of the Bible in 1782.[30] If, as Leo Pfeffer maintains, the political leaders of this period worked from an assumed consensus of opinion in support of Christianity, there is little reason to suppose this assumption suddenly changed in 1787. In fact, Robert Cord has challenged Pfeffer's separationist hypothesis regarding the religion clauses of the Constitution, claiming that the facts "prove beyond reasonable doubt that no 'high and impregnable' wall between Church and State was in historical fact erected by the First Amendment nor was one intended by the Framers of that Amendment."[31] Cord notes that the new Congress continued to employ chaplains and even provided direct aid to religion, sometimes in fulfillment of treaty obligations. The first four Presidents except Jefferson proclaimed

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[30]B. F. Morris, *Christian Life and Character of the Civil Institutions of the United States, Developed in the Official and Historical Annals of the Republic* (Philadelphia: George W. Childs, 1864), pp. 206-26; Baird, Religion, pp. 262-67.

[31]Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), p. xiv.

days of public thanksgiving and prayer. Sunday continued to be observed as a day of rest.[32]

THE RELIGION CLAUSES

The religion clauses did not make any substantive changes to earlier practice, except to prohibit religious tests for national office. Charles Pinckney of South Carolina first brought up the matter at the Constitutional Convention by proposing that the "legislature of the United States shall pass no law on the subject of religion."[33] Edmund Randolph's resolutions of June 19, 1787 provided for an oath of office. One month later, the oath clause was unanimously adopted. When Article VI came up for a final vote at the end of August, the oath clause was modified by adding the words "or affirmation" after "oath" and Charles Pinckney moved that a clause prohibiting religious tests be added. Given the religious implications of oath taking, the clause may have been regarded as a precaution against a national church establishment. It was adopted unanimously and placed immediately following the oath clause, even though Roger Sherman replied that he "thought it unnecessary."[34]

The meaning of the Constitution or the intent of its framers has been the central issue in this century in regard to properly accommodating the spheres of church and

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[32]*Ibid*., pp. 51-82. Sabbath or Sunday laws were enacted in some federal territories, although not in all, and Sunday restrictions were observed generally. R. C. Wylie, *Sabbath Laws in the United States* (Pittsburgh: The National Reform Association, 1905), pp. 175-86. During the John Adams Administration, Fast and Thanksgiving Day sermons began to display a political bias that limited their national appeal and weakened the authority of the federalist clergy of New England. W. DeLoss Love, Jr., *The Fast and Thanksgiving Days of New England* (Boston: Houghton, Mifflin and Company, 1895), pp. 373-79.
[33]Jonathan Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, vol. 1, 2nd ed. (Philadelphia: J. B. Lippincott & Co., 1863), p. 148. See also Ibid., vol. 5, p. 131.
[34]Ibid., vol. 1, pp. 182, 215, 277.

state. Among historians the prevailing view of the condition of American religion at the time of the founding is that Christian orthodoxy was losing its hold and that the beliefs of the founders reflected the heterodoxy of the Enlightenment. This interpretation is equally prevalent among evangelical scholars. Edwin Gaustad writes:

> Pietist groups . . . vigorously condemned on principle any linkage between the civil and ecclesiastical realm; religion was personal, not political, and the redeemed Christian community was called to live in separation from the world, not in corrupting alliance with it. Then the founding fathers themselves, largely deist in their orientation and sympathy, saw the politically powerful church as a liability for the state and a shackle on those struggling to advance the cause of mankind.[35]

American culture undoubtedly had already begun to show signs of the pluralism that has characterized it ever since. But too much has been made of the impact of deism and rationalism in shaping our political institutions. John Warwick Montgomery, for instance, acknowledges that "in spite of the Deistic flavor of terminology in our founding documents, these documents actually convey a view of government which gives expression to some of the most basic biblical principles.[36] Although English deism – which is often confused with natural theology – gave birth to radical biblical criticism and influenced the continental Enlightenment, its concept of an absentee god found few worshipers in America. Indeed, neither the anticlericalism of European rationalists nor any messianic conception of the state took root at this

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[35]Gaustad, *Documentary History*, p. 227.

[36]Some evangelical Christians doubt the orthodoxy of the founders and tag them collectively as deists. See, for example, John Warwick Montgomery, *The Shaping of America* (Minneapolis: Bethany Fellowship, 1976), p. 64; C. Gregg Singer, *A Theological Interpretation of American History* (Philadelphia: Presbyterian and Reformed Publishing Co., 1964; Nutley, N.J.: The Craig Press, 1978), pp. 36-50; Robert D. Linder and Richard V. Pierard, *Twilight of the Saints: Biblical Christianity and Civil Religion in America* (Downers Grove, Ill.: InterVarsity Press, 1978), pp. 70-73. By way of contrast, see William W. Story, ed., *Life and Letters of Joseph Story*, vol. 1 (Boston: Charles C. Little and James Brown, 1851), pp. 441-42; Rousas John Rushdoony, *This Independent Republic: Studies in the Nature and Meaning of American History* (Fairfax, Va.: Thoburn Press, 1978), pp. 2-7.

time. Open freethinkers like Thomas Paine found little favor. Others who held heterodox opinions, like Jefferson and Franklin, were actually quite ambivalent in their religious views and cautious about expressing them. Even then, they continued to draw on the intellectual capital of their more orthodox countrymen.[37]

Despite regional and ecclesiastical differences, the American culture was united by its common roots in the dissenting tradition and a general preference for local institutions as opposed to concentrations of political and religious power. The secularization of politics did not mean either hostility or indifference to religion but probably reflected a laissez faire attitude that church and state were most secure when left free to find their own equilibrium. In fact, the religious views of most members of the Convention were fairly orthodox, as M. E. Bradford – among others – has noted:

> Approximately thirty of the Philadelphia Framers were greatly involved with the growth and administration of their own particular denomination. A few were zealous proselytizers. Another twenty were conventional Christians, in most cases conforming to an inherited faith. Concerning John Rutledge and George Wythe and even Madison, there were rumors of Deism; but these were probably politically motivated calumnies, with all the evidence pointing to the contrary. Hugh Williamson was a very heterodox Presbyterian who speculated about "unfallen men" who lived on comets, and James Wilson was a nominal Anglican who was probably a freethinker in the privacy of his study. Others were "broad" churchmen who in the effort to practice tolerance adopted the kind of periphrasis in speaking of God which the Deists had made fashionable: they avoided the terms of reverence provided by Holy Scripture and spoke instead of the "Author of our being" or the "Great Architect." They were no more genuine skeptics than they were democrats, as was often made clear in their private correspondence.[38]

The Ratification Debates

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[37]Thomas Cuming Hall, *The Religious Background of American Culture* (Boston: Little, Brown, and Company, 1930), pp. 172-74, typifies the perplexity of later scholars who treat the religious ambivalence of some of the founders.

[38]See Colin Brown, *Philosophy and the Christian Faith: A Historical Sketch from the Middle Ages to the Present Day* (London: Inter-Varsity Press, 1969), pp. 73-81.

At the time of the Convention, religious tests were required in all the states except Rhode Island. The provision of the Constitution that prohibited their use for national office stirred controversy at several state ratifying conventions. The debates clearly show that the meaning of this clause was subject to a diversity of interpretations. But it was the absence of a bill of rights that grew into the major point of contention in several states and brought the religious issue into sharper focus. Patrick Henry, for example, recited numerous objections to the Constitution, including the absence of specific safeguards to ensure religious liberty. Edmund Randolph replied that the "variety of sects . . . is the best security for the freedom of religion."[39] Madison declared there was "not a shadow of right in the general government to intermeddle with religion."[40] Oliver Wolcott of Connecticut answered critics that the oath itself was "a direct appeal to that God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence."[41]

Henry Abbot of North Carolina, however, summarized the objections that were then being raised. These ranged from a fear of infringements on religious liberty – particularly through the treaty-making power – to the possibility that "pagans, deists, and Mahometans might obtain offices among us" if religious tests were barred.[42] James Iredell replied that religious tests were the cause of persecution and an invitation to hypocrisy. "Had Congress undertaken to guaranty religious freedom, or any particular species of it," he claimed, "they would then have had a pretence to interfere in a subject

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[39]M. E. Bradford, *A Worthy Company: Brief Lives of the Framers of the United States Constitution* (Marlborough, N.H.: Plymouth Rock Foundation, 1982), pp. ix-x.
[40]Elliot, *Debates*, vol. 3, p. 469.
[41]Ibid., vol. 3, p. 330.
[42]Ibid., vol. 2, p. 202.

they have nothing to do with.[43] Thus the debates revealed a general desire to preserve the influence of Christianity and protect religious liberty, but also disagreements about the appropriate means to use. Delegates who sought a bill of rights succeeded in stipulating that the new government would attend to this matter after Congress met. In addition, North Carolina proposed twenty amendments, including one modeled after the popular Virginia Bill of Rights of 1776. This guarantee had already been adopted by North Carolina and other states:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and, therefore, all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience; and that no particular religious sect or society ought be favored or established by law in preference to others.[44]

The original wording of the final clause of this article, which was drafted by George Mason and amended by James Madison, read: "and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other."[45]

The Bill of Rights

When the First Congress met in 1789, James Madison introduced the Bill of Rights proposal on June 8th, three months after the opening of the session. Roger Sherman, the author of the compromise plan that ultimately prevailed at the Constitutional Convention, urged that the important business at hand not be interrupted and suggested allowing sufficient time to test the Constitution before recommending

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[43]Ibid., vol. 4, p. 192.
[44]Ibid., vol. 4, p. 195.
[45]Schaff, *Church and State*, p. 28.

changes.[46] M. E. Bradford believes Sherman was concerned lest the enumeration of individual rights or limitations upon federal authority lead to the loss of rights about which the Constitution is silent and that a "Federal authority to define and guarantee human rights would result in a power of oversight concerning questions related to the internal order of the states."[47] But the Bill of Rights soon became the main order of business.

The wording of Madison's original proposal indicates a close conjunction between the issues of "establishment" and what was subsequently called the "free exercise of religion:"

> Fourthly, That in article I., section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[48]

The wording was changed in committee to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." On August 15, the House went into a Committee of the Whole to debate this version of the amendment. Peter Sylvester of New York "feared it might be thought to have a tendency to abolish religion altogether." Elbridge Gerry of Massachusetts wanted the wording changed to read: "no religious doctrine shall be established by law." Roger Sherman again declared that he "thought the amendment altogether unnecessary, inasmuch as Congress had no authority to make religious establishments." James Madison said that he interpreted the language to mean "that Congress should not

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[46]Pfeffer, *Church*, p. 107.
[47]Joseph Gales, ed., *The Debates and Proceedings in the Congress of the United States*, vol. 1 (Washington: Gales and Seaton, 1834), pp. 444-45, 465-66.
[48]Bradford, *Worthy Company*, p. 27.

establish a religion, and enforce the legal observance of it by law, nor compel men to worship God in any manner contrary to their conscience." But he also reiterated a common concern expressed during the ratification debates that the "necessary and proper" clause of Article I, section 8 could be used to "infringe the rights of conscience, and establish a national religion."[49]

The tenor of the debate and the wording of Madison's remarks warrant careful attention. Michael Malbin maintains that Madison's speech supports a hypothesis that the "establishment" clause of the First Amendment – even in its final version – was not intended to "require strict neutrality between religion and irreligion."[50] The debate centered instead on the issue of a national church.

> Madison's response to Sherman in this speech is obvious and on the surface: whether the amendment really was needed or not – he privately agreed that it was not – some states wanted it. But there is another interesting aspect of this speech. In two places Madison misquotes his own proposal, adding a word to it by saying that Congress should not establish a religion. The additional word is significant. If it had been in the original, Sylvester would never have objected. If the added word had been in Madison's clause, it could not have been read as a prohibition of indirect, nondiscriminatory assistance to religion. To say that Congress should not establish religion differs from saying it should not assist religion as such.[51]

Malbin elsewhere weakens his case, however, by basing it – like Pfeffer's separationist hypothesis – on the assumption that the Constitution authorizes Congress either to promote or restrict religion unless prevented by specific prohibitions. It is evident from these debates that the threat of national intervention in religious affairs – whether of a positive or a negative nature – was the foremost concern of both those

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[49]Gales, *Debates*, vol. 1, p. 451.
[50]Ibid., vol. 1, pp. 757-58.
[51]Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington: American Enterprise Institute for Public Policy Research, 1978), p. ii.

who supported the amendment and those who, like Sherman, opposed it. In any case, the amendment neither added to nor subtracted from any existing power of Congress.

Benjamin Huntington of Rhode Island agreed with Madison's view but repeated Sylvester's concern that the amendment might be "extremely hurtful to the cause of religion" by observing that "others might find it convenient to put another construction on it." Moreover, in case of lawsuits growing out of internal church disputes, the federal courts might be unable to enforce contracts according to the by-laws of the religious societies. Citing the Rhode Island charter as a model of religious liberty, Huntington "hoped . . . the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[52]

Madison replied that he "thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent." But it appears that Madison misjudged the effects of his remarks. Samuel Livermore of New Hampshire objected to Madison's proposed rewording and offered a different proposal: "Congress shall make no laws touching religion, or infringing the rights of conscience." Elbridge Gerry objected to the implication that a national as opposed to a federal government had been created. After Madison withdrew his motion, Livermore's proposal was passed by 31-20.[53] Malbin believes that the new wording would have prohibited any form of federal aid to religion while, at the same time, enhancing state power. This, he suggests, could have "raised havoc with the powers of the new federal

[52]Ibid., p. 8.
[53]Gales, *Debates*, vol. 1, p. 758.

government. It was precisely for this reason that Gerry, ever watchful of the new government's power, supported Livermore."[54] But Malbin gives no reason to assume that Livermore meant to do anything more than prevent a nationalist reading of the amendment.

On August 20, Fisher Ames of Massachusetts proposed returning the amendment to committee and changing the language to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." While there is no record of a floor debate, this is the version that was sent to the Senate.[55]

Several substitute versions were offered in the Senate but the floor debates and even the vote counts were kept off the record. The Senate quickly defeated two motions that prohibited any official preference for one religion over another. The last clause of the Ames version was deleted following a vote and, finally, the language was severely narrowed to read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." The amendment was then sent back to the House after the Senate defeated a separate proposal to prevent the states from infringing on the rights of conscience. Meanwhile in the House, an attempt to introduce into the Second Amendment a clause exempting conscientious objectors from militia duty – another issue with nationalist implications – had also been defeated. A conference committee, which included Madison and Sherman among its members, worked out the final wording for the First Amendment religion clause:

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[54]Ibid., vol. 1, pp. 758-59.
[55]Malbin, *Religion and Politics*, p. 10.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[56]

Implications

The record is fully consistent with a narrow construction of the role of the general government in religion. No positive grant of power in this area was recognized. A separation of church and state was not required except where legislation might tend toward an establishment of religion, as would be the case with direct aid. Philip Kurland has observed:

> From this legislative history of the religion clauses, a few propositions can be derived that should be beyond debate. First, the restraints, whatever they were, were to be restraints only on the United States. The states had not forfeited, by the promulgation of the amendment, any of their rights to establish a state religion or to afford preferences to one religious sect over others. Second, the national government could not establish a state religion or afford privileges to any religious group or impose disabilities on any individual on the basis of religious preference or affiliation. Or, in sum, religion was to be no business of the national government.
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> A third proposition emerges from the legislative history of the religion clauses, I think, and that is that they were not separate and distinct conceptions, but rather a unified one. The existence of an established church implied intolerance for the nonestablished religions. The ban on a national church monopoly would factionalize the churches and thereby assure religious freedom.[57]

Kurland's sweeping statement that "religion was to be no business of the national government" may be disregarded without diminishing the importance of his argument that the religion clauses of the First Amendment are "not separate and distinct conceptions." While the so-called wall of separation between church and state has never been solid, attempts to seal it against all aid to religion has provoked a new

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[56]Ibid. , p. 11.
[57]Ibid., pp. 12-13, 39 n4. See Gales, *Debates*, vol. 1, pp. 778-80.

version of the iconoclastic controversy. The Supreme Court's artificial separation of the establishment and free exercise clauses frequently pits them against each other. The word "religion" consequently has been degraded into a dualistic, split-level concept in which belief is divorced from practice. This allows religion to be treated merely as a system of belief – its definition being broadened or narrowed whenever convenient – while its unimpeded practice is severed from the constitutionally protected area of free exercise values. What the Supreme Court includes in the category of religion in such free exercise cases as *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), or *Welsh* v. *United States*, 398 U.S. 333 (1970), is sometimes effectively narrowed to one religious tradition in a case like *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and altogether ignored in various establishment clause cases.[58] The result may be much the same as Philip Kurland's third proposition: to "factionalize the churches."

Since the Court has taken upon itself the task of arbitrating the various political and religious interpretations of the Constitution, a large share of the responsibility for the tangled state of current law and precedent on religion must be attributed to its decisions and, at times, indecision. In some respects, a constitutional revolution has taken place within the last four or five decades.[59] Yet, with the exception of the Fourteenth Amendment, nothing has been added to the Constitution since the Bill of Rights that can

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[58]Philip B. Kurland, "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," *Villanova Law Review*, 24 (1978-79): 9.

[59]A footnote in *Torcaso* v. *Watkins*, 367 U.S. 488, 495 n11, lists 247 several nontheistic "religions" – including "Secular Humanism" – that qualify for free exercise protections. In *Welsh* v. *United States*, 398 U.S. 333, 340, the Court admitted personal ethical or moral beliefs as grounds for religious conscientious objector military exemptions. The narrow application of the Court's ruling in *Wisconsin* v. *Yoder*, 406 U.S. 205, effectively restricts compulsory school attendance exemptions on religious grounds to members of the Old Order Amish that have graduated from the eighth grade. Justice Douglas pointed out this contrast with Welsh in his concurring opinion. But none of these definitions of "religion" coincides – even remotely – with the definitions used in determining whether religion is being "established."

account for the significantly altered place of religion in public life today. Tax-subsidized schools are being purged of traditional religious activities which, in turn, are often replaced by new varieties of religiosity.

One proponent of this development, Conrad Moehlman, has stated the case for a "common faith" such as John Dewey advocated:

> Religion has never left the public-school classroom. It has only been adjusted to the new synthesis which is replacing the medieval synthesis--the synthesis of science, democracy, and ethically evaluated religion. A sectarian public school can exist only in a sectarian society. American mores were sectarian during much of the nineteenth century but during the last half-century have been casting out sectarianism. . . . Children are entitled to a religion which is simple and understandable, and such an interpretation has always been in the curriculum of the common school. What other public institution in history has been founded on the principle of "the brotherhood of man as he is?"[60]

But this unambiguously religious sentiment seems tame by comparison with current examples of values education mandated for public school classrooms.[61] Private church-affiliated schools and home schools are similarly facing bureaucratic intervention in the form of detailed curriculum requirements, mandatory certification of teachers, and other requirements that often tread a fine line between legitimate oversight and harassment. Tax exemptions, loans, corporation laws, and grants-in-aid may serve as effective conduits for regulation.

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[60]Conrad Henry Moehlman, *The Wall of Separation Between Church and State* (Boston: The Beacon Press, 1951), p. 162. Dewey, like Horace Mann, addressed the mission of education in the language of religion: "I Believe that education is the fundamental method of social progress and reform . . . . every teacher should realize the dignity of his calling: that he is a social servant set apart for the maintenance of proper social order and securing of the right social growth. in this way the teacher is the prophet of the true God and the usherer in of the true kingdom of God." John Dewey, *Education Today*, ed. Joseph Ratner (New York: G. P. Putnam's Sons, 1940), pp. 15, 17, from "My Pedagogic Creed" (1897).

[61]Educational fashions are so fluid that any listing of them – often in the guise of values education – is likely to be quickly out of date. One of the latest is "sex equity." For other examples, see Barbara M. Morris, *Change Agents in the Schools* (Upland, Cal.: The Barbara M. Morris Report, 1979); James Hitchcock, *What is Secular Humanism?: Why Humanism Is Becoming Secular and How It Is Changing Our World* (Ann Arbor, Mich.: Servant Books, 1982), pp. 106-13.

In order to evaluate these developments, it is appropriate to first examine a few of the earlier authorities, interpretations, and precedents that have helped shape the current state of religion in the republic.

INTERPRETATIONS

Many of the early commentators on the voluntary principle in religion took pains to emphasize that no slight to religion was intended. The idea of loosening churches from dependence on the state treasury was as novel as the penitentiary system that drew interested European visitors like Alexis de Tocqueville, and it similarly drew comment. Francis Grund, who immigrated from Bohemia, wrote that

> Americans look upon religion as a promoter of civil and political liberty; and have, therefore, transferred to it a large portion of the affection which they cherish from the institutions of their country. In other countries, where religion has become the instrument of oppression, it has been the policy of the liberal party to diminish its influence but in America its promotion is essential to the Constitution.[62]

If the institutional separation of church and state had developed purely for reasons of state, the character of the American religious tradition might have followed a very different line of development. For instance, the Spanish colonies were governed by a union of church and state. Clergymen were licensed and the government was authorized to elect bishops and other ecclesiastics. Thus lay investiture persisted. William Torpey notes that secular control was similarly dominant in the French colonies "and religious freedom strikingly lacking."[63]

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[62]Francis J. Grund, "Religious Habits of the American," in *The Happy Republic: A Reader in Tocqueville's America*, ed. George E. Probst (New York: Harper Torchbooks, 1962), p. 243.
[63]William George Torpey, *Judicial Doctrines of Religious Rights in America* (Chapel Hill: University of North Carolina Press, 1948), p. 8.

The disestablishment of the Roman Catholic Church in France, when it finally came during the French Revolution, was accompanied by violent anticlericalism and was followed by the creation of a highly syncretistic civil religion. Although there were strong fears of similar Jacobin violence in America during this period, the disestablishment of churches proceeded rather peacefully. The immediate effect of disestablishment, as Lyman Beecher and others saw it, was to strengthen the character and prestige of the churches themselves.[64]

The nineteenth century opened with a period of religious revival known as the Second Great Awakening, which centered in the "burned-over district" of western New York. Voluntary societies flourished: home missions, foreign missions, the grammar school movement, the Sunday school movement, Bible and tract societies, and various charitable associations. Religious liberals took the lead on such social reform issues as abolition, temperance, women's rights, prison discipline, and public education. But as Ann Douglas has shown, "an anti-intellectual sentimentalism" gained the upper hand in religious and cultural circles, providing a vehicle through which clergymen and women were able to win greater social status and preserve some traditional cultural values while avoiding the responsibility of a comprehensive program. One result was a tendency to redefine and subvert old doctrines without facing up to the consequent loss of center. Douglas concluded:

> The triumph of the "feminizing," sentimental forces that would generate mass culture redefined and perhaps limited the possibilities for change in American society. Sentimentalism, with its tendency to obfuscate the visible dynamics of

[64]Sidney E. Mead, *The Old Religion in the Brave New World: Reflections on the Relation Between Christendom and the Republic* (Berkeley: University of California Press, 1977), p. 113.

> development, heralded the cultural sprawl that has increasingly characterized post-Victorian life.[65]

These moral crusades spilled over into all areas of life and paralleled the early efforts by physicians to establish medicine as a state-authorized, self-regulating profession. Medical societies sought the power of licensure and fee scheduling, setting an example for other vocational associations. But following the Civil War, it was increasingly the idea of professionalism that provided the banner underneath which the social reform movement could spread and consolidate its gains. The evangelical influence began to wane. [66]

While various commentators disagreed – it is a disagreement that persists – as to the nature and quality of the religion during this period, they could not discount its impact. Alexis de Tocqueville detected vitality and a centrifugal tendency he considered pantheistic, concluding:

> Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. • . I do not know whether all Americans have a sincere faith in their religion--for who can search the human heart?--but I am certain that they hold it 59 be indispensable to the maintenance of republican institutions.[67]

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[65]Ann Douglas, *The Feminization of American Culture* (New York: Avon Books, 1978), p. 13. On the interlocking circles of social reform, see Baird, *Religion*, pp. 286-411, on "The Voluntary Principle Developed;" Otto J. Scott, *The Secret Six: John Brown and the Abolitionist Movement* (New York: Times Books, 1979); Alice Felt Tyler, *Freedom's Ferment: Phases of American Social History to 1860* (Minneapolis: The University 248 of Minnesota Press, 1944).

[66]William G. Rothstein, *American Physicians in the Nineteenth Century: From Sects to Science* (Baltimore: Johns Hopkins Press, 1972) traces the development of medical professionalism from early efforts to use state police powers to control medical practice. The connection between professionalism, social reform, and philanthropy has been largely neglected. This study on church and state grew out of – and in some respects continues – earlier research on self-regulating medical societies and professionalism as a political strategy for occupational control. See also Burton J. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (New York: W. W. Norton & Company, 1976), pp. 80-128. See Sidney Fine, *Laissez Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901* (Ann Arbor: University of Michigan Press, 1956).

[67]Alexis de Tocqueville, *Democracy in America*, vol. 1 (New York: Vintage Books, 1945), p. 316.

But Rev. Robert Baird, an American who addressed himself to Europeans, heartily disagreed with Tocqueville's notion that religion in America "reigns there much less as a doctrine of revelation than as a commonly admitted opinion" and that it was composed of "a multitude of ready-made opinions" dictated by a tyranny of the majority.[68]

> M. de Tocqueville does not forget that religion gave birth to Anglo-American society, but he does forget for the moment what sort of religion it was; that it was not a religion that repels investigation, or that would have men receive any thing as truth, where such momentous concerns are involved, upon mere trust in public opinion. Such has never been the character of Protestantism, rightly so called, in any age.[69]

Constitutional Commentators

The religious underpinnings of American political and legal institutions have been duly noted by legal scholars, historians, judges, politicians, and clergymen alike. Church polities provided models not only for colonial civil governments but also for the present constitutional system. R. Kemp Morton summarized some of these influences from a Presbyterian standpoint:

> Presbyterians had a more republican system; each congregation was independent of every other congregation in its purely local affairs, but the presbyteries and synods of pre-Revolutionary times exhibited a pattern for a union in a central organization without any loss of fundamental rights. It was from this church structure that the formula co-ordinating the large and the small states into one union came. The College of Cardinals of the Catholic Church formed the pattern for the Electoral College for electing the President and the Vice-President. The persistent pursuit of religious freedom by these and other dissenting sects had taught their votaries the philosophy of both religious and civil liberty.[70]

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[68] Baird, *Religion*, p. 55.
[69] Ibid., p. 56
[70] R. Kemp Morton, *God in the Constitution* (Nashville: Cokesbury Press, 1933), pp. 82-83. See also Loraine Boettner, *The Reformed Doctrine of Predestination* (Phillipsburg, N. J.: The Presbyterian and

Other writers have detected Congregationalist, Baptist, Episcopalian, and Jewish contributions to the constitutional framework.[71] Justice Joseph Story and Chancellor James Kent were among many sitting judges during the nineteenth century who cited the maxim that "Christianity is part of the common law." As early as 1764, however, Thomas Jefferson attributed the phrase to a misinterpretation made by Sir Henry Finch in 1613 that had subsequently been perpetuated by Matthew Hale and William Blackstone. But Justice Story disputed Jefferson's contention that it was a "judicial forgery" and quoted the opinion of Chief Justice Prisot of the Court of Common Pleas which established the precedent in 1458:

> As to those laws, which those of holy church have in ancient scripture, it behooves us to give them credence, for this is common law, upon which all manner of laws are founded; and thus, sir, we are obliged to take notice of their law of holy church; and it seems they are obliged to take notice of our law.[72]

Reformed Publishing Company, 1979), pp. 382-95, for a survey of the political effects of Calvinism in America, including the influence of the Mecklenburg Declaration of Independence of 1775.

[71]See William Warren Sweet, *The Story of Religion in America* (New York: Harper & Brothers, 1939), pp. 250-73. A thoughtful statement of the nature of the Christian influence on the American constitutional system may be found in the introduction to Verna M. Hall, comp., *The Christian History of the American Revolution: Consider and Ponder* (San Francisco: Foundation for American Christian Education, 1976), p. xxiv: "The Christian history of the American Revolution is not to be proved through the contemporary Christian statements of individuals or sermons of the clergy, although there are such documents; not even through Providential events, although there are such events. These are effects, the results of God's Law of Liberty being accepted and obeyed individually, internally." Underscoring this, she continues: "Inasmuch as Christian liberty is individual, internal and causative, does it not follow that there should be a societal, external effect of this fact?"

[72]James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman: University of Oklahoma Press, 1973), p. 122. Thomas Jefferson developed his views at some length in a letter to Dr. Thomas Cooper dated 10 February 1814. Thomas Jefferson, *The Writings of Thomas Jefferson*, vol. 14 (Washington: The Thomas Jefferson Memorial Association, 1904), pp. 85-97. For a detailed critique of Jefferson's complaint, see the opinion or Chief Justice J. M. Clayton of the Delaware Supreme Court in *The State* v. *Chandler*, 2 Harrington 553 (1837), which includes the following passage at 561-62: 249 "We know, notwithstanding Mr. Jefferson's defiance, that even Finch himself had quoted 8 H. 8, "Ley de Dieu est ley de terre," the law of God is the law of the land, Doc. & Stud. lib. 1, c. 6, Plowd. 265, to sustain his position that the holy scripture is of sovereign authority, and to show the extent and meaning of the maxim." Perry Miller discovered many complexions to the controversy over whether Christianity was part of the common law. In fact, it might be best characterized as a falling out among Christians over the implications of the statement: that is, what it meant in regard to the establishment or free exercise of religion. See Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965)' pp. 186-206.

James McClellan has noted, moreover, that Justice Story was not satisfied simply to base his contention on a single precedent but attempted to prove that the maxim was a general principle of common law. The Presbyterian theologian, Charles Hodge, carried the higher law argument to its conclusion: "Whatever Protestant Christianity forbids, the law of the land (within its sphere, i.e., within the sphere in which civil authority may appropriately act) forbids."[73] By implication, then, anything contrary to the law of "ancient scripture" would violate the common law and the Constitution.[74]

Mark DeWolfe Howe suggests that Thomas Jefferson "had always been uncomfortably aware of the closeness of the affiliation between Christianity and the common law" and "saw the transmitting of the maxim from English to American shores as the transplanting of the seeds of establishment."[75] The idea that the common law established Christianity remained an important political issue because of the persistence of church establishments in several states. In fact, at the time the Constitution was adopted, five states still maintained formal denominational establishments while others like Massachusetts adopted Protestantism or showed

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[73]Hall, *American Revolution*, p. 156. See Gary DeMar, *God and Government: A Biblical and Historical Study*, vol. 1 (Atlanta: American Vision Press, 1982), p. ix, quoting A. A. Hodge, the brother of Charles Hodge: "If Christ is really king, exercising original and immediate jurisdiction over the State as really as he does over the church, it follows necessarily that the general denial or neglect of his rightful lordship, any prevalent refusal to obey that Bible which is the open law-book of his kingdom, must be followed by political and social as well as moral and religious ruin. If professing Christians are unfaithful to the authority of their Lord in their capacity as citizens of the State, they cannot expect to be blessed by the indwelling of the Holy Ghost in their capacity as members of the Church. The kingdom of Christ is one, and cannot be divided in life or in death. If the Church languishes, the State cannot be in health: and if the State rebels against its Lord and King, the Church cannot enjoy his favour." Charles Hodge's statement view was echoed by Justice William O. Douglas as recently as 1954: "A 'religious' rite which violates standards of Christian ethics and morality is not in the true sense, in the constitutional sense, included within 'religion,' the 'free exercise' of which is guaranteed by the *Bill of Rights*." William O. Douglas, *An Almanac of Liberty* (Garden City, N.Y.: Doubleday and Company, 1954), p. 303.

[74]4 see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press, 1955), pp. 88-89 and note.

[75] Howe, *Garden and Wilderness*, pp. 27, 28.

preference to Christianity. Only Virginia and Rhode Island guaranteed full religious liberty.[76] In all, ten of the fourteen states effectively established Protestantism; all favored Christianity in some manner.[77] Justice Story, a Unitarian, abhorred ecclesiastical establishments but believed Christianity to be the foundation of social order in America:

> Probably at the time of the adoption of the constitution, and of the amendment to it . . . , the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. It yet remains a problem to be solved in human affairs, whether any free government can be permanent where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape.[78]

Justice Story agreed with the sentiment that religion should be encouraged by the state but not through compulsion and not by showing sectarian preferences:

> The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[79]

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[76]Pfeffer, *Church*, pp. 118-19; Cobb, *Religious Liberty*, p. 507.
[77]James McClellan, "The Making of the Establishment Clause," in *A Blueprint for Judicial Reform*, ed. Patrick B. McGuigan and Randall R. Rader (Washington, D.C.: Free Congress Research and Education Foundation, 1981), p. 307.
[78]Joseph Story, *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*, vol. 3 (Boston: Hilliard, Gray, and Company, 1833; reprinted., New York: Da Capo Press, 1970), pp. 726-27. Evidence to support Story's thesis may be gleaned, for example, from Nathan 0. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millenium in Revolutionary New England* (New Haven: Yale University Press, 1977), p. 168: "As intellectual heirs of a tradition which had entwined republicanism and Christian theism, New Englanders in the last two decades of the century were unable to perceive religion as free from matters of civil government. From ancient history they were convinced that 'the state cannot stand without religion' and from their own experience that 'Rational Freedom cannot be preserved without the aid of Christianity.'"
[79]Ibid., p. 728.

He concluded that, because liberty of conscience is protected and power over religion is left to the state governments, "the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship."[80]

Justice Story did not try to make a distinction between the establishment and free exercise clauses. His interpretation was echoed by other commentators, such as James Bayard and William Rawle, both of whom noted the evils growing out of the union of church and state. Both also believed religious liberty enabled religion to flourish in greater purity and vigor.[81] Chancellor James Kent of New York indicated that he found no real difference between the federal and state constitutions in regard to religious liberty, except in seven states that still retained religious tests at the time he wrote. He regarded religious liberty as an absolute right and believed it went hand in hand with civil liberty.[82] Nevertheless, during the 1821 convention to revise the state constitution, he joined with Vice President Daniel Tompkins, Chief Justice Spencer of the New York Supreme Court, and Rufus King in defending the recognition of Christianity as part of the common law and helped turn aside a proposed amendment that "no particular religion shall ever be declared or adjudged to be the law of the land.[83]

[80]Ibid., p. 731.
[81]Morris, *Christian Life*, pp. 259-62.
[82]James Kent, *Commentaries on American Law*, ed. 0. W. Holmes, Jr., 12th ed., vol. 2 (Boston: Little, Brown, and Company, 1873), pp. 34-35 (45). Francis Lieber, *Miscellaneous Writings*, vol. 2: *Contributions to Political Science* (Philadelphia: J. B. Lippincott and Company, 1880), pp. 74-80.
[83]Morris, *Christian Life*, pp. 656-59.

Near the end of the nineteenth century, Thomas M. Cooley, who publicly opposed Sunday closing laws, strongly reaffirmed the same judicial precepts held by Justice Story and Chancellor Kent:

> By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.[84]

In a letter he sent to Robert Baird, Henry Wheaton, who then served as an ambassador to the court of Berlin, described a few of the ways Christianity continued to be recognized, encouraged, and protected back home. His examples included laws governing sabbaths, church property, blasphemy, oath taking, and marriage, all of which helped illustrate his point that the church was not viewed as a rival or enemy of the state but as a "co-worker in the religious and moral instruction of the people."[85]

The Administration and Congress

Comparatively little attention was paid to religious issues either by Congress or the Administration early in the nineteenth century. The few exceptions do not indicate any of the profound differences that began to be especially felt after the Civil War.

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[84]Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, ed. Andrew C. McLaughlin, 3rd ed. (Boston: Little, Brown, and Company, 1898), pp. 224-25.
[85]Baird, *Religion*, p. 282.

The controversy over the maxim that "Christianity is part of the common law" was closely paralleled by another one concerning the first Treaty with Tripoli, which had been negotiated by Joel Barlow and signed by President John Adams in 1797. One version of the treaty contains a clause – possibly spurious – stating that the United State government "is not, in any sense founded upon the Christian religion." In any case, this wording was absent from the Treaty with Tunis of the same year and again absent from the second Treaty with Tripoli of 1805.[86] Moreover, a series of treaties with Algiers guaranteed protection for any "christian captives" who boarded warships of the United States.[87]

One of the first occasions on which Congress made a declaration regarding a religious controversy occurred in 1829 when the Senate – and later the House – responded to petitions against Sunday mail delivery by issuing a report upholding the principle of Sabbatarian legislation but excepting the ban on work "in cases of absolute necessity or great public utility." The report noted denominational differences on the subject, then asserted that the "transportation of the mails on the first day of the week ... does not interfere with rights of conscience."[88] Postal workers were allowed to abstain

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[86]As an illustration of the controversy, the Treaty with Tripoli was cited as supporting evidence in *Board of Education of Cincinnati* v. *Minor*, 23 Ohio St. 211, 217, by counsel for plaintiffs in error. Counsel for defendants in error rejoined at 234 by citing the Treaty with Tunis and other treaties in 8 U.S.Stat. at Large, 157, 224, and 244. On the authenticity question, see 11 Bevans 1070 n3 (1974).

[87]Jonathan Elliot, *The American Diplomatic Code: Embracing a Collection of Treaties and Conventions Between the United States and Foreign Powers from 1778 to 1834*, vol. 1 (Washington: J. Elliot, Jr., 1827; New York: Burt Franklin, 1970), pp. 487, 492-93. These treaties may be compared with the Treaty of Kutchuk-Kainardji (1774), in which the Russian Czar was appointed as the guardian of Christians in the Ottoman Empire. Norman J. G. Pounds, *Political Geography* (New York: McGraw-Hill Book Company, 1963), p. 132.

[88]Wylie, *Sabbath Laws*, pp. 180, 181. More detailed documentation of this prolonged controversy is available in William Addison Blakely, comp., *American State Papers: Bearing on Sunday Legislation*, ed. William Allen Colcord, revised ed. (Washington, D.C.: The Religious Liberty Association, 1911), pp. 176-86, 226-70. See also David McAllister, *Christian Civil Government in America: The National Reform Movement: Its History and Principles*, ed. T. H. Acheson and Wm. Parsons, 6th ed. (Pittsburgh: National Reform Association, 1927), pp. 166-68.

from work on their particular day of rest, but this policy remained only an exception to the general observance of Sunday as the official day of rest.

Then, during the 1853-1854 sessions of Congress, both houses responded to petitions against the practice of employing chaplains in the military, at Indian stations, and in Congress itself. Each house issued a report finding that no establishment of religion resulted from the employment of chaplains. The employment of chaplains was reaffirmed as a means of protecting the free exercise of religion – especially for naval personnel at sea – and preserving "the safety of civil society.[89] It is noteworthy that the report of the House Judiciary Committee is colored by a presumption of continuity between the Articles of Confederation and the Constitution:

> What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist. There never was an established religion without all these. Is there now, or has there ever been, any thing of this in the appointment of chaplains in Congress, or army, or navy? The practice before the adoption of that Constitution is much the same as since. . . .
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> When the Constitution was formed, Congress had power to raise and support armies, and to provide for and support a navy, and to make rules and regulations for the government and regulations of land and naval forces. In the absence of all limitations, general or special, is it not fair to assume that they were to do these substantially in the same manner as had been done before? If so, then they were as truly empowered to appoint chaplains as to appoint generals or to enlist soldiers. Accordingly, we find provision for chaplains in the acts of 1791, of 1812, and of 1838. By the last there is to be one to each brigade in the army; the number is limited to thirty, and these in the most destitute places. The chaplain is also to discharge the duties of schoolmaster.[90]

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[89]Morris, *Christian Life*, pp. 317-27.

[90]Ibid., pp. 317-18. Although the Supreme Court has recently upheld the constitutionality of a legislature opening each session with a prayer by a chaplain paid with public funds, Justice Brennan has correctly noted its incongruity with previously developed establishment clause tests in Marsh v. Chambers, 103 S.Ct. 3330, 3338 (1983). The Court appears simply to have made an exception rather than to have returned to the historical interpretation of the religion clauses.

This would change. New issues came to the fore during and immediately following the Civil War.

TRANSFORMATION

Sectional tensions were already near the breaking point when a third great wave of religious revivalism began spreading through the country. The severity of the Civil War was compounded by the confusion of religious loyalties associated with it. Elements on both sides treated the conflict as a religious crusade. The Presbyterian, Methodist, and Baptist denominations split along sectional lines. After the war, a spirit of self-righteous vengeance held the upper hand during the political "reconstruction" that followed.[91]

The war was also followed by a growing controversy over the place of Christianity in the republic. In response to the national crisis, the National Reform Association was founded in 1864 to restore the Bible to public schools, uphold Sunday laws, and lobby for a proposed Christian Amendment to the Constitution.[92]

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[91]Sydney E. Ahlstrom, *A Religious History of the American People*, vol. 2 (Garden City, N.Y.: Image Books, 1975), pp. 101-11. On why the War Between the States was a "civil war" in the most tragic sense, see Rousas John Rushdoony, *Nature of the American System* (Fairfax, Va.: Thoburn Press, 1978), pp. 32-44.

[92]Ibid., p. 226. Anson Phelps Stokes reprinted the texts of several of these proposals and summarized the considerations that inspired them. Stokes, *Church and State*, vol. 3, pp. 582-92. See also McAllister, *Christian*, pp. 173-77. Numerous versions of the proposed Christian Amendment were introduced into Congress roughly over the period of a century. The most recent version – H. J. Res. 103 of 1961 – reads as follows: "Section 1. This Nation devoutly recognizes the authority and law of Jesus Christ, Saviour and Ruler of Nations, through whom are bestowed the blessings of Almighty God. Sec. 2. This amendment shall not be interpreted so as to result in the establishment of any particular ecclesiastical organization, or in the abridgment of the rights of religious freedom, or freedom of speech and press, or of peaceful assemblage. Sec. 3. Congress shall have power, in such cases as it may deem proper, to provide a suitable oath or affirmation for citizens whose religious scruples prevent them from giving unqualified allegiance to the Constitution as herein amended." Charles Rice, a Notre Dame law professor, has suggested a similar amendment along the following lines: “1. This nation is in fact under God, who has created all human beings and endowed them with unalienable rights. 2. Nothing in this Constitution shall prevent the United States or any state from affirming this fact." Charles E. Rice, *Beyond Abortion: The Theory and Practice of the Secular State* (Chicago: Franciscan Herald Press, 1979), p. 71.

In 1865, after the newly organized National Unitarian Conference committed the denomination to the "Lordship of Christ," dissidents bolted and formed the Free Religious Association in 1867. Francis Ellingwood Abbot organized a political arm called the National Liberal League and lobbied for complete separation of church and state. One of its fruits was an amendment sponsored in 1875 by Sen. James A. Blaine that would have prohibited state religious establishments and tax support for religious schools.[93] Although both major political parties endorsed a separation of church and state in their 1876 platforms, the bill failed the Senate. Like the Christian Amendment, the Blaine Amendment was introduced on numerous occasions but failed each time.[94]

Such attempts to rewrite the Constitution or rewrite history were symptomatic of the much greater political and cultural changes that were already beginning to rewrite both. The War Between the States represents a watershed event in American history. The political revolution that accompanied it produced an unprecedented concentration of power in the central government.[95] One contemporary observer, Bernard Janin Sage, who served as one of the counsel to Jefferson Davis, wrote a lengthy defense of the constitutional theory of state sovereignty "upon which the anti-slavery sentiment of the country based itself, in opposing the extension of slavery, the fugitive slave law, and, indeed, slavery itself; while it supports the action (except nullifying), of those states

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[93]The proposed Blaine Amendment read as follows: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by school taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised, or lands so devoted, be divided between religious sects or denominations." Blakely, *American State Papers*, p. 347.

[94]See U. S. Congress, Senate, *Proposed Amendments to the Constitution of the United States: Introduced in Congress from December 4, 1889 to July 2, 1926*, S. Doc. 93, 69th Cong., 1st sess., 1926.

[95]On the suspension of constitutional liberties and the centralization of power, see Rushdoony, *Nature*, pp. 41-44; Felix Morley, *Freedom and Federalism* (Chicago: Henry Regnery Company, 1959), pp. 55-71.

which have from time to time defended themselves against federal excesses."[96] Like Judge Perkins of Indiana, Sage opposed centralizing tendencies and quoted with approval a warning by Edmund Burke: "'This change,' said he, 'from an immediate state of procuration and delegation, to a course of acting as from original power, is the way in which all the popular magistracies of the world have been perverted from their purposes.'"[97]

The industrial revolution of the prewar years was followed by a postwar commercial revolution that led to great concentrations of financial and industrial capital through the retooling of existing legal forms, such as the trust and the corporation, and the creation of sympathetic regulatory agencies. The intellectual revolution that grew out of the romantic and transcendentalist movements of earlier decades found a new impetus in the application of the latest scientific developments to the study and reform of society. Colleges that had been founded to train ministers and missionaries were converted to supplying the new professions – medicine, law, engineering, management, education, and social work – with a new social status, a respectable scientific rationale, and trained specialists. Thus the American university system was born.[98]

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[96]*The Republic of Republics: A Retrospect of Our Century of Federal Liberty*, 3rd ed. (Philadelphia: William W. Harding, 1878), p. iii. Some editions do not identify the author on the title page, as with the third, or use a pseudonym, P. C. Centz, Barrister.

[97]Ibid., p. 6. A section of the original dissertation, "State Courts," was earlier published by the author as "Christianity in Nineteenth Century American Law," *Antithesis*, II, 2 (March/April 1991): 23-29. https://digitalcommons.liberty.edu/gov_fac_pubs/7/.

[98]On the commercial revolution and federal regulation, see Grant McConnell, *Private Power and American Democracy* (New York: Vintage Books, 1966), pp. 246-55; Edward S. Greenberg, *Serving the Few: Corporate Capitalism and the Bias of Government Policy* (New York: John Wiley & Sons, 1974), pp. 87-127. On the law of charitable trusts and corporations, see Laurence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), pp. 221-24, 446-63. The author treats the Girard College case – discussed in Chapter Seven – as a precedent reversing a longstanding legal prejudice against charitable trusts. On the convergence of science, religion, and social reform, see James C. Malin, *A Concern About Humanity: Notes on Reform, 1872-1912 at the National and Kansas Levels of Thought* (Lawrence, Kan.: James C. Malin, 1964), pp. 1-16, *passim*. Malin points out that much of the impetus toward secularization of education and taxing of church property came from nativists. The

These new challenges required immediate attention and probably left little time for considering specifically religious or ecclesiastical issues. At the state level, the customary religious accommodation remained outwardly intact. Little changed except for occasional modifications of Sunday laws to moderate certain inconveniences. At the national level, few religious controversies were brought before the High Court. But when the Court adopted a more active conception of its responsibilities and began involving itself in a battery of religious issues in the 1940s, it had new interpretative tools at its disposal. It immediately addressed itself to two general categories: free exercise cases involving unpopular religious minorities, particularly the Jehovah's Witnesses, and establishment cases involving primary and secondary schools. The precedents set during this period appear to have been the opening wedge in a major redefinition by the federal judiciary of the place of religion in public life.[99]

In summary, the political and cultural history of the first century of the constitutional era was dominated by a decisively Christian framework of assumptions and values. The framers of the Constitution and judges of the state courts appear to have made a conscious effort to harmonize a genuine commitment to religious liberty with an equally strong devotion to basic Christian values and practices. They left no suggestion that the temporal laws of men and nations should ever be permitted to

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Kansas People's Party platform of 1890, by contrast, opened with the following preamble: "The people's party of Kansas . . . , recognize Almighty God as the rightful sovereign of nations, and from whom all just powers of government are derived, and to whose will all human enactments ought to conform. . . ." *Ibid*., p. 35. On higher education, see Laurence R. Veysey, *The Emergence of the American University* (Chicago: The University of Chicago Press, 1965; Phoenix Books, 1970), pp. 1-120; David N. Smith, *Who Rules the Universities?: An Essay in Class Analysis* (New York: Monthly Review Press, 1974), pp. 61 - 111.

[99]The rise of judicial activism raised anew questions about the legitimacy of judicial review. On the debate over judicial review, see Leonard W. Levy, *Judgments: Essays in American Constitutional History* (Chicago: Quadrangle Books, 1972), pp. 25-63.

contradict or supersede the revealed will of God in the Bible. In fact, they continued to rely on the Bible as an authoritative textbook of law and political theory to which all sides could – and frequently did – appeal.

Even so, this same century was marked by profound political and religious changes that eventually exploded the common framework of values and redrew the political and religious map of the country. Novel interpretations of the Constitution and the Bible that brought basic points of doctrine into question were introduced into public discussions. The net effects of such gradually unfolding changes, however, were so imperceptible and disjointed as to reassure all but the most vigilant souls of their continuity with tradition. This was particularly true of the constitutional,[100] religious,[101]

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[100]Different commentators have traced these changes to different causes. John W. Burgess pointed a finger at the progressive income tax of 1913 and, later, the use of draftees in the First World War. John W. Burgess, *The Reconciliation of Government with Liberty* (New York: Charles Scribner's Sons, 1915), pp. 365-72; John W. Burgess, *Recent Changes in American Constitutional Theory* (New York: Columbia University Press, 1923), 56-64. William Graham Sumner attributed the change to what he called "The Conquest of the United States by Spain" in 1898. William Graham Sumner, *The Conquest of the United State by Spain and Other Essays*, ed. Murray Polner (Chicago: Gateway, 1965), pp. 139-73. Others have reached back to the Reconstruction, the Civil War, the Dred Scott decision, and even earlier for an explanation. But such political events are often only the outward manifestations of inward personal and cultural changes. See, generally, Gottfried Dietze, *America's Political Dilemma: From Limited to Unlimited Democracy* (Baltimore: The Johns Hopkins Press, 1968). The tragic issue of slavery that rent the nation was nearly averted by the action of the Continental Congress in 1784. For want of a quorum in the New Jersey delegation, the vote on Thomas Jefferson's proposal to abolish slavery in the states after the year 1800 ended in a tie. Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (New York: William Morrow and Company, 1938), p. 650.

[101] The religious dimension of the transformation may be seen in the repudiation of the New England theology late in the nineteenth century. For an account by a church historian who was unfriendly to the old orthodoxy, see Frank Hugh Foster, *A Genetic History of the New England Theology* (Chicago: University of Chicago Press, 1907), pp. 543-53. See also Beecher, *Autobiography*, pp. 109-12. Richard Hildreth, a nineteenth century Massachusetts historian, probed the psychology of revolution in his account of the theological changes that have since borne a thousand flowers: "Education and habit, especially in what relates to outward forms, are not easily overcome. Episcopacy made but slow progress in New England. A greater change, however, was silently going on; among the more intelligent and thoughtful, both of laymen and ministers, Latitudinarianism continued to spread. Some approached even toward Socinianism, carefully concealing, however, from themselves their advance to that abyss. The seeds of schism were broadly sown; but extreme caution and moderation on the side of the Latitudinarians long prevented any open rupture. They rather insinuated than avowed their opinions. Afraid of a controversy in which they were conscious that popular prejudice would be all against them, unsettled many of them in their own minds, and not daring to probe matters to the bottom, they patiently waited the further effects of the progressive changes by which they themselves had been borne along. To gloss over their heresies, they called themselves Arminians; they even took the name of moderate

and educational changes that quietly refashioned the cultural landscape of America. While the nature of the transformation has come to be more widely recognized, it has long since become practically irreversible.[102] Writing in 1946, Edward S. Corwin characterized the transformation thus:

> The Constitution of 1789, even though not originally designed as such, early became primarily a Constitution of Rights, and hence structurally a Constitution of checks and balances . . . . The Constitution of the present year of grace, 1946, is by contrast a Constitution of Powers, one that exhibits a growing concentration of power in the hands, first, of the National Government; secondly, in the hands of the President and the administrative agencies. Nor is the source of this

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Calvinists. Like all doubters, they lacked the energy and zeal of faith. Like all dissemblers, they were timid and hesitating. Conservatives as well as Latitudinarians, they wished, above all things, to enjoy their salaries and clerical dignities in comfort and peace. Free comparatively in their studies, they were very cautious in their pulpits how they shocked the fixed prejudices of a bigoted people whose bread they ate. It thus happened that while the New England theology, as held by the more intelligent, underwent decided changes, the old Puritan phraseology was still generally preserved, and the old Puritan doctrines, in consequence, still kept their hold, to a great extent, on the mass of the people. Yet remarkable local modifications of opinion were silently produced by individual ministers, the influence of the abler Latitudinarian divines being traceable to this day in the respective places of their settlement. The growth of Latitudinarianism was the natural fruit of that doctrine of the Puritan fathers, the necessity of a learned ministry. That learning on which they relied against papist and prelatic superstition on the one hand, and Antinomian enthusiasm on the other, could not but react on themselves. As the exalted religious imagination of New England subsided to the common level, as reason and moral sense began to struggle against the overwhelming pressure of religious awe, a party inevitably appeared which sought by learned glosses to accommodate the hard text of the Scriptures and the hard doctrines of the popular creed to the altered state of the public mind." Richard Hildreth, *The History of the United States*, vol. 2 (New York: Harper and Brothers, 1856), pp. 309-11. Political and social reform – what Octavius Frothingham termed "the religion of humanity" – was becoming the religion of Hildreth's contemporaries. Hildreth's analysis is even more caustically echoed, but perhaps overstated, by Herbert Schneider, who displayed little sympathy for the new "genteel tradition" and none for the declining orthodoxy. Schneider went so far as to characterize the change as a "revolution" and "the beginning of a new religion," claiming that "it is the secularization of democracy, the dethronement of God, the unholiness of the commonwealth, that marks a revolution." Herbert Wallace Schneider, *The Puritan Mind* (New York: Henry Holt and Company, 1930; Ann Arbor: The University of Michigan Press, 1958), pp. 94-101. On the political overtones of the schism between the Unitarians and Trinitarians, see Jacob C. Meyer, *Church and State in Massachusetts From 1740 to 1833: A Chapter in the History of the Development of Individual Freedom* (Cleveland: Western Reserve University Press, 1930), pp. 160-183; Charles Warren, *Jacobin and Junto: or Early American Politics as Viewed in the Diary of Dr. Nathaniel Ames, 1758-1822* (Cambridge: Harvard University Press, 1931), pp. 286-311.

[102]As one journalist wrote near the end of the Second World War, "The Revolution Was:" "There are those who have never ceased to say very earnestly, 'Something is going to happen to the American form of government if we don't watch out.' These were the innocent disarmers. Their trust was in words. They had forgotten their Aristotle. More than 2,000 years ago he wrote of what can happen within the form, when 'one thing takes the place of another, so that the ancient laws will remain, while the power will be in the hands of those who have brought about revolution in the state.'" Garet Garrett, *The People's Pottage* (Boston: Western Islands, 1953), p. 9. https://mises.org/mises-daily/revolution-was. A classic statement of this principle may be found in the third chapter of Edward Gibbon, *The Decline and Fall of the Roman Empire*, vol. 1 (New York: The Modern Library, 1932), pp. 52-73.

> Constitution of Powers at all obscure. It is the Constitution of World War I pruned of a few excrescences like Presidentially created agencies, "directives," and "indirect sanctions," and adapted to peacetime uses in an era whose primary demand is longer the protection of rights but the assurance of security.[103]

If Corwin was correct in claiming that a "change of attitude toward constitutional values" took place during this period which was "nothing short of revolutionary," an event of such magnitude might be registered in a variety of ways. Corwin studied its effects in terms of the war power. Others focused on the power to regulate commerce. While civil liberties considerations also evoked great concern during this period, it was more in terms of direct invasions of personal liberties than with a view to the erosion of their constitutional presuppositions.

An overview of the history of Supreme Court cases on religion might very well yield valuable insights into these larger constitutional changes.

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[103]Edward S. Corwin, *Total War and the Constitution* (New York: Alfred A. Knopf, 1947), pp. 170-71, 172. Charles Warren made a similar observation in a study of the power of Congress under the general welfare clause: "The words of a great American President – Grover Cleveland – remain as true today as when they were written in 1887, that 'the lesson should be constantly enforced that though the people support the Government, the Government should not support the people.' If the opposite theory shall prevail in this country, if the people are to be taught to look to the Government for their support, if the Government is to assume to defray the needs of its individual citizens, then one result will inevitably follow: Elections will become a mere barter of promises of Government appropriations; competitive promises of public provender will take the place of competing poli tical principles; and those candidates for office who promise to the voters the most Government support will receive the most support from the voters." Charles Warren, *Congress as Santa Claus or National Donations and the General Welfare Clause of the Constitution* (Charlottesville, Va.: The Michie Company, 1932), p. 145. The reference to Grover Cleveland is to that President's veto of the Texas Seed Bill, an appropriation of $10,000 for the distribution of seeds to drought-stricken farmers. For the text of the veto message, see George F. Parker, ed., *The Writings and Speeches of Grover Cleveland* (New York: Cassell Publishing Company, 1892), pp. 449-451. Arthur Selwyn Miller, who views these developments more favorably, has used the concept of a Constitution of Powers as a point of departure for outlining the contours of "the Positive State." He has concluded that the "constitutional revolution" reflects the "flexibility" and "theological nature" of the original charter. Arthur Selwyn Miller, "Constitutional Revolution Consolidated: The Rise of the Positive State," *The George Washington Law Review*, 35 (December 1966): 172-90. Similar observations on "the emergence of the Second Republic" may be found in Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: W. W. Norton & Company, 1979), pp. 273-94. Post-dissertation (1984), my subsequent research, teaching, and writing have often focused on aspects of the origins, rise, and operation of this Constitution of Powers and the resulting Administrative State.