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# RELIGIOUS LIBERTY IN THE EARLY AMERICAN REPUBLIC

STEVEN ALAN SAMSON\*

## Abstract

The early nineteenth century in America was a period in which the idea of religious liberty came to be worked out in practice in a setting of growing diversity. The immediate effect of the dissolution of state religious establishments was to strengthen the vitality and prestige of the churches themselves. Before the end of the century, the church historian Philip Schaff could regard as normal ‘a free church in a free state, or a self-supporting and self-governing Christianity in independent but friendly relation to the civil government.’

## I INTRODUCTION

The representation of the Constitution of the United States as ‘the supreme law of the land’, which echoes the phrase ‘law of the land’ in the *Magna Carta*, refers to more than the document itself.<sup>1</sup> It is unnecessary to speculate about the exact intent of the founders when the very language of the Constitution attests to its continuity with and even incorporation of common law or higher law concepts. Indeed, this understanding was

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<sup>1</sup> This article is largely drawn from the fifth and sixth chapters, “The American Commonwealth” and “Early Constitutional Issues,” of the author’s doctoral dissertation. Steven Alan Samson, *Crossed Swords: Entanglements Between Church and State in America*. Ph.D. dissertation, University of Oregon, 1984.

affirmed by the founders themselves and has been periodically reaffirmed by members of the judiciary.<sup>2</sup> As Edward S. Corwin contended:

The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of an essential and unchanging justice. ... There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, all together regardless of the attitude of those who wield the physical resources of the community.<sup>3</sup>

The principles of higher law jurisprudence may be traced to the earliest period of modern western law. In the twelfth century, for example, Gratian

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<sup>2</sup> Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Cornell University Press, 1955) 89. See R. Kemp Morton, *God in the Constitution* (Cokesbury Press, 1933) 110-116. See also H. E. Bradford, 'And God Defend the Right: The American Revolution and the Limits of Christian Obedience' (1983) *Christianity and Civilization* 239: "According to the Old Whig view of the English Constitution, it was not a contract but a source of identity—with no author but the nation and its history, with God an implicit party to the process. As covenant qua law it grew out of the interaction of people and princes living out of the nation's genius, with God's blessing its confirmation. These assumptions undergird most of the early American political documents." Henry Steele Commager, 'Constitutional History and the Higher Law' in Conyers Read (ed), *The Constitution Reconsidered* (Harper Torchbooks, revised ed, 1968) 225–226, cited several affirmations of this sort as expressions of an early higher law tradition in early American jurisprudence. While Commager, who wrote this essay in 1938, claimed that the tradition's underlying philosophy had been repudiated three-quarters of a century earlier, he did acknowledge its importance in constitutional history: 'Americans, having discovered the usefulness of natural law, elaborated it, and having justified its application by success, protected that success by transforming natural into constitutional law: the state and federal constitutions. And in so far as natural law had found refuge in written law, there was little reason to invoke it; it was automatically invoked whenever the constitution was invoked, and this was the logic of Marshall in the Marbury case.' Ibid 228.

<sup>3</sup> Ibid 4.

wrote: 'Enactments (*constitutiones*), whether ecclesiastical or secular, if they are proved to be contrary to natural law, must be totally excluded.'<sup>4</sup>

The new federal union was, in effect, given the authority to coordinate the political system but not to dominate it. Its overall success assumes the continued good health of the various social institutions, such as families and churches, that also exercise powers of a governmental nature. The safeguards built into the constitutional system ultimately depend on the consensus and self-restraint of its component parts. This is a key to properly understanding the relationship between church and state as it was originally envisioned. As James Madison remarked during the ratification debates in Virginia: "There is not a shadow of a right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."<sup>5</sup>

Like the Declaration, the Constitution is based on the premise that the primary purpose of civil government is essentially negative rather than positive: that is, protective, prohibitory, and punitive. Since its power is coercive by nature rather than simply persuasive, the founders believed that civil authority must be constitutionally restrained. James Madison declared that an accumulation of powers in the same hands "may justly be pronounced the very definition of tyranny."<sup>6</sup> Alexander Hamilton similarly urged that the original grant of powers to Congress was a limited one:

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<sup>4</sup> Harold J. Berman, 'The Origins of Western Legal Science' (1977) 90 *Harvard Law Review* 925.

<sup>5</sup> 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* (J. B. Lippincott & Co., 2<sup>nd</sup> ed, 1863) vol 1, p. 330.

<sup>6</sup> Alexander Hamilton, John Jay, and James Madison, *The Federalist: A Commentary on the Constitution of the United States*, ed. Edward Mead Earle (New York: Modern Library) 313. Quoting Federalist, no. 47. See also Abraham

The plan of the convention declares that the power of Congress, or, in other words, of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.<sup>7</sup>

Likewise, in his Farewell Address, George Washington cautioned against the tendency of governments to usurp power:

If, in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. —But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.—The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.— Of all the dispositions and habits, which lead to political prosperity, Religion, and Morality are indispensable supports.—In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens.<sup>8</sup>

But this warning has been largely ignored because the focus of American politics is more generally on the means rather than on commonly conceded ends. Chief Justice John Marshall helped set the stage—and the tone—for many subsequent controversies by adopting a sweeping view of proper constitutional means in *McCulloch v Maryland*, 4 Wheat 316, 421 (1819):

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Kuyper, *Lectures on Calvinism* (Wm. B. Eerdmans Publishing Company, 1978) 9699, on the practical implications of sphere sovereignty.

<sup>7</sup> Ibid 541, quoting Federalist, no. 83.

<sup>8</sup> Charles W Eliot (ed), *The Harvard Classics: American Historical Documents 1000-1904* (Collier & Son, 1910) vol 3, 260.

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

One of the great challenges to constitutional liberty has come through a gradual shift of emphasis from prohibition to regulation, from a protective to a beneficent or philanthropic conception of civil power.<sup>9</sup> What Alexis de Tocqueville subsequently wrote about the regulation of manufacturing associations might be applied with equal validity to the regulation of religious activity:

If once the sovereign had a general right of authorizing associations of all kinds upon certain conditions, he would not be long without claiming the right of superintending and managing them, in order to prevent them from departing from the rules laid down by himself. In this manner the state, after having reduced all who are desirous of forming associations into dependence, would proceed to reduce into the same condition all who belong to associations already formed; that is to say, almost all the men who are now in existence.<sup>10</sup>

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<sup>9</sup> See Frederick Bastiat, *The Law* (Dean Russell trans, The Foundation for Economic Education, Inc., 1950) 21–29; H L Richardson, *What Makes You Think We Read the Bills?* (Caroline House Books, 1978) 79–89; T. Robert Ingram, *The Two Powers* (St Thomas Press, 1959) 15.

<sup>10</sup> Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans, Phillips Bradley (ed), Vintage Books, 1945) vol 2, 33031. Walter Lippmann regarded it as ‘an extraordinary paradox’ that the intellectual leaders of the 1930's believed such detailed regulation to be necessary. As an illustration, he cited Lewis Mumford: "As industry advances in mechanization, a greater weight of political authority must develop outside than was necessary in the past." Lewis Mumford, *Technics and Civilization* (Harcourt, Brace & World, 1934; Harbinger, 1963) 420. Regarding this kind of other-directedness, Lippmann commented: "Is it not truly extraordinary that in the latest phase of the machine technic we are advised that we must return to the political technic—that is, to the sumptuary laws and the forced labour which were the universal practice in the earlier phases of the machine technic? I realise that Mr Mumford hopes and believes that the omnipotent sovereign power will now be as rational in its purposes and its

The success of the struggle for political liberty was soon followed by a growth of religious liberty and the collapse of denominational establishments. For a time, centralizing tendencies were held in check.

## II THE IDEA OF A CHRISTIAN REPUBLIC

The idea of religious liberty is best understood in the context of a prolonged practical experiment. Many of the colonies, particularly Plymouth Plantation (1620), Massachusetts Bay (1630), Maryland (1634), Rhode Island and Providence Plantations (1636), Connecticut (1636), New Haven (1640), and Pennsylvania (1681), were settled by religious dissenters who wished to be free to practice their faith unmolested. Religious liberty was born in the crucible of conflicting European religious practices which spilled over into a distant land. Denominational traditions were put to the test under frontier conditions characterized by slow communication, fluid migration, and the intermingling and fusion of various religious and political ideas. As Alexis de Tocqueville later observed of the result: "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. ..." <sup>11</sup>

A century after the Constitution was ratified, church historian Philip Schaff reviewed the development of religious liberty in America and detected a close connection between the American political and religious consensus.

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measures as are the physicists and chemists who have invented alloys and harnessed electricity. But the fact remains that he believes the beneficent promise of modern science can be realized only through the political technology of the pre-scientific ages." Walter Lippmann, *The Good Society* (Grosset & Dunlop, 1936) 89.

<sup>11</sup> Ibid vol 1, 316.

If we speak of a Christian nation we must take the word in the qualified sense of the prevailing religious sentiment and profession; for in any nation and under any relation of church and state, there are multitudes of unbelievers, misbelievers, and hypocrites. ... With this understanding, we may boldly assert that the American nation is as religious and as Christian as any nation on earth, and in some respects even more so, for the very reason that the profession and support of religion are left entirely free. State-churchism is apt to breed hypocrisy and infidelity, while free-churchism favors the growth of religion.<sup>12</sup>

Schaff regarded as distinctively American the easy cooperation between religious and civil institutions, characterized by "a free church in a free state, or a self-supporting and self-governing Christianity in independent but friendly relation to the civil government."<sup>13</sup> He concluded that the American system of law could not have originated from any other religious soil, adding that "we may say that our laws are all the more Christian because they protect the Jew and the infidel, as well as the Christian of whatever creed, in the enjoyment of the common rights of men and citizens."<sup>14</sup>

The nature of the difference between the state church and free church viewpoints may be seen in the different versions of the Westminster Confession of Faith, the most influential of Protestant doctrinal statements used in America. Originally, the twenty-third chapter of the Confession—entitled "Of the Civil Magistrate"—reflected the "national church" concept accepted in England and Scotland, where—even in 1647—it was somewhat

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<sup>12</sup> Philip Schaff, 'Church and State in the United States: or The American Idea of Religious Liberty and Its Practical Effects' in *Papers of the American Historical Association* (G. P. Putnam's Sons, 1888) vol 2, no 4, 5455.

<sup>13</sup> Ibid 9.

<sup>14</sup> Ibid 62.



at variance with the congregational establishments of New England. The third section of the original chapter reads:

The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven: yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God.<sup>15</sup>

Despite a marked break with the pure Erastian view that the church is subject to the state, the assumption of a national establishment that underlay the Confession did not square with either the decentralized establishments of seventeenth century New England or the later voluntary church concept.<sup>16</sup> As early as 1729, the Presbyterian synod of Philadelphia adopted the Westminster standards with modifications. The wording in three of the chapters was formally changed in 1788. The commonly accepted American revision of chapter 23, section three, reflects a conception of religious liberty which strongly resembles that of the First Amendment, even though it predated the Amendment by a year:

Civil magistrates may not assume to themselves the administration of the word and sacraments; or the power of the keys of the kingdom of heaven;

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<sup>15</sup> Ibid 50.

<sup>16</sup> An attempt by Robert Child and others to petition Parliament to support a Presbyterian establishment in New England and appoint a governor-general was successfully averted in 1647 by the General Court. John Fiske, *The Beginnings of New England, or the Puritan Theocracy in Its Relations to Civil and Religious Liberty* (Houghton Mifflin Company, 1930) 18891; Samuel Eliot Morison, *Builders of the Bay Colony* (Houghton Mifflin Company, revised ed, 1958) 244-68.

or, in the least, interfere in matters of faith. Yet, as nursing fathers, it is the duty of civil magistrates to protect the church of our common Lord, without giving the preference to any denomination of Christians above the rest, in such a manner that all ecclesiastical persons whatever shall enjoy the full, free, and unquestioned liberty of discharging every part of their sacred functions, without violence or danger. And, as Jesus Christ hath appointed a regular government and discipline in his church, no law of any commonwealth should interfere with, let, or hinder, the due exercise thereof, among the voluntary members of any denomination of Christians, according to their own profession and belief. It is the duty of civil magistrates to protect the person and good name of all their people, in such an effectual manner as that no person be suffered, either upon pretense of religion or infidelity, to offer any indignity, violence, abuse, or injury to any other person whatsoever: and to take order, that all religious and ecclesiastical assemblies be held without molestation or disturbance.<sup>17</sup>

But the problems of jurisdiction and sovereignty are not suddenly resolved by the simple expedient of substituting a "neutral state" for a "confessional state."<sup>18</sup> In fact, this concept of neutrality or disinterestedness has--by its lack of definition--introduced a genuine ambiguity into the relationship between church and state that very likely encouraged not only the proliferation of antagonistic sects but also the creation of public agencies that have duplicated—and sometimes replaced—various church ministries.

For the most part, the Christian character of the social order was taken for granted. But it may not have been simply the blithe indifference of churches to the hazards of Erastianism that led them to support a greater role by the state in public education and welfare. Robert Handy explains

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<sup>17</sup> Schaff, above n 12, 50. For an example of the new attitude, see Gardiner Spring, *Obligations of the World to the Bible: A Series of Lectures to Young Men* (Taylor & Dodd, 1839) 14549.

<sup>18</sup> The terms "neutrality of the state" and "state confessionalism" are used in E. R. Norman, *The Conscience of the State in North America* (University Press, 1968).

that "the overtones of religious establishment implicit in much of what they did then was not clear to them, because as they developed new ways they did not realize how much of the old patterns they carried over the wall of separation into their new vision of Christian civilization."<sup>19</sup> Well into the twentieth century, historian Edward Humphrey could still write:

The American conception allows for national characteristics that are independent of the state. So we are a Christian nation even though Christianity is not a feature of the American state. The adoption of the American concept of the limited state resulted in the ideal of a free church in a free nation, the present American ideal of religious freedom. As a corollary to this we have the ideal of a state freed from ecclesiastical control.<sup>20</sup>

These words echo the sentiments of earlier and even later commentators, including judges and legal scholars like James Kent, Joseph Story, Thomas Cooley, David Brewer, and William O. Douglas.<sup>21</sup> Yet the general respect

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<sup>19</sup> Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* (Oxford University Press, 1971) 40.

<sup>20</sup> Edward Frank Humphrey, *Nationalism and Religion in America, 1774-1789* (Chipman Law Publishing Company, 1924) 2.

<sup>21</sup> See James Kent, *Commentaries on American Law*, ed. O. W. Holmes, Jr. (Little, Brown, and Company, 12 ed, 1873) vol 2, 3435 (45); 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* (Hilliard, Gray, and Company, 1833; reprinted Da Capo Press, 1970) vol. 3, 72627; Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, ed. Andrew C. McLaughlin, (Little, Brown, and Company, 3<sup>rd</sup> ed, 1898) 22425. The definitive judicial statement regarding the Christian character of the American constitutional system is probably the lengthy obiter dictum by Justice David Brewer in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). Justice William O. Douglas appears to have made special reference to the long series of polygamy cases, particularly *Davis v. Beason*, 133 U.S. 333 (1890), when he wrote: "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* (Doubleday and Company, 1954) 304.

for Christianity did little to prevent the now commonly accepted compartmentalization of spiritual and temporal concerns. The divorce of religion from practical life appears to be the result of a dualistic attitude that regards the state as "worldly" and the church as "otherworldly," diminishing the reputation of both. In this, it resembles the tendency of innumerable church heresies throughout history.<sup>22</sup> Thus religion as a private concern of individuals is separated from politics as the public concern of communities.<sup>23</sup>

The struggle for religious liberty during the last half of the eighteenth century succeeded in discrediting any remaining pretense that the kingdom of God could be established through coercion rather than conversion. John Locke's view that a church "is a free and voluntary Society" soon prevailed.<sup>24</sup> But with public opinion divided on the nature and extent of this new religious liberty, any consideration of the positive responsibilities of the state with respect to religion was obliged to take a back seat to the fight for disestablishment. As a result, important issues were not fully addressed. If, according to the Westminster standards, civil magistrates are

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<sup>22</sup> Some of the antecedents of this dualism are examined in a chapter entitled "The Socialism of the Heresies" in Igor Shafarevich, *The Socialist Phenomenon* (William Tjalsma trans, Harper-Row, 1980) 1879.

<sup>23</sup> See Richard E. Morgan, *The Politics of Religious Conflict: Church and State in America* (Pegasus, 1968) 22, who quoted Roger Williams to the effect that the church should be regarded as just another private association: "... [L]ike unto a Body or College of Physicians in a City; like unto a Corporation, Society or Company of East-Indie or Turkie-Merchants, or any other Society or Company in London; Which Companies may hold their Courts, keep their Records; hold disputations; and in matters concerning their Society, may dissent, divide, break into Schisms and Factions, sue and implead each other at the Law, yea, wholly break up into pieces and nothing."

<sup>24</sup> Verna M. Hall, *The Christian History of the Constitution of the United States of America: Self-Government with Union. American Revolution Bicentennial Edition*, ed. Joseph Allan Montgomery (Foundation for American Christian Education, 1979) 48, quoting Locke's "A Letter Concerning Toleration."

to be regarded as "nursing fathers" (Isa. 49:22-23), in what way are they obliged to promote the welfare of the church? In what sense is the magistrate "the minister of God" (Rom. 13:4)? Who is responsible to set and uphold the moral standards of the community? Even if the prophetic calling of the church to proclaim the word of God or the ministerial calling of the magistrate to enforce it were not at issue, some manner of involvement by civil officers in religious affairs and by church leaders in civil affairs would be unavoidable. The church does not operate in a political vacuum. Neither does the state operate in a religious vacuum. Indeed, it is a basic premise of Christianity—despite periodic neglect of this principle—that both church and state are ministries under the direct authority of God and must govern their affairs within the framework of God's revealed word, the Bible. The practical issue is, as it always has been, to harmonize their respective activities.

### III 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

... [T]he 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.<sup>25</sup>

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.<sup>26</sup>

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

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<sup>25</sup> Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (The University of Chicago Press, 1965) 56, quoting Perry Miller, *Roger Williams: His Contribution to the American Tradition* (Atheneum, 1966) 98.

<sup>26</sup> Peter N. Carroll, *Puritanism and the Wilderness: The Intellectual Significance of the New England Frontier, 1629-1700* (Columbia University Press, 1969) 8790, 10914. The "wall" is variously used as a metaphor for the Christian magistrate or the state itself.

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.<sup>27</sup>

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.<sup>28</sup>

Edward S. Corwin's comment on the phrase and its use by Justice Black in *Everson v Board of Education*, 330 US 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

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<sup>27</sup> 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 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* (Congregational Publishing Society, 1876) 7980.

<sup>28</sup> Americans United for Separation of Church and State, *Basic Documents Relating to the Religious Clauses of the First Amendment* (Americans United, 1965) 19.

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.<sup>29</sup>

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 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."<sup>30</sup> While Madison conceded that a "properly executed" bill of rights might guard against ambitious rulers, he warned that

... [T]here 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

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<sup>29</sup> Edward S. Corwin, *American Constitutional History: Essays*, eds. Alpheus Mason and Gerald Garvey (Harper and Row, 1964) 20405.

<sup>30</sup> Alpheus Thomas Mason, *Free Government in the Making: Readings in American Political Thought* (Oxford University Press, 3<sup>rd</sup> ed, 1965) 320, quoting a letter of Madison to Jefferson dated 17 October 1788. See Irving Brant, *The Bill of Rights: Its Origin and Meaning* (New American Library, 1965) 5157.



definition would be narrowed much more than they are likely ever to be by an assumed power.<sup>31</sup>

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 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

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<sup>31</sup> Ibid 320.

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.<sup>32</sup>

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 John Cotton'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.

#### IV 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 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.

##### A *Virginia*

Prior to 1776, attempts to obtain toleration for religious dissenters in Virginia had largely failed. A number of Baptist preachers were beaten and

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<sup>32</sup> Howe, see above n 25, 78.

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."<sup>33</sup>

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 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.<sup>34</sup>

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<sup>33</sup> Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (The Macmillan Company, 1902; Burt Franklin, 1970) 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*, Joseph Allan Montgomery (ed) (Foundation for American Christian Education, 1975) 35.

<sup>34</sup> Ibid 492; See Humphrey, above n 20, 380-4.

Meanwhile, churches of all denominations were being devastated by the war. Numerous church buildings were destroyed and congregations were deprived of their clergy.<sup>35</sup> 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.<sup>36</sup>

"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.

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<sup>35</sup> Robert Baird, *Religion in the United States of America* (Blackie and Son, 1844; reprint ed, Arno Press, 1969) 248.

<sup>36</sup> Leo Pfeffer, *Church, State, and Freedom* (Beacon Press, revised ed., 1967) 112,

The last vestige of the old establishment—the glebe lands which supported the clergy—did not finally pass away until 1840.<sup>37</sup>

## B *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

... [N]ever 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. ... 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, liberty of conscience. And if

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<sup>37</sup> Ibid 113-14; See Cobb, above n 33, 36.

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.'<sup>38</sup>

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.<sup>39</sup> But the establishment held out until 1833.

### C *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

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<sup>38</sup> Edwin S. Gaustad (ed), *A Documentary History of Religion in America: To the Civil War* (William B. Eerdmans Publishing Company, 1982) 25556.

<sup>39</sup> William G. McLoughlin, *Isaac Backus and the American Pietist Tradition, The Library of American Biography* (Boston: Little, Brown and Company, 1967) 231-33, contrasts the motives of Jefferson and Backus: rationalism and evangelicalism; See also Pfeffer, above n 36, 100; *Ibid* 26870, reprints Backus's bill of rights proposal.

Divinity School. The school had been Unitarian since the board of Harvard had been taken over in 1805.

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.<sup>40</sup>

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<sup>40</sup> William G. McLoughlin, *New England Dissent, 1630-1883: The Baptists and the Separation of Church and State* (Harvard University Press, 1971) vol. 2, 118995. See Raymond B. Culver, *Horace Mann and Religion in the Massachusetts Public Schools* (Yale University Press, 1929) 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

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 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.<sup>41</sup>

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. 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.<sup>42</sup>

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(ed), *Autobiography, Correspondence, Etc., of Lyman Beecher, D.D.* (Harper & Brothers, 1865) vol. 2, 10912; Anson Phelps Stokes, *Church and State in the United States* (Harper & Brothers, 1950) vol. 1, 76364.

<sup>41</sup> Ibid 1193. For a contemporary comment, see *Spirit of The Pilgrims* (1829) 37073.

<sup>42</sup> Norman, above n 18, 45.



The establishment principle was not yet dead in Massachusetts, however: only dormant. Four years later the Unitarian-dominated legislature, led by Senate president Horace Mann, established a state Board of Education 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."<sup>43</sup> In his study of the origins of the early American public school 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.<sup>44</sup>

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 pastors and school masters as well as the controversy among various religious traditions—both pro and con—it generated throughout the remainder of the

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<sup>43</sup> Samuel L. Blumenfeld, *Is Public Education Necessary?* (The Devin-Adair Company, 1981) 188, quoting Mary Tyler Peabody Mann, *Life of Horace Mann* (Lee and Shepherd, 1891) 80.

<sup>44</sup> *Ibid* 185.

century.<sup>45</sup> 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.

## V 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 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 artefact. 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.<sup>46</sup> "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."<sup>47</sup>

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<sup>45</sup> Ibid 23347. See generally, Rousas John Rushdoony, *The Messianic Character of American Education: Studies in the History-of the Philosophy of Education* (The Craig Press, 1963); Zach Montgomery, *Poison Drops in the Federal Senate: The School Question From a Parental and Non-Sectarian Stand-Point* (Gibson Bros., 1886).

<sup>46</sup> Rousas John Rushdoony, 'The Freedom of the Church' in *Chalcedon Position Paper No. 16* (Chalcedon, 1980).

<sup>47</sup> Rousas John Rushdoony, *Law and Liberty* (Thoburn Press, 1977) 2.

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."<sup>48</sup> Accordingly, the effort to understand 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 underlies 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

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<sup>48</sup> Greg L. Bahnsen, 'Socrates or Christ: The Reformation of Christian Apologetics' in Gary North (ed), *Foundations of Christian Scholarship: Essays in the Van Til Perspective* (Ross House Books, 1976) 234.

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.<sup>49</sup>

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.

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.<sup>50</sup> While the religious references it does contain are too oblique to satisfy critics who lament its "political atheism,"<sup>51</sup> other critics are equally offended by any expression of public religiosity, regarding it as "religious treason" or as "an establishment

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<sup>49</sup> M. Stanton Evans, 'Toward a New Intellectual History' (1981) 25 *Modern Age* 36468.

<sup>50</sup> Sidney E. Mead, "The Nation with the Soul of a Church," in Russell Richey and Donald Jones (eds), *American Civil Religion* (Harper & Row, 1974) 55. See E. R. Craven, 'Religious Defect in the Constitution of the United States' (n.d) 25 *Studies in Christian Citizenship* 116, originally given as an address to the National Reform Convention in New York, February 26-27, 1873.

<sup>51</sup> See Schaff, above n 12, 38-43, a section entitled 'The Charge of Political Atheism'; Baird, above n 35, 25962.

of religion."<sup>52</sup> 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 Articles of Confederation and the Constitution are also silent about the question of sovereignty.<sup>53</sup> The issues which prompted the calling of the Philadelphia Convention related to the strengthening of an already existing "perpetual Union" rather than the creation of an altogether new political system. The assumption that the founders 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

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<sup>52</sup> See, for example, Franklin Steiner, *Religious Treason in the American Republic* (The American Rationalist Association, n.d.). This was published circa 1926.

<sup>53</sup> See the discussion by Alexander Hamilton in *Federalist*, no. 83, in Hamilton, Jay, and Madison, above n 6, 539.

1782.<sup>54</sup> 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."<sup>55</sup> Cord notes that the new Congress continued to employ chaplains and even provided direct aid to religion, sometimes in fulfilment of treaty obligations. The first four Presidents except Jefferson proclaimed days of public thanksgiving and prayer. Sunday continued to be observed as a day of rest.<sup>56</sup>

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<sup>54</sup> 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* (George W. Childs, 1864) 20626; Baird, above n 35, 26267.

<sup>55</sup> Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (Lambeth Press, 1982) xiv.

<sup>56</sup> Ibid 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* (The National Reform Association, 1905) 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* (Houghton, Mifflin and Company, 1895) 37379.

VI A RELEASE OF ENERGY<sup>57</sup>

The historian Richard Cornuelle maintains that a spirit of cooperation and local self-government grew among the early colonists out of "an unusual sense of interdependence, powerfully reinforced by the terrors of the Atlantic crossing."<sup>58</sup> These early Americans pioneered "the democratization of community service." Immigrants would establish voluntary associations—with names like the Scots Charitable Society (1657) in Boston and the Norden Aid Society in Hudson, Wisconsin—to help them adjust to life in America.

Although the motives for reform during this period varied, they generally fell into two broad categories: expressly Christian evangelism and missionary work, and broadly non-sectarian humanitarian programs.<sup>59</sup> These motives operated side by side and were often almost indistinguishable. With a few exceptions, what they shared was a strong

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<sup>57</sup> The phrase "release of energy" was introduced by the legal historian James Willard Hurst: "The most important nineteenth-century uses of law in relation to social problems involved the control of the general environment. So far as concerns the simple release of individual energy in social affairs, law had its principal influence in the tolerance, protection, sometimes fostering, of associations of all kinds. Legally assured freedom of religious association was in the background of one of the most dynamic elements of the first half of the century: the evangelical Protestant movement in the rural areas, especially on the frontier, whose credo of individual dignity generated much of the emotional fervor of agrarian politics." James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (University of Wisconsin Press, 1956) 30.

<sup>58</sup> Richard Cornuelle, 'A Brief Interpretive History of America's Voluntary Sector' (1977) *United Way of America Annual Report*.

<sup>59</sup> Horace Mann's "nonsectarianism" in the common schools was criticized as a means of smuggling Unitarianism into the curriculum. David Tyack, 'The Kingdom of God and the Common School' (1966) 36 *Harvard Educational Review*, 449.

emphasis on voluntary cooperation through private benevolent associations, as opposed to relying on direct government intervention.

The objects of all this moral energy ranged from poor relief to legal reform to preservation of the Sabbath to the salvation of seamen to vegetarianism and the water cure, including temperance (“jumping on the bandwagon” and “falling off the wagon”), the peace movement, the abolition of dueling, public education, prison reform, various communal experiments, asylums for the handicapped, health fads, feminism, the abolitionist movement, and the literary movement that in many respects embodied or embraced so many of them: Transcendentalism.<sup>60</sup>

It was the proliferation of such voluntary associations that so impressed Alexis de Tocqueville on his visit to America in 1831. But Eugen Rosenstock-Huessy had an even larger view of the critical importance of what he called the “freedom of endowment,” which provides a practical foundation and expression for freedom of conscience:

The Truce of God, the free choice of a profession, the liberty to make a will, the copyright of ideas—these institutions are like letters in the alphabet which we call Western civilization. ... They have emancipated the various elements of our social existence from previous bondage. Each time one of these institutions came into being, it had a stiffening effect on one type of human activity. Each time it enabled man to direct his energies towards ends that hitherto transcended his potentialities. Less and less did he remain bound by the unchangeable traditions of his environment. A police force means nothing less than the emancipation of the civilian within myself; for without it, I should be forced to cultivate the rugged virtues of a vigilant

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<sup>60</sup> See, generally, Alice Felt Tyler, *Freedom's Ferment: Phases of American Social History to 1860* (University of Minnesota Press, 1944) 40102; Van Wyck Brooks, *The Flowering of New England, 1815-1865* (Houghton Mifflin Company, 1981) 7388.



man. To free the courts from the whims of a changing government exalts my will and testament to a kind of immortality: something will endure when I have passed away. And so each of these institutions was hailed as a deliverance. Not one of them came into existence without the shedding of streams of blood. Each of these institutions was accorded the greatest sacrifices. The paradoxical truth about progress, then, is that it wholly depends on the survival of massive institutions which prevent a relapse from a stage which has once been reached.<sup>61</sup>

By the time Rosenstock-Huessy wrote in 1938, however, these institutions and the liberties they upheld had been put at risk. Due to poor stewardship, they are still at risk today. To drive his point home, Rosenstock-Huessy cited Daniel Webster's successful argument before the U.S. Supreme Court on behalf of Dartmouth College, which had been chartered by the Crown, against a takeover by the State of New Hampshire.<sup>62</sup> Webster famously concluded his argument: "It is, Sir, as I have said, a small college. And yet there are those who love it."

## VII CONCLUSION

The American experiment in ordered liberty shows that nothing should be considered so small as to fall below constitutional notice or protection. As Webster himself put it in a speech, "The Spirit of Liberty:"

The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defences, and fortifies itself with all possible

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<sup>61</sup> Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (William Morrow and Company, 1938) 3031. Earlier, Francis Lieber contributed the concept of institutional liberty to the political science literature.

<sup>62</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

care against the assaults of ambition and passion. It does not trust the amiable weaknesses of human nature, and therefore it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to its legal authority. Far otherwise. It seeks for duration and permanence. It looks before and after; and, building on the experience of ages which are past, it labors diligently for the benefit of ages to come. This is the nature of constitutional liberty; and this is *our* liberty, if we will rightly understand and preserve it.<sup>63</sup>

Webster's "Spirit of Liberty" reflects an understanding that both enabled and accompanied the rise of religious liberty in America. Many of the early commentators on the voluntary principle in religion took pains to emphasize that no slight to religion was intended by dissolving the state religious establishments. 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 drew similar wonderment and comment. Francis Grund, who emigrated to America 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.<sup>64</sup>

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<sup>63</sup> Francis Lieber, *On Civil Liberty and Self-Government* (J. B. Lippincott, 3<sup>rd</sup> ed, revised ed, 1877) 154.

<sup>64</sup> Francis J. Grund, 'Religious Habits of the American' in George E. Probst (ed), *The Happy Republic: A Reader in Tocqueville's America*, (Harper Torchbooks, 1962) 243.

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.<sup>65</sup> For example, 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.<sup>66</sup>

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<sup>65</sup> 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." William George Torpey, *Judicial Doctrines of Religious Rights in America* (University of North Carolina Press, 1948) 8.

<sup>66</sup> Sidney E. Mead, *The Old Religion in the Brave New World: Reflections on the Relation Between Christendom and the Republic* (University of California Press, 1977) 113.