# FROM TYPOLOGY TO SYNTHESIS: RECASTING THE JURISPRUDENCE OF RELIGION

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#### Introduction

The United States Supreme Court's jurisprudence of religion has been plagued by multiple inconsistencies and contradictions. A careful examination of the case law scarcely reveals a single principle to which one can point and state with assurance that it is pre-eminent and inviolable. Commenting on the obviously irreconcilable and unpredictable results of the *Lemon* test<sup>1</sup> in Establishment Clause<sup>2</sup> cases, then-Justice Rehnquist wrote:

[A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place

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<sup>&</sup>lt;sup>1</sup> See generally Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding Pennsylvania and Rhode Island statues providing subsidies to church-affiliated schools unconstitutional under the Religion Clauses of the First Amendment).

<sup>&</sup>lt;sup>2</sup> U.S. CONST. amend I.

outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.<sup>3</sup>

One might add to this litany of incoherencies many others, such as the following: A state may display a crèche in a public place during the Christmas season so long as the crèche is situated next to a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, a clown, an elephant, a teddy bear, hundreds of lights, and a large banner proclaiming "Season's Greetings," but the state may not display a crèche that stands alone in a public place. A state may hire a Presbyterian minister to offer a prayer each day its legislature is in session, but it may not formulate a brief generic prayer for public school students to recite before class instruction begins.

Cases adjudicated under the Free Exercise Clause<sup>8</sup> also comprise a hodgepodge of anomalous results. An Amish family is free to disregard a state statute requiring compulsory school attendance by children until the age of sixteen,<sup>9</sup> but Amish employers are not free to opt out of social security taxation,<sup>10</sup> even though the government's not paying social security benefits to them would more than compensate for their paying nothing into the system.<sup>11</sup> A state cannot deny unemployment compensation benefits to a Jehovah's Witness for refusing to assist in the fabrication of turrets for military tanks, although such work would have violated no tenet of the Jehovah's Witness creed,<sup>12</sup> but a state can deny

<sup>&</sup>lt;sup>3</sup> Wallace v. Jaffree, 472 U.S. 38, 110–11 (1985) (Rehnquist, J., dissenting) (footnotes and citations omitted).

<sup>&</sup>lt;sup>4</sup> Lynch v. Donnelly, 465 U.S. 668, 671–72 (1984).

<sup>&</sup>lt;sup>5</sup> County of Allegheny v. ACLU, 492 U.S. 573, 579–81 (1989) (plurality opinion).

<sup>&</sup>lt;sup>6</sup> Marsh v. Chambers, 463 U.S. 783, 784–86 (1983).

<sup>&</sup>lt;sup>7</sup> See Engel v. Vitale, 370 U.S. 421, 422–24 (1962).

<sup>&</sup>lt;sup>8</sup> U.S. CONST. amend. I.

<sup>&</sup>lt;sup>9</sup> See Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

<sup>&</sup>lt;sup>10</sup> United States v. Lee, 455 U.S. 252, 254 (1982).

<sup>&</sup>lt;sup>11</sup> Id. at 262 (Stevens, J., concurring).

<sup>&</sup>lt;sup>12</sup> See Thomas v. Review Bd., 450 U.S. 707, 709–11, 719 (1981).

such benefits to Native Americans who smoke peyote as part of an age-old Native American religious ritual.<sup>13</sup>

The jurisprudence of religion is, in the words of one constitutional law scholar, simply "a mess," and in the words of another, "a muddle." These negative assessments are hardly surprising considering that the Court has made little more than pragmatic and fragmentary attempts to understand the nature of religious devotion and the ways in which it shapes and interacts with societal and state concerns. It is an ineffectual endeavor to pour over the Court's religion cases with the objective of uncovering a set of underlying jurisprudential principles that will serve to elucidate the various points of law. One must be content either to read order into virtual chaos or to satisfy oneself with holdings that are too unpredictable and divergent from one another to form a coherent system of judicial reasoning.

To understand the jurisprudence of religion, one must look beyond law and toward politics. Elsewhere I have constructed a typology by correlating fundamental positions taken with respect to religion in the First Amendment to various political theories. <sup>16</sup> I have argued, in addition, that

<sup>&</sup>lt;sup>13</sup> See Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874, 890 (1990).

<sup>&</sup>lt;sup>14</sup> Frederick Mark Gedicks, The Rhetoric of Church and State 3–4 (1995).

<sup>&</sup>lt;sup>15</sup> Michael W. McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?*, in 1990 FIRST AMENDMENT LAW HANDBOOK 269, 269 (James L. Swanson & Christian L. Castle eds., 1990). But see Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581 (1995), in which the author states, "Notwithstanding the many naysayers, the *Restatement of the Law of Religious Freedom* shows that the Supreme Court's case law on religious freedom is not at all in chaos." *Id.* at 613. One wonders why, if this body of law is as coherent as he claims, the outcomes of cases leave so many commentators scratching their heads. Are we to assume that the situation is attributable to their failure to avail themselves of Professor Esbeck's suggested principles of understanding? Even in the face of such remarkable certitude, I suggest that it makes sense to look in a contrary direction for a plausible explanation of the obvious constitutional confusion.

L. Scott Smith, Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 117 tbl. (2004). The two views of the Establishment Clause are accommodation and separation. The two interpretations of Free Exercise are narrow and expansive. Id. When these are combined, four fundamental political positions come to light. Id. Separationism plus narrow free exercise describes classical liberalism, while separationism combined with expansive free exercise results in communitarianism. Id. Accommodationism and (continued)

the full swing in recent years toward a "religion-neutral" jurisprudence has no single meaning and is little more than a ruse by which political conclusions are made to appear judicial.<sup>17</sup> The Court's decision in a religion case signifies the particular political point of view that was able to claim a majority of the Justices on the date the decision was issued. As Larry Alexander might put it, "It's politics all the way down." <sup>18</sup>

The Court's jurisprudence of religion is in need of a broad synthetic approach, not for the dubious purpose of attempting to make this body of law apolitical, but in order to knit together a synthetic theory of religion cases in which each of the political theories I have previously identified has its place and function. The hope of such a theory is that it will bring increased understanding, balance, and predictability to this body of law. Radical zigs and zags, as well as hypertrophic extensions of the law, may be minimized, if not avoided altogether.

In this Article, I will attempt to draw kernels of insight from each major political perspective previously identified and, in the process, examine and analyze specific case law, with concentrated attention given to the school prayer cases and to the recent Pledge of Allegiance controversy. I will likewise continue in conversation with historical and philosophical writers, while attempting to move toward a broad creative synthesis in the jurisprudence of religion.

In the movement from typology to synthesis, the place to begin is with classical liberalism and the manner in which it envisions the individual in terms of an autonomous self.<sup>20</sup> The question is whether the Court's jurisprudence of religion, which has been generously suffused with the spirit of this philosophy, is now being strangulated by it. I answer this question affirmatively. The next consideration is whether there are ways to correct the problem. I believe that there are, and I have found them in other political approaches to the same subject. De facto

expansive free exercise delineates revised liberalism, whereas accommodationism with narrow free exercise expresses de facto establishmentarianism. *Id.* 

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<sup>&</sup>lt;sup>17</sup> See L. Scott Smith, "Religion-Neutral" Jurisprudence: An Examination of Its Meanings and End, 13 WM. & MARY BILL RTS. J. 815, 818 tbl., 869–70 (2005), in which the notion of neutrality is described and analyzed from the points of view of classical liberalism, communitarianism, revised liberalism, and de facto establishmentarianism and is found to be deficient in each instance.

Larry Alexander, *Illiberalism All the Way down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 636 (2002).

<sup>&</sup>lt;sup>19</sup> See Smith, supra note 17, at 823–39.

 $<sup>^{20}</sup>$  See infra Part I.

establishmentarianism, revised liberalism, and communitarianism each have corrective contributions to make, depending upon the aspect of the jurisprudence of religion under consideration.

# I. CLASSICAL LIBERALISM AND THE PROBLEM OF BOUNDLESS AUTONOMY

## A. The Value of Autonomy

As I have explained elsewhere, Immanuel Kant and John Stuart Mill have profoundly influenced the meaning of the term "autonomy" in modern parlance. For Kant, the term implies the rational faculty of a self-legislative will. Each person exists not as a means, but only as an end. The will of the individual makes universal law. Because the "autonomy of the will" is the "supreme principle of morality," the individual is not bound by holy writ, tradition, or the pronouncements of others. For Kant, each time a person makes a moral choice, it is as if the world is created anew, for there is no guide except reason. Each person is his or her own ultimate authority.

While he came from a philosophical place and time quite different from Kant, Mill too stressed that individuals need not be constrained by the moral predilections of others.<sup>29</sup> He passionately insisted that "[t]he only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it."<sup>30</sup> Moreover, Mill emphasized that anyone "who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation."<sup>31</sup>

<sup>&</sup>lt;sup>21</sup> See Smith, supra note 17, at 820–30.

<sup>&</sup>lt;sup>22</sup> See Immanuel Kant, Foundations of the Metaphysics of Morals 49–52 (Lewis White Beck trans., Bobbs-Merrill 1959) (1785).

<sup>&</sup>lt;sup>23</sup> Id. at 46.

<sup>&</sup>lt;sup>24</sup> *Id.* at 49.

<sup>&</sup>lt;sup>25</sup> *Id.* at 59.

<sup>&</sup>lt;sup>26</sup> See id.

<sup>&</sup>lt;sup>27</sup> See id. at 59–60.

<sup>&</sup>lt;sup>28</sup> See id.

<sup>&</sup>lt;sup>29</sup> See John Stuart Mill, On Liberty 12 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

<sup>&</sup>lt;sup>30</sup> *Id*.

<sup>&</sup>lt;sup>31</sup> *Id.* at 56.

Morality and religion, along with the values emanating from them, are, for the foregoing thinkers, matters solely of individual preference and determination. Being "autonomous" means choosing values for oneself, unconstrained by the opinions and dictates of others.<sup>32</sup> When the state or others interfere with the individual's right to choose, coercion and heteronomy countermand and supplant choice and autonomy, resulting in a violation of the individual.<sup>33</sup>

## B. Autonomy and School-Sponsored Prayer

During the last half century, the autonomy of the individual has been a recurrent theme to which immense homage has been paid in the Court's jurisprudence of religion. The individual's right to seek independence from the faith and practice of the majority has been consistently upheld. In *Engel v. Vitale*,<sup>34</sup> for example, the Court outlawed a brief, nonsectarian<sup>35</sup> prayer adopted by the New York State Board of Regents, and did so based upon parental protestations on behalf of ten children that the prayer was "contrary to the beliefs, religions, or religious practices of both themselves

<sup>&</sup>lt;sup>32</sup> See KANT, supra note 22, at 51.

<sup>&</sup>lt;sup>33</sup> See id. at 59–60.

<sup>&</sup>lt;sup>34</sup> 370 U.S. 421 (1962).

<sup>35</sup> Michael W. McConnell argues that the term "nonsectarian" is simply a long-time euphemism for liberal Protestantism. Michael W. McConnell, Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?, 1991 U. CHI. LEGAL F. 123, 138. Another commentator explains that, as between Christians, the term "nonsectarian" once stood for "generic Christian doctrine, as expressed, for example, in the Apostles' Creed, and as opposed to doctrinal distinctions between Roman Catholicism and Protestant sects." Steven H. Aden, Who Speaks for the State?: Religious Speakers on Government Platforms and the Role of Disclaiming Endorsement, 9 WM. & MARY BILL RTS. J. 419, 428 (2001). The same commentator states that the term is meaningless in a public school context that "may include large numbers of Buddhist, Hindu, Muslim, Jewish, and Sikh students, as well as practitioners of fetishistic and animistic religions, atheists and agnostics." Id. It would seem that, despite its problems, if any, the term might still be used to describe religious ideas and principles for which there is overwhelming support in American life. When asked the question, "Do you believe in God, or a universal spirit?," polls consistently show that at least 94% of Americans answer in the affirmative. Ontario Consultants on Religious Tolerance, Religious Beliefs of Americans (1999), http://www.religioustolerance.org/chr poll3.htm#salv. The vast preponderance of Americans, although a lesser percentage than those who believe in God, also admit belief in an afterlife. See id. I can think of no reason why the term "nonsectarian" may not be properly applicable to such widely held beliefs.

and their children."<sup>36</sup> The Court's majority, speaking through Justice Black, stated that, although it was unnecessary to prove coercion in order to make a prima facie case for an Establishment Clause violation, coercion was manifest under the facts of this case.<sup>37</sup> "When the power, prestige and financial support of government," Justice Black declared, "is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."<sup>38</sup> In order to avoid coercion and a host of other contemplated evils, the Court's solution was to divest public schools of collective prayer.<sup>39</sup> The religious rights of the smallest minority of individuals were vindicated at the expense of sacrificing a communal practice of the majority.

The same classical liberal emphasis on autonomy continued in other public school prayer cases like *School District of Abington Township v. Schempp*, <sup>40</sup> *Wallace v. Jaffree*, <sup>41</sup> *Lee v. Weisman*, <sup>42</sup> and *Santa Fe Independent School District v. Doe*. <sup>43</sup> In *Schempp*, two cases were joined together as one. <sup>44</sup> Two families, one from Pennsylvania and the other from Maryland, <sup>45</sup> complained about the devotional practice of students briefly reading together from the Bible and thereafter collectively reciting the Lord's Prayer. <sup>46</sup> Justice Clark, delivering the Court's majority opinion and following *Engel*, noted that, although coercion is not a constitutive element of an Establishment Clause offense, a government that prescribes a particular form of religious worship is indeed coercive. <sup>47</sup> Bible-reading and the recitation of the Lord's Prayer were stripped from public schools in order to vindicate the rights of few without so much as considering the effects, if any, of such judicial fiat upon the majority's core values.

Wallace, in which the Court struck down an Alabama statute that authorized a period of silence "for meditation or voluntary prayer" in Alabama public schools, 48 did little more than emphasize one of the

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<sup>36</sup> Engel, 370 U.S. at 423, 425.
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<sup>&</sup>lt;sup>37</sup> See id. at 430–31.

<sup>&</sup>lt;sup>38</sup> *Id.* at 431.

<sup>&</sup>lt;sup>39</sup> See id. at 425.

<sup>&</sup>lt;sup>40</sup> 374 U.S. 203 (1963).

<sup>&</sup>lt;sup>41</sup> 472 U.S. 38 (1985).

<sup>&</sup>lt;sup>42</sup> 505 U.S. 577 (1992).

<sup>&</sup>lt;sup>43</sup> 530 U.S. 290 (2000).

<sup>44</sup> See Schempp, 374 U.S. at 205.

<sup>&</sup>lt;sup>45</sup> See id. at 205–06, 211.

<sup>&</sup>lt;sup>46</sup> Id. at 205–07, 211.

<sup>&</sup>lt;sup>47</sup> *Id.* at 221 (citing Engel v. Vitale, 370 U.S. 421, 430–31 (1962)).

<sup>&</sup>lt;sup>48</sup> Wallace v. Jaffree, 472 U.S. 38, 40 (1985).

principles advanced in *Schempp*; namely, a statute must have a secular purpose in order to survive Court scrutiny.<sup>49</sup> The problem with the state's case in *Wallace* was that it "did not present evidence of *any* secular purpose."<sup>50</sup> The Court correlated secular purpose with "the individual's freedom to choose his own creed . . . , [a freedom that the Court viewed as] the counterpart of his right to refrain from accepting the creed established by the majority."<sup>51</sup> The majority opinion showcases the Court's classical liberal inclination to be on guard against the slightest invasion of the individual's autonomy, even when that concern means divesting the majority of a brief period of silence.

The issue in Weisman was whether inviting a clergyman to offer nonsectarian prayers at a middle school graduation ceremony constituted a violation of the Establishment Clause.<sup>52</sup> In a five to four opinion, the Court responded affirmatively by advancing, in Justice Scalia's words, the "psycho-coercion test" for determining establishment infractions. <sup>54</sup> The Court emphasized that the "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"55 The Court declared that it constituted an invasion of a petitioner's rights under the Establishment Clause to place her in a position where she has either to participate in the religious exercise or to protest having to do so.<sup>56</sup> The clarity of the offense against the petitioner was increased because she was an adolescent.<sup>57</sup> "To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure [upon those who are not mature adults to enforce orthodoxy than it may use more direct means."58 The tradition of a graduation prayer, even the kind based upon and reflecting the broad common ground of diverse religious communities, as in this case, was outlawed by the Court.<sup>59</sup> The autonomy of a father and

<sup>&</sup>lt;sup>49</sup> *Id.* at 56; *Schempp*, 374 U.S. at 222.

<sup>&</sup>lt;sup>50</sup> Wallace, 472 U.S. at 57.

<sup>&</sup>lt;sup>51</sup> *Id.* at 52.

<sup>&</sup>lt;sup>52</sup> Lee v. Weisman, 505 U.S. 577, 580, 586 (1992).

<sup>&</sup>lt;sup>53</sup> *Id.* at 644 (Scalia, J., dissenting).

<sup>&</sup>lt;sup>54</sup> See id. at 599 (majority opinion).

<sup>&</sup>lt;sup>55</sup> Id. at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

<sup>&</sup>lt;sup>56</sup> *Id.* at 593.

<sup>&</sup>lt;sup>57</sup> See id.

<sup>&</sup>lt;sup>58</sup> *Id.* at 594.

<sup>&</sup>lt;sup>59</sup> See id. at 598–99.

his daughter in matters of religion was honored and upheld at the expense of jettisoning a long-standing tradition affirming core values of the majority.

In Santa Fe, the Court held that a public school district cannot provide for formal prayer at a school function, such as a pre-game football ceremony, even when the prayer is voluntary, because it does not constitute private speech in an open forum and is therefore coercive of the minority. It was no small part of the Court's purpose to protect those members of the student body who did not wish to conform to the practices of the majority, for "[t]he constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." The Court gave no consideration to the effects of its ruling upon the majority of the population's desire to affirm, in a manner meaningful to it, the values of good sportsmanship, student safety, and an appropriate environment for competition.

It would be wrong to convey the impression that the issue of coercion in the Court's jurisprudence of religion comes to the forefront only in the school prayer cases. The issue is continually expressed, or at least lurking in the shadows of the Court's reasoning, in many religion cases. The fear of religious imposition is present in the Court's discussions of matters such as released-time programs for religious instruction, legislative prayer, legislative prayer

[The operation of that law] assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the taxestablished and tax-supported public school system to aid religious groups to spread their faith.

<sup>&</sup>lt;sup>60</sup> Santa Fe Indep. Sch. Dist. v. Doe. 530 U.S. 290, 294, 317 (2000).

<sup>&</sup>lt;sup>61</sup> Id. at 312 (quoting Weisman, 505 U.S. at 596).

<sup>62</sup> Id. at 322 (Rehnquist, C.J., dissenting).

<sup>&</sup>lt;sup>63</sup> In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1998), Justice Black, opining for the majority regarding the constitutionality of the released-time program under review from Illinois, began with the fact that Illinois had a compulsory education law, and then argued:

*Id.* at 209–10. A state statute, in other words, was co-opted by religious interests to be coercive toward sectarian ends.

<sup>&</sup>lt;sup>64</sup> In *Marsh v. Chambers*, 463 U.S. 783 (1983), Justice Brennan reasoned that the practice of having a chaplain open each session of the legislature with a prayer violates all (*continued*)

and the battle waged between evolutionary theory and creationism,<sup>65</sup> to name but a few. In all these cases, the intrusion of the religious into the public square is explicitly, or at least impliedly, coercive.

Yet the school prayer decisions, perhaps more than any single group of cases, demonstrate the Court's propensity to stress the value of individual autonomy while condemning as "coercive" anything that invades it, This understanding of autonomy is flawed and however slightly. misguided. It ignores the fact that, between autonomy and constraint, there is a vital and dynamic balance necessary in order to sustain a healthy and productive self and society. Commentators draw attention to the fact that "[c]oercion is not always bad, and it is not even always the enemy of autonomy."66 They explain that, because human beings are the products as well as the creators of their environment, sacrificing the community for the sake of the individual is a highly suspect endeavor. <sup>67</sup> Neither a society nor an individual can be free without constraints.<sup>68</sup> Examples of constructive constraints are forcing children to be inoculated against certain diseases and to attend school, insisting that every citizen contribute to a program of social security, and implementing a military draft in order to address an

three prongs of the *Lemon* test, *id.* at 795–801 (Brennan, J., dissenting), because *Lemon* emphasizes that "religion 'must be a private matter for the individual, and family, and the institutions of private choice." *Id.* at 802 (quoting Lemon v. Kurtzman, 403 U.S. 602, 625 (1971)). Furthermore, a basic goal of the Religion Clauses in the First Amendment is "to keep the state from interfering in the essential autonomy of religious life." *Id.* at 803. For Justice Brennan, then, a legislative chaplain interferes with one's religious autonomy and is therefore coercive. *See id.* 

In Epperson v. Arkansas, 393 U.S. 97 (1968), a case addressing an Arkansas statute criminalizing the teaching of biological evolution in public schools, *id.* at 98, the majority emphasized that the Constitution is religiously neutral, "knows no heresy," and will tolerate no law that attempts to advance religious orthodoxy in the classroom. *Id.* at 104–05 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)). Banning the teaching of evolution in public schools was tantamount to coercing students into religious orthodoxy. *See id.* at 108–09. Edwards v. Aguillard, 482 U.S. 578 (1987), outlawed a Louisiana statute requiring that, whenever evolution was taught in public schools, it was to be accompanied by instruction in "creation science." *Id.* at 580–82. The Court's majority opinion, delivered by Justice Brennan, makes clear that "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at 584.

<sup>&</sup>lt;sup>66</sup> WILLARD GAYLIN & BRUCE JENNINGS, THE PERVERSION OF AUTONOMY: COERCION AND CONSTRAINTS IN A LIBERAL SOCIETY 8 (rev. & expanded ed. 2003).

<sup>&</sup>lt;sup>67</sup> *Id.* at 7.

<sup>&</sup>lt;sup>68</sup> See id.

international crisis.<sup>69</sup> Constraint (or "coercion") is as necessary to freedom as autonomy.<sup>70</sup> It is erroneous to identify freedom with autonomy alone.<sup>71</sup> One simply needs to observe the drug addict who lives homelessly as a derelict on the streets of a large city.<sup>72</sup> His or her choices may well be autonomous (examples of "negative freedom", but they are hardly conducive to what most would contend is genuine freedom.<sup>74</sup> Rather than autonomy on the one hand and constraint militating against it on the other, it is more accurate to maintain that "[s]ocial order is not something from which we can be 'autonomous' . . . [but is instead] the precondition of autonomy."<sup>75</sup>

### C. Autonomy, the Self, and Society

The Court's proclivity to accentuate autonomy in the manner it has presupposes a concept of the self that is truncated, if not simply mistaken. Human beings are not merely self-legislative, or as John Rawls puts it, "self-originating sources of valid claims." We are social animals who must live in groups in order to survive. The matter may also be expressed as follows: "We have built-in biological directives for altruism and social accommodation . . . [that] set limits to choice." We are born in abject dependence and remain in that state for a strikingly prolonged period of time. This fact enables parents to nurture their children and to inculcate values in them. Indeed, through this relatively long period of dependence and process of socialization, the child comes to experience the emotions of guilt, shame, and pride, which give him or her a moral sense that can be used in service to the common good. Pre-conditioning a child's autonomy with a system of societal constraints, which are instilled into the child through parental nurture, creates an adult for whom external

<sup>&</sup>lt;sup>69</sup> *Id.* at 13.

<sup>&</sup>lt;sup>70</sup> *Id*. at 8.

<sup>&</sup>lt;sup>71</sup> See id. at 11.

<sup>&</sup>lt;sup>72</sup> *Id.* at 10.

 $<sup>^{73}</sup>$  Isaiah Berlin, Two Concepts of Liberty (1958), reprinted in Four Essays on Liberty 118, 121–22 (1969).

<sup>&</sup>lt;sup>74</sup> See GAYLIN & JENNINGS, supra note 66, at 10.

<sup>&</sup>lt;sup>75</sup> *Id*. at 105.

<sup>&</sup>lt;sup>76</sup> John Rawls, Kantian Constructivism in Moral Theory, 77 J. PHIL. 515, 543 (1980).

<sup>&</sup>lt;sup>77</sup> GAYLIN & JENNINGS, *supra* note 66, at 86.

<sup>&</sup>lt;sup>78</sup> *Id.* at 99.

<sup>&</sup>lt;sup>79</sup> See id.

<sup>&</sup>lt;sup>80</sup> Id.

<sup>81</sup> Id. at 100.

constraint, such as increased policing and surveillance, is generally unnecessary.<sup>82</sup> What is true for the welfare of the self is equally true for that of society.

No society can sustain itself for very long if it has to maintain social order by having a policeman on every corner all the time. Surveillance and external coercion are inefficient and expensive. External coercion is only a supplemental tool of social order. Societies survive by putting a policeman—and an ego ideal—inside almost every head.

Socialization and internalization are the linchpins that hold bounded autonomy and liberal social order together in a delicate balance. Behind the socialization process itself stands the very way we are put together as human beings....<sup>83</sup>

The problem with the valuation of autonomy to the exclusion of constraint is that it lopsidedly discounts, if not completely undermines, the socialization process and the "emotions of guilt, shame, [and] pride," upon which a society allowing for maximal freedom relies.<sup>84</sup> The breakdown of these emotions gives rise to a societal order, whose operative social rule is fear.<sup>85</sup> As Montesquieu observed in the eighteenth century, the principle of fear suits an authoritarian or despotic regime, whereas a republic depends upon the virtue of its citizenry.<sup>86</sup> For this reason, the assessment of Willard Gaylin and Bruce Jennings is precisely on target: "Instead of leading to social chaos and breakdown, excessive autonomy and individualism are more likely to lead eventually to increased repression and authoritarianism." Although the realization of one's individuality is a goal to be celebrated, the philosophy of extreme individualism, where "every man is for himself alone and has no regard for any person farther

<sup>&</sup>lt;sup>82</sup> See id. at 73.

<sup>83</sup> *Id.* at 74.

<sup>84</sup> Id. at 73.

<sup>&</sup>lt;sup>85</sup> *Id*.

<sup>&</sup>lt;sup>86</sup> 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 30 (Thomas Nugent trans., Robert Clarke & Co. 1873) (1752). Montesquieu writes, "[A]s virtue is necessary in a republic, and in a monarchy honour, so fear is necessary in a despotic government." *Id*.

<sup>&</sup>lt;sup>87</sup> GAYLIN & JENNINGS, *supra* note 66, at 73.

than he can make him subservient to his own views," is disastrously destructive to society and ultimately to the individual. 89

The Court's uncritical reverence for autonomy has resulted in the tendency to disregard throughout our institutions—particularly and most destructively in our institutions of learning—religious and moral values that condition and constrain autonomy so as to facilitate the realization of freedom, virtue, and productivity in a republican state. The Court has tended to confuse *anomy* with autonomy. What society has received from this mistaken identity is a fragmented citizenry, characterized by the impervious, unrelenting pursuit of self-interest and the continuous use of the first person singular and the possessive mood, where each person is generally alienated from others. As Stanley Hauerwas, a Christian ethicist, has bluntly stated, "[L]iberalism makes for shitty people."

The classical liberalism of the nineteenth century is widely and correctly admired, but we can now see that it was inevitably a transitional phase. The tendencies inherent in individualism were kept within bounds by the health of institutions other than the state, a common moral culture, and the strength of religion.

*Id.* at 64. I think that Bork would agree with me that the root cause of the problems we both describe is inherent in the public philosophy of classical liberalism.

<sup>&</sup>lt;sup>88</sup> See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 308 (Vintage Books 1993) (1992) (quoting Samuel Latham Mitchill's 1800 address to the citizens of New York).

<sup>&</sup>lt;sup>89</sup> It should be noted that Robert H. Bork's assessment of "modern liberalism" is much like my own of "classical liberalism." See ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 331 (1996), in which he maintains, "[M]odern liberalism has corrupted our culture across the board." The difference in adjectives preceding the word "liberalism" is not as significant as it might at first appear. Bork freely admits that "current liberalism's rot and decadence is merely what liberalism has been moving towards for better than two centuries." *Id.* at 63. The drive toward extreme individualism was always, in other words, germinating within it. He adds:

<sup>&</sup>lt;sup>90</sup> Jean Elshtain argues that liberalism encourages a view of the self in which citizens think of themselves as unbound by the past and as always free to start new. *See* Jean Elshtain, *The Question Concerning Authority, in* Religion and Contemporary Liberalism 253, 257 (Paul J. Weithman ed., 1997) [hereinafter RACL]. It is a philosophy that undermines all authority. *See id.* at 258. She writes, "Institutions cannot survive without authoritative forms and norms, and these are dissolved if the self is made sovereign in all things and if claims on the self are construed as arbitrary impositions." *Id.* 

<sup>&</sup>lt;sup>91</sup> Timothy P. Jackson, *The Return of the Prodigal? Liberal Theory and Religious Pluralism*, in RACL, *supra* note 90, at 182, 182.

### D. Coercion and Political Ideology

The first and foremost point to be made about the term "coercion" is that it is always understood relative to political ideology. Political values will invariably determine the relevance and applicability of the term. It is beyond question that constraints are necessary in order to give structure to and to define the boundaries of any society. The constraints that one dislikes and with which he or she disagrees are labeled "coercive." Constraints that are thought to be constructive and that meet with the majority's approval—such as a lifeguard prohibiting a child who cannot swim from diving off the high board, or a police officer pushing an elderly person out of the path of an oncoming train—are hardly regarded as coercive. Indeed, to speak of them in that fashion would raise eyebrows concerning one's grammatical facility.

Other illustrations of the same principle are not as commonplace. In the slave-holding southern states of America, black people had no rights pursuant to the prevailing political ideology of the time and, hence, could not be coerced. It would make no sense to speak of the "coercion" of slaves. In contrast, in the northern states that rejected the institution of slavery, the relationship between plantation owners and slaves was viewed as coercive. Thus, whether the institution of slavery was "coercive" depended upon whether, according to one's political ideology, slaves were people or property. 97

<sup>&</sup>lt;sup>92</sup> See GAYLIN & JENNINGS, supra note 66, at 73.

<sup>&</sup>lt;sup>93</sup> See Timothy C. Caress, Note, *Is Justice Kennedy the Supreme Court's Lone Advocate* for the Coercion Element in Establishment Clause Jurisprudence?: An Analysis of Lee v. Weisman, 27 IND. L. REV. 475, 493 (1993), in which he points out that the four Justices joining Justice Kennedy's majority opinion in Weisman "seem eager to find an Establishment Clause violation whenever the government 'endorses,' 'promotes,' or even 'acknowledges' religion." He also states that "the four [J]ustices dissenting in [Weisman] apply a narrow interpretation of coercion when determining if an Establishment Clause violation exists and, even then, may be unwilling to find a violation if the challenged practice comports with established government traditions." *Id.* This difference underscores the principle that the applicability of the term "coercion" means whatever one's politics dictate.

 $<sup>^{94}\,</sup>$  Alan S. Rosenbaum, Coercion and Autonomy: Philosophical Foundations, Issues, and Practices 182 (1986).

<sup>95</sup> See id.

<sup>&</sup>lt;sup>96</sup> See id. at 182–83.

<sup>&</sup>lt;sup>97</sup> See id.

The "Refuseniks," who were Russian Jews whose exit visas had been denied, are another example. Those in the West were convinced that these people were suffering a tragic violation of their autonomy and that they were being coerced by the Russian government to remain within the confines of that state. Yet the Russians did not view the matter in those terms at all. They believed, pursuant to their socialist ideology, that citizens did not possess the right to emigrate from their country at will. The political reasoning behind the Russian emigration policy required a citizen first to fulfill his or her duties to society. Here again, the limits of coercion are obviously determined by political ideology.

The tenets of classical liberalism dictate that religious and moral convictions are private matters, which should be kept out of the public sphere. 104 The individual should be unconstrained when deciding what the components of "the good life" are. 105 The reading of the Bible or the utterance of a prayer in a classroom, at a graduation ceremony, or during pre-game activities of a sporting event constitutes a serious breach of that political ideology and is thus viewed pejoratively as "coercive." Using public educational facilities, on the other hand, to teach students that "safe sex" necessitates the use of condoms and that marriage may include partners of the same sex is viewed charitably as expanding the students' horizon of autonomous choices; this is the bedrock upholding the freedom and dignity of every individual. Setting aside one's political ideology, it is difficult to see how one set of activities is any more "coercive" than the other. Marital and sexual choices are no less "private" than one's religious practices and personal moral code; certainly, the former carry inescapable religious and moral implications.

 $<sup>\</sup>frac{1}{98}$  *Id.* at 183.

<sup>&</sup>lt;sup>99</sup> Id.

<sup>&</sup>lt;sup>100</sup> Id.

<sup>&</sup>lt;sup>101</sup> *Id*.

<sup>&</sup>lt;sup>102</sup> *Id*.

<sup>&</sup>lt;sup>103</sup> See id. at 182–83. Interestingly enough, the author of this insightful work chose to make the point of the intricate connection between coercion and political ideology in the last chapter of his book. See id. at 161, 182–83. I think the point is sufficiently crucial, so far as religion in the First Amendment is concerned, that it deserves to be stressed from the outset of the discussion.

<sup>&</sup>lt;sup>104</sup> See, e.g., R. Randall Rainey, S.J., Law and Religion: Is Reconciliation Still Possible?, 27 Loy. L.A. L. REV. 147, 164–65 (1993).

<sup>&</sup>lt;sup>105</sup> GAYLIN & JENNINGS, *supra* note 66, at 34.

## E. The Anatomy of Coercion

Let us assume, arguendo, that political ideology is irrelevant to the applicability of the term "coercion." The question then becomes, of what specifically does coercion consist, or better still, how does one define it? A correlative question is: assuming that a suitable definition of the term can be formulated, are activities in public school, such as devotional prayer, Bible-reading, and singing Christmas carols, necessarily coercive?

There are four "elemental categor[ies]" of coercion: <sup>106</sup> (1) the coercer, (2) the instrument he or she uses to coerce, (3) the coercee, and (4) the coercee's resultant behavior. <sup>107</sup> For example, an employer (the coercer) threatens to demote (the instrument) an employee (coercee) unless she signs a false affidavit, which she does (resultant behavior). These elemental categories are objectively present in every act of coercion. <sup>108</sup>

There are nonobjective terms involved in an act of coercion as well, such as "permission, will, choice, wish, [and] intent." These characterize the relationships among the elemental categories. Without considering these terms, there can be no adequate analysis of the phenomenon of coercion. Consider again the example of the employer and employee. If the employee readily consents to signing the affidavit, i.e., freely gives herself permission to do so, then the employer's threat is inconsequential and one of the objective elements of coercion (the instrument) is absent. It is nevertheless not always possible to distinguish, on objective grounds, between permission and dissent if neither is explicitly or tangibly communicated. That is why permission is a nonobjective term.

The "will," according to Alan Rosenbaum, is "an abstraction for one's disposition, capacity, or power to effect a reason or to determine an action." If this disposition, capacity, or power of the employee were not operative during the employee's transaction with the employer (e.g., the employee was medicated with a drug that destroyed her volitional power during the time in question), then the employer's threat would again be inconsequential and nullify one of the necessary elements of coercion.

ROSENBAUM, *supra* note 94, at 33, 37.

<sup>&</sup>lt;sup>107</sup> See id. at 37.

<sup>&</sup>lt;sup>108</sup> See id.

<sup>&</sup>lt;sup>109</sup> *Id.* at 51.

<sup>&</sup>lt;sup>110</sup> *Id*.

<sup>&</sup>lt;sup>111</sup> See id. at 56–57.

<sup>&</sup>lt;sup>112</sup> See id. at 57.

<sup>&</sup>lt;sup>113</sup> Id. at 55.

If the employee, on the other hand, were sober and clear-headed when threatened by the employer, the employee might respond, "Considering my financial circumstances, I really had no choice in the face of the threat that was made other than to sign the affidavit." She is not actually maintaining that she had no choice—she could well have felt herself physically and emotionally able to refuse to sign the document immediately prior to signing it. As Rosenbaum explains, "choice' signifies a chooser's mind-state prior to . . . the choice made." What the employee is stating is that the threat directed against her was of such a magnitude that it overcame her willful resistance to sign. If the employee had, in truth, absolutely no range of choices in the matter, she would have been a mere pawn or automaton of her employer and would not have been coerced. Coercion involves a tension between opposing wills resulting from the application of an instrument, which is met by resistance from the coercee.

"'Motive' is an internal cause of, or 'reason for,' a person's mobilization of will and direction-force for the action done . . . ."<sup>118</sup> Intention, by contrast, "is an object of thought, particularly something to be achieved by the person, or perhaps coupled with the 'will,' to accomplish the motive." To illustrate this distinction between motive and intention, one might assume that the employer's motive in the foregoing example was to avoid the staggering civil liability occasioned by a history of sexual harassment, whereas, the intention was to threaten the employee so that she would sign a false affidavit and thereby assist in fulfillment of the motive. Without a specific motive and intention by the employer, the meaning of the transaction between employer and employee is open to numerous conflicting interpretations.

The point is that an analysis of coercion involves not only objective elements, but also a number of nonobjective ingredients, which are necessary to an understanding of it. Inessential variables, such as the participants' wants, needs, wishes, desires, and expectations, may also enter the coercion equation. 120

 $<sup>\</sup>overline{114}$  *Id.* at 86.

<sup>&</sup>lt;sup>115</sup> See id. at 88.

<sup>116</sup> See id. at 55-56.

<sup>117</sup> See id. at 37-40.

<sup>118</sup> Id. at 90.

<sup>&</sup>lt;sup>119</sup> *Id*.

<sup>120</sup> See id. at 93-95.

So one might, based upon the foregoing exposition of coercion as a social phenomenon, venture the following definition of it with respect to religious freedom:

- 1. Coercion consists of the following:
- (a) P intentionally <sup>121</sup> applies an instrument to Q,
- (b) in order to evoke from Q a specific response concerning a matter of religious significance to Q,
- (c) which results in Q's active resistance, but final decision, to choose such response,
- (d) although Q would prefer to choose another response that Q could and would have chosen but for P's application of the instrument to Q.
- 2. The term "instrument" includes, but is not necessarily limited to, physical force, threats, offers, and incentives. 123

See Robert A. Holland, A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty, 80 CAL. L. REV. 1595 (1992). Holland assesses Robert Nozick's formulation of coercion, which includes an element of intentionality, id. at 1673-74 (quoting Robert Nozick, Coercion, in PHILOSOPHY, SCIENCE, AND METHOD 440, 463 (Sidney Morgenbesser et al. eds., 1969)), and argues that "the government's intention [to coerce] should be irrelevant under the Establishment Clause." Id. at 1674. The reason is Holland's contention that "[t]here may be situations . . . where government pressure does not alter one's choice but where the pressure still can be fairly characterized as coercive." Id. But how can Holland say that one has been coerced if his or her will has not been overcome? Holland's problem with Nozick's formulation is not actually with the element of intentionality, but with that of effect. If one inadvertently pushes another person off the sidewalk, the other has not been coerced, precisely because there was no intentionality. Assuming that P intends for Q to do X, if Q does not do X, then Q has not been coerced. Either way, whether the argument is that intentionality or effect is unnecessary, Holland's analysis is flawed. He accepts Peter Westen's definition of coercion, in which an act is deemed coercive when Q is left "worse off either than he otherwise expects to be or than he ought to be for refusing to do [P's] bidding." Id. (quoting Peter Westen, "Freedom" and "Coercion"—Virtue Words and Vice Words, 1985 DUKE L.J. 541, 589). This is Holland's way of stating that one can be coerced without his or her will being overcome. But the major question is: how coherent is it to speak of P having coerced Q to do that which Q did not do?

<sup>&</sup>lt;sup>122</sup> See ROSENBAUM, supra note 94, at 88.

<sup>&</sup>lt;sup>123</sup> Id. at 38–39.

3. Evidence of the respective social roles and circumstances of P and Q, such as their actions, expectations, motives, intentions, wants, needs, wishes, and desires relative to the alleged act of coercion, may be considered in determining whether coercion is present. <sup>124</sup>

## F. Are All Religious Ideas that Are Supported by the State "Coercive"?

We may assume, with the Court, that elementary and middle school children are highly impressionable and that their teachers are role models for them. 125 We may further assume that some of the children and their parents do not pray and do not believe in prayer of any kind. There is no cogent connection between these assumptions and the conclusion that a period of silence for meditation or voluntary prayer or the recitation of a prayer in a public classroom is coercive. In *Engel* and *Schempp*, recitation of the prayer was voluntary. 126 It lay within the discretion of each and every parent whether his or her child would participate. 127 There was no evidence that anyone's will was overwhelmed, choice was abridged, or desire was refused accommodation. 128 There was not even a requirement in Wallace that the student pray at all; he or she was merely provided the option to do so. 129 There was, moreover, no evidence in *Engel* and Schempp that any child or parent actively, but futilely, resisted or protested active involvement in the recitation or the period of silence. Under such circumstances, a religious practice is no more coercive than any other act to which one readily assents. To assert of public school prayer, as Justice Black did in *Engel*, that "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain,"130 will convince no one, not already convinced, that coercion is present in such a classroom. It is much closer to the truth to charge that the Court's decision to preclude "voluntary" prayer from each public classroom in the country coercively abridges the choice of the vast majority who desire to participate in the exercise. One might guess that, because the coercion argument is and always has been intellectually

<sup>&</sup>lt;sup>124</sup> See id. at 57–60.

<sup>&</sup>lt;sup>125</sup> See Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

<sup>&</sup>lt;sup>126</sup> Engel v. Vitale, 370 U.S. 421, 430 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 207 (1963).

<sup>&</sup>lt;sup>127</sup> Engel, 370 U.S. at 430; Schempp, 374 U.S. at 207.

<sup>&</sup>lt;sup>128</sup> See Engel, 370 U.S. at 430; Schempp, 374 U.S. at 207.

<sup>&</sup>lt;sup>129</sup> Wallace v. Jaffree, 472 U.S. at 38, 43 (1985).

<sup>&</sup>lt;sup>130</sup> Engel, 370 U.S. at 431.

anemic, *Engel* and *Schempp* held in part that coercion was not an element essential to any offense against the Establishment Clause.

In Weisman and Santa Fe, a parent or child who desired to attend the graduation ceremony or football game would be subjected to the utterance of a prayer. But listening to another's prayer is a far cry from participating in, much less agreeing with, such prayer. It does not follow that, because a person offers a public prayer, the force of such utterance occasions the collapse of any resistance to the prayer on the part of those who are listening to it. An act of speech, such as prayer, is not coercive by virtue of the fact that others listen to and disagree with it. The Court's implicit estimation of those who complained in these cases is a negative one. It rests upon the patronizing assumption that whatever oppositional view they hold is so fragile and weakly supported that a brief prayer is sufficient to overwhelm their volition and to induce in them a response contrary to their own belief. 132

The Court's concern about coercion in the school prayer cases is exaggerated and misplaced. If coercion was present in these cases, it was trivial and should have fallen under the familiar rule *de minimis non curat* 

Some Americans get angry at parents who want to ban carols because they tremble that their kids might feel "different" and "uncomfortable" should they, God forbid, hear Christian music sung at their school. I feel pity. What kind of fragile religious identity have they bequeathed their children that it should be threatened by exposure to carols?

I'm struck by the fact that you almost never find Orthodox Jews complaining about a Christmas crèche in the public square. That is because their children, steeped in the richness of their own religious tradition, know who they are and are not threatened by Christians celebrating their religion in public. They are enlarged by it.

It is the more deracinated members of religious minorities, brought up largely ignorant of their own traditions, whose religious identity is so tenuous that they feel the need to be constantly on guard against displays of other religions—and who think the solution to their predicament is to prevent the other guy from displaying his religion, rather than learning a bit about their own.

<sup>&</sup>lt;sup>131</sup> See supra notes 52, 60 and accompanying text.

<sup>&</sup>lt;sup>132</sup> See Charles Krauthammer, *Just Leave Christmas Alone*, WASH. POST, Dec. 17, 2004, at A33. Dr. Krauthammer, himself a Jew, makes a similar point when he writes:

*lex*. What was really at stake in these cases was the political structure of public education in this country. One of the supreme tenets of classical liberalism is to rid public institutions of any overt religious practice or observance; on consequently, in keeping with this goal, any relic of religious exercise in public schools is condemned as "coercive." Solemnizing classroom instruction, graduation ceremonies, and sporting events with prayer is a social structure that traditional liberals abhor. It is by virtue of this fact alone that it is regarded as coercive.

### G. Brief Summary

Structure of any kind always entails constraints of some kind. Make no mistake about it, classical liberalism stands for its own structuring and manner of constraining our public institutions. The paramount question concerns which structural constraints will shape those institutions now and in the future. The question is a political one. The classical liberal position should be seen for precisely what it is—only one political view among others that in no way transcends them, constitutionally or otherwise.

When one examines the social phenomenon of coercion while bracketing its political implications, the conclusion is compelling. There is nothing in the anatomy or definition of coercion that requires activities such as prayer, Bible-reading, Christmas pageants and carols, released-time programs for religious instruction, and the consideration of creationism to be regarded as coercive or as an offense against individual autonomy.

By indulging each minority point of view to the extent of providing it with a veto power over the religious and moral values that bind together the national community, the Court has played a unique role in reengineering our society as one in which most vestiges of solidarity have disintegrated and where the unopposed and undisputed principle of value is self-interest. The Court has worked assiduously, though perhaps unwittingly, to bring the country "critically close to a tilt point that will lead either to its destruction or a regression toward authoritarianism." <sup>134</sup>

Classical liberalism has been a formative, and in many ways constructive, influence in American society and politics. There is no reason to deprecate its many contributions. Yet its emphasis upon autonomy rapidly becomes lopsided in a society where voices of communal authority are weak by comparison to it. Traditional liberalism now constitutes a threat. Rather than taking a reactionary stance toward it,

<sup>&</sup>lt;sup>133</sup> See GAYLIN & JENNINGS, supra note 66, at 33, 62–65.

<sup>&</sup>lt;sup>134</sup> *Id.* at 88.

one may search for the desired corrective in a balance, or reflective equilibrium, between it and other political perspectives. So far as the jurisprudence of religion is concerned, the proper approach is to inform classical liberalism's consuming crescendo of individual autonomy with other notes and melodies that have been heard far less during the last half century.

# II. DE FACTO ESTABLISHMENTARIANISM AND NATIONAL COMMUNITY VALUES

### A. Definitions

De facto establishmentarianism means that the state supports and promotes religious ideas and values, and usually those of the majority religion. As I have previously argued, there are Justices on the Court whose decisions tend to prefer the Christian religion. This fact, of course, raises the specter of "civil religion." By this term, I refer to national religious and moral values (not necessarily those that are explicitly Christian) that are state-supported. Those who dislike and oppose the idea of state-supported religious and moral values invariably invoke the doctrine of separation between church and state as if it were sacrosanct.

## B. Historical Perspective

If there is a single religion case that deserves, because of the boldly harsh rule it advances, to take its place alongside the infamous triumvirate of *Dred Scott v. Sandford*, <sup>139</sup> *Plessy v. Ferguson*, <sup>140</sup> and *Lochner v. New* 

<sup>&</sup>lt;sup>135</sup> Smith, *supra* note 17, at 818 tbl., n.10.

<sup>&</sup>lt;sup>136</sup> See Smith, supra note 16, at 127–28.

<sup>&</sup>lt;sup>137</sup> ROBERT N. BELLAH, *Civil Religion in America*, *in* BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD 168 (Univ. of Cal. Press 1991) (1970); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 176–87 (Maurice Cranston trans., Penguin Books 1968) (1762). Rousseau is reputed to have been the first to use this term. See *infra* note 198 for a discussion of it.

<sup>&</sup>lt;sup>138</sup> ROUSSEAU, *supra* note 137, at 181.

<sup>&</sup>lt;sup>139</sup> 60 U.S. (19 How.) 393 (1856) (denying the power of the federal government to abolish slavery in any state or territory and the power of a state to do so within its own territory).

<sup>&</sup>lt;sup>140</sup> 163 U.S. 537 (1896) (announcing the "separate but equal" doctrine respecting African-Americans).

York, 141 it is Everson v. Board of Education of the Township of Ewing. 142 the majority, speaking through Justice Black, constitutionalized Jefferson's "wall of separation between church and State." The Justice matter-of-factly declared, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."144 With the benefit of this infelicitous and widely misunderstood metaphor, religious and moral values became off-limits to, and altogether outside the cognizance of, the state. secularization of American society followed with devastating effect; the public mention of such values now stirs unease and the sense that a Maginot Line has been transgressed. It is not an exaggeration to state that, with classical liberalism's doctrine of the complete separation of church and state, 145 came the official estrangement of the political process from core religious and moral values. The result has been nothing short of the re-inventing of America.

# 1. Separationism Versus Disestablishment

Justice Black's appropriation of the language of separation was as historically questionable as it was socially radical. Philip Hamburger, in a work of brilliant scholarship, explains that religious dissenters in eighteenth century America desired a civil government that would support and protect religious liberty and that this desire did not involve a separation of church and state. The object was disestablishment, along with the full protection and support of religion. The Danbury Baptists, who received

<sup>&</sup>lt;sup>141</sup> 198 U.S. 45 (1905) (striking down, as violating the liberty provision of the Fourteenth Amendment, a New York statute providing maximum working hours for New York bakers).

<sup>&</sup>lt;sup>142</sup> 330 U.S. 1 (1947). I have previously discussed the rule of the case. *See* Smith, *supra* note 16, at 98–100; Smith, *supra* note 17, at 830–31.

<sup>143</sup> Everson, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)); accord Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), in 16 The Writings of Thomas Jefferson 281–82 (Albert Ellery Bergh ed., 1907). See also Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State 125–26 (2002), in which the author explains that Justice Black's appropriation of Jefferson's metaphor defined the "structure of a putatively secular polity" throughout local, state, and federal spheres and so bears a meaning quite different from the one Jefferson intended.

<sup>&</sup>lt;sup>144</sup> Everson, 330 U.S. at 18.

<sup>&</sup>lt;sup>145</sup> See supra note 133 and accompanying text.

<sup>&</sup>lt;sup>146</sup> PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 107 (2002).

<sup>&</sup>lt;sup>147</sup> *Id*.

President Jefferson's famous "wall of separation" letter, 148 were no exception. 149 They did not favor civil government attempting to regulate worship, compel taxation in support of religion, or discriminate in favor of one or more religions against others. 150 Yet it would be going too far to contend that they desired government and religion to be completely separate.<sup>151</sup> They understood religion to be the foundation of virtue and, thus, intricately connected to government. 152 Baptist leaders did not use the language of separation, but insisted that "rulers are the ministers of God, and accountable to him." <sup>153</sup> Jefferson's letter to the Danbury Baptist Association, Hamburger argues, was an attempt to criticize the Federalist party in Connecticut by calling attention to what he believed was the negative and debilitating influence of the clergy there. 154 Jefferson generally disliked clergy and organized religion, and thought of them as enslaving the mind. 155 His metaphor of separation, with its negative underpinnings, did not ring true to Baptist ears. 156 Consequently, the Baptists veered from their usual practices and did not publish Jefferson's letter. 157 The probable reason, Hamburger suggests, is that the Baptists

<sup>148</sup> Letter from Thomas Jefferson to Danbury Baptist Association, *supra* note 143, at 281–82

<sup>&</sup>lt;sup>149</sup> HAMBURGER, *supra* note 146, at 170–71.

<sup>150</sup> See id. The Danbury Baptists did not want other religious groups to be treated preferentially. Id. Yet they were not willing to accept the notion that religious and moral values are wholly outside the cognizance of the state. Id. This meaning is the crux of what is here referred to as their desire for "disestablishment" and corresponds in meaning to the term "de facto establishment" as used in this Article.

<sup>&</sup>lt;sup>151</sup> See id. See also WILLIAM G. MCLOUGHLIN, SOUL LIBERTY: THE BAPTISTS' STRUGGLE IN NEW ENGLAND, 1630–1833, at 194–95, 267–68 (1991), in which the author points out that many New England Baptists took vigorous exception to Jefferson's religious views and believed that Jews, Muslims, deists, atheists, and infidels should not hold office; that America should be a Christian nation; and that there should be laws against blasphemous conduct, profaning the Sabbath, card playing, and gambling.

<sup>&</sup>lt;sup>152</sup> See HAMBURGER, supra note 146, at 177–78.

<sup>&</sup>lt;sup>153</sup> *Id.* at 174 (quoting Circular Letter, *in* MINUTES OF THE CHARLESTON BAPTIST ASSOCIATION CONVENED AT THE EUHAW 7–8 (1804)). Hamburger states, in fact, that no Baptist or Baptist association has been unmistakably identified that demanded a separation between church and state. *Id.* at 177. What Baptists sought differed from separation and also conflicted with it. *Id.* at 177–78.

<sup>&</sup>lt;sup>154</sup> See id. at 145.

<sup>155</sup> See id. at 148-49.

<sup>&</sup>lt;sup>156</sup> *Id.* at 163.

<sup>&</sup>lt;sup>157</sup> *Id*.

wished to be known for advocating disestablishment rather than the separation of church and state. 158

The Doctrine of Separation did not begin to gather momentum in this country until large numbers of Roman Catholic immigrants arrived on its shores between 1830 and 1850. Their demand for state aid to parochial schools in New York City engendered Protestants' cry for separation of church and state. This cry was soon joined by Liberals, like Judge Elisha P. Hurlbut, who was anti-Catholic and anti-ecclesiastical, and radical fringe groups like the Ku Klux Klan, of which Justice Hugo Black was once a member. The Doctrine of Separation was, in fact, not read into the Establishment Clause until a decade after Justice Black took his seat on the Court.

Furthermore, little evidence exists that anyone, even fervent advocates for separation, envisioned that, when the Fourteenth Amendment was ratified in 1868, the Religion Clauses of the First Amendment were applicable to the states through the new amendment. It was not until over seven decades after ratification that the Court, in *Cantwell v. Connecticut*, 66 decided that the Fourteenth Amendment ha[d] rendered the legislatures of the states as incompetent as Congress to enact" laws respecting an establishment of religion or prohibiting its free exercise.

The interpretation of the Religion Clauses of the First Amendment has, since *Cantwell*, tended to blind contemporary observers to the fact that the relationship between religion and state was not always formulated in classical liberal terms.<sup>168</sup> Religion, far from being a private matter of marginal significance in the public square, once provided the constellation

<sup>&</sup>lt;sup>158</sup> *Id.* at 164–65. Jefferson's letter, although it was immediately published in several newspapers, was not widely disseminated until 1853, more than *fifty years* after it was written. *See id.* at 259; *see also* DREISBACH, *supra* note 143, at 95–96.

<sup>&</sup>lt;sup>159</sup> See HAMBURGER, supra note 146, at 202, 220–23.

<sup>&</sup>lt;sup>160</sup> *Id*.

<sup>&</sup>lt;sup>161</sup> Id. at 314.

<sup>&</sup>lt;sup>162</sup> Id. at 407–08.

<sup>&</sup>lt;sup>163</sup> *Id.* at 423.

<sup>&</sup>lt;sup>164</sup> See id. at 3, 429–30.

<sup>&</sup>lt;sup>165</sup> See id. at 434–37. Judge Elisha P. Hurlbut even proposed a constitutional amendment that would extend the First Amendment to the states. *Id.* at 437.

<sup>166 310</sup> U.S. 296 (1940).

<sup>&</sup>lt;sup>167</sup> *Id.* at 303.

<sup>&</sup>lt;sup>168</sup> See infra Part II.B.2-3.

of values in accordance with which the citizens of this country understood themselves and their participation in all public affairs. <sup>169</sup>

## 2. Religious Themes in Early American History

Robert Bellah illustrates how "[b]iblical imagery provided the basic framework for imaginative thought in America up until quite recent times." He considers a sermon by John Winthrop, the first leader of the Massachusetts Bay Colony, to be an event of foundational significance in "America's myth of origin." Winthrop preached the sermon aboard a ship before he and his fellow passengers reached "the new world." His homily was an elaboration upon the theme of "covenant" between themselves and God:

Wee are entered into Covenant with him for this worke, wee have taken out a Commission, the Lord hath given us leave to draw our owne Articles, wee have professed to enterprise these Accions upon these and these ends, wee have hereupon besought him of favour and blessing: Now if the Lord shall please to heare us, and bring us in peace to the place wee desire, then hath hee ratified this Covenant and sealed our Commission [and] will expect a strickt performance of the Articles contained in it, but if wee shall neglect the observacion of these Articles which are the ends wee have propounded, and dissembling with our God, shall fall to embrace this present world and prosecute our carnall intencions seekeing greate things for our selves and our posterity, the Lord will surely breake out in wrathe against us, be revenged of such a perjured people and make us knowe the price of the breache of such a Covenant. 173

Winthrop went on to emphasize that "wee shall be as a Citty upon a Hill, the eies of all people are uppon us"<sup>174</sup> and warned again of the dire consequences to ensue if the covenant with God were broken. <sup>175</sup>

<sup>&</sup>lt;sup>169</sup> See infra Part II.B.2-3.

 $<sup>^{170}</sup>$  Robert N. Bellah, The Broken Covenant: American Civil Religion in Time of Trial 12 (1975).

<sup>&</sup>lt;sup>171</sup> *Id.* at 13.

<sup>&</sup>lt;sup>172</sup> *Id*.

<sup>&</sup>lt;sup>173</sup> *Id.* at 14.

<sup>&</sup>lt;sup>174</sup> *Id.* at 15.

Bellah explains that Winthrop and those like him viewed America, in biblical terms, as both a "paradise and a wilderness." They saw themselves on a divine mission or "errand into the wilderness." The silver-tongued Jonathan Edwards envisioned America as a new heaven and a new earth in the midst of wilderness. 178

In their new land, the New England colonists were cognizant of temptation as well as opportunity. For this reason, the theme of covenant was complemented by that of conversion. One entered into a covenant with God through conversion to a new sense of responsibility. <sup>179</sup> Calvinists they most certainly were, but they had "a strongly social, communal, or collective emphasis." Their "Calvinist 'individualism' only made sense within the collective context. Individual action outside the bounds of religious and moral norms was seen in Augustinian terms as the very archetype of sin." Through a rigorous sense of religious and moral discipline, early Americans intended to avoid the fate of the ancient Israelites and Romans. <sup>182</sup>

Bellah writes that the American Revolution was the first great crisis to confront those of the new world. While settlers in New England stressed the theme of covenant, the colonists in Virginia were impressed with Montesquieu's insistence upon republican government couched in virtue. According to Bellah, Thomas Jefferson, a masterful writer, was able in the Declaration of Independence to fuse the ideas of covenant and republican government by invoking phrases such as the "laws of nature and of nature's God," which suggested that civil authority is republican and rests not only upon positive law created by those who are subject to it, but also, and ultimately, upon the will of God.

Some New England preachers viewed King George III as the "Antichrist" and as the "horrible wild beast" mentioned in the book of

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<sup>175</sup> Id. <sup>176</sup> Id. at 6.
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<sup>&</sup>lt;sup>177</sup> *Id.* at 11–12.

<sup>&</sup>lt;sup>178</sup> *Id.* at 12.

<sup>179</sup> Id. at 19.

<sup>&</sup>lt;sup>180</sup> *Id.* at 17.

<sup>&</sup>lt;sup>181</sup> *Id*. at 18.

<sup>&</sup>lt;sup>182</sup> See id. at 25.

<sup>&</sup>lt;sup>183</sup> *Id.* at 1.

<sup>&</sup>lt;sup>184</sup> *Id.* at 27; see also MONTESQUIEU, supra note 86, at 30.

 $<sup>^{185}</sup>$  Bellah, supra note 170, at 27 (quoting The Declaration of Independence para. 1 (U.S. 1776)).

<sup>&</sup>lt;sup>186</sup> *Id*.

Revelation. 187 When the hardships of the revolution occasioned doubt, despair, and discouragement, the preachers also compared the colonists to the ancient Israelites, who with flagging faith, wandered in the wilderness.188 At the end of the eighteenth century, following the Revolution, George Washington, in his Farewell Address, correlated ""permanent felicity of a Nation with its virtue." John Adams likewise wrote. "I always consider the settlement of America as the opening of a grand scheme and design in Providence." The urge to create a constitution following independence from England paralleled the themes of conversion and covenant in New England Calvinist theology. 191 As Bellah phrases this pattern of thought, "Conversion that does not move toward covenant becomes a new hardness of heart . . . [and, analogously, r]evolution that does not move toward constitution quickly becomes a new despotism."192 It is safe to say that, according to Bellah's account, religious themes were so profoundly ingrained in early American modes of thought that they were impossible to separate from politics. 193 observation serves to underscore two generalizations that are of central, even paramount, importance to this discussion:

It is one of the oldest of sociological generalizations that any coherent and viable society rests on a common set of moral understandings about good and bad, right and wrong, in the realm of individual and social action. It is almost as widely held that these common moral understandings must also in turn rest upon a common set of religious understandings that provide a picture of the universe in terms of which the moral understandings make sense. <sup>194</sup>

The birth of this country in no way constitutes an exception to these generalizations. The United States of America is steeped in "a common set of religious and moral understandings" emanating, for better or for

<sup>&</sup>lt;sup>187</sup> *Id.* at 28.

<sup>&</sup>lt;sup>188</sup> See id. at 29.

<sup>&</sup>lt;sup>189</sup> *Id.* at 32.

<sup>&</sup>lt;sup>190</sup> *Id*. at 33.

<sup>&</sup>lt;sup>191</sup> *Id.* at 32–33.

<sup>&</sup>lt;sup>192</sup> *Id*. at 34.

<sup>&</sup>lt;sup>193</sup> See id. at 34-35.

<sup>&</sup>lt;sup>194</sup> *Id.* at ix.

<sup>&</sup>lt;sup>195</sup> *Id.* at ix-x.

worse depending upon one's perspective, from the Bible. These understandings structure a moral order in which "liberty, justice, and charity" define personal virtue and are constitutive elements of the good society. Bellah is not only maintaining that America has a "civil religion." He is equally quick to observe that "[t]oday the American civil religion is an empty and broken shell."

<sup>&</sup>lt;sup>196</sup> See id. at x. One should not confuse the fact that the Massachusetts Bay Colony was a self-consciously Christian commonwealth with the fact that those who participated in the Constitutional Convention in Philadephia bequeathed to us a founding document that does not mention God and is largely silent concerning matters of religion. With respect to the latter, any argument from constitutional silence is a notoriously difficult one to make. One may draw a large variety of inferences, some of which are conflicting, from the Founders' silence. Some writers have concluded that the "the nation's founders, both in writing the Constitution and in defending it in the ratification debates, sought to separate the operations of government from any claim that human beings can know and follow divine direction in reaching policy decisions." ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 12 (1996). These writers make a strong case against the assertion that the United States was founded as a Christian nation. The assertion is indeed fraught with difficulties, not the least of which is Article II of the Treaty of Tripoli, ratified by the United States Senate on June 10, 1797. See Forrest Church, The Treaty of Triploi, Article 11, in The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders 121, 121, 123 (Forrest Church ed., 2004). The pertinent words of the Article are that "the Government of the United States of America is not in any sense founded on the Christian Religion." Id. at 123. Others have looked at the same evidence and drawn similar conclusions, but have significantly qualified them by arguing that, while the Founders constructed a secular state in which free religious exercise and open religious competition were the rule, they also practiced a "civil religion" in which general religious propositions were openly and unabashedly advanced in the public sphere. See Frank Lambert, The Founding Fathers AND THE PLACE OF RELIGION IN AMERICA 1, 263-64, 282 (2003); see also infra note 198. These general religious propositions expressed national pieties that, while not explicitly Christian, were in accord with the religious convictions of the vast preponderance of the citizenry, which was Christian.

<sup>&</sup>lt;sup>197</sup> BELLAH, *supra* note 170, at x.

think in the life of every people, through which it interprets its historical experience in the light of transcendent reality." *Id.* In another brilliant essay on the subject, he contends "not only that there is such a thing, but also that this religion—or perhaps better, this religious dimension—has its own seriousness and integrity and requires the same care in understanding that any other religion does." Bellah, *supra* note 137, at 168. See also ROUSSEAU, *supra* note 137, at 176–87, in which Jean-Jacques Rousseau is the first to use (*continued*)

the expression "civil religion." Rousseau, much like Bellah, maintains that "no state has ever been founded without religion as its base." *Id.* at 180. He also argues:

The dogmas of the civil religion must be simple and few in number, expressed precisely and without explanations or commentaries. The existence of an omnipotent, intelligent, benevolent divinity that foresees and provides; the life to come; the happiness of the just; the punishment of sinners; the sanctity of the social contract and the law—these are the positive dogmas. As for the negative dogmas, I would limit them to a single one: no intolerance.

Id. at 186. The idea of a "civil religion" worries First Amendment scholars. For them, even the phrase, "ceremonial deism," Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting), smacks of the governmental sponsorship of religion. Michael W. McConnell writes that Justice "Brennan's suggestion looks very much like endorsement of a civil religion, something serious religionists of all faiths should find deeply troubling." Michael W. McConnell, Religious Freedom at a Crossroads, in The BILL of RIGHTS IN THE MODERN STATE 115, 154 (Geoffrey R. Stone et al. eds., 1992). One wonders how McConnell would respond to Rousseau's and Bellah's insights and to the facts they adduce in support of them. What would McConnell say about the references to a Supreme Being that are found in almost every presidential inaugural address as well as in other presidential pronouncements on solemn occasions? See generally Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26-29 (2004) (Rehnquist, C.J., concurring) (detailing references to God in speeches by former Presidents). What would he say about the fact that, following the September 11, 2001 destruction of the Twin Towers in New York City, "God Bless America" was sung on the floor of the United States Senate? Congress Vows Unity, Reprisals for Attacks, CNN.com, Sept. 12, 2001, http://archives.cnn.com/2001/US/09/11/congress.terrorism/. Would he ignore these religious phenomena? Or would he perhaps argue that they have only a secular meaning? Or might he contend that, because they are actually genuinely religious references, they are unfortunately unconstitutional? None of these options is appealing or enlightening. Maybe instead of speaking in terms of "civil religion," one might allude to "core values." Does the country have core values? If so, may they be appropriately expressed by political representatives? Would McConnell treat all of these questions in the same way? How one expresses Bellah's insights is not of crucial importance. What is significant about them is that they rest upon a sociological and historical truth in American society and in virtually every other, i.e., that there is a direct, positive correlation between some set of common religious and moral understandings and the existence of a workable society. To seek to interpret the religious clauses in the First Amendment as if this fact were not so is to indulge in fictional thinking and to play "make believe."

<sup>&</sup>lt;sup>199</sup> BELLAH, *supra* note 170, at 142.

### 3. The Role of Religion as Conceived in Eighteenth Century America

Sidney E. Mead explains that there were two movements that stood for religious freedom in eighteenth century America. One was rationalism, represented by thinkers like Thomas Jefferson, Benjamin Franklin, and Thomas Paine. The other was pietism, which included men like John Wesley, George Whitefield, and Jonathan Edwards. The rationalists tended to believe in natural religion, including a deistic "God, immortality, and the life of virtue." The pietists tended to be enthusiastic revivalists, who believed in "no creed but the Bible," and who found a source of unity with their fellows and peace in "personal religious experience." Both movements supported religious freedom. The rationalists desired to free the mind for open inquiry, and the pietists wanted the freedom to hold their revivals and to propagate their views without fear of molestation from civil authority.

While both movements held that freely given individual consent is the *sine qua non* of religious freedom,<sup>209</sup> it is important to highlight that neither movement accepted the notion of extreme individualism. Mead writes:

They did not surrender to the kind of individualism that sets the individual over against the community in an antagonistic relationship, because they envisaged the individual's consent as first to the authorities and laws necessary for stability and order in the community. For both the rationalist and the pietist, the individual became free only as he consented to necessary authority, discipline, and responsibility.<sup>210</sup>

Individual autonomy was never allowed to undermine the solidarity of the

<sup>&</sup>lt;sup>200</sup> Sidney E. Mead, The Lively Experiment: The Shaping of Christianity in America 38 (1963).

<sup>&</sup>lt;sup>201</sup> Id. at 38–49.

<sup>&</sup>lt;sup>202</sup> Id. at 29–30.

<sup>&</sup>lt;sup>203</sup> *Id.* at 39.

<sup>&</sup>lt;sup>204</sup> *Id.* at 62.

<sup>&</sup>lt;sup>205</sup> *Id.* at 40.

<sup>&</sup>lt;sup>206</sup> *Id.* at 60.

<sup>&</sup>lt;sup>207</sup> See id. at 61.

<sup>&</sup>lt;sup>208</sup> See id. at 61–62.

<sup>&</sup>lt;sup>209</sup> Id.

<sup>&</sup>lt;sup>210</sup> *Id*. at 62.

national community.<sup>211</sup> Freedom was constrained by a sense of "necessary authority, discipline, and responsibility."<sup>212</sup>

In fact, men like Franklin and Jefferson were convinced that the various religious sects shared a common core of moral belief that was necessary to insure the healthy survival of the state.<sup>213</sup> These men thought that each sect, in its own way, inculcated in its devotees principles of common morality, which in turn made for not only a virtuous citizenry, but also insured the well-being of the state.<sup>214</sup> Franklin was of the "opinion that the worst [of these sects] had some good effects."<sup>215</sup> In the same way, Jefferson, while scrutinizing religious pluralism in New York and Pennsylvania, observed that there were religions "of various kinds, indeed, but all good enough; [for they were] all sufficient to preserve peace and order."<sup>216</sup> As these men saw it, the work of the churches provided the foundation for a free, but stable society. 217 The judicatories of the church were separate from the governing institutions of state, but the two depended upon each other in a tandem arrangement; the state protected the free religious expression of the church, while the church educated the citizenry in principles of virtue.

### 4. Connecting the Analyses of Bellah and Mead

At first blush, it may appear that there is no point of intersection between Bellah's and Mead's respective treatments of religion in eighteenth century America. One speaks, after all, of civil religion, while the other is concerned with the inculcation of virtue into the citizenry by free churches. The difference is, in reality, unremarkable. Both agree that those who founded this country were convinced that a core of religious values, moral values, and principles mirror the soul of the nation and that belief in God and in principles of common morality were indispensable to its security and survival.<sup>218</sup> The issue for the Founders was not so much

 $<sup>\</sup>overline{^{211}}$  Id.

<sup>&</sup>lt;sup>212</sup> *Id*.

<sup>&</sup>lt;sup>213</sup> See id. at 39–40.

<sup>&</sup>lt;sup>214</sup> See id.

<sup>&</sup>lt;sup>215</sup> *Id.* at 40 (quoting BENJAMIN FRANKLIN, *Autobiography*, *in* BENJAMIN FRANKLIN 3, 70 (Frank Luther Mott & Chester E. Jorgenson eds., 1936)).

<sup>&</sup>lt;sup>216</sup> *Id.* (quoting Thomas Jefferson, *Notes on the State of Virginia, in* The Complete Jefferson 567, 676 (Saul K. Padover ed., 1943)).

<sup>&</sup>lt;sup>217</sup> Id. at 58.

 $<sup>^{218}</sup>$  MEAD, supra note 200, at 53; see BELLAH, supra note 137, at 171.

whether, but how such ideas were to be imbued upon the citizenry. <sup>219</sup> Bellah argues that "the separation of church and state has not denied the political realm a religious dimension." <sup>220</sup> Mead, by comparison, is aware that the government has had to take over moral education because sectarian groups have tended to bury the core elements of republican virtue within the peculiarities of their own doctrine. <sup>221</sup> Mead recognizes that "of necessity the state in its public-education system is and always has been teaching religion . . . [and] does so because the well-being of the nation and the state demands this foundation of shared beliefs." <sup>222</sup> He goes on to state, "In this sense the public-school system of the United States *is* its established church."

Over the better part of the last century, religious and moral norms have comprised the focal point for the battles waged in public school systems across the country: Can the Ten Commandments be posted in classrooms?<sup>224</sup> Will prayer and devotional Bible-reading be tolerated there?<sup>225</sup> Can other theories of the origin and development of life be taught along with neo-Darwinism?<sup>226</sup> And, most recently, does the recitation of the Pledge of Allegiance, with its reference to God, constitute an example of religious coercion?<sup>227</sup>

## C. "Under God" in the Pledge of Allegiance

In 2004, the Supreme Court reviewed Michael Newdow's complaint challenging, on establishment grounds, the reference to God in the national Pledge of Allegiance.<sup>228</sup> The appellate court found that the phrase "one nation under God" was indeed religious and violated the coercion test of *Lee v. Weisman.*<sup>229</sup> The Court concluded, without reaching the merits of the case, that Newdow lacked the requisite standing to bring the complaint

<sup>&</sup>lt;sup>219</sup> See supra Part II.B.2–3.

<sup>&</sup>lt;sup>220</sup> BELLAH, *supra* note 137, at 171.

<sup>&</sup>lt;sup>221</sup> See MEAD, supra note 200, at 67–68, 71.

<sup>&</sup>lt;sup>222</sup> Id. at 68.

<sup>&</sup>lt;sup>223</sup> Id

<sup>&</sup>lt;sup>224</sup> See generally Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (invalidating a Kentucky statute requiring the posting of the Ten Commandments on public school classroom walls).

<sup>&</sup>lt;sup>225</sup> See supra Part I.B.

<sup>&</sup>lt;sup>226</sup> See discussion of Edwards v. Aguillard, supra note 65.

<sup>&</sup>lt;sup>227</sup> See infra Part II.C.

<sup>&</sup>lt;sup>228</sup> Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4–10 (2004).

<sup>&</sup>lt;sup>229</sup> Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2002); *see also* Lee v. Weisman, 505 U.S. 577, 587 (1992).

and reversed the lower court decision on that basis.<sup>230</sup> Justice Stevens, writing for the majority, noted that "the School District permits students who object on religious grounds to abstain from the recitation."<sup>231</sup>

Chief Justice Rehnquist, in a concurring opinion, characterized the invocation of God in the Pledge as "patriotic"<sup>232</sup> and distinguished it from a religious exercise, such as the prayer in *Weisman*.<sup>233</sup> The Chief Justice cited numerous examples of the patriotic use of the term God, such as United States Presidents invoking the name in inaugural ceremonies, the motto "In God We Trust" appearing on the nation's coinage, and President Lincoln's referring to the Deity in the Gettysburg Address.<sup>234</sup>

Justice O'Connor, in her concurring opinion, applied the "endorsement test" with its "reasonable observer" standard and decided that the Pledge does not constitute a governmental endorsement of religion. She argued that there are times in public life when religious references employ "the [religious] idiom for essentially secular purposes." Such purposes are to "solemniz[e] public occasions, [to] express[] confidence in the future, and [to] encourag[e] the recognition of [that which deserves] appreciation in the society." Religious references for secular purposes are examples of "ceremonial deism." In her opinion, the reference to God in the Pledge is an example of ceremonial deism; she considered the "history and ubiquity" of the recitation of the Pledge, the "absence of worship or prayer" and of "reference to [a] particular religion" within the context of the recitation, and the "minimal religious content" involved in it.

A concurring Justice Thomas contended that adherence to *Weisman* would require striking down the Pledge policy in California because the latter "poses more serious difficulties than the prayer at issue in

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<sup>230</sup> Newdow, 542 U.S. at 17–18.
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<sup>&</sup>lt;sup>231</sup> *Id*. at 8.

<sup>&</sup>lt;sup>232</sup> *Id.* at 26 (Rehnquist, C.J., concurring).

<sup>&</sup>lt;sup>233</sup> *Id.* at 30–31.

<sup>&</sup>lt;sup>234</sup> *Id.* at 26–29.

<sup>&</sup>lt;sup>235</sup> *Id.* at 33–45 (O'Connor, J., concurring).

<sup>&</sup>lt;sup>236</sup> Id. at 35

<sup>&</sup>lt;sup>237</sup> *Id.* at 36 (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1983) (O'Connor, J., concurring)).

<sup>&</sup>lt;sup>238</sup> *Id.* at 37.

<sup>&</sup>lt;sup>239</sup> *Id.* at 37–39.

<sup>&</sup>lt;sup>240</sup> Id. at 39–41.

<sup>&</sup>lt;sup>241</sup> *Id*. at 42.

<sup>&</sup>lt;sup>242</sup> *Id.* at 42–44.

[Weisman]."<sup>243</sup> He stated, "I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional . . . , [but] I believe . . . that [Weisman] was wrongly decided."<sup>244</sup> Regarding Weisman, Justice Thomas noted that high school graduates are "almost (if not already) adults" and that graduation is a "one-time event" where "parents are usually present." He contrasted these circumstances with those of the Pledge policy, where young students are removed from parental protection and exposed to the Pledge every school day. 247 The Justice observed that only "peer pressure" to attend the graduation ceremony was involved in Weisman, 248 while Newdow's daughter was actually compelled by force and penalty of law to attend school where the Pledge was recited.<sup>249</sup> Justice Thomas tended to discount that the Pledge is not a prayer because, under the rule of Torcaso v. Watkins, 250 a citizen cannot be required to "declare his belief in God." Justice Thomas further, and perhaps most significantly, argued that "the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right."<sup>252</sup> He therefore disagreed with the Court's having incorporated the Establishment Clause into the Fourteenth Amendment. 253

## D. Analysis

### 1. "Sidestep and Avoid"

<sup>243</sup> *Id.* at 46 (Thomas, J., concurring).

The majority of the Court showed no signs of desiring to tackle the weighty and fundamental issue addressed in Newdow's complaint. Chief Justice Rehnquist's reminder that the Court failed to follow its "settled and firm policy of deferring to regional courts of appeals in matters that

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244 Id. at 49.
245 Id. at 46.
246 Id.
247 Id.
248 Id.
249 Id. at 47.
250 367 U.S. 488 (1961).
251 Newdow 542 U.S. at 48 (Thomas J. concurring) (quoting Torcase, 367 U.S. at 48 (Thomas J. concurring)
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<sup>&</sup>lt;sup>251</sup> Newdow, 542 U.S. at 48 (Thomas, J., concurring) (quoting Torcaso, 367 U.S. at 489).

<sup>&</sup>lt;sup>252</sup> *Id.* at 50.

<sup>&</sup>lt;sup>253</sup> See id. at 45–46.

involve the construction of state law". reinforces the impression that the Court opted for a jurisprudence of "sidestep and avoid." This strategy seems strangely curious, even shocking, in a country like this one, which was conceived in a self-consciously religious fashion, where belief in God was a foundational value regarded as the presupposition of the good society. It is a safe guess that sociologists of religion like Bellah and historians of American religious thought like Mead would find it difficult to disagree with Justice Douglas's statement, "We are a religious people whose institutions presuppose a Supreme Being." 255

One might suspect that the main reason the Court sidestepped adjudicating Newdow's case on its merits is that the word "God" has unquestioned religious overtones and so, when assessed from the point of view of whether it is coercive in an elementary school setting, the Court would be inclined to answer in the affirmative. That has certainly been the course adopted in the prayer cases as well as in many other religion cases. Yet the Court's responding in that way might have occasioned a public hue and cry at a time when immense public animus was already directed against it, might have served to raise additional questions regarding its "political agenda," and almost certainly would have further fragmented society. Justice Thomas was correct that the ruling in *Weisman*, with the advancement of its "coercion test," 257 cannot be squared

<sup>&</sup>lt;sup>254</sup> *Id.* at 23 (Rehnquist, C.J., concurring) (quoting Bowen v. Massachusetts, 487 U.S. 879, 908 (1988)).

<sup>&</sup>lt;sup>255</sup> Zorach v. Clauson, 343 U.S. 306, 313 (1952). In *Zorach*, Justice Douglas, after voting with the majority in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948) (striking down on establishment grounds a released-time program for religious instruction), delivered the majority opinion of the Court, upholding a similar program. Zorach, 343 U.S. at 308–09, 315. With an eye on his colleague's change of position, Justice Jackson wryly commented, "Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law." Id. at 325 (Jackson, J., dissenting). Bruce Allen Murphy interprets Justice Jackson's statement to mean that Justice Douglas appeared "to be taking this proreligion position because of his thoughts about the need to win the support of a Catholic constituency for a possible run for the presidency later that year." BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 311 (2003). The Justice was interested in an office other than one on the Court. See id. Apparently politics, even in its base forms, can influence the opinion a Justice renders. Notwithstanding cynical explanations of Justice Douglas's position in Zorach, along with the fact that he himself came to regret it, id. at 356–57, his statement emphasizing the significance of belief in God in American life is factually correct.

<sup>&</sup>lt;sup>256</sup> See supra Part I.B.

<sup>&</sup>lt;sup>257</sup> See Lee v. Weisman, 505 U.S. 577, 587 (1992).

with the Pledge policy in California.<sup>258</sup> In both cases, citizens were invited by the state to pay homage to God.<sup>259</sup> If the practice in *Weisman* was unconstitutional, then the Pledge policy in California should be as well.

## 2. Distinguishing Between the Religious and the Patriotic

Chief Justice Rehnquist's distinction between the "patriotic" and the "religious" presupposes a bifurcation of the two. Neither Mead nor Bellah paints a picture of eighteenth century American politics uninformed by religious beliefs and practices. The Chief Justice's distinction between the two, not surprisingly, collapses under close scrutiny. He fails to mention instances in which the word "God" is both patriotic and religious, such as when President Franklin Roosevelt, by radio, led the American people in prayer during the D-Day invasion. To admit that President Roosevelt's prayer was religious would suggest that the Court, if given an opportunity, would be justified in ruling it unconstitutional; to contend that it was merely patriotic would imply a crass disingenuousness and

"Last night when I spoke with you about the fall of Rome, I knew at that moment that troops of the United States and our Allies were crossing the Channel in another and greater operation[]" . . . . "It has come to pass with success thus far. And so, in this poignant hour, I ask you to join me in prayer: Almighty God: Our sons, pride of our Nation, this day have set upon a mighty endeavor, a struggle to preserve our Republic, our religion, and our civilization, and to set free a suffering humanity. Lead them straight and true; give strength to their arms, stoutness to their hearts, steadfastness in their faith. . . . They will be sore tried, by night and by day, without rest-until victory is won. The darkness will be rent by noise and flame. Men's souls will be shaken with the violences of war. For these men are lately drawn from the ways of peace. They fight not for the lust of conquest. They fight to end conquest. They fight to liberate. They fight to let justice arise, and tolerance and good will among all Thy people. They yearn but for the end of battle, for their return to the haven of home. Some will never return. Embrace these, Father, and receive them, thy heroic servants, into Thy kingdom. . . . Thy will be done, Almighty God."

James P. Moore Jr., *American Prayers, on D-Day and Today*, WASH. POST, June 6, 2004, at B3 (third and fourth alterations in original).

<sup>&</sup>lt;sup>258</sup> See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 46–47 (2004) (Thomas, J., concurring).

<sup>&</sup>lt;sup>259</sup> See id.; Weisman, 505 U.S. at 580.

<sup>&</sup>lt;sup>260</sup> See supra Part II.B.2–3.

<sup>&</sup>lt;sup>261</sup> Roosevelt stated to the American people:

loathsome manipulation of the religious sensibilities of the American people. The dilemma is escaped if and when one acknowledges the simple fact that religion and politics are inextricably related in this country and have been since the first European immigrants arrived on American shores. <sup>262</sup>

The Chief Justice's distinction between the religious and the patriotic safeguards the language of the Pledge and is true to what I have elsewhere described as his "de facto establishmentarian" stance on religion issues. <sup>263</sup> But, in another sense, the distinction receives its intellectual impetus from the classical liberal notion that importing religious meanings into the public square invariably issues in coercion.<sup>264</sup> The sense of the term "coercion," as I have noted above, cannot in practice be divorced from political ideology.<sup>265</sup> If, according to one's ideological preferences, religion is a "personal" and "private" matter, then the very mention of one's religious views in the public sphere is imposing, coercive, and reproachable. By contrast, if the public use of the word "God" is merely patriotic, then it has an appropriate place in the public arena and is free from attack. Essentially, the Chief Justice is attempting to carve out a public place for religious language by maintaining that its purpose is only "patriotic." The classical liberal lining of his reasoning marginalizes the public expression of religion by identifying it with frothy patriotism and trivializes patriotism by emptying it of its deepest meanings. His stance, which is intended to support the Pledge by safeguarding the legitimacy of its "patriotic" language in the public square, ultimately serves only to demean the recitation of the Pledge as both a religious affirmation and an expression of patriotism.<sup>266</sup>

<sup>&</sup>lt;sup>262</sup> See supra Part II.B.1–2.

<sup>&</sup>lt;sup>263</sup> Smith, *supra* note 16, at 129–30.

<sup>&</sup>lt;sup>264</sup> See supra Part I.

<sup>&</sup>lt;sup>265</sup> See supra Part I.D.

There are many commentators who would undoubtedly agree with the Chief Justice's reasoning here, and they would do so out of deference to the Doctrine of Separation. One such commentator argues that the Establishment Clause is structural in character, meaning that it limits the power of government such that it cannot legislate over religion and the churches. See Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 IOWA L. REV. 1, 3–4 (1998). It is interesting that Esbeck criticizes what he calls "cultural religion" (i.e., civil religion) and contends that it is "the confusion of genuine religious faith with one's pride in tradition, love of country, and the badge of having entered into full acceptance as a citizen of a nation." Id. at 70. It might be informative to his readers if he were to point out a religion to them that is devoid of "cultural" elements. Every manifestation of Christianity contains cultural influence, even (continued)

### 3. The Secularization of Religious References

Justice O'Connor's response to the issue is no more helpful than the Chief Justice's. Her facile use of the expression "ceremonial deism". is close to being dismissive of the religious significance of ceremony and ritual in American culture. Bellah puts the point well when he writes, "What people say on solemn occasions need not be taken at face value, but it is often indicative of deep-seated values and commitments that are not made explicit in the course of everyday life." He takes, as an example, the following words from President Kennedy's Inaugural Address: "I have sworn before you and Almighty God the same solemn oath our forebears prescribed nearly a century and three quarters ago." The President's reference to God was not an empty rhetorical one but struck deeply at the heart of how the American people have long understood their national political experience. The issue concerned then, and continues to concern now, nothing less than the final seat of sovereignty and the "higher criterion" by which the will of the people and the actions of Presidents

the faith of evangelicals. Of course, it does not follow from that fact that a religious outlook has to be consonant in every respect with culture; the two may, and often are, in opposition. But the primary snare in which Esbeck is caught is the following: once he has separated politics from religion, he must then discount (in much the way he has) genuine religious impulses expressed in the context of state, including Lincoln's Second Inaugural Address, Bellah, *supra* note 137, at 177, Franklin Roosevelt's D-Day prayer, *supra* note 261 and accompanying text, and virtually every other invocation of deity. He might learn from Bellah and Mead, whose points of view tend not to be parochially "either-or" as his own, but "both-and." *See supra* Part II.B.2–3. There need not be a radical disjuncture between national religious and moral values and personal ones shared with a community of faith.

<sup>&</sup>lt;sup>267</sup> Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring).

<sup>&</sup>lt;sup>268</sup> BELLAH, *supra* note 137, at 170.

<sup>&</sup>lt;sup>269</sup> *Id.* at 171.

<sup>270</sup> Id.; see Sanford Levinson, Abstinence and Exclusion: What Does Liberalism Demand of the Religiously Oriented (Would Be) Judge?, in RACL, supra note 90, at 76. The author considers the extent to which judges are to exercise abstinence and restraint in providing reasons for their opinions. See id. He considers the example of Justice Clarence Thomas, who, when asked in an interview whether he would use his position on the Court to advance the interests of black people, recalled a story from the Bible, explained his Christian perspective, and invoked "God's law" in response to the question. Id. at 90–91. Levinson wonders whether Justice Thomas's suggestion that he knows "God's law" should have been sufficient to disqualify him from being a Supreme Court Justice. Id. at 91. Yet Levinson's critic might wonder why a Justice's statement, made off the bench, affirming (continued)

are ultimately judged. This transcendent dimension in American life, insists Bellah, is conveyed in part by the words "In God We Trust" on our currency and "under God" in the Pledge.<sup>271</sup> Justice O'Connor's superficial appeal to "ceremonial deism"<sup>272</sup> tends to reduce this dimension to the ordinary and, in the process, has the effect of trivializing a most vital aspect of the American experience, which has unfolded over four centuries and has been aptly described by those such as Bellah and Mead.

Once the varnish is removed from Justice O'Connor's exposition of ceremonial deism, one is led to conclude that her vision for the country is little more than one-dimensional and secular. It is a country in which the invocation of any foundational value is either de-mythologized to meet the narrow requirements of her secular vision or else ruled unconstitutional. The Justice's "endorsement test", implies that the state will tolerate no governmental expression of religion that cannot be justified by secular purposes and effects. The flawed rationale of the test renders unconstitutional any prayerful or worshipful expression by a state official, including not only President Roosevelt's national prayer during the D-Day invasion, 274 but also quite possibly President George W. Bush's adulatory words, with their religious imagery, concerning the historical events of the Normandy invasion, such as the "crucifixion" of paratroopers on telephone poles, the Bibles found on the shores of Normandy, and of course the prayer itself of the former President.<sup>275</sup> President Bush may have even uttered a prayer for those killed during the invasion when he stated, "We pray in the peace of this cemetery that they have reached the far shore of God's mercy."<sup>276</sup>

The question arises: does Justice O'Connor's position not discount for the survivors of the invasion, and for the country in general, the meaning of such a ceremony, by insisting that it is intended either as a secularly inspired solemnizing procedure or, in the alternative, is unconstitutional?

the existence of a law above positive law should be regarded as radically different from the idea expressed by President Kennedy or, for that matter, similar ones advanced by Washington, Adams, Jefferson, and Franklin. Should their religious pronouncements have disqualified them as well? *See* Bellah, *supra* note 137, at 171; *supra* Part II.B.1–3.

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<sup>&</sup>lt;sup>271</sup> BELLAH, *supra* note 137, at 171.

<sup>&</sup>lt;sup>272</sup> Newdow, 542 U.S. at 37 (O'Connor, J. concurring).

<sup>&</sup>lt;sup>273</sup> *Id.* at 33–35.

<sup>&</sup>lt;sup>274</sup> Supra note 261 and accompanying text.

<sup>&</sup>lt;sup>275</sup> Dana Milbank, *Bush Honors D-Day Veterans in Normandy*, THE GREATEST JENERATION, June 7, 2004, http://www.greatestjeneration.com/archives/001906.php. <sup>276</sup> *Id*.

To regard such patently religious expressions as having to do only with secular solemnization of the occasion issues in cynicism about their meaning and the meaning of the occasion itself. One who takes Justice O'Connor's reasoning seriously might be tempted to ask about the ceremonial commemoration of D-Day: was this really a triumph of good over evil, and does it have any lasting transcendent significance? These are religious and moral questions which, in her view, the state is not allowed to address. For her, an affirmative answer to them by a state official, working in that capacity, would be unconstitutional. One must then doubt whether close correlations, such as those made by President Washington in his Farewell Address, between religion and "national morality" on the one hand, and "political prosperity" on the other, could possibly pass muster today as a way of theorizing about religion in the First Amendment.

# 4. Insulating "Coercive" State Establishments from the Establishment Clause

Justice Thomas's concurring opinion is no more promising than those of his colleagues. He contends that the Pledge policy of California is unconstitutional when analyzed under the authority of *Weisman*, but that *Weisman* was wrongly decided.<sup>278</sup> Justice Thomas states that California's Pledge policy was, if anything, more coercive than the graduation prayer in *Weisman*.<sup>279</sup> Yet, as I have already sought to explain in this Article, the graduation prayer in *Weisman* was a far cry from being "coercive" of anyone.<sup>280</sup> The same may be said about California's Pledge policy because any dissenting parent was given the choice to keep his or her child from participating in the recitation.<sup>281</sup> There was no evidence that the state made even the smallest attempt to overwhelm that choice. There can hardly be coercion of a child when his or her parent's resistance to an alleged instrument of coercion is readily respected and acceded to by the state.

Justice Thomas's argument that the Establishment Clause is not incorporable into the "liberty" provision of the Fourteenth Amendment<sup>282</sup> has the advantage of extricating the Court's jurisprudence of religion from

<sup>&</sup>lt;sup>277</sup> George Washington, Farewell Address to the People of the United States (Sept. 17, 1796), http://earlyamerica.com/earlyamerica/milestones/farewell/text.html.

<sup>&</sup>lt;sup>278</sup> Newdow, 542 U.S. at 46–49 (Thomas, J., concurring).

<sup>&</sup>lt;sup>279</sup> *Id.* at 47.

<sup>&</sup>lt;sup>280</sup> Supra notes 131–32 and accompanying text.

<sup>&</sup>lt;sup>281</sup> Newdow, 542 U.S. at 8 (majority opinion).

<sup>&</sup>lt;sup>282</sup> See id. at 49 (Thomas, J., concurring).

the strictures of *Everson*. That is historically sound in light of the fact that the Establishment Clause of the First Amendment was never intended to affect state establishments of religion.<sup>283</sup> The problem with Justice Thomas's argument is not with the concerns it addresses but with the one it does not. Referring to God in the *national* Pledge is the issue. The main philosophical concern with complaints such as Newdow's is their effect upon the *national* consciousness and the sense of *national* solidarity. This country has a long history and rich culture in which religion and morality have been formative influences.<sup>284</sup> It should not be necessary to entrust a nation's spiritual identity to a heckler's veto, even when the heckler may be sincere.

#### E. De Facto Establishmentarianism's Corrective Contribution

There is no reason why the Court should be reluctant to acknowledge that religious faith is, and always has been, of vital importance to the American people, and that their institutions in turn were and are intended to reflect the fact. There is likewise no reason for the Court to be hesitant in affirming, along with the nation's first President, that political prosperity in this country is dependent upon religion and a sense of national morality. It is hardly intelligible, given our national cultural and religious history, and especially the publicly religious causes of abolitionism and the civil rights movement, for anyone to suggest that religious and moral expression remain a private affair.

<sup>&</sup>lt;sup>283</sup> Supra Part II.B.1–3.

<sup>&</sup>lt;sup>284</sup> Supra Part II.B.1–3.

<sup>&</sup>lt;sup>285</sup> See Washington, supra note 277.

<sup>&</sup>lt;sup>286</sup> See Smith, supra note 17, at 851.

Robert Audi argues that it is generally best for citizens to discourse in secular terms, although they may, on occasion, have to present religious reasons for their political positions. Robert Audi, *The State, the Church, and the Citizen, in* RACL, *supra* note 90, at 38, 73. When religious reasons must be given, citizens must remember, he insists, to express their commitment to "the principle of secular rationale," *id.*, which enjoins them not to support any restrictive law unless they can give an "adequate secular reason" for their advocacy and support. *Id.* at 54–55. While Audi would not totally ban religious expression from the public square, he is against its presence there unless there is a secular basis for it. *See id.* at 73. His position incorrectly assumes, I think, that each and every political issue can be adequately determined in secular terms. Consider, for example, the environmental concern to preserve and to protect other species. What "adequate secular reason" might one give for advocating that? The concern is about one's values, is it not? The same point may be made about fetal life: at what stage of conception should it be protected by law? *See generally* Roe v. Wade, 410 U.S. 113 (1973). Is distinguishing the third trimester from the (*continued*)

I am not suggesting that individualism, with its emphasis upon autonomy, has no place in American culture. Anyone who chooses to be an agnostic or atheist or to take an unorthodox religious position has that inviolable constitutional right. What he or she does not have, and should never be provided, is a veto power over the nation's expression of its religious and moral impulses. It approaches absurdity for an atheist like Newdow to argue that the phrase "under God" should be purged from the national Pledge of Allegiance on the basis that his daughter has been "coerced" to engage in a religious affirmation. The fact is that his daughter is in a public school, where he is given the clear choice of whether to allow her to participate in the recitation. There is no evidence that any school official has ever attempted to overpower either his will or that of his daughter.

first delineated by some bold line in commonly shared secular reasoning? *See id.* at 164–66. The point is that many public issues are indeterminate on the basis of secular reasoning. Is the citizen, under such circumstances, simply to remain mute? Audi's position is deeply rooted in classical liberal thought. Far from enriching political discourse, his position actually impoverishes it. Even Kent Greenawalt, who firmly accepts the classical liberal position that legislation should be justified in a secular manner, recognizes that "shared premises of justice and criteria for determining truth cannot resolve critical questions of fact, fundamental questions of value, or the weighing of competing benefits and harms." Kent Greenawalt, Religious Convictions and Political Choice 12 (1988). One may, of course, criticize Audi's stance without assuming, along with Greenawalt, that religious reasons are subrational in every respect. They may not be secular, but it does not follow that they possess no logic or coherence.

<sup>&</sup>lt;sup>288</sup> See U.S. CONST. amend. I.

<sup>&</sup>lt;sup>289</sup> Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004).

<sup>&</sup>lt;sup>290</sup> *Id.* at 7–8.

<sup>291</sup> The recitation of the Pledge, like prayer, in public schools is said to be coercive. *Id.* at 46–47 (Thomas, J., concurring). Likewise, the complaint against civil religion is that it is not voluntary. *See* Yong Huang, Religious Goodness and Political Rightness: Beyond the Liberal-Communitarian Debate 181 (2001) (citing James Luther Adams, On Being Human Religiously: Selected Essays in Religion and Society 61 (1976)). If the complaint concerns the pervasiveness of certain core ideas and values, the response should be that living in a particular culture always means living with the ideas and values that pervade that culture. One has no choice in the matter other than to change cultures. If the complaint, on the other hand, boils down to the allegation that individuals, like Newdow and others, are forced to recite the Pledge and to pray against their wills, then that is categorically incorrect. What living in a democratic state means is that those who disagree with state values are, in the case of the recitation of the Pledge and prayer, not required under the force and penalty of law to participate in such exercises. It does not mean living in the absence of state values, even religious and moral ones. Yong Huang, in a (*continued*)

With the advent of public schools, the state took over the responsibility of educating the nation's children.<sup>292</sup> Education in the principles of virtue, on which any republican state rests, is a necessity. Devotional exercises, like the Pledge to the flag, are an integral part of that educational process. Although religious pluralism has proliferated in this country during the last three decades, that fact can be utilized as a way of enlarging, not minimizing, national morality. What the Court has instead given us is a body of law in which religious and moral discussion is regarded as outside the parameters of public education.

The question, increasingly urgent, now becomes: to whom will education in virtue be entrusted? Unquestionably, family and religious groups have an important role to play in this process; however, to expect them to shoulder this immense responsibility alone is naïve. Some years ago, John Paul Williams emphasized that "at those points where religion is a public matter, those areas which contain the ethical propositions essential to corporate welfare, society will only at its peril allow individuals and sects to indulge their dogmatic whims." Williams's words are, if anything, truer now than they were then. Because principles of virtue are

provocative work on the issues between liberalism and communitarianism, agrees with Adams's criticism of civil religion. *See id.* But note how Huang writes of community values:

[A] communal belief system obtained by a community is not something set in stone for its members, actual or potential. By admitting a new member, a community has its obligation to readjust its communal belief system, since this communal belief system, in order to be an overlapping consensus of all its members . . . , has also to take the newcomer's belief system into consideration.

*Id.* at 170 (emphasis added). Although a civil religion, for Huang, cannot be voluntary, a community with long-standing beliefs and values, which it voluntarily accepts, "has its obligation" to readjust those when newcomers enter the community. *See id.* at 170, 181. Where does this leave the community if it does not wish to readjust its values to other values with which it may disagree? To declare that it "has its obligation" suggests that Huang's resolution of the liberal-communitarian debate is no more voluntary than the civil religion he criticizes.

<sup>292</sup> See generally Victoria J. Dodd, American Public Education and Change: Not an Oxymoron, 17 St. Louis U. Pub. L. Rev. 109, 111–13 (1997) (discussing the history of American public education).

<sup>293</sup> J. Paul Williams, What Americans Believe and How They Worship 489 (rev. ed. 1962).

not being adequately taught in any of these institutional settings, our republican state is eroding at the base and is in jeopardy.

The de facto establishmentarian position contains a kernel of truth worth salvaging. That truth is that the national religious and moral character of this country's cultural heritage must be openly explored, acknowledged, and expressed. Failing to do so will result in national confusion<sup>294</sup> and, eventually, in republican collapse. As a result, individual autonomy will be impossible to realize because there will be no boundaries within which it can be expressed. Those who truly cherish autonomy will readily embrace a nation shaped by specific religious and moral values.

Privatization and suppression of the religious dimension of reality comprise classical liberalism's approach to our first freedoms.<sup>295</sup> That approach is myopic and misguided. De facto establishmentarianism's contribution to the formulation of a new model of religious freedom is the insistence that principles of virtue "essential to corporate welfare".<sup>296</sup> be expressed and taught.

# III. REVISED LIBERALISM AND THE VIGOROUS DISCUSSION OF THE RELIGIOUS AND THE MORAL IN THE PUBLIC SQUARE

#### A. Franklin I. Gamwell's Liberalism

The political position that I have elsewhere described as "new" or "revised" liberalism opens the public square to religionists of a wide variety of persuasions. <sup>298</sup> They are free to publicly express their religious

Margo Lucero, an eighth-grade counselor at Everitt Middle School in Wheat Ridge, Colorado, filling in for an absent principal, took it upon herself to change the Pledge from "one nation under God" to "one nation under your belief system." Jim Kirksey, "God"-less Pledge Stirs Jeffco School Backlash, DENVER POST, Apr. 22, 2005, at B-03, http://www.denverpost.com/Stories/0,1413,36%257E53%257E2829903,00.html. One parent, not surprisingly, stated that her child was confused. *Id.* Extreme individualism not only viciously tears at the fabric of a society, but also invariably results in chaos and confusion. One wonders how Ms. Lucero might respond to an atheistic parent who complains that he and his child neither have a "belief system" nor follow one, and that this alteration of the Pledge is biased in favor of the religious. Ms. Lucero would presumably indulge the complainant by further modifying the Pledge, perhaps to "one nation under your belief system if you happen to have one."

<sup>&</sup>lt;sup>295</sup> See Smith, supra note 17, at 820–21.

<sup>&</sup>lt;sup>296</sup> MEAD, supra note 200, at 70 (quoting WILLIAMS, supra note 293, at 489).

<sup>&</sup>lt;sup>297</sup> See Smith, supra note 16, at 124–25; Smith, supra note 17, at 818, 850–52.

<sup>&</sup>lt;sup>298</sup> Smith, *supra* note 16, at 124–25.

reasons for political positions.<sup>299</sup> Their religious views often influence the way in which they address issues such as abortion, euthanasia, birth control, gender-based preferences, marital rights, protection of the environment, treatment of animals, warfare, and the distribution and use of alcohol and tobacco.

Many have noted that the public square in this country, under the influence of a liberalism that marginalizes religious thought, is dominated by discourse on economic self-interest, privatism, and nationalism, with no attention given to the moral or religious aspects or considerations of public life. Revised liberalism, in which religion may be explored, discussed, and debated in the public square, provides a corrective to this state of affairs.

Franklin I. Gamwell's work concerning how to resolve the relationship between religion and politics is interesting as well as intellectually rigorous. It consists of a sustained argument in support of vigorous religious discussion and debate in the public square. For those who desire to enrich political discourse and, at the same time, to bolster the public presence of religion in this country, Gamwell's work deserves careful attention. It is especially relevant here because bringing religion and politics into close proximity is pivotal to my recasting of religion jurisprudence. Discussion and debate are the vehicles by which there may be a continual exploration and reinterpretation of core values promoted by the state as well as a public understanding of the deepest convictions of religious communities regarding matters touching the body politic. Lively interaction, drawing from people's religious experience, is imperative if religion is to play a formative role in addressing and solving social and political issues.

<sup>&</sup>lt;sup>299</sup> See id.

<sup>&</sup>lt;sup>300</sup> See Stephen Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion 8 (1993); Philip L. Quinn, *Political Liberalisms and Their Exclusions of the Religious, in RACL, supra* note 90, at 138, 159; Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons, in RACL, supra* note 90, at 162, 177. Quinn argues that the public square should accommodate religious reasons and that religious American citizens should not have to affirm a duty of civility that will not allow them to appeal to comprehensive doctrines in order to justify their responses to political questions. Quinn, *supra*, at 159.

<sup>&</sup>lt;sup>301</sup> See generally Franklin I. Gamwell, The Meaning of Religious Freedom: Modern Politics and the Democratic Resolution (1995).

<sup>&</sup>lt;sup>302</sup> *Id*.

### B. Gamwell's Statement of the Problem

Gamwell attempts to answer what he calls the "modern political problematic," which he expresses as follows: "What, if anything, is the proper relation between politics and religion, given that the political community includes an indeterminate plurality of legitimate religions?" To put the question another way, each religious sect's beliefs are comprehensive; so, whenever there is disagreement between two or more religious factions, on what basis other than coercion or war can the conflict be resolved?<sup>305</sup>

In his treatment of this problem, Gamwell seeks to avoid terms like "toleration," which he believes implies state-favored religion, and "disestablishment," which he thinks connotes a secularist state.<sup>306</sup> He wishes to advocate, instead, for "religious freedom." This expression, for him, signifies "a political discussion and debate in which differing religious convictions are or can be publicly advocated and assessed."<sup>308</sup>

# C. Gamwell's Understanding of the Common Ground Between Religion and Politics

But what are "religion" and "politics"? Admitting the difficulty and disagreement that exists among scholars in defining each term, Gamwell acknowledges as an additional complication that the "terms do not refer to differing instances of the same thing."<sup>309</sup> Religion is referred to by Clifford Geertz as a "pattern of culture,"<sup>310</sup> while politics is described as "a specific form of human association."<sup>311</sup> What they have in common, Gamwell contends, is that they both "identify specific forms of activity."<sup>312</sup> Religion is "the primary form of culture in terms of which humans explicitly ask and answer what [Gamwell calls] the comprehensive

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<sup>303</sup> Id. at 5.
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<sup>&</sup>lt;sup>304</sup> *Id*.

 $<sup>^{305}</sup>$  See id. at 6–9.

<sup>&</sup>lt;sup>306</sup> *Id.* at 9–10.

<sup>&</sup>lt;sup>307</sup> *Id.* at 10.

<sup>&</sup>lt;sup>308</sup> *Id*.

<sup>&</sup>lt;sup>309</sup> *Id.* at 14.

<sup>&</sup>lt;sup>310</sup> *Id.* (citing CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 90–93 (1973)).

<sup>&</sup>lt;sup>311</sup> *Id*.

<sup>&</sup>lt;sup>312</sup> *Id.* at 15.

question."<sup>313</sup> Politics, by contrast, is "the primary form of association in which humans explicitly ask and answer the question of the state."<sup>314</sup>

# D. Gamwell's Understanding of Human Activity

Gamwell defines "human activity" to include the distinctive human capacity for self-understanding.<sup>315</sup> He argues that the understanding of oneself always implies an understanding of others, for to understand oneself involves an understanding of that which is not oneself, i.e., others.<sup>316</sup> The self and others in turn imply a reality larger than either belong to.<sup>317</sup> We are able to compare and to contrast ourselves with others because we and they all belong to another reality, or a single whole.<sup>318</sup> In each distinctively human activity, human beings are aware of themselves, others, and a reality larger than either.<sup>319</sup>

### E. Gamwell's View of Self-Understanding and Freedom

Because we are endowed with self-awareness, we are able to choose what we will be. 320 We possess freedom. 321 Gamwell equates self-understanding and freedom by stating that the former "is the choice of one's purpose. 422 Yet it does not follow, he points out, that such choice is always explicit. 423 "Explicit understanding . . . refers to . . . conscious thoughts, 324 and no human activity is always completely conscious. There are implicit understandings, which are not part of conscious thought but which nonetheless support it. A lawyer might, for example, listen carefully to a hostile witness's direct examination at trial with the purpose of cross-examining the witness the next day in the attempt to impeach her credibility. The lawyer's listening is shaped by that underlying purpose, or by the implicit self-understanding of being a cross-examiner.

 $<sup>\</sup>overline{}^{313}$  *Id*.

 $<sup>^{314}</sup>$  *Id* 

<sup>&</sup>lt;sup>315</sup> *Id.* at 15–16.

<sup>&</sup>lt;sup>316</sup> *Id.* at 16.

<sup>&</sup>lt;sup>317</sup> See id.

<sup>&</sup>lt;sup>318</sup> See id.

<sup>&</sup>lt;sup>319</sup> See id.

<sup>&</sup>lt;sup>320</sup> *Id*.

<sup>&</sup>lt;sup>321</sup> See id. at 17.

<sup>&</sup>lt;sup>322</sup> *Id*.

 $<sup>^{323}</sup>$  Id

<sup>&</sup>lt;sup>324</sup> *Id*.

<sup>325</sup> *Id*.

<sup>&</sup>lt;sup>326</sup> *Id*.

# F. Gamwell's "Explicit" and "Implicit" Self-Understandings

For Gamwell, "an activity is distinctively human when it includes an explicit or implicit self-understanding." It follows from this premise that each human activity includes at least an implicit understanding of general human activity. It follows from this premise that that Thomas Jefferson wrote the Declaration of Independence, for example, implies that it was written in the eighteenth century. Self-understanding, or the choice of a purpose as set forth in a particular human activity, raises the question: "What are the characteristics common to the diverse self-understandings of all human activities, actual or possible?" Phrased another way: what is the general understanding of life by which one lives? This is what Gamwell calls one's "comprehensive self-understanding" or "comprehensive human purpose." An individual's particular purposes are always an expression of his or her comprehensive human purpose.

### G. Gamwell's "Comprehensive Self-Understanding" and Morality

Gamwell cautions that our particular choices may express a misunderstanding of what we take to be "the purpose of the human adventure." Our choices are not always congruent with our valid comprehensive self-understanding. But inasmuch as "the character of human activity . . . [in general] is implied by any given activity," our choice of a particular purpose "includes, at least implicitly, the valid comprehensive self-understanding." In this sense, "Gamwell states, "we can never fail to understand correctly the purpose of all human activity." The "valid comprehensive self-understanding" constitutes, for us, a moral standard that each and every human activity should express.

<sup>&</sup>lt;sup>327</sup> *Id.* at 18.

 $<sup>^{328}</sup>$  Id

<sup>&</sup>lt;sup>329</sup> *Id*.

<sup>&</sup>lt;sup>330</sup> *Id*.

<sup>&</sup>lt;sup>331</sup> *Id*.

<sup>&</sup>lt;sup>332</sup> *Id.* at 23.

<sup>&</sup>lt;sup>333</sup> *Id.* at 18.

<sup>&</sup>lt;sup>334</sup> *Id.* at 18–19.

<sup>&</sup>lt;sup>335</sup> See id. at 19.

<sup>&</sup>lt;sup>336</sup> *Id*.

<sup>&</sup>lt;sup>337</sup> *Id*.

<sup>338</sup> *Id*.

An invalid understanding of the comprehensive purpose is a divergence from that standard and defines immorality.<sup>339</sup>

# H. Gamwell's Refined Definition of Religion

Gamwell explains that culture comprises "the concepts and symbols in terms of which human activities explicitly understand themselves and other things and the larger world to which they make a difference."<sup>340</sup> Since he has previously stated that "religion is a specific form of culture, it . . . follows that a particular religion is a set or system of shared concepts and symbols in terms of which humans ask and answer some specific question."341 Because each human activity includes a particular purpose, which in turn implies a comprehensive one, Gamwell formally defines religion as that "primary form of culture in terms of which the comprehensive question is explicitly asked and answered."342 He insists that, while all human activity implies the possibility of religion, he does not concede that all human activity is religious.<sup>343</sup> He does contend, however, that religion is always important in human life.<sup>344</sup> Humans are compelled by life itself, not only to ask the question of comprehensive purpose, but also to give an explicit answer to it.345 "[T]he specific function of religious activity is so to address the comprehensive question explicitly as to cultivate in the lives of religious adherents comprehensive self-understandings that are not duplicitous or . . . authentic." The claim of every religion is that it provides an understanding of authentic, or moral, living. 347

# I. Gamwell's Distinction Between Religious Activity and Critical Reflection on It

One may ask and answer religious questions in two basic ways. The first is to ask the question and to give a decisive answer.<sup>348</sup> The second is to ask the question and to reflect critically on one or more answers that

 $<sup>\</sup>overline{}^{339}$  Id.

<sup>&</sup>lt;sup>340</sup> *Id.* at 22.

<sup>&</sup>lt;sup>341</sup> *Id*.

<sup>&</sup>lt;sup>342</sup> *Id.* at 23.

<sup>&</sup>lt;sup>343</sup> *Id.* & n.5.

<sup>&</sup>lt;sup>344</sup> *Id*.

<sup>&</sup>lt;sup>345</sup> *Id.* at 23–24.

<sup>346</sup> Id. at 24.

<sup>&</sup>lt;sup>347</sup> *Id.* at 25.

<sup>&</sup>lt;sup>348</sup> *Id.* at 28.

have been decisively given.<sup>349</sup> The former is simply religious activity, while the latter is the work of disciplines such as theology and philosophy of religion.<sup>350</sup> Gamwell emphasizes that religious activity can always issue in critical reflection regarding it.<sup>351</sup>

# J. Gamwell's Manner of Distinguishing Politics from Religion

Religion and politics are distinguishable from each other by virtue of the questions they explicitly ask and answer.<sup>352</sup> The former addresses our comprehensive purpose, while the latter considers a "noncomprehensive" aspect of our lives; viz., the question of the state.<sup>353</sup> Politics is "the primary form of association in which the question of the state is explicitly asked and answered."<sup>354</sup> Gamwell formulates the question of the state as follows: "What should the activities of the state be, or what should the state do?"<sup>355</sup>

Of course, political, like religious, activity can be critically assessed.<sup>356</sup> This point is important to Gamwell's overall argument that religious freedom as a political principle is "constituted by a free discussion and debate that includes differing religious convictions."<sup>357</sup>

# K. Gamwell's "Modern Political Problematic" as a Constitutional Issue

The "modern political problematic" is not suitable for resolution by statute.<sup>358</sup> Statutes are enacted and revoked. The comprehensive condition of all authentic politics is the subject of religious conviction.<sup>359</sup> As such, it may not vary from time to time as it might under statutes.<sup>360</sup> The relationship between religion and politics is properly a constitutional issue.<sup>361</sup> "If religious freedom has a coherent meaning, it is a constitutional principle."<sup>362</sup>

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\overline{^{349}} Id.
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 $<sup>^{350}</sup>$  *Id* 

<sup>&</sup>lt;sup>351</sup> *Id.* at 29.

<sup>&</sup>lt;sup>352</sup> *Id.* at 31.

<sup>&</sup>lt;sup>353</sup> *Id.* at 31–32.

<sup>354</sup> *Id.* at 32.

<sup>&</sup>lt;sup>355</sup> *Id*.

<sup>&</sup>lt;sup>356</sup> *Id.* at 34.

<sup>&</sup>lt;sup>357</sup> *Id.* at 34–35.

<sup>&</sup>lt;sup>358</sup> See id. at 37.

<sup>&</sup>lt;sup>359</sup> Id

<sup>&</sup>lt;sup>360</sup> *Id*.

<sup>&</sup>lt;sup>361</sup> *Id*.

<sup>&</sup>lt;sup>362</sup> *Id*.

### L. Gamwell's Basic Proposal

The constitutional principle of religious freedom, according to Gamwell, may be stated as follows: "Religious freedom means nothing other than a political expression of the comprehensive question. Because the modern political problematic cannot be resolved by an answer to this question, . . . a modern political community must be constituted by the question itself." No particular answer to the question is satisfactory, because it would define a duty to insure the teaching of it, and that would constitute a religious establishment that is inconsistent with the plurality of religious views. Even "a secularistic meaning of religious freedom is . . . incoherent" by virtue of setting forth an answer that violates the antiestablishment norm.

Gamwell's manner of defining the constitutional principle of religious freedom in terms of the question places a forceful accent upon vigorous, free, and public discussion and debate of the various answers which are offered to the question. Stout and full-bodied discussion and debate suggest that the issues involved in such endeavors are resolvable by reason.<sup>366</sup> Gamwell takes issue with those who argue otherwise.<sup>367</sup>

He is deeply influenced by a particular strand of Mead's thought. He rejects the view, which is accepted in this Article, that particular principles of virtue should be explicitly affirmed by citizens and taught by the state. Gamwell opts instead for the contrary view that he believes Mead sets forth in his discussion of Lincoln's religion, i.e., that the will of the people is the most certain key we have to an understanding of God's will, which is known "only when all the channels of communication and expression are kept open." Gamwell believes that truth will emerge out of the conflict of various points of view and this is the meaning of religious freedom. He maintains that "the only solution to the modern political problematic is a free discussion and debate about alternative understandings of human authenticity as such."

 $<sup>\</sup>overline{}^{363}$  *Id.* at 38.

<sup>&</sup>lt;sup>364</sup> *Id*.

<sup>&</sup>lt;sup>365</sup> *Id.* at 40.

<sup>&</sup>lt;sup>366</sup> *Id.* at 41.

<sup>&</sup>lt;sup>367</sup> See id.

<sup>&</sup>lt;sup>368</sup> See id. at 126–28.

<sup>&</sup>lt;sup>369</sup> *Id.* at 129–30 (quoting MEAD, *supra* note 200, at 81).

<sup>&</sup>lt;sup>370</sup> See id. at 133.

<sup>&</sup>lt;sup>371</sup> *Id.* at 157.

# M. Gamwell Distinguishes His Position from Others

#### 1. John Rawls

Gamwell disagrees with John Rawls's view of "political liberalism." According to Gamwell, Rawls maintains that political association should be "freestanding or independent of any comprehensive doctrine," including religious ones. His public square is one in which religious discussion and debate seldom, if ever, occur. According to Gamwell, Rawls's answer concerning how a just and stable society of free and equal citizens is possible, when they are profoundly divided along reasonable religious, philosophical, and moral lines, is that comprehensive convictions be privatized. The political "right," therefore, is prior to the religious "good." Gamwell argues that Rawls does not appreciate that his position is one that no religious adherent can accept. A religious citizen "is bound to believe that no citizen has reason to accept any principles of human activity independent of the valid answer to the comprehensive question." The political of the valid answer to the comprehensive question." The political of the valid answer to the comprehensive question." The political of the valid answer to the comprehensive question."

### 2. John Courtney Murray

Whereas Rawls takes what Gamwell calls the "privatist" stance in response to the modern political problematic, <sup>379</sup> John Courtney Murray, a Roman Catholic, adopts the "partisan" answer. <sup>380</sup> The crux of this view is that the political process is dependent upon a certain class of religious convictions. <sup>381</sup> The meaning of the Establishment Clause is the barring of discrimination among theistic religions. <sup>382</sup> The proper exercise of reason, for Murray, "depends on relation to an ultimate reality that is, in some respects, rationally inaccessible." This is another way for him to

<sup>&</sup>lt;sup>372</sup> See id. at 50, 73–75.

<sup>&</sup>lt;sup>373</sup> *Id.* at 55.

<sup>&</sup>lt;sup>374</sup> See id.

<sup>&</sup>lt;sup>375</sup> See id. at 48.

<sup>&</sup>lt;sup>376</sup> *Id.* at 57.

<sup>&</sup>lt;sup>377</sup> *Id.* at 73.

<sup>&</sup>lt;sup>378</sup> *Id*.

<sup>&</sup>lt;sup>379</sup> See id. at 47–48.

<sup>&</sup>lt;sup>380</sup> *Id.* at 77.

<sup>&</sup>lt;sup>381</sup> *Id.*; *see also* John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition 79–84 (Image Books 1964) (1960).

<sup>&</sup>lt;sup>382</sup> GAMWELL, *supra* note 301, at 78.

<sup>&</sup>lt;sup>383</sup> *Id.* at 83.

maintain that natural law participates in the eternal law.<sup>384</sup> The threat of secularism is precisely its elevation of individual will to a position of moral supremacy, not allowing one to affirm the limitations of reason and thereby a political life that is governed by natural law.<sup>385</sup> The state, according to Murray, is faced inescapably with having to choose between theistic religion and secularism.<sup>386</sup> Gamwell accuses Murray of advocating an establishment of religion and criticizes him for accepting a political argument, whose basic tenet is "a particular comprehensive conviction that transcends reason."<sup>387</sup>

#### 3. Kent Greenawalt

Kent Greenawalt takes a third position, one that Gamwell calls "the pluralist view." According to Gamwell, Greenawalt contends that all "religious convictions in the community are important to politics," although he assumes (without setting forth any specific theory of rationality) that such "convictions cannot be publicly or rationally assessed." Religious convictions are outside of reason. He maintains, however, that citizens should be free in the political positions they take to rely on their religious convictions when their "publicly accessible reasons are inconclusive.",<sup>391</sup> Gamwell hastens to point out that, without articulating a theory of rationality, the best that Greenawalt can do is to resolve the modern political problematic on the basis of mere assumptions.<sup>392</sup> Gamwell further argues that Greenawalt's position stressing the importance of nonrational religious convictions in the political process succeeds only in limiting the rational grounds for political argument and choice.<sup>393</sup> Gamwell contends that Greenawalt is caught on the horns of a dilemma.<sup>394</sup> Either nonrational religious convictions are important to politics, or they are not.<sup>395</sup> If they are, "there is no reason why religious citizens should affirm . . . [a] commitment to publicly accessible

<sup>&</sup>lt;sup>384</sup> *Id*.

<sup>&</sup>lt;sup>385</sup> *Id.* at 83–84.

<sup>&</sup>lt;sup>386</sup> *Id.* at 85–86.

<sup>&</sup>lt;sup>387</sup> *Id.* at 91–92.

<sup>&</sup>lt;sup>388</sup> *Id.* at 97.

<sup>&</sup>lt;sup>389</sup> See id.

<sup>&</sup>lt;sup>390</sup> *Id.* at 102.

<sup>&</sup>lt;sup>391</sup> *Id.* at 104.

<sup>&</sup>lt;sup>392</sup> *Id.* at 109.

<sup>&</sup>lt;sup>393</sup> See id. at 111–13.

<sup>&</sup>lt;sup>394</sup> *Id.* at 113.

<sup>&</sup>lt;sup>395</sup> *Id*.

... reasons."<sup>396</sup> But if they are not important to politics, then it makes no sense why nonrational religious convictions should have a constructive role to play therein.<sup>397</sup> To cast the dilemma in another fashion, Gamwell asserts that Greenawalt must either stand for "a plurality of comprehensive claims for which no principle of political unity is possible," or he must support "the establishment of a particular comprehensive conviction that contradicts that plurality."<sup>398</sup>

# N. Gamwell's Position on "Civil Religion"

Gamwell states that "what is proscribed to the state is the explicit affirmation of any comprehensive conviction, that is, the teaching or support for the teaching of any answer to the comprehensive question." Thus, religious freedom implies state neutrality toward religious convictions. He desires to distinguish between "explicit prescriptions or purposes of the state" and "implicit claims regarding the comprehensive purpose." Regarding the former, he states that the term "civil religion" refers to religious convictions that are constitutive of and explicitly supported by the state. Mead refers to it as "the religion of the public welfare." Bellah describes it, in much the same way, as existing "alongside of and rather clearly differentiated from [that of] the churches." Gamwell insists that any meaning of "civil religion," which suggests that it may be taught or supported by the state for teaching, is inconsistent with his understanding of religious freedom.

A second meaning of civil religion "refers to those [religious] comprehensive convictions that are implicit in [state] activities." Gamwell cannot avoid this soft understanding of the term because, in accordance with his definition of religion, each and every activity of the state implies some comprehensive purpose. It follows, for him, that three separate legislative enactments may imply three separate and distinct

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<sup>396</sup> Id.
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<sup>&</sup>lt;sup>397</sup> *Id*.

<sup>&</sup>lt;sup>398</sup> *Id.* at 115.

<sup>&</sup>lt;sup>399</sup> *Id.* at 186–87.

<sup>&</sup>lt;sup>400</sup> *Id.* at 187.

<sup>&</sup>lt;sup>401</sup> *Id.* at 188.

<sup>402</sup> Id. at 188–89.

<sup>&</sup>lt;sup>403</sup> *Id.* at 189 (quoting MEAD, *supra* note 200, at 66).

<sup>&</sup>lt;sup>404</sup> *Id.* (quoting BELLAH, *supra* note 137, at 168).

<sup>&</sup>lt;sup>405</sup> *Id*.

<sup>&</sup>lt;sup>406</sup> *Id.* at 190.

<sup>&</sup>lt;sup>407</sup> *Id*.

civil religions, since each enactment implies a policy that differs from the others in the way it addresses the comprehensive question. One might also, Gamwell maintains, reason that a particular civil religion dominates one period of history, while it recedes in another. In this second sense of the term, one may say that the purpose of the public debate about answers to the comprehensive question is nothing other than to determine what the civil religion should be. Ugorous discussion and debate will accomplish that goal. But the one policy that can never properly be enacted is the state's own teaching or support for the teaching of what the civil religion is or should be. That is proscribed by the meaning of religious freedom itself. The state may certainly teach to all its citizens the meaning of religious freedom, for that is the same as teaching them an explicit commitment to a democratic body politic.

### O. Analysis and Case Application

Gamwell's treatment of religious freedom in this country emphasizes an aspect of the subject that has been sorely neglected by traditional liberalism. That he advocates in favor of an open and vigorous public discussion and debate of religious and moral issues is a breath of fresh air. His goals are to move beyond silence about and compartmentalization of what matters most to people and, in that manner, to enrich rather than to diminish the political process. His sanguine interpretation of religious freedom approaches the subject from the vantage point of what I have termed "revised liberalism," and he has offered, from that political perspective, one of the antidotal ingredients necessary for re-casting the troubled jurisprudence of religion.

# 1. The "Free Discussion and Debate"

It should not escape one's attention that Gamwell's notion of religious freedom is strongly identified with the "free discussion and debate" of ideas. This concentration is as significant for what it omits as for what it

<sup>408</sup> See id.

<sup>&</sup>lt;sup>409</sup> *Id*.

<sup>410</sup> Id. at 191.

<sup>&</sup>lt;sup>411</sup> See id.

<sup>&</sup>lt;sup>412</sup> *Id*.

<sup>&</sup>lt;sup>413</sup> *Id* 

<sup>&</sup>lt;sup>414</sup> *Id*.

<sup>&</sup>lt;sup>415</sup> See discussion supra notes 297–300.

<sup>&</sup>lt;sup>416</sup> GAMWELL, *supra* note 301, at 157.

includes. He is not arguing that religious freedom requires that the public square be free and open for the practice of all kinds of religious ceremony and ritual, or that the same be legalized regardless of the consequences. Nowhere does he contend, for example, that fundamentalist Mormons should be allowed publicly to practice polygamy or that exceptions should be carved out for Rastafarians to smoke marijuana and for Native Americans to ingest peyote. So one may wonder whether there is anything in Gamwell's treatment of religious freedom that is truly novel; after all, Chief Justice Waite, as early as 1878, was insisting that, while laws "cannot interfere with mere religious belief and opinions, they may with practices."417 If one were to try to explain the crux of Gamwell's view of religious freedom to Native Americans who were fired from their jobs and denied unemployment compensation because of their having engaged in an age-old religious ritual involving the sacramental use of peyote<sup>418</sup> or to Native American tribes whose sacred lands were co-opted by the federal government for the purpose of constructing a highway through them in order to haul timber, 419 the complaining parties might be tempted to ask, "So what?" This criticism of Gamwell is not entirely just, because it is probable that what was absent from the adjudication of these issues was precisely the kind of in-depth rational discussion and debate that Gamwell advocates.

#### 2. Gamwell's "Partisan" Position

A larger issue than the criticism of relevance is the observation that Gamwell's view of religious freedom constitutes a concrete, bounded position on the subject. By this I mean that his analysis elevates some forms of the religious to an exalted height, while discounting others. The role given to reason, for example, is all-encompassing. By attempting to distinguish his analysis from those of Rawls, Murray, and Greenawalt, Gamwell goes to great lengths to insist that religion is a rational phenomenon. One wonders how he would respond to Rudolf Otto's classic description of "the holy," which Otto maintained is "a category of interpretation and valuation peculiar to the sphere of religion . . . , which sets it apart from 'the Rational' . . . in the sense that it completely eludes

<sup>417</sup> Reynolds v. United States, 98 U.S. 145, 166 (1878).

<sup>&</sup>lt;sup>418</sup> Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

<sup>&</sup>lt;sup>419</sup> Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 441–42 (1988).

<sup>&</sup>lt;sup>420</sup> See supra Part III.D–G.

<sup>&</sup>lt;sup>421</sup> See supra Part III.M-N.

apprehension in terms of concepts."<sup>422</sup> Would Gamwell simply deny that religious phenomena have a nonrational, or "numinous,"<sup>423</sup> aspect? It appears that he might, although it should go without saying that many students involved in the phenomenological study of religion would strongly disagree with him. Gamwell's denial would determine for him not only how a religious phenomenon is viewed and understood in the public square, but also what is to pass muster there as "religious." The primary point that I wish to underscore is that no position on religious freedom succeeds in being neutral, contrary to his declaration that such freedom mandates "that the state be explicitly neutral with respect to religious convictions." While he criticizes Murray's position as "partisan,"<sup>425</sup> Gamwell's is just as much so.

This partisanship is a significant consideration in the assessment of his position regarding religious freedom. One must ask why the state can affirm only the importance of the comprehensive question and not an answer. In the absence of a religion-neutral position, it would appear that the state is saddled with the task of choosing between religious convictions. Unless and until Gamwell can demonstrate, which he has not sufficiently done, that a religion-neutral position by the state is possible, one must assume that religious freedom in the state is not inconsistent with its support of a particular religious position.

#### 3. The Role of Reason

The role given to reason serves to tilt the scales in favor of one formulation of religious freedom over another. Gamwell's view of religious freedom is inconceivable apart from his theory of rationality. A theory of rationality, whether Gamwell's or not, weighs the scales on one side or the other. Many who argue for limitations of reason tend to maintain that it is unable to exhaust the explanation of religious experience, because such experience points beyond itself to that which transcends its rational component. For many who do not affirm such limitations, there is nothing higher in religious experience than the rational character of the human mind. Choosing in favor of the former position implies a theistic establishment, while choosing in favor of the latter suggests a secularist one. Once a state commits to, or unwittingly assumes,

<sup>&</sup>lt;sup>422</sup> RUDOLF OTTO, THE IDEA OF THE HOLY 5 (John W. Harvey trans., 1924).

<sup>&</sup>lt;sup>423</sup> *Id.* at 7.

<sup>&</sup>lt;sup>424</sup> GAMWELL, *supra* note 301, at 187.

<sup>&</sup>lt;sup>425</sup> See supra Part III.M.2.

a theory of rationality, where is there any neutral ground to occupy? Gamwell does not sufficiently address this question.

### 4. The Inevitability of Civil Religion

An establishment of some kind is unavoidable, which Gamwell comes close to admitting in his discussion of civil religion. He acknowledges the fact of civil religion. 426 In doing so, he distinguishes the kind of civil religion about which Mead and Bellah write, from a second kind that refers to the religious convictions implicit in the activities of the state.<sup>427</sup> Gamwell asserts that all activities of the state endorse one or another civil religion.428 In an astounding statement concerning the matter, he maintains, "one may say that the purpose of the public debate about answers to the comprehensive question is nothing other than to determine what the civil religion should be." The crucial distinction for him is whether it is "explicit" or "implicit." He contends that religious freedom "prohibits the state's explicit affirmation of a civil religion." 431 contention seems strangely curious. After a free and open discussion and debate brings into full view what the civil religion is or should be, the state, it appears, is impotent. But why would stating a fact be a political travesty? A fact is what it is and certainly involves no coercion; so why is it wrong for the state to acknowledge its own civil religion? For the state to remain explicitly noncommittal after it knows the results of the free and open public debate would be disingenuous or, worse yet, cynical lip service to the benefits supposedly garnered from the vigorous exchange of religious and moral ideas. The situation is ludicrously analogous to that of a physician telling her patient, "After extensive tests and consultation with other specialists in the field, it is clear to us what ails you, but we are not going to tell you." A policy of withholding knowledge, not simply from a patient but from the general public, defines obscurantism. Does that state of affairs define freedom or despotism?

Gamwell's view that a religious conviction is the comprehensive ideal in accordance with which all political activity is to be evaluated, and that the relationship between politics and religion is properly a constitutional

<sup>&</sup>lt;sup>426</sup> See supra Part III.N.

<sup>&</sup>lt;sup>427</sup> See GAMWELL, supra note 301, at 190–91.

<sup>428</sup> Id. at 190.

<sup>429</sup> Id. at 191.

<sup>&</sup>lt;sup>430</sup> *Id*.

<sup>&</sup>lt;sup>431</sup> *Id*.

issue<sup>432</sup> raises a similar question. May one not conclude from such statements that the Constitution embodies, at least implicitly, religious conviction? Not to be able explicitly to teach the substance of this conviction suggests a strange ambivalence about not only it, but also the Constitution.

Gamwell's commendation of a free and open public discussion is well taken and consistent with the benefits and responsibilities of religious freedom. He is correct that the purpose of public discussion is to explore civil religion and to determine the form it should take. But the state, contrary to his view of the matter, should be free to articulate in the broadest terms, just as it has throughout the history of this country, 433 ideas and principles in accordance with the emergent public consensus. That is why President Lincoln's Second Inaugural Address, with its quotation of particular Bible verses, its references to the God of the Bible, and its theological interpretation of the institution of slavery. 434 was not an offense against religious freedom. That is also why President Franklin Roosevelt's public prayer during the D-Day Invasion<sup>435</sup> did not abridge religious freedom. Both Presidents were acting on the basis of a broad public consensus of religious conviction. Although the country to which each spoke consisted mostly of Christians, neither explicitly referred to Jesus. 436 This fact highlights Bellah's observation that America's civil religion was not then, nor is it now, identifiable with Christianity. 437 The civil religion is more general than that.

# 5. The Religious in Public Schools

Public schools ought not, in the name of religious freedom, shy away from a discussion of religious ideas bearing relevance to American social life. In fact, Justice Clark's majority opinion in *School District of Abington Township v. Schempp* does not prohibit such a discussion. 438

In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said

(continued)

 $<sup>\</sup>overline{^{432}}$  *Id.* at 37.

<sup>&</sup>lt;sup>433</sup> See supra Part II.B.1–3.

<sup>&</sup>lt;sup>434</sup> BELLAH, *supra* note 137, at 177.

<sup>435</sup> Supra note 261 and accompanying text.

<sup>&</sup>lt;sup>436</sup> See Bellah, supra note 137, at 177; supra note 261 and accompanying text.

<sup>&</sup>lt;sup>437</sup> See supra Part II.B.2.

<sup>&</sup>lt;sup>438</sup> See *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), in which the Justice writes:

Furthermore, there is no reason why children and their parents should be deprived of their right to choose whether to participate in a schoolsponsored prayer, like the one in *Engel v. Vitale*<sup>439</sup> or the ones at Deborah Weisman's middle school graduation. 440 Gamwell would doubtless take the position that, although the children and their parents (as well as most people in the country) may believe in a God who listens and responds to prayer, the school, as an instrumentality of the state, should refrain, in the name of religious freedom, from adopting an explicit religious position. This is a stark illustration of how Gamwell's theory overlooks its own lack of neutrality. The state's deciding against a policy of prayer in public schools is certainly not a neutral stance. Gamwell's analysis of religious freedom issues in the anomaly that the overwhelming majority of American students are not free to express basic and common tenets of religion in public schools, while the few students who have adopted a secularist or atheistic answer to the comprehensive question are. 441 His theory fails to respond convincingly to either the problem highlighted with urgency by Mead concerning who will teach the religious values and principles on which republican statehood depends, 442 or the problem underscored as of paramount importance to Bellah concerning the religious understandings necessary to address the moral crisis in American life.<sup>443</sup> Gamwell's theory of religious freedom is impotent in responding to either problem because it finally takes individual autonomy more seriously than national community values. Revised liberalism is, after all, a close cousin of the classical variety.

# 6. The Pledge

The reference to deity in the Pledge of Allegiance is an acknowledgement of one of the basic tenets of the country's core religious values, or what Bellah would call "America's civil religion." It is obscurantist for one to argue that, while the idea of a Supreme Being is

that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

<sup>&</sup>lt;sup>439</sup> 370 U.S. 421, 422 (1962).

<sup>440</sup> Lee v. Weisman, 505 U.S. 577, 581-82 (1992).

<sup>441</sup> See supra Part I.B.

<sup>442</sup> See supra Part II.B.3.

<sup>&</sup>lt;sup>443</sup> See supra Part II.B.2.

<sup>&</sup>lt;sup>444</sup> Bellah, *supra* note 137, at 142.

part of the rich religious heritage of this country, 445 an expression of the idea in the Pledge by the vast majority of Americans is violative of the religious freedom of dissenters. There is no violation of religious freedom when those who refuse to subscribe to a tenet of national faith are not compelled to do so. A violation does result, however, when subscribers are forbidden by force of law to recite the Pledge in its entirety.

#### P. Brief Summary

The specific kernel of revised liberalism that is worth incorporating into the jurisprudence of religion is the emphasis upon a free and open discussion in the public square. The "open forum" cases may, in their most positive light, be read as the insistence that religious and moral discussion should be allowed and encouraged in a public context. The Court's decisions in *Board of Education v. Mergens*, 446 *Lamb's Chapel v. Center Moriches Union Free School District*, 447 and *Rosenberger v. Rector & Visitors of University of Virginia* support the idea of a free and open discussion of religious and moral ideas once an open forum is established. 449

This essential ingredient of religious freedom stands in marked contrast to the formulation of it bequeathed to us by classical liberalism, where religious expression is privatized and becomes an "unmentionable" in the public sphere. In accordance with the view that I am taking, the relationship between religious thought and politics is straightforwardly acknowledged, and citizens are allowed to address political issues with religious and moral reasons. Politics does not suffer impoverishment by being cut off from its religious and moral moorings. Additionally, the free and open public discussion of religious ideas serves to clarify America's values and principles of virtue. Furthermore, without the teaching of

<sup>445</sup> See supra Part II.B.1-3.

<sup>&</sup>lt;sup>446</sup> 496 U.S. 226 (1990).

<sup>&</sup>lt;sup>447</sup> 508 U.S. 384 (1993).

<sup>&</sup>lt;sup>448</sup> 515 U.S. 819 (1995).

<sup>449</sup> *Id.* at 837–46 (declaring that a university's refusal to grant student funds to a Christian group that published an expressly religious magazine was unconstitutional); *Lamb's Chapel*, 508 U.S. at 390–97 (holding that if a school district allows a non-religious community group to use its facilities for meetings, it must allow religious groups to do the same); *Mergens*, 496 U.S. at 247–52 (holding that a high school's having a Christian club did not violate the Establishment Clause).

<sup>&</sup>lt;sup>450</sup> See GAYLIN & JENNINGS, supra note 66, at 33–34.

religious values, the republican state will eventually collapse or deteriorate into an authoritarian regime.

It bears repeating that there should be a protected place for individualism and for the person who does not accept the traditional values of American society. The state should assure that no one who holds views that are religiously or morally unorthodox or otherwise dissident be pushed into a position where he or she cannot remain loyal to guiding convictions. Yet such citizens, while free to hold and to express their own views, have no right to a national veto.

# IV. COMMUNITARIANISM AND RELIGION AS THE SEEDBED OF DEMOCRACY

### A. The Breakdown of Associational Life

Michel Crozier, a Frenchman, has written that he noticed significant changes in American society during his multiple visits to this country between 1947 and the 1980s. He observed that the society, within that relatively short time frame, evidenced a transition from being one characterized by a strong sense of civic virtue throughout associational life to one that "seemed to have lost its bearings" and exemplified a "breakdown of community structures." Robert D. Putnam has corroborated this trend of disintegrating civic life in America. He notes that the country has experienced a remarkable decline in voluntary associations in recent decades. Since the mid-1970s, the likelihood to find Americans attending a meeting on city issues or school affairs has plummeted, he maintains, to new lows. Paralleling and reflecting this disintegrative trend is the equally troubling fact that most Americans claim that our society is less trustworthy than in years past.

 $<sup>^{451}</sup>$  MICHEL CROZIER, THE TROUBLE WITH AMERICA, at xvii–xx (Peter Heinegg trans., 1984).

<sup>&</sup>lt;sup>452</sup> *Id.* at xviii.

<sup>&</sup>lt;sup>453</sup> *Id.* at 85.

<sup>&</sup>lt;sup>454</sup> See ROBERT D. PUTNAM, BOWLING ALONE 25 (2000).

<sup>&</sup>lt;sup>455</sup> *Id.* Putnam explains that, during the first two-thirds of the twentieth century, Americans were deeply engaged in the life of their communities, but "a few decades ago—silently, without warning—that tide reversed and we were overtaken by a treacherous rip current. Without at first noticing, we have been pulled apart from one another and from our communities over the last third of the century." *Id.* at 27.

<sup>456</sup> *Id.* at 43.

<sup>&</sup>lt;sup>457</sup> *Id.* at 139. Putnam states that in 1952, polling data showed that about one-half of all Americans believed in the moral uprightness of their society, while in 1998, Americans "by (*continued*)

that the effectiveness of government positively correlates with the amount of "social capital" on hand, including realities such as civic trust, networks of association, and community engagement. Government works when civil society does.

B. The Positive Relationship Between Effective Government and Civil Society

John A. Coleman stresses the connection between civil society and citizenship. He writes,

The key to the renewal of democratic citizenship will be found less in counting the number of people who vote than in the number of contexts, even outside of politics, where the right to vote—or its equivalent in the right to voice, dignity as social standing and influence—gets exercised. 460

The distinction implied in the passage between a civil society and a political one is significant. In the latter, citizens involve themselves in affairs of state. 461 Voting, campaigning, working in or with a political party, lobbying, and formulating policy in a political think tank are endeavors of political society. 462 Civil society, by contrast, is the sector where citizens voluntarily gather, deliberate, and engage in long- and short-term planning. 463 The associations in which they become involved are those like churches, temples, synagogues, and mosques; community service clubs like Junior League, Rotary, Kiwanis, and Lions; lodges like the Free Masons and Knights of Pythias; and community boards that direct

a margin of three to one [believed society to be] less honest and moral than it used to be. *Id* 

<sup>&</sup>lt;sup>458</sup> *Id.* at 19. Putnam utilizes the understanding of "social capital" described by an educational reformer, L.J. Hanifan, writing in the Progressive Era. *Id.* The term refers, in part, to "those tangible substances [that] count for most in the daily lives of people: namely good will, fellowship, sympathy, and social intercourse among the individuals and families who make up a social unit." *Id.* (alteration in original) (quoting Lyda Judson Hanifan, *The Rural School Community Center*, 67 Annals Am. Acad. Pol. & Soc. Sci. 130, 130 (1916)) It is distinguished from "physical capital" (such as a piece of machinery) and "human capital" (like a university education). *Id.* 

<sup>459</sup> Id. at 344-49.

<sup>&</sup>lt;sup>460</sup> John A. Coleman, *Deprivatizing Religion and Revitalizing Citizenship*, in RACL, supra note 90, at 264, 285.

<sup>&</sup>lt;sup>461</sup> See id. at 280.

<sup>&</sup>lt;sup>462</sup> See id.

<sup>463</sup> See id. at 282-83.

the local hospital, the symphony, and the community food bank. Such associations provide opportunities for citizens to become involved in projects that mean the most to them.

When people participate in organized religious activities, their efforts are anchored in civil society. He at least juridical separation between church and state, organized religious activities rarely take place in the state sector. As Coleman puts it, "The fate of the public church and a vital and public civil society rise and fall together. He points out that, in the Anglo-Saxon world, the church actually generated civil society and is appropriately called "the godmother of the independent sector. Not surprisingly, the majority of America's volunteers and contributors to philanthropies, as well various shades of charitable givers, direct their largesse to churches. He points out that,

Churches likewise cannot be rivaled as vehicles for promoting community organization. The churches are best at providing "networks of solidarity and trust" on which community organizers build. Coleman thinks it hardly accidental that, in the 1980s, social movements, as in Latin America and Eastern Europe, were fueled by the churches. Citizenship in America, he believes, is also being refurbished today largely by churches and organizations spawned by them.

Coleman advances some of José Casanova's insights concerning public religion, which they both agree "insists on the links between private and public morality." Casanova sets forth three conditions in which religion can be legitimately public:

(1) When religion enters the public sphere to protect not only its own freedom of religion but all modern freedoms and rights, and the very right of a democratic civil society to exist against an absolutist, authoritarian state.

<sup>464</sup> *Id.* at 285.

<sup>&</sup>lt;sup>465</sup> Id

<sup>466</sup> Id

<sup>&</sup>lt;sup>467</sup> *Id.* at 286 (citing Michael O'Neill, The Third America: The Emergence of the Nonprofit Sector in the United States 20 (1989)).

<sup>&</sup>lt;sup>168</sup> Id.

<sup>&</sup>lt;sup>469</sup> See id. at 286–87.

<sup>&</sup>lt;sup>470</sup> *Id.* at 287.

<sup>&</sup>lt;sup>471</sup> *Id*.

<sup>472</sup> Id

<sup>&</sup>lt;sup>473</sup> *Id.* at 288 (citing José Casanova, Public Religions in the Modern World 104 (1994)).

- (2) When religion enters the public sphere to question and contest the *absolute* lawful autonomy of the secular spheres and their claims to be organized in accordance with principles of functional differentiation without regard to extraneous ethical or moral considerations.
- (3) When religion enters the public sphere to protect the traditional life-world from administrative or juridical state penetration, and in the process opens up issues of norm and will formation to the public and collective self-reflection of modern discursive ethics.<sup>474</sup>

Casanova, it bears emphasizing, restricts the public arena in which religion can operate to civil society.<sup>475</sup> The church and state remain separate and distinct from each other, although religion can still enjoy a limited public presence.<sup>476</sup>

### C. The Part of Communitarianism Worth Saving

Communitarianism, as it presents itself in the jurisprudence of religion, allows religion an expansive right of free exercise and expression, while simultaneously affirming that the church and the state are to exist separately from each other. 477 The danger, as I have stated elsewhere, is that the two may become disjunctive realms, almost as if they were two ships passing in the night.<sup>478</sup> Thinkers like Coleman, however, draw attention to the fact that the church, by being active in civil society, fans the flames of democracy by inspiring and encouraging associational life. training people to work together and to cooperate in charitable ventures, and providing them a voice in their doing so. 479 The church, even when its perceptions and goals are sometimes in tension with those of the state, functions as a seedbed for democracy. The portion of communitarianism that is most valuable, and that the jurisprudence of religion can ill afford not to support, is the free and cooperative spirit and voice of voluntary association. In order to hold on to this vital ingredient of communitarianism, it is imperative that the state not obstruct the church.

<sup>&</sup>lt;sup>474</sup> *Id.* at 288–89 (quoting CASANOVA, *supra* note 473, at 57–58).

<sup>&</sup>lt;sup>475</sup> CASANOVA, *supra* note 473, at 57.

<sup>476</sup> Coleman, supra note 460, at 289.

<sup>&</sup>lt;sup>477</sup> See Smith, supra note 16, at 121–24.

<sup>&</sup>lt;sup>478</sup> See id.

<sup>479</sup> See Coleman, supra note 460, at 286–87.

# D. Case Application and Analysis

## 1. The Court on Tax Exemption

An important case, in which the Court walks a non-obstructive path, is Walz v. Tax Commission of City of New York. 480 The question was whether a tax exemption for religious property, which was in turn used for religious worship, constituted a violation of the Establishment Clause. 481 Chief Justice Burger, delivering the Court's opinion, responded negatively to the question. 482 He reasoned that an attitude of "benevolent neutrality" should characterize the state's attitude toward the church. 483 In accordance with this attitude, no religion is favored by the state over others, while none suffers interference. The purpose of the property tax exemption was neither to advance nor to inhibit religion. <sup>485</sup> A proper judicial response to the question, the Chief Justice opined, does not mean that the church's tax exemption is to be justified by the Court's attempting to evaluate the social causes and community projects in which the church is involved. 486 Such an endeavor would result in excessive entanglement between church and state, and would not be consonant with the policy of "benevolent neutrality" that the state desires to sustain. 487 The Chief Justice noted that the practice of exempting churches from taxation has deep historical roots, without "the remotest sign of leading to an established church." 488

In a concurring opinion, Justice Brennan stated his firm conviction that tax exemption for churches reflected the understanding of the Founding Fathers. He pointed out that Thomas Jefferson was President when Washington churches received tax exemptions and that James Madison participated in the Virginia General Assembly that afforded exemptions to churches in that commonwealth. It is unlikely, the Justice stated, that two men so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion.

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<sup>480</sup> 397 U.S. 664 (1970).
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<sup>&</sup>lt;sup>481</sup> *Id.* at 667.

<sup>&</sup>lt;sup>482</sup> Id. at 673, 680.

<sup>&</sup>lt;sup>483</sup> *Id.* at 669.

<sup>&</sup>lt;sup>484</sup> *Id.* at 676–77.

<sup>&</sup>lt;sup>485</sup> *Id.* at 672.

<sup>&</sup>lt;sup>486</sup> *Id.* at 674.

<sup>&</sup>lt;sup>487</sup> *Id.* at 674–75.

<sup>&</sup>lt;sup>488</sup> *Id.* at 677–78.

<sup>&</sup>lt;sup>489</sup> *Id.* at 684–85 (Brennan, J., concurring).

<sup>&</sup>lt;sup>490</sup> *Id.* at 684.

<sup>&</sup>lt;sup>491</sup> *Id.* at 685.

There are secular purposes, he insisted, for the tax exemption; churches are non-profit organizations that contribute to the community in a variety of positive ways, <sup>492</sup> and churches contribute to "the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."<sup>493</sup>

Justice Douglas, on the other hand, dissented from the majority. He recognized no difference between a monetary subsidy and an exemption. But he saw "a major difference" between churches and other nonprofit organizations, because the former concern worship and the latter do not. The Justice feared that the church would soon be on the state's payroll. 497

# 2. The Court's Hollow Reasoning

The Court's majority opinion turns on the idea of a religion-neutral state. 498 I have argued elsewhere that this idea is hollow and is nothing more than judicial legerdemain. 499 Without revisiting that discussion here, it will suffice to point out that the Court's majority could have just as readily used the concept of neutrality to argue that tax-exempt status for The crux of the church property offends the Establishment Clause. argument would then have been that the Court cannot be "neutral" toward religion when it forces those who are opposed to religion to subsidize it through large property tax exemptions. This was essentially Justice Douglas's argument. He was willing to admit that tax exemptions for churches have merely "the ring of neutrality," although they were, for him, anything but neutral. 500 He opined that such exemptions treat the property of believers differently from that of nonbelievers; hence, how could anyone contend that the exemptions truly demonstrate neutrality?<sup>501</sup> What neither of these distinguished jurists seemed to understand is that they were arguing about politics, not law. Chief Justice Burger and the majority of the Justices were taking the communitarian position that the state should not interfere with religious organizations by taxing them, while Justice Douglas was arguing in a classical liberal manner that the majority's stance

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\overline{^{492}} Id. at 687–89.
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<sup>&</sup>lt;sup>493</sup> *Id.* at 689.

<sup>&</sup>lt;sup>494</sup> *Id.* at 700 (Douglas, J., dissenting).

<sup>&</sup>lt;sup>495</sup> *Id.* at 707, 709.

<sup>&</sup>lt;sup>496</sup> *Id.* at 708–09.

<sup>&</sup>lt;sup>497</sup> *Id.* at 711.

<sup>&</sup>lt;sup>498</sup> *Id.* at 676–77 (majority opinion).

<sup>&</sup>lt;sup>499</sup> See Smith, supra note 17, at 869–70.

<sup>&</sup>lt;sup>500</sup> Walz, 397 U.S. at 711 (Douglas, J., dissenting).

<sup>&</sup>lt;sup>501</sup> *Id.* at 700–01.

toward religion was favorable to it and, hence, heteronomously trampled upon the rights of those of other persuasions. Not surprisingly, Justice Brennan, whose religion opinions often demonstrated a communitarian spirit, voted with the majority.<sup>502</sup>

The majority and concurring opinions in Walz starkly demonstrate the disingenuousness of the Court's jurisprudence of religion. However one chooses to characterize property tax exemptions, they are an enormous monetary benefit to houses of worship. With them, religious organizations are benefited; without them, the organizations are hindered. There is no neutral ground. The question is simply the following: what value should be placed upon the role of religion in American society? When cast in this way, it becomes necessary to consider whether there is a direct and positive correlation between the health and well-being of this country's republican institutions and the work of churches. If churches are a vital seedbed for democracy, by sensitizing citizens to community concerns and enabling them to work together cooperatively toward constructive ends in society, then the state should not interfere with the churches' work by levying taxes against their property. By strengthening churches in this way, the state directly invests in a strong, viable citizenry and indirectly The Court's reasoning would have been far more invests in itself. convincing than it was had the Court simply made the preceding point as a matter of public policy rather than importing into its reasoning the ruse of neutrality.

# V. CONCLUSION: POLICY GOALS FOR THE JURISPRUDENCE OF RELIGION

#### A. The Current Situation

Classical liberalism has made significant contributions to American society. The abolition of slavery, the legislative enactment of fair labor laws, and the civil rights movement guaranteeing equal rights to all citizens regardless of race, ethnicity, gender, creed, or age are but a few stars in the crown of this political philosophy.

Yet unbounded autonomy, which exemplifies the traditional liberal spirit, often serves the cause of extreme individualism.<sup>503</sup> In reverence to that cause, the common good is obscured.<sup>504</sup> The narcissistic

<sup>&</sup>lt;sup>502</sup> See Walz, 397 U.S. at 680–81 (Brennan, J., concurring); see also Smith, supra note 16, at 123–24.

<sup>&</sup>lt;sup>503</sup> See supra Part I.

<sup>504</sup> See RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS 96–97 (Harry Frankfurt ed., 2001). Geuss thinks that the idea of "a single common good," or "a universal public good," (continued)

preoccupation with one's own rights and self-interest is catapulted to a position of social and moral pre-eminence.

Extreme individualism has become the overarching reality in this country. The concomitant privatization of religion and morality is an exacerbating factor. Liberalism blankets the public square with a virtual gag order, where citizens dare not offer religious reasons in support of their political positions. The political process, extricated from religious and moral moorings, has become impoverished. Moral constraints are condemned as "coercive" and viewed as contrary to the freedom and dignity of the individual. Liberalism, with its message of unbridled autonomy, once greeted as a friend, is now the enemy.

The jurisprudence of religion in American life mirrors the corrosive effects of the classical liberal spirit in its modern setting. Prayer and the reading of the Bible have been expunged from public schools, along with virtually every vestige of the religious. The secularization of American public life, under the delusion of "neutrality," has gradually followed. In order to survive judicial scrutiny at the present time, any religious symbol—whether a crèche in the public square during the holiday season or the reference to "God" in the Pledge to the flag must be justified as secular, not religious.

is chimerical. *Id.* at 97, 99. "There is no single common good in a society in which whatever is good for the proletariat is bad for capitalists and vice versa, and any form of consciousness that pretended to embody such a common neutral good could be nothing other than ideological delusion." *Id.* at 97. He explains that "we have innumerable, entrenched antagonistic groups with sometimes highly articulated and deeply incompatible interests.... Surely that gives us no reason to be optimistic about the possible existence of a state of social harmony and consensus, or the existence of a universal public good." *Id.* at 99. Geuss does admit, however, that this "received liberal view," as he calls it, which lends itself to an approach stressing "consensus, nonviolence, and discussion, ... can work quite well in the everyday politics of relatively affluent societies with stable institutions and a homogeneous liberal consensus on basic values and assumptions." *Id.* at 96. I agree with him to the extent that he suggests that any meaningful discussion of the common good implies a "consensus on basic values and assumptions." *Id.* 

School in Newtown Square, was asked to pick a favorite book for a parent to read in class. Kathy Boccella, *District Sued over Bible Ban*, Phila. Inquirer, May 12, 2005, at A1. He chose the Bible. *Id.* His mother, however, was informed by school officials that he would not be allowed to read from the Bible in the classroom, because doing so would violate the separation of church and state. *Id.*; *see also supra* Part I.B.

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<sup>&</sup>lt;sup>506</sup> County of Allegheny v. ACLU, 492 U.S. 573, 579–81 (1989) (plurality opinion).

<sup>&</sup>lt;sup>507</sup> Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004).

I do not view these developments as salutary reasons to celebrate. National and community solidarity and, with it, the hope for republican government are teetering on the edge of an abyss. In order to reverse these destructive developments, I have suggested a balanced approach to the jurisprudence of religion.

### B. Autonomy and Constraint

First, it is necessary to confront the fact that the problem I have described is primarily political, not legal. Liberalism, in whatever form, has no claim to transcendence. It constitutes one political approach among others. Its emphasis upon individual autonomy is destructive in the absence of a countervailing emphasis upon constraint. Individual freedom is the product of both autonomy and constraint, and should never be identified with the former to the exclusion of the latter.

Second, constraints are a matter of morality, which in turn implicates religion for countless citizens. This country, it bears remembering, was conceived and came into being as a religious venture. 508 Its cultural and religious heritage—its self-understanding—is anchored in the Bible. 509 "We are a religious people whose institutions presuppose a Supreme Being.",510 These words from the pen of Justice Douglas constitute stubborn and irreducible fact; they are neither fiction nor hyperbole. It would, however, be presumptuous for one to state that the majority of the framers of the Constitution intended to create a Christian state. There is no compelling evidence that they intended to do that. But a general civil religion, heavily influenced by biblical thought, has always pervaded the state and the culture of the country. 511 The Founders were convinced that religion played a unique and vital role in supporting the constitutional government that they envisioned.<sup>512</sup> A religious people make a republican state possible, because the possibility of such a state rests upon virtue. There is, therefore, nothing incoherent or unreasonable about the state acknowledging these facts and acting upon them. State-sponsored prayer and moments of silence, Bible-reading, and the recitation of the Pledge of Allegiance throughout its institutions are, whenever the exercises are voluntary, simply examples of ways in which the state is true to its cultural and religious heritage. However else the Court may choose to interpret the

<sup>&</sup>lt;sup>508</sup> See supra Part II.B.1–2.

<sup>&</sup>lt;sup>509</sup> See supra Part II.B.1–2.

<sup>&</sup>lt;sup>510</sup> Zorach v. Clauson, 343 U.S. 306, 313 (1952).

<sup>&</sup>lt;sup>511</sup> See supra note 196 and accompanying text.

<sup>&</sup>lt;sup>512</sup> See supra Part II.B.2–3.

Establishment Clause, it should not interpret that Clause to mean that core values in American history cannot be honored and that principles of virtue, which are essential to republican well-being, cannot be taught. When deciding a case that calls into question the state's support of a national community value, the Court should err on the side of the value. So long as the complainant has been provided a choice, without punitive consequence, about whether personally to acknowledge and to honor the value, then that will be a sufficient recognition of individual autonomy.

# C. Religion in the Public Square

Third, the public square should accommodate the vigorous discussion and exploration of religious and moral values. Citizens should be under no gag order barring them from sharing all their reasons for supporting or not supporting a particular legislative bill or political initiative. The relationship between politics and religion should be heartily affirmed. The people, through their elected representatives, should be the final judge of which reasons are convincing. Maximal freedom should be provided for the expression of any religious and moral justification as it bears upon a social issue, a political issue, or both. A large part of the meaning of religious freedom, and of good citizenship, consists of one's engaging in the free and open discussion of matters affecting the body politic and sharing one's best reasons, which may be religious ones, for the positions taken.

#### D. No Interference with Religious Communities

Fourth, because religious organizations constitute a major seedbed for democracy, the state should allow churches, synagogues, temples, and mosques as much leeway as possible in order to flourish in civil society. They should have the freedom to proselytize and to seek converts, and should not be encumbered in that process by the state. But if and when these religious associations represent an anti-democratic policy in civil society by, for example, the advocation of cruel discrimination against women or minorities, the state should have the ability selectively to withdraw from them "negative freedom" benefits like tax exemptions. Yet the property of religious organizations should not otherwise be taxed.

#### E. A Protected Place for the Individual

Fifth, the individual should be affirmed in his or her right to dissent from any or all values that the state embodies or otherwise promotes. The points of view a person may have regarding religious and moral issues should be allowed free expression, and each person's right of conscience should be honored. But no individual should be assigned what is

essentially an absolute veto power over the public expression of state values.

The preceding points comprise little more than a bare outline for recasting the jurisprudence of religion. Sketching any political position is sure to suffer the same vulnerability. The perspective for which I advocate draws selectively from de facto establishmentarianism, revised liberalism, communitarianism, and classical liberalism. Balancing individual interests with collective moral and religious values, while simultaneously enriching and revivifying discourse (both political and religious) in the public square, are two of the major goals of this jurisprudential approach to first freedoms. A third goal, and by far the most vital from the state's perspective, is the overall strengthening of the republican state.