

RELIGION AND ITS RELATION TO LIMITED GOVERNMENT

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Is religion, and strong protection for the freedom of religion in particular, best understood as allied with commitment to freedom in general? Or should we understand religion and strong protection for freedom of religion as a pre-modern and essentially authoritarian force in political life? Conventional wisdom teaches that secularization was an essential ingredient in the cultural background for liberal democracy. To have liberal pluralistic democracy, it is said, we in the West first had to break away from the religious worldviews that were characteristic of pre-modern feudalism, aristocracy, and monarchy. The Establishment Clause of the First Amendment and the various disestablishments at the state level are said to be the legal embodiment of that movement toward a secularization of our public culture.¹ This Essay argues that this understanding is historically and constitutionally incorrect.

The First Amendment at the national level, like disestablishment at the state level, was intended to prevent the government from exercising control over religion, which was seen as a particularly important and valuable institution for the formation of public character and opinion in a republic. The Establishment Clause is thus more akin to the Free Press Clause—indeed to free enterprise and limited government in general—than to any impulse of secularization or anti-religiosity.

This perspective is apparent in three different ways. The first situates the Religion Clauses within a set of decisions that deprived the new federal government of power to control or even

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1. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2195 (2003).

greatly to influence public opinion, public culture, or the formation of national character. These functions would be left to private or decentralized institutions, and not infrequently to religious ones. The second situates the commitment to a separation between church and state within a broader understanding of limitations on the proper role of government. The separation of church and state is not a limitation on churches or religion; it is a limitation on the role of government with respect to churches and religious life in general. The third analogizes the free exercise of religion to free enterprise in the economic sphere. Both are strategies to encourage certain socially desirable activity through deregulation and liberty. Religion was not made free of establishment because religion was regarded as unimportant or deleterious, any more than the economy was made free of government domination because economic activity is unimportant or deleterious. Free exercise promotes the flourishing of religion in much the same way free enterprise promotes a flourishing economy.

I. THE FRAMERS' DISESTABLISHMENT

The Framers, or at least the disestablishmentarians among them, believed that in a republic public opinion should control the government, instead of the reverse. The Free Press Clause served this principle by preventing the government from controlling the press, an important institution for the formation and spreading of opinion and ideas. And by keeping the state's hands off religion, the Establishment Clause did the same.²

In assessing this point, it is important to note how the establishment of religion functioned historically. We often think of the establishment of religion as synonymous with theocracy, leading to religious control over the government. But in the established Church of England that the Framers knew, it was the other way around. Britain under the Church of England was not a theocracy. It was, in theological terms, Erastian: The government controlled the Church and used the Church for politi-

2. Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 643.

cal and governmental purposes.³ The Act of Supremacy made the King or Queen of England the supreme head of the Church, responsible for maintaining orthodoxy and naming all of the high prelates.⁴ The doctrine and liturgy of the Church of England were also determined by parliamentary statute, and all ministers in the land were required to conform to them.⁵ Parliament adopted the Book of Common Prayer and the Thirty-nine Articles of Faith—one of which held that the Monarch was supreme in all matters both religious and civil.⁶ A highly convenient tenet of faith, if you happen to be the Monarch.

Moreover, the state was not at all hesitant to use the Church as an instrument of social control: by inculcating the idea that good Christian subjects should be obedient to the King and should not engage in rebellion or resistance, but should instead behave themselves as good monarchical subjects. As one Anglican minister in America wrote in 1774 while urging his flock to be loyal to the mother country: “The principles of submission and all lawful authority are as inseparable from a sound, genuine member of the Church of England, as any religious principle whatever.”⁷ It was not mere coincidence that many of the leading orators and polemicists among the Loyalists were Anglican clergy.⁸

As the Revolution got underway, Americans were less keen to embrace the principle of submission. The Church of England was disestablished in every state where it had been established, which was everywhere south of Pennsylvania plus the four counties of metropolitan New York.⁹ This was not establishment in some metaphorical sense, such as displaying Nativity scenes in the city park¹⁰ or allowing veterans groups to erect

3. McConnell, *supra* note 1, at 2189.

4. *Id.* at 2112–13.

5. *Id.* at 2113.

6. *Id.* at 2112–13, 2125.

7. *Id.* at 2125 (quoting THOMAS BRADBURY CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS, ON THE SUBJECT OF OUR POLITICAL CONFUSIONS: IN WHICH THE NECESSARY CONSEQUENCES OF VIOLENTLY OPPOSING THE KING’S TROOPS, AND OF A GENERAL NON-IMPORTATION ARE FAIRLY STATED 51 (1774)).

8. *Id.* at 2188.

9. See *id.* at 2110 (for a list of Anglican establishments); *id.* at 2125–26 (for a description of the fate of the Church of England during the Revolution).

10. See, e.g., Lynch v. Donnelly, 465 U.S. 668 (1984).

crosses in remote places in the Mojave Desert.¹¹ Under the established church, citizens were actually taxed for the support of the church,¹² the laws required church attendance,¹³ the government took a hand in selecting clergy,¹⁴ and in a few states dissenting clergy were imprisoned for preaching without a license.¹⁵

All that ended with the Revolution. But the Church of England was not disestablished in 1776 because the American people were suddenly seized with a principled horror of religious establishment—though some were. The principal motivation for disestablishment was that the established Church proclaimed the divine status of obedience to the King of England.¹⁶ That kind of church was simply not tenable in Revolutionary America.

After the Revolution, leaders in many states sought to reestablish a church along republican lines in order to inculcate piety and morality of the sort that would make people into good republican citizens.¹⁷ In the words of the Massachusetts Constitution of 1780:

As the happiness of a people, and the good order and preservation of civil government, essentially depend [upon] piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: Therefore, . . . the people of this Commonwealth have a right to invest their legislature with power to authorize and require . . . the several towns . . . to make suitable provision, at their own expense, for the institution of the public worship of God¹⁸

Under this system, all were required to pay taxes to support a church, but they could choose which one their funds would support (within certain limits), and the rights of dissenters to practice their own faith, or none at all, received strong protec-

11. See *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008) (O’Scannlain, J., dissenting), *cert. granted*, 77 U.S.L.W. 3458 (U.S. Feb. 23, 2009) (No. 08-472).

12. McConnell, *supra* note 1, at 2152–59.

13. *Id.* at 2144–46.

14. *Id.* at 2136–44.

15. *Id.* at 2119.

16. See *id.* at 2125–26.

17. See *id.* at 2194–95.

18. MASS. CONST. of 1780, art. III.

tion.¹⁹ Most states debated a system of this sort, not because of its spiritual value or the glory of God, but for the good order and preservation of civil government.²⁰ Republican government, almost everyone agreed, required a degree of public virtue, and the only way most people could imagine inculcating public virtue was through religious teaching.²¹

Such a system was adopted in three of the thirteen original states plus Vermont, all of them in New England where a similar system had prevailed before the Revolution instead of the Church of England.²² Most states, led by Virginia, rejected the proposal; a few formally adopted the proposal but never put it into practical operation.²³ Even in the states where it was adopted, the system was dismantled in the early decades of the Republic.²⁴ Massachusetts was the last to dismantle its establishment, in 1833.²⁵ It was the rejection of this idea that constituted the disestablishment of religion in America.

There were many reasons for disestablishment, not least among them the growing realization that governmental involvement was bad for religion. The grand underlying theme of disestablishment, like freedom of the press, was the notion that the state should not control the instruments for the formation of character and opinion. Indeed, the new American government was conspicuously stripped of control over every one of the institutions that typically are used to propagate public opinion and shape public character. Because of the First Amendment, there would be no government-controlled press and no government-controlled church. There was no public school system in the United States until roughly the 1830s, so

19. McConnell, *supra* note 1, 2158–59.

20. See *id.* at 2157 (quoting declarations of the New York, Delaware, and New Jersey legislatures and the Continental Congress).

21. *Id.* at 2194–96.

22. *Id.* at 2157–58 (discussing post-Revolution compulsory church financing laws in Massachusetts, Connecticut, New Hampshire, and Vermont); *id.* at 2121.

23. *Id.* at 2156.

24. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437 (1990).

25. J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?* 2001 BYU L. REV. 755, 759.

education was not even on the table.²⁶ Some Framers at the Constitutional Convention and in the early Congresses proposed creating a new national university,²⁷ which would have been a way to forge a unified republican national elite out of leading young citizens from the thirteen states. But the idea was voted down both at the Convention and then in the Congresses.²⁸ America was not going to tolerate centralized government institutions controlling public opinion. Opinion formation, instead, was left to private and decentralized institutions. The church was to be prominent among these institutions. Disestablishment did not make the churches' role in the formation of public character any less important; quite the contrary, disestablishment assumed the importance of religion, and left it free of government control.²⁹

II. DISESTABLISHMENT AND LIMITED GOVERNMENT

The idea of the separation between church and state maps closely onto the idea of limited government. John Locke, whose work on the subject was studied by Madison, Jefferson, and other Framers, wrote: "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other."³⁰ The basic idea of separation between church and state is thus to figure out what the government should be doing, figure out what the church should be doing, and distinguish between them. This system only works if there is a rigorous understanding of a limited governmental sphere.

26. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860*, at 62 (1983).

27. LORRAINE SMITH PANGLE & THOMAS L. PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 149 (1993) (noting that James Madison seconded the Convention proposal, and that George Washington asked Congress to create a national university during his First Annual Address to Congress).

28. *Id.*

29. See Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 133.

30. JOHN LOCKE, *A Letter Concerning Toleration*, in *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 215, 218 (Ian Shapiro ed., 2003).

If government does everything, there is either no separation or no space for the church.

When we compare Locke's writing about the proper bounds of civil government in his *Essay on Toleration* with Locke's understanding of the proper role of government in the *Second Treatise on Government*, we see that his wall of separation between church and state is virtually identical to the limits on civil government set forth in the *Second Treatise*. In both works, the proper sphere of government is to protect the population against domestic violence, crime, and fraud, as well as foreign violence and invasion, and to maintain the basic infrastructure of civilized society.³¹ Locke did not imagine a government that was engaged heavily in such matters as education, charity, the arts, the economy, and so forth.³² Those undertakings were left to the private sphere, and frequently to the religious sector. Education and charity, for example, were almost exclusively regarded as within the purview of religion.³³

When the ideas of a Lockean limited state cease to have purchase in society and the government becomes involved in ever-widening spheres that previously had been private, church-state conflicts inevitably proliferate. The original Lockean conception of necessary state action is workable under conditions of a limited state. But once the limited state gives way to the modern omni-competent regulatory hegemon, the wall of separation that kept the government within a narrow sphere no longer operates, and church-state relations become much more complicated and fraught with difficulty.

The new difficulty arises in the process of figuring out how to preserve religious freedom and autonomy on the government's side of the wall. Will we have military or prison chaplains?³⁴ Will religious charities be able to participate in government funded but privately administered programs?³⁵ If so,

31. Compare *id.* at 228, with JOHN LOCKE, *Second Treatise on Government*, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 156 (Ian Shapiro ed., 2003).

32. See LOCKE, *Second Treatise on Government*, *supra* note 31, at 101, 156 (arguing that power over the education of children belongs to the parent).

33. McConnell, *supra* note 29, at 134.

34. See, e.g., *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).

35. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988).

will they be able to maintain any degree of religious autonomy?³⁶ Will religious groups be permitted to operate on public property?³⁷ Will there be religious symbols on public property?³⁸ Can churches share in tax exemptions?³⁹ Can they be licensees over the public airwaves?⁴⁰ Myriad church-state conflicts arise upon departure from the Framers' idea of a limited government. These conflicts arise not because of religious encroachments on the secular but because of governmental encroachments on the private. And unfortunately, the slogan of "separation" does not provide any answer.

III. THE FRAMERS' RELIGIOUS DEREGULATION

The Framers believed that relinquishing governmental control would promote both economic and religious flourishing.⁴¹ Free enterprise represented an abandonment of the old mercantilist ideology that advocated the political direction of society's resources as a means to a better, stronger economy in the service of the public good. Disestablishment represented an abandonment of the old Erastian ideology that advocated the political direction of religious teaching as a means to republican virtue, peace, and good order.⁴² Just as protections for contracts, property, and the rule of law created the constitutional preconditions for free enterprise, the First Amendment carved out another important area free from the control of govern-

36. See 42 U.S.C. § 604(d) (2006).

37. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); see also *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 319 F. App'x 645 (9th Cir. 2009), cert. granted, 77 U.S.L.W. 3635 (U.S. Dec. 7, 2009) (No. 08-1371).

38. Compare *Van Orden v. Perry*, 545 U.S. 677 (2005), with *McCreary County v. ACLU*, 545 U.S. 844 (2005) (upholding one Ten Commandments display yet striking down another—on the same day).

39. See, e.g., *Walz v. Comm'n*, 397 U.S. 664 (1970).

40. See, e.g., *In the Matter of Revision of Rules Permitting Multiple Ownership of Non-Commercial Educational Radio and Television Stations in Single Markets*, 54 F.C.C.2d 941, 950 (1975).

41. See JAMES MADISON, *To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 6, 9–10 (Marvin Meyers ed., 1973) (1785) (arguing that Christianity is more likely to flourish absent the support of legal establishment).

42. McConnell, *supra* note 24, at 1441.

ment. This protection of religion did not exist because the Framers believed religion should have a lesser role in society, but rather because they believed that religion, if left free, would be more likely to flourish.⁴³ Just as a free-enterprise system would lead to a more robust economy, a sphere of religious free exercise would lead to a more robust and more religious people.

In fact, the arguments for free exercise and disestablishment arose from many of the same sources as the arguments for economic freedom. Adam Smith's great work *The Wealth of Nations*,⁴⁴ for example, is mostly an extended attack upon the various aspects of mercantilist economics, but one chapter is devoted to the question of the establishment of religion.⁴⁵ In it, Smith wrote that the teachers of religious doctrine "may either depend altogether for their subsistence upon the voluntary contributions of their hearers; or they may derive it from some other fund, to which the law of their country may entitle them."⁴⁶ In other words, you can either depend on passing the contribution plate or on an entitlement to a stipend from the state. According to Smith, the clergy's "exertion, their zeal and industry, are likely to be much greater in the former situation than in the latter."⁴⁷

Smith observes that when supported by the state, the clergy, "reposing themselves upon their benefices," would "neglect[] to keep up the fervour of faith and devotion in the great body of the people."⁴⁸ Many clergy who have been given state support have become very "learned, ingenious, and respectable men; but they have in general ceased to be very popular preachers."⁴⁹ In other words, the secure support for religion that establishment promises is bad for religion, not good for it.

Interestingly, Smith's friend David Hume advocated establishment of religion for precisely this reason. Hume, a skeptic, believed that active, enthusiastic religion was bad for the pub-

43. MADISON, *supra* note 41, at 6, 9–10.

44. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Jonathan B. Wight ed., Harriman House 2007) (1776).

45. *Id.* at 510–27.

46. *Id.* at 510.

47. *Id.*

48. *Id.*

49. *Id.* at 511.

lic sphere and that religion was a superstitious and deleterious influence.⁵⁰ He believed that establishment of religion would render the clergy docile and suppress religious enthusiasm, which he thought would be a good thing.⁵¹ The contrast between Smith and Hume puts in an interesting light the Supreme Court's assumption that the "advancement of religion"⁵² is a hallmark of establishment.

For the Framers, disestablishment and free exercise were no more intended to depress religion or to secularize society than free enterprise was intended to depress the economy. Limited government and a vigorous private religious sphere went hand in hand. Indeed, dissenting Protestant clergy were in the forefront of the resistance to monarchical oppression.⁵³ This history suggests that religion is not antagonistic to freedom, nor is secularization necessary to liberal democratic society. Instead it suggests that government control over religion is bad for religion at the same time that it is antagonistic to freedom.

50. 3 DAVID HUME, *THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 134–36 (London, T. Cadell 1778).

51. *Id.*

52. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

53. See JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007).