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## Religion, Politics, and the Establishment Clause: Does God Belong in American Public Life?

L. Scott Smith

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## Religion, Politics, and the Establishment Clause: Does God Belong in American Public Life?

*L. Scott Smith\**

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\* B.A., University of Texas (Austin); M.Div., Austin Presbyterian Theological Seminary; Ph.D., Columbia University (New York); J.D., Texas Tech University.

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#### INTRODUCTION: CULTURE WAR AND RELIGION

There is unquestionably a growing cultural divide in this country, a polarization that resembles nothing so much as a war. Rather than being fought with guns and bayonets, the implements of the fight are ideas or, more precisely, political world-views. The battlefronts span the horizons of intellectual endeavor. Disciplines such as science, ethics, education, law, and journalism are inescapably involved. None of them, however, constitutes the most fundamental fault line of the conflict. That distinction belongs to religion; and why should this fact be surprising? Paul Tillich, and Friedrich Schleiermacher before him, reminded us years ago that there is a symbiotic relationship between religion and culture. Schleiermacher, addressing the "cultured despisers" of religion, described it as "the profoundest depths whence every feeling and conception receives its form."<sup>1</sup> Tillich, in a similar vein, wrote that "religion is the substance of culture, [while] culture is the form of religion."<sup>2</sup> The roots of the current cultural tug-of-war lie deeply embedded in the participants' respective political assessments of religion, whether orthodox and fundamentalist or liberal and progressive. Hence, when one speaks of such a "culture war," one question becomes relevant—"Does God belong in American public life?"

<sup>1</sup> FRIEDRICH SCHLEIERMACHER, ON RELIGION: SPEECHES TO ITS CULTURED DESPISERS 11 (John Oman trans., Harper Torchbooks 1958) (1799).

<sup>2</sup> PAUL TILlich, THEOLOGY OF CULTURE 42 (Robert C. Kimball ed., Oxford Univ. Press 1972) (1959).

### A. Approach to the Question

The question is a weighty one, and the answers provided by commentators are often characterized by subtle nuance and meticulous qualification. A social pundit may respond negatively to a state Supreme Court Justice who, hearing the appeal of a child custody case, quotes Leviticus 18:22 in condemnation of the lesbianism of the mother.<sup>3</sup> But the same pundit may be reserved in his or her criticism when a United States President concludes his inaugural address with the words “God bless America.” Gradations of criticism tend to be part and parcel of any expanded treatment of the above-stated question.

Yet it lies beyond the scope of this article to probe these multifarious distinctions. The goal here is a modest one. I will first consider whether public life in this country was initially intended under the newly proposed Constitution of 1787 to be a secular affair, and I will argue that the answer is far from a definitive “yes.” I will then seek to explain why, in light of the indecisive answers that history gives us, the American public sphere is largely a secular place and what the U.S. Supreme Court’s role has been in that process, from approximately the middle of the twentieth century to the present.

To fulfill this goal, in Parts I and II of this Article, I will set forth and analyze the thesis of Kramnick and Moore that ours is a “Godless Constitution”<sup>4</sup> intended to comprise the foundation of a secular state. In Parts III and IV, I will describe the tidal wave of secularism that overwhelmed American culture in the nineteenth century and critically analyze the manner in which the Supreme Court rode that cultural wave in its interpretation of the Establishment Clause during the twentieth century. In Parts V and VI, I will dissect the Court’s two recent decisions regarding the public display of the Ten Commandments<sup>5</sup> and then analyze the opinions advanced by the various Justices. Finally, I will conclude with some of my thoughts concerning how the Supreme Court should interpret the Religion Clauses.

## I. HIGHLIGHTS OF KRAMNICK’S AND MOORE’S ARGUMENT

### A. The Thesis

Kramnick and Moore argue in favor “of the godless Constitu-

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<sup>3</sup> See *Chicoine v. Chicoine*, 479 N.W.2d 891, 896 (S.D. 1992) (Henderson, J., concurring in part; dissenting in part).

<sup>4</sup> ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* (2005) (1996) [hereinafter *GODLESS CONSTITUTION*].

<sup>5</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2856 (2005) and *McCreary v. ACLU of Kentucky*, 125 S. Ct. 2722, 2727–28 (2005).

tion and of godless politics.”<sup>6</sup> They insist that the Founders “sought to separate the operations of government from any claim<sup>7</sup> that human beings can know and follow divine direction in reaching policy decisions.”<sup>8</sup> The Constitution and the political state to which it gave birth were on an “intentionally secular base.”<sup>9</sup> Our founding document, they point out, was vehemently denounced by many during the Framers’ own time as a godless one, precisely because it was and is such.<sup>10</sup> Nowhere within its text is there a substantive reference to deity.<sup>11</sup>

### B. Constitution Contrasted with Other American Documents

Consider the radical difference in this respect between the Constitution on the one hand and the Declaration of Independence and the Articles of Confederation of 1776 on the other. The Declaration mentioned “Nature’s God” and the “Creator.” The Articles similarly referred to “the Great Governor of the World.” Yet the Constitution maintains a conspicuous silence in this regard.<sup>12</sup>

### C. Exclusion of Religious Tests

The only reference to religion that resulted from the work of the Constitutional Convention was a negative one: “no religious

<sup>6</sup> GODLESS CONSTITUTION, *supra* note 4, at 12.

<sup>7</sup> Kramnick and Moore take aim squarely at the Christian Right. *Id.* at 157–61. It is an obtrusive target. One more difficult than that is religion in general, which Kramnick’s and Moore’s thesis is also intended to address. That America was never intended to be a Christian state is spelled out in the Treaty of Tripoli, but that all state and state-supported activity in this country was intended to be divorced from the religious is impossible to prove. See Article II of the Treaty of Tripoli, in THE SEPARATION OF CHURCH AND STATE 121–23 (Forrest Church ed., 2004) [hereinafter SEPARATION OF CHURCH AND STATE]. See also SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 38–49 (1963) [hereinafter LIVELY EXPERIMENT]; Robert N. Bellah, *Civil Religion in America*, in BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 168 (University of California Press 1991) (1970) [hereinafter *Civil Religion*].

<sup>8</sup> GODLESS CONSTITUTION, *supra* note 4, at 12. I do not altogether agree with the following statement by Erez Kalir in review of Kramnick’s and Moore’s book: “The first problem with [the book]—and the genesis of several others—lies in the authors’ failure to define exactly what they mean by the title phrase, and especially by the term ‘godless.’” Erez Kalir, *Book Review: Is the Constitution “Godless” or Just Nondenominational?*, 106 YALE L.J. 917, 919 (1996). It is reasonably clear that Kramnick and Moore have embraced the classical liberal idea that religion, personified by “God,” has no role to play in public policymaking. The authors demonstrate an indifference toward the religious that borders upon hostility.

<sup>9</sup> GODLESS CONSTITUTION, *supra* note 4, at 14.

<sup>10</sup> *Id.* at 23.

<sup>11</sup> In Article VII of the document the date is written as “the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven.” U.S. CONST. art. VII. This reference to “our Lord” is hardly to be interpreted as a resounding expression of religious faith.

<sup>12</sup> GODLESS CONSTITUTION, *supra* note 4, at 28.

Test shall ever be required as a Qualification to any Office or public Trust under the United States.”<sup>13</sup> Luther Martin, a delegate to the Convention from Maryland, commenting upon the almost unanimous passage of this provision, observed the following:

[T]here were some members *so unfashionable* . . . as to think that a *belief in the existence of a Deity* and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that in a Christian country it would be at *least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism.<sup>14</sup>

Oliver Ellsworth, a delegate to the Philadelphia Convention from Connecticut, who would later become a United States Senator and the Chief Justice of the Supreme Court, also was critical of the notion of a religious test as a qualification for public office.<sup>15</sup> He argued that, in view of the many diverse religious denominations in the United States, “[a] test in favour of any one denomination of christians would be to the last degree absurd.”<sup>16</sup>

The Constitutional Convention’s antipathy to religious tests in the political sphere was paralleled by its refusal even to discuss Benjamin Franklin’s suggestion that each session of the Convention be opened with a prayer.<sup>17</sup>

#### D. Responses to the Absence of Religious Reference

The Convention’s apparent lack of enthusiasm for religion, along with the secular bent of the Constitution itself, did not go unnoticed by the American citizenry. Colonel William Jones, a delegate to Massachusetts’ ratification convention, was outspoken against the document’s exclusion of religious oaths, declaring that “publick men were to be of those who had a good standing in

<sup>13</sup> U.S. CONST. art. VI.

<sup>14</sup> GODLESS CONSTITUTION, *supra* note 4, at 29 (quoting Luther Martin). Martin’s estimate of this provision is the same as that of the Reverend Daniel Shute, who in the Massachusetts ratification convention spoke in favor of it, when he stated:

Nor is there to me any conceivable advantage, sir, that would result in the *whole* from such a test. Unprincipled and dishonest men will not hesitate to subscribe to *any thing*, that may open the way for their advancement, and put them into a situation the better to execute their base and iniquitous designs. Honest men alone, therefore, however well qualified to serve the publick, would be excluded by it, and their country be deprived of the benefit of their abilities.

*The Reverend Daniel Shute and Colonel William Jones on Religious Tests and Christian Belief* (Jan. 31, 1788), in *THE DEBATE ON THE CONSTITUTION*, pt. 1, at 919 (Bernard Bailyn ed., Library of America 1993) [hereinafter *THE DEBATE ON THE CONSTITUTION*].

<sup>15</sup> GODLESS CONSTITUTION, *supra* note 4, at 42.

<sup>16</sup> Oliver Ellsworth, “*A Landholder*” VII, *CONN. COURANT* (Hartford), Dec. 17, 1787, in *THE DEBATE ON THE CONSTITUTION*, *supra* note 14, pt. 1, at 523.

<sup>17</sup> GODLESS CONSTITUTION, *supra* note 4, at 34.

the church” and “that a person could not be a good man without being a good Christian.”<sup>18</sup> Henry Abbot, a North Carolinian, echoed the concern of many that “[t]he exclusion of religious tests is . . . dangerous and impolitic,” and concluded “that if there be no religious test required, Pagans, Deists and Mahometans might obtain offices among us, and that the Senate and Representatives might all be Pagans.”<sup>19</sup> The Reverend David Caldwell, also from North Carolina, took an equally negative view of the religious oath exclusion. For him, it amounted to little more than “an invitation to ‘Jews and pagans of every kind’ to govern us.”<sup>20</sup>

William Williams, a delegate to the Connecticut ratification convention, was uneasy and troubled by the lack of any acknowledgment in the Constitution of “the being of a God . . . [and] his perfections and his providence.”<sup>21</sup> He favored editing its Preamble, suggesting that its opening words be the following:

We the people of the United States, in a firm belief of the being and perfections of the one living and true God, the creator and supreme Governour of the world, in his universal providence and the authority of his laws: that he will require of all moral agents an account of their conduct, that all rightful powers among men are ordained of, and mediately derived from God, therefore in a dependence on his blessing and acknowledgment of his efficient protection in establishing our Independence, whereby it is become necessary to agree upon and settle a Constitution of federal government for ourselves . . . .<sup>22</sup>

The suggestion failed to find a winning following.

Kramnick and Moore observe that a similar suggestion, made during the height of the Civil War, also went nowhere. In 1863, the National Association for the Amendment of the Constitution, soon renamed the National Reform Association and directed by Presbyterian layman John Alexander, proposed the following alteration of the Preamble:

We, the people of the United States, humbly acknowledging Almighty God as the source of all authority and power in civil government, The Lord Jesus Christ as the Governor among the Nations, and His revealed will as of supreme authority, in order to constitute a

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<sup>18</sup> *Id.* at 32. See also *The Reverend Daniel Shute and Colonel William Jones on Religious Tests and Christian Belief*, *supra* note 14, at 920.

<sup>19</sup> *Henry Abbot and James Iredell Debate the Ban on Religious Tests: Could Not the Pope Be President?* (July 30, 1788), in *THE DEBATE ON THE CONSTITUTION*, *supra* note 14, pt. 2, at 902.

<sup>20</sup> *GODLESS CONSTITUTION*, *supra* note 4, at 32 (quoting *Rev. David Caldwell and Samuel Spencer Continue the Debate on Religious Toleration*, in *THE DEBATE ON THE CONSTITUTION* (July 30, 1788), *supra* note 14, pt. 2, at 908).

<sup>21</sup> *William Williams to the Printer* (Feb. 11, 1788), in *THE DEBATE ON THE CONSTITUTION*, *supra* note 14, pt. 2, at 193. See also *GODLESS CONSTITUTION*, *supra* note 4, at 37.

<sup>22</sup> *William Williams to the Printer*, *supra* note 21, at 193–94 (emphasis omitted).

Christian government . . . do ordain and establish this Constitution for the United States of America.<sup>23</sup>

The proposal was brought to the attention of President Lincoln who, while respectful of and cordial to those who supported it, observed that “the work of amending the Constitution should not be done hastily.”<sup>24</sup> The President, in the secular spirit of the Founders, simply allowed the proposal to die its own natural death.

This evidence, according to our authors, demonstrates that the lack of substantive religious reference in the Constitution, as the document emerged from the Philadelphia Convention, was hardly a happenstance, but was intended by its Framers, and later accepted by the states and thoughtful leaders like Lincoln who came along in American history, to convey a strong message in favor of the separation of church and state.<sup>25</sup>

#### E. Roger Williams: Religion and Secular Politics

The doctrine of church-state separation was, Kramnick and Moore maintain, solidly embedded in liberal and religious thought, both in America and in England. The roots of the doctrine in this country go back to the religious leader Roger Williams, who pioneered it in his book, *The Bloudy Tenant of Persecution*.<sup>26</sup> Religious purity and good government were, for him, two separate and distinct concerns.<sup>27</sup> There was, he taught, no necessary correlation between being a good and steadfast governmental official on the one hand and a religious believer on the other.<sup>28</sup> Nor would there ever be justifiable cause for the government to support religion, either directly or indirectly, since the Kingdom of God was and is not of this world.<sup>29</sup> Williams subscribed to the proposition that religion is fundamentally a private concern of conscience.<sup>30</sup> Although he never went so far as to maintain that religious belief is irrelevant to public policy,<sup>31</sup> believing as he did that elected officials were not immune from religious influence<sup>32</sup> and that the state should, in keeping with the Ten Commandments, enjoin murder, thievery, and adultery,<sup>33</sup>

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<sup>23</sup> GODLESS CONSTITUTION, *supra* note 4, at 146.

<sup>24</sup> *Id.* at 146–47.

<sup>25</sup> *Id.* at 12, 66.

<sup>26</sup> *Id.* at 48; ROGER WILLIAMS, *THE BLOODY TENANT OF PERSECUTION FOR CAUSE OF CONSCIENCE* (Richard Groves ed., Mercer Univ. Press 2001) (1644).

<sup>27</sup> GODLESS CONSTITUTION, *supra* note 4, at 52.

<sup>28</sup> *See id.* at 53–54.

<sup>29</sup> *See id.* at 52.

<sup>30</sup> *Id.* at 59–60.

<sup>31</sup> *Id.* at 53.

<sup>32</sup> *Id.* at 61.

<sup>33</sup> *Id.* at 60.



Williams was strongly insistent that religious morality should be distinguished from national pieties and that governmental officials should never claim to act in God's name or under his authority.<sup>34</sup>

#### F. The Lockean State and Religious Freedom

Religious freedom, understood through the frame of church-state separation, had been advocated not only by the influentially religious in America, but had also been promoted and defended by the most thoughtfully liberal in England, with John Locke being the foremost example. Kramnick and Moore stress that American personages such as John Adams, John Otis, Samuel Adams, James Madison, Thomas Jefferson, Patrick Henry, and Benjamin Franklin were supremely indebted to Locke's intellectual treasury.<sup>35</sup> He believed in a minimal government, the function of which was to preserve life, liberty, and especially property and, aside from that, was to stay out of people's lives.<sup>36</sup> One's right to secure property is accorded by God and natural law,<sup>37</sup> and government treads upon this right at the expense of violating nature and becoming tyrannous.<sup>38</sup> Locke's conception of government is therefore, according to our authors, "purely negative."<sup>39</sup> It does little more than to establish the ground rules by which to compete for wealth and property.<sup>40</sup> By no means should the political state attempt to defend or to promote moral and religious truths or any particular notion of good.<sup>41</sup>

Locke's minimalist, or *laissez faire*, view of government allows him to draw a bold line of demarcation between political and religious issues. The government must take care not to encroach upon the latter, which is solely a matter of private provenance.<sup>42</sup> Religious beliefs do not concern the state; they neither prejudice

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<sup>34</sup> *Id.* at 61.

<sup>35</sup> *Id.* at 72.

<sup>36</sup> *Id.* at 73. See also JOHN LOCKE, *The Second Treatise of Government, in TWO TREATISES OF GOVERNMENT* 178 (Mark Goldie ed., Everyman 1993) (1689), in which the author maintains that a person is willing to leave the state of nature and to unite with others "for the mutual preservation of their lives, liberties and estates, which I call by the general name, property." Locke stresses that the protection of one's property is the primary rationale for government. *Id.*

<sup>37</sup> LOCKE, *supra* note 36, at 130–31.

<sup>38</sup> See *id.* at 217. Locke quotes King James I as saying, "whereas the proud and ambitious tyrant doth think, his kingdom and people are only ordained for satisfaction of his desires . . . the righteous and just king doth by the contrary acknowledge himself to be ordained for the procuring of the wealth and property of his people." *Id.*

<sup>39</sup> GODLESS CONSTITUTION, *supra* note 4, at 73.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 73–74.

<sup>42</sup> *Id.* at 75. See also JOHN LOCKE, A LETTER CONCERNING TOLERATION 28–29 (Prentice Hall 1950) (1689) [hereinafter TOLERATION], in which he argues that religion is a private, personal matter.

another's property rights nor injure him or her in any way.<sup>43</sup> These structural limitations serve to carve out an ample area for the free, unmolested exercise of religion and for the mutual toleration of sectarian differences.<sup>44</sup> For Locke, civil government is concerned with outward force, while "[a]ll the life and power of true religion consist in the inward and full persuasion of the mind."<sup>45</sup> The punitive power of the state can never be of assistance in the salvation of souls,<sup>46</sup> for the church is "a thing absolutely separate and distinct from the commonwealth."<sup>47</sup>

Locke's vision of religious freedom, conceptualized as a private sphere of ritual and belief, to be distinguished and separated from the public domain of the state, deeply imbued itself upon the minds of the Framers and was reflected in the secular character of the Constitution that they proposed.<sup>48</sup>

### G. Thomas Jefferson and the "Wall Of Separation"

#### 1. Jefferson and Locke

Thomas Jefferson regarded Locke as one of "the three greatest men that have ever lived, without any exception."<sup>49</sup> Jefferson was familiar with the latter's *Second Treatise of Government*, and on at least one occasion commended it to a friend as one of a group of excellent and influential works concerning politics.<sup>50</sup>

Locke's minimalist state appealed to Jefferson.<sup>51</sup> Both men

<sup>43</sup> GODLESS CONSTITUTION, *supra* note 4, at 78.

<sup>44</sup> See TOLERATION, *supra* note 42, at 17, in which Locke explains that "[c]ivil interests" consist of "life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like," and that the jurisdiction of the state "reaches only to these civil concernsments . . . and that it neither can nor ought in any manner to be extended to the salvation of souls."

<sup>45</sup> *Id.* at 18.

<sup>46</sup> *Id.* at 19.

<sup>47</sup> *Id.* at 27.

<sup>48</sup> GODLESS CONSTITUTION, *supra* note 4, at 77–78.

<sup>49</sup> See FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 161 (2003) [hereinafter THE FOUNDING FATHERS] (pointing out that Jefferson commissioned John Trumbull as artist to paint portraits of Francis Bacon, Isaac Newton, and John Locke on the same canvas in order that these personages might be given a place of honor at Monticello and "not be confounded at all with the herd of other great men") (quoting THOMAS JEFFERSON, *To John Trumbull*, in THE PORTABLE THOMAS JEFFERSON 434, 435 (Merrill D. Peterson ed., Penguin Books 1977) (1975)). Compare NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 129 (Ballantine Books 1988) (1987), where the author relates that Jefferson "asked Trumbull to purchase for him in England [portraits] of Bacon, Locke, and Newton."

<sup>50</sup> GODLESS CONSTITUTION, *supra* note 4, at 82. Jefferson describes the work as "Locke's little book on government." *Id.*

<sup>51</sup> *Id.* at 70. When describing Jefferson's view of the state, Kramnick and Moore write: "That government was best which governed least, as Jefferson put it." *Id.* It should be noted that there is no evidence that the third President ever wrote or uttered such words. While they are often attributed to him in error, they accurately portray his understanding.

avored and supported a policy of laissez faire not only in politics, but also in religion. Kramnick and Moore observe that “[t]he Declaration of Independence reads like a paraphrase”<sup>52</sup> of the *Second Treatise*. They also point out that, in his *Notes on the State of Virginia*, Jefferson wrote of religion that “it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.”<sup>53</sup> The passage brings to mind the words of Locke, who argued that religious matters should not be regulated by the state, “because they are not prejudicial to other men’s rights, nor do they break the public peace of societies.”<sup>54</sup> Both thinkers, state Kramnick and Moore, were committed to the idea that religion has no place in the public and political sector, but belongs exclusively to the realm of personal and private opinion.<sup>55</sup>

## 2. A Bill for Establishing Religious Freedom

Jefferson’s understanding of the relationship between church and state was enacted into Virginia law in 1786. Styled “A Bill for Establishing Religious Freedom,” it stated in part

that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.<sup>56</sup>

The bill was shepherded through the Virginia Assembly by none other than master strategist James Madison and, in the estimation of Kramnick and Moore, constituted a “comprehensive call for a total separation of church and state.”<sup>57</sup> The clergy, as might be expected, condemned the measure as indicative of a disregard for public worship and an indifference to religion.<sup>58</sup>

## 3. Jefferson and the Clergy

Our authors further note that Jefferson had little use for the clergy. Many of them reciprocated the animus and thought that

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<sup>52</sup> *Id.* at 72.

<sup>53</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY XVII (1787), reprinted in THOMAS JEFFERSON, WRITINGS 283, 285 (Merrill D. Peterson ed., 1984) [hereinafter WRITINGS].

<sup>54</sup> TOLERATION, *supra* note 42, at 42; see GODLESS CONSTITUTION, *supra* note 4, at 87.

<sup>55</sup> GODLESS CONSTITUTION, *supra* note 4, at 96.

<sup>56</sup> THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom* (1789), reprinted in WRITINGS, *supra* note 53, at 346, 347.

<sup>57</sup> GODLESS CONSTITUTION, *supra* note 4, at 92.

<sup>58</sup> *Id.* at 91–92.

his election to the Presidency would jeopardize their place in American life. Jefferson privately responded to their dislike of him in a missive to his friend Benjamin Rush:

They . . . believe that any portion of power confided to me, will be exerted in opposition to their schemes. And they believe rightly: for I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man. But this is all they have to fear from me: and enough too in their opinion.<sup>59</sup>

Interestingly enough, an excerpt from this passage appears in the Jefferson Memorial. Many churchgoing Americans, observe Kramnick and Moore, scarcely realize that the very words memorializing Jefferson are those which comprise an attack upon the Philadelphia clergy.<sup>60</sup>

Yet not all clergy were averse to Jefferson. Some, like Baptist ministers Isaac Backus and John Leland, supported him in his bid to become President. These and other evangelicals resented the fact that state governments were attempting to define religious doctrines and to impose them upon everyone by force of law.<sup>61</sup> Baptists were impressed by the fact that Jefferson had written and inspired the passage of the statute establishing religious freedom in Virginia and stood firmly for the liberty for which they had been struggling.<sup>62</sup>

#### 4. Jefferson's Correspondence with the Danbury Baptist Association

After Jefferson was elected President, Baptists from the Danbury Baptist Association in Connecticut wrote a letter to him setting forth, in part, their concern that their religious privileges in that state were enjoyed merely as "favours granted" and not as "inalienable rights."<sup>63</sup> In his letter of reply, Jefferson underscored a belief they and he shared in common, i.e., "that religion

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<sup>59</sup> *Id.* at 69 (quoting THOMAS JEFFERSON, *Letter to Dr. Benjamin Rush* (Sept. 23, 1800), reprinted in WRITINGS, *supra* note 53, at 1080, 1082, available at <http://www.positiveatheism.org/hist/jeff1080.htm>).

<sup>60</sup> GODLESS CONSTITUTION, *supra* note 4, at 69.

<sup>61</sup> *Id.* at 110–21. There were churches that separated from the Congregational establishment in New England. Some of these churches became Baptist. *Id.* at 116. Not being part of the protected religious establishment, they were still required either to pay financial support to the established church or to obtain a formal certificate declaring that they were exempt from it. *Id.* at 114–15. Backus and Leland strongly opposed the idea of a Christian commonwealth that employed sanctions of law in this manner. Although they were not disciples of Locke and were not known for being political theorists, they recognized that their view of religious freedom shared an affinity with Jefferson's liberal philosophy. *Id.* at 110–11, 116–17, 119–20.

<sup>62</sup> *Id.* at 119.

<sup>63</sup> *Correspondence with the Danbury Baptist Association, 1801–1802*, in DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE app. 6, at 142, 143 (2002).

is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, [and] that the legitimate powers of government reach actions only, & not opinions.”<sup>64</sup> The President then stated the following: “I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”<sup>65</sup> According to Kramnick and Moore, Baptists “gave qualified support to Jefferson’s wall of separation between church and state,” and they “agreed with [him] that America had not been founded as a Christian nation.”<sup>66</sup>

### 5. Jefferson’s Respect for Separationism

Jefferson showed respect for the “wall of separation” when he abandoned the practice of his predecessors in proclaiming national days of prayer, fasting, and thanksgiving.<sup>67</sup> He couched his inaction in terms of the state’s not infringing upon religion rather than in terms of the churches attempting to preempt the powers of state.<sup>68</sup>

## H. Undermining the Secular Ideal

### 1. Religious Holidays and the Appointment of Chaplains

Kramnick and Moore point out that there have been remarkable deviations from the secular ideal of government advanced in the Constitution. Two of them involved none other than James Madison, whose views on church and state are thought to have closely approximated those of his political mentor Thomas Jefferson.<sup>69</sup> One deviation occurred while Madison was President. During the War of 1812, Congress requested that there be a day “of public humiliation and prayer.”<sup>70</sup> Under in-

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<sup>64</sup> *Id.* at 148 (citation omitted).

<sup>65</sup> *Id.* (citation omitted) (quoting U.S. CONST. amend. D). Kramnick and Moore argue that Jefferson’s celebrated metaphor was inspired by James Burgh’s book *Crito*, published in 1767, in which Burgh argued that it was necessary to “build an impenetrable wall of separation between things sacred and civil.” See GODLESS CONSTITUTION, *supra* note 4, at 83 (quoting JAMES BURGH, 2 CRITO, OR ESSAYS ON VARIOUS SUBJECTS 119 (London, 1767)).

<sup>66</sup> GODLESS CONSTITUTION, *supra* note 4, at 119. The authors do, however, point out that Isaac Backus took issue with Jefferson on numerous points. For example, Backus did not seem to oppose the assertion that the United States was a Christian nation, and he supported a religious test for officeholders that discriminated against Roman Catholics. *Id.* at 119–20.

<sup>67</sup> *Id.* at 96.

<sup>68</sup> *Id.* at 96–97.

<sup>69</sup> SEPARATION OF CHURCH AND STATE, *supra* note 7, at 132.

<sup>70</sup> GODLESS CONSTITUTION, *supra* note 4, at 105 (quoting James Madison, *A Proclamation* (July 9, 1812), in 24 ANNALS OF CONG. 2223, available at <http://www.wallbuilders.com/resources/search/detail.php?ResourceID=39>).

tense pressure from both politicians and clerics alike, the President acceded to the request, in contravention of his apparently firmly held view that religious matters constituted no part of government polity. Another deviation occurred in 1787, when Madison was a Congressman and voted to support the appointment of chaplains to Congress, which appointment Kramnick and Moore state that he unsuccessfully opposed.<sup>71</sup>

## 2. The Coinage

The authors also observe that the Constitution was undermined when God entered the United States currency in 1863. During the height of the Civil War, Horace Bushnell, the famous Connecticut preacher, decried the influence of Thomas Jefferson's view that government should be a godless endeavor and interpreted the bloody carnage of the War as divine retribution for the country's acceptance of that view. Secretary of the Treasury, Salmon P. Chase, in response to such religious sentiment, decided to recommend a religious motto for one-cent and two-cent coinage. The motto finally approved by Chase and the Congress was "IN GOD WE TRUST."<sup>72</sup> Thereafter, it became commonplace on United States currency.

## 3. Sunday Movement and Delivery of the Mail

The authors also describe the bitter conflict between the church and the state, from 1810 to 1912, over the Sunday movement and delivery of the mail.<sup>73</sup> In 1810, Congress enacted legislation which provided that the mail would move every day and that post offices would be open for at least an hour each day. By 1815, clergymen and their churches were actively urging the repeal of the legislation, although their attack upon it was ultimately unsuccessful.<sup>74</sup>

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<sup>71</sup> GODLESS CONSTITUTION, *supra* note 4, at 105. But compare *Marsh v. Chambers*, 463 U.S. 783, 788, 788 n.8 (1983), in which Chief Justice Burger, speaking for the majority, points out that the House of Representatives elected its first chaplain on May 1, 1789, and that Madison voted for the bill authorizing payment of the chaplains for both the House and the Senate. *Id.* at 788, n.8.

<sup>72</sup> See United States Department of the Treasury, Fact Sheet on the History of "In God We Trust," <http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.shtml> (last visited Oct. 10, 2006). According to this source, Secretary Chase was moved to the decision by a letter to him from Rev. M.R. Watkinson, from Ridleyville, Pennsylvania. A portion of the letter is as follows: "One fact touching our currency has hitherto been seriously overlooked. I mean the recognition of the Almighty God in some form on our coins." The clergyman asked, "What if our Republic were not shattered beyond reconstruction? Would not the antiquaries of succeeding centuries rightly reason from our past that we were a heathen nation?" Rev. Watkinson's suggestion was a coin with the name of God inscribed upon it. *Id.*

<sup>73</sup> See GODLESS CONSTITUTION, *supra* note 4, at ch. 7.

<sup>74</sup> *Id.* at 133-34.

But in 1828, a second frontal assault was directed by Christians, principally by clergyman Lyman Beecher and evangelical businessman Josiah Bissell, Jr. They urged a strategy of boycott against all companies that operated on Sunday and sent over 900 petitions to Congress demanding repeal of the 1810 legislation.<sup>75</sup>

With the advent of the railroad and the telegraph, the commercial atmosphere in America changed significantly, with the result that seven-day mail service lost its compelling economic rationale. Kramnick and Moore point out that by the 1850s most of the Sunday movement of mail was slowed, if not eliminated, and that, in the aftermath of the Civil War, the trend grew.<sup>76</sup> By 1912, Congress had closed all post offices that remained open on Sunday.<sup>77</sup>

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

Our authors argue that the entry of God into the Pledge of Allegiance undermined the "godless federal constitutional structure," which the Framers erected.<sup>78</sup> America was in the midst of the Cold War and was threatened by communism, primarily of the Soviet variety. The Knights of Columbus, the Reverend Billy Graham, President Eisenhower, and the United States Congress all believed that the country's ultimate protection from the threat was to be found "under God."<sup>79</sup> So in 1954, a half century after Francis Bellamy's Pledge had been adopted, the phrase "under God" was incorporated into it.<sup>80</sup>

Contemplating the next time the Supreme Court will address Michael Newdow's claim that this phrase in the Pledge violates the Establishment Clause, Kramnick and Moore are admittedly troubled by the prospect that the Court may decide "that being religious, i.e., recognizing the existence of a deity"<sup>81</sup> is what it means to be a patriot. They write, "[t]his should be deeply

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<sup>75</sup> *Id.* at 135–36.

<sup>76</sup> *Id.* at 142.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 143.

<sup>79</sup> *Id.* at 196. See also SUSAN JACOBY, FREETHINKERS: A HISTORY OF AMERICAN SECULARISM 308 (2004). Jacoby underscores the role played by the Knights of Columbus and the Roman Catholic Church in the adoption of the "under God" language, although she makes clear that not only Catholics, but also Protestants and Jews were involved in the venture. She further explains the Roman Catholic hierarchy's leadership of the movement to incorporate the phrase into the Pledge "represented a major tactical change" on their part with regard to public education. Instead of attempting to banish all vestiges of Protestantism from the schools, the Roman Catholic leaders would support religious ideas in public schools that did not violate their own doctrine. *Id.* at 308–09.

<sup>80</sup> GODLESS CONSTITUTION, *supra* note 4, at 196.

<sup>81</sup> *Id.* at 197. See also L. Scott Smith, *From Typology to Synthesis: Re-Casting the Jurisprudence of Religion*, 34 CAP. U. L. REV. 51, 80–95 (2005) [hereinafter *From Typology to Synthesis*] (analyzing *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004)).

worrisome to all of us, whether one be personally religious or not. The question of whether God exists or not is not a question that should be before our legislative bodies and our courts, whatever a majority might say.”<sup>82</sup>

Although Kramnick and Moore emphasize that the Constitution created a secular state, they highlight that this secularism “is a precious but confused legacy, one that Americans have fought over since the beginning of the republic.”<sup>83</sup> In spite of prominent deviations from the constitutional ideal, the hope is that “the state and religion will not conflict and that each will work in complementary ways to lead us toward the creation of a just society.”<sup>84</sup> The formula by which the hope will be realized, according to the authors, is that of the separation of church and state, a standard that they freely acknowledge is in trouble.<sup>85</sup>

## II. ANALYSIS

### A. An Argument from Silence

The fact that the Constitution contains no positive reference to religion and no reference to God whatsoever is not proof that the document was intended to create a secular state. For Kramnick and Moore to rest their thesis, even in part, upon this foundation amounts to an argument from silence. It is like stating that, because no American President has invoked the name of Christ in an inaugural address, it follows that none has professed Christianity. One must remember that, when the Constitution initially emerged from the Philadelphia Convention and was presented to the states for ratification, there was no mention of the freedom of speech, the freedom of assembly, the right to bear arms, or the right against cruel and unusual punishment, to name but a few of the Framers’ most notable silences. If one had lived in that day and had drawn the conclusion from such silence that the Framers were not favorably disposed to such rights and freedoms, he or she certainly would have been mistaken.

#### 1. The Issue of States’ Rights

There are multiple inferences which one may draw concerning why the Constitution contains no reference to deity. Kramnick’s and Moore’s thesis that the Founders desired to create a secular state and a “godless politic” comprises only one such inference, and perhaps the least convincing one at that. It would

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<sup>82</sup> GODLESS CONSTITUTION, *supra* note 4, at 197.

<sup>83</sup> *Id.* at 200.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*



certainly be as easy to reason that, under the federalist system of government that the Founders were proposing, they considered religion a matter best reserved to the states and one over which the national government should have no jurisdiction. We are aware, after all, that many of those who were involved in the proposal and adoption of the Constitution were profoundly interested in and sensitive to the issue of states' rights. James Madison continually addressed the fears of those who believed that the national government would swallow up state governments. He wrote that "all those alarms which have been sounded, of a meditated or consequential annihilation of the State Governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them."<sup>86</sup> He highlighted, in the same vein, that "each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them."<sup>87</sup>

Madison's tone was categorical and his point unmistakable as he tirelessly underscored that the jurisdiction of the proposed federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."<sup>88</sup> Not only Madison, but also many men of the time, like George Mason,<sup>89</sup> James Wilson,<sup>90</sup> and Samuel Bryan,<sup>91</sup> spoke in the most serious and solemn tones about the issue of states' rights. So why is it not plausible to conclude,

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<sup>86</sup> THE FEDERALIST NO. 46 (James Madison), in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 2, at 116.

<sup>87</sup> THE FEDERALIST NO. 45 (James Madison), in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 2, at 104.

<sup>88</sup> THE FEDERALIST NO. 39 (James Madison), in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 2, at 31.

<sup>89</sup> See *George Mason Fears for the Rights of the People*, in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 2, at 605. Mason states that the power of the "General Government" to tax the states directly is "totally subversive of every principle which has hitherto governed us" and "is calculated to annihilate totally the State Governments." *Id.*

<sup>90</sup> See *James Wilson's Speech at a Public Meeting*, in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 1, at 67. Wilson assures his listeners that "it is evidently absurd to suppose . . . that the annihilation of the State governments will result from their union." *Id.* Later, in the Pennsylvania Ratification Convention, he described the driving principle of federalism as follows: "whatever object was confined in its nature and operation to a particular State, ought to be subject to the separate government of the States, but whatever in its nature and operation extended beyond a particular State, ought to be comprehended within the F[e]deral jurisdiction." *James Wilson's Opening Address*, in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 1, at 796.

<sup>91</sup> See *Reply to Wilson's Speech: "Centinel" [Samuel Bryan] II*, in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 1, at 80. Bryan responds to Wilson's initial speech and asserts that he "has recourse to the most flimsey sophistry in his attempt to refute the charge that the new plan of general government will supersede and render powerless the state governments." *Id.*

in contradistinction to the argument of Kramnick and Moore, that the Founders may have regarded issues of religion as ones which the states, and not the national government, should decide? In such light, would it not make sense that the nation's patriarchs apparently felt no compulsion to cover ground that the state constitutions had already covered?<sup>92</sup> Kramnick and Moore are curiously silent regarding the towering issue of federalism that occupies, even on occasion monopolizes, the first debates regarding the Constitution.

## 2. A Reluctance to State the Obvious

Our authors further ignore a second likely and closely related inference. The Framers' failure to reference God in the Constitution may have amounted to little more than an expression of their desire not to address unnecessary issues. Consider the manner in which Noah Webster engaged the argument, made by those who opposed the Constitution, that there was no provision within it against a standing army during times of peace. His words serve to enlighten us about why there is silence on particular subjects. He asks: "Why do not people object that no provision is made against the introduction of a body of Turkish Janizaries; or against making the Alcoran the rule of faith and practice, instead of the Bible?"<sup>93</sup> "The answer to such objections," he emphasizes, "is simply this—*no such provision is necessary*."<sup>94</sup> Webster explains that there is no provision against standing armies because "the principles and habits, as well as the power" of the American people are opposed to them, and that "there is as little necessity to guard against them by positive constitutions, as to prohibit the establishment of the Mahometan religion."<sup>95</sup> Would taking Webster's point seriously in this instance not readily suggest that the Founders' failure to refer to God in the Constitution could have had to do with their reluctance to state the obvious? This is certainly an inference no less viable than supposing that they intended to secularize American public life. One may wonder that, if the latter had been their object, why they

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<sup>92</sup> The Massachusetts Constitution required the governor and legislators to believe the "Christian religion." The Maryland Constitution similarly required officeholders to declare their "belief in the Christian religion." The New Hampshire Constitution limited senators to those of "the protestant religion." Delaware's oath of office required affirmation of the Trinity and the divine inspiration of the Old and New Testaments. North Carolina required its officeholders to affirm the being of God, to profess the truth of Protestantism, to accept the divine authority of the Old and New Testaments, and not to hold to any religious principle "incompatible with the freedom and safety of the State . . ." See THE FOUNDING FATHERS, *supra* note 49, at 250–51.

<sup>93</sup> See Noah Webster, *A Citizen of America*, in THE DEBATE ON THE CONSTITUTION, *supra* note 14, pt. 1, at 150.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 151.

proposed a Constitution that left the states free to do about religion what they wished.

### 3. No Justification for Ineffectual Provisions

Another reasonable inference not in keeping with the secularization thesis deserves mention. Jefferson once wrote that in matters of religion, the effect of coercion was “[t]o make one half the world fools, and the other half hypocrites.”<sup>96</sup> The point was not lost on the Founders nor on those who debated the adoption of the Constitution. Oliver Ellsworth observed that it is easy for “an unprincipled man”<sup>97</sup> to take an oath or to declare his belief in a creed and then to justify himself for not comporting himself in accordance with it. Requirements such as religious oaths and tests tend to bind only the person whose virtue binds him anyway; they in no way safeguard the body politic from and screen out the disreputable opportunist who lies and takes the oath or test insincerely. “In short,” Ellsworth maintained, “test-laws are utterly ineffectual.”<sup>98</sup> James Iredell made the same point when he opined in North Carolina’s ratification convention that religious oaths do not fulfill their purpose.<sup>99</sup> Why incorporate a well-meaning, albeit ineffectual, requirement into the Constitution? It comprises nothing short of a quantum leap in logic to conclude the failure to do so *ipso facto* suggests that the Founders’ goal was to secularize American public life.

### 4. The Overarching Point

While the Constitution contains no substantive reference to God and no positive reference to religion, it is prudent to exercise caution when interpreting these facts. They do not in and of themselves demonstrate an antipathy to public expressions of religion, nor do they reveal skepticism regarding the idea of God. One need not conclude that they illustrate the Founders’ desire to create an entirely secular state. Such facts allow a variety of inferences, some of which are incompatible with Kramnick’s and Moore’s thesis, such as those set forth above.

## B. Roger Williams and John Locke

### 1. Roger Williams’s View of Separation

If the separation of church and state is interpreted to mean that the latter is to be a thoroughly secular sphere, then the ap-

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<sup>96</sup> JEFFERSON, *supra* note 53, at 283, 286.

<sup>97</sup> Ellsworth, *supra* note 16, at 523.

<sup>98</sup> *Id.* at 524.

<sup>99</sup> *Henry Abbot and James Iredell Debate the Ban on Religious Tests*, *supra* note 19, at 904.

peal to Roger Williams is in vain. According to one scholar, Williams “had no argument with making God’s will supreme in public as well as in private life.”<sup>100</sup> His dispute was with the manner in which the Puritans in Massachusetts were attempting to do it. He emphasized that civil magistrates should not seek to interpose their will upon church affairs by forcing another under threat of legal penalty to obey commands, which come as a “direct call from God.”<sup>101</sup> But he was also insistent that God should not be left out of the affairs of state. He asserted that civil peace arises and is maintained from not only civil laws, but also “true religion.”<sup>102</sup> He declared: “Civil peace cannot stand entire where religion is corrupted.”<sup>103</sup>

Since Williams’s emphasis upon separation was not his way of shielding the state from the influence of the church and of religion, how may his notion of separation be characterized? It was, for him, the means of protecting the individual’s right of conscience, while simultaneously safeguarding the purity of the church and of “true religion.” He was haunted by the specter of a pure and righteous Christian believer, who desired nothing more than to reside within a “garden” fashioned by God that is separated and walled off from the “wilderness” of the world, being molested by civil authorities and forced at the point of sword to confess false beliefs.<sup>104</sup> There are admittedly points of overlap between Williams’s view of separation as a quest for religious purity and Kramnick’s and Moore’s view of it as advocacy for a godless state and politics, but the two visions differ radically from each other in their underlying assumptions, motivation, and ultimate objective. To conflate them is to misunderstand both.

## 2. John Locke’s View of Separation

Locke, as revealed in his *Letter of Toleration*, did not speak of church and state so much in terms of being separate spheres as of being different ones.<sup>105</sup> Aside from this fact, his view of

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<sup>100</sup> JERALD C. BRAUER, *PROTESTANTISM IN AMERICA: A NARRATIVE HISTORY* 33 (1965), available at <http://www.religion-online.org/showchapter.asp?title=1663&C=1656>.

<sup>101</sup> *Id.*

<sup>102</sup> WILLIAMS, *supra* note 26, at 153.

<sup>103</sup> *Id.*

<sup>104</sup> See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 38–51 (2002) [hereinafter *SEPARATION*], in which Hamburger argues that Williams adopted “the wall of separation” metaphor as an image of purity which he sought in religion.

<sup>105</sup> See *TOLERATION*, *supra* note 42, at 27, where the author states that church is “a thing absolutely separate and distinct from the commonwealth.” Compare and contrast this statement with the way in which Locke distinguishes the two elsewhere in this work: e.g., civil government is concerned with the outward, while religion the inward, *id.* at 18; civil government is restricted to the things of the temporal world, while religion with those in the world to come, *id.* at 20; civil government is a public matter, whereas religion is a private, personal one, *id.* at 28–31; civil government enforces its precepts with penal-

separation is a narrow one. It rests upon his minimalist conception that the *raison d'être* of the state is the protection of life, liberty, and property. Because the public realm of government is limited, the private and personal realm of religion is expansive. As the tentacles of government now reach deeper into people's lives than they did under Locke's theory, his view of separation is increasingly inapplicable, if not impossible. The advent of the welfare state, in other words, has rendered his notion of separation archaic and hard to square with the present.

So for commentators like Kramnick and Moore to call upon the classical liberalism of Locke in order to defend their regime of secularizing the current welfare state is confused and disingenuous from the start. The essential condition for Locke's view of the separation of church and state is a minimalist state. Without that, the jurisdiction of the state eventually consumes that of the church, rendering it powerless. Assuming that the state is a godless sphere, then godlessness will predominate throughout society as the state increases. Locke's political philosophy does not support such an outcome. He was not by any stretch of the imagination the secularist that Kramnick and Moore are and can hardly be relied upon to support their argument.

Our authors should not regard Locke's view of separation as helpful to their defense of the secular state for other notable reasons. The leading rationale for a secular state is toleration, but Locke's view of separation does not lend itself to the wholehearted promotion of that virtue. In Locke's view, all religious beliefs are not equally deserving of protection. Beliefs that are subversive to the state should never be protected.<sup>106</sup> Nor should those religious beliefs that undermine the foundations of human society.<sup>107</sup> What is more, a church in which communicants owe their allegiance to another prince, (and here some think that he was referring specifically to Roman Catholics although he explains that the reference is to Islam),<sup>108</sup> cannot be tolerated.<sup>109</sup> Atheists likewise have no place in Locke's state.<sup>110</sup> The point is that his view of the separation of church and state is quite narrow and is as influenced by religion as it is separated from it. To phrase the observation another way, Locke's is a political point of view that provides freedom *of* religion, but no freedom *from* it.

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ties, but religion relies only upon the light of reason and evidence, *id.* at 19; and civil government is concerned with life, liberty, and property, whereas religion is concerned with the salvation of souls, *id.* at 17.

<sup>106</sup> *Id.* at 50.

<sup>107</sup> *Id.*

<sup>108</sup> Patrick Romanell, *Introduction* to TOLERATION, *supra* note 42, at 10.

<sup>109</sup> TOLERATION, *supra* note 42, at 51.

<sup>110</sup> *Id.* at 52.

To correlate this position with Kramnick's and Moore's is possible perhaps, but only if one takes a broad leap of abstraction and turns a blind eye to what Locke specifically taught.

### 3. Summary Observation

Here again, it is imprudent to invoke, as Kramnick and Moore have done, the views of Roger Williams and John Locke in order to defend the secular state. While there are, between these icons and our authors, certain similarities and points of agreement, they are far from conclusive and ultimately convince only those who are already convinced of the secularist position.

## C. Thomas Jefferson and the Secular State

### 1. The Celebrated "Wall"

The most egregious mistake that Kramnick and Moore make is that they, in a less than critical fashion, enlist Jefferson in support of their thesis and interpret his correspondence with the Danbury Baptists as an illustration of his dedication to the notion of the secular state.

One must first remember that the third President was indeed a devoted disciple of Locke. He believed that the best government was a minimal one.<sup>111</sup> The national government was, for him, properly limited; there were undertakings that were permitted to it, but many others that were not. It was, with respect to religion, distinguishable from state governments and ecclesiastical institutions.<sup>112</sup> States were free to engage in religious activities, and Jefferson had no problem with that idea.<sup>113</sup> He had even issued a thanksgiving proclamation while he was governor of Virginia.<sup>114</sup> Furthermore, as a member of the Virginia House of Burgesses, he had participated in the drafting and enactment of a resolution calling for a day of fasting, humiliation, and prayer.<sup>115</sup> Daniel L. Driesbach perceptively concludes, therefore, that "[t]he 'wall' metaphor was not offered as a general pronouncement on the prudential relationship between religion and all civil government; rather, it was, more specifically, a statement delineating the legitimate constitutional jurisdictions of the federal and state governments on matters pertaining to relig-

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<sup>111</sup> See GODLESS CONSTITUTION, *supra* note 4, at 70.

<sup>112</sup> THOMAS JEFFERSON, *Second Inaugural Address* (March 4, 1805) para. 7, reprinted in WRITINGS, *supra* note 53, at 518, 519–20 [hereinafter *Second Inaugural*].

<sup>113</sup> See *id.*

<sup>114</sup> DANIEL L. DRIESBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 58–59 (2002) [hereinafter JEFFERSON AND THE WALL].

<sup>115</sup> *Id.* at 56.

ion.”<sup>116</sup> The letter to the Danbury Baptists, in short, served a political purpose: it was a way by which the President could swipe at John Adams and other Federalists who, during the malicious 1800 presidential campaign, had been suspected of supporting the establishment of a national church.<sup>117</sup>

## 2. Jefferson and Public Religion

Kramnick's and Moore's depiction of Jefferson's views border upon caricature. His statements and actions were far more complex than these authors portray. Aside from his conviction that states were free to engage in religious observances, Jefferson nonetheless could bend his own philosophy a bit in the national arena. When the Reverend John Leland, who had been instrumental in disestablishing the Anglican Church in Virginia, came to Washington approximately a year after Jefferson initially took office as President, Leland not only presented the President with a mammoth cheese weighing twelve hundred and thirty-five pounds,<sup>118</sup> but also preached in the Hall of the House of Representatives the following Sunday.<sup>119</sup> Jefferson, a mere two days after writing his letter to the Danbury Baptists in which he advanced his famous metaphor, appeared in the House to hear Leland preach. Jefferson's listening to Leland's sermon in this context did not represent a sudden break from his usual practice, since he had attended worship services on public property before becoming President.<sup>120</sup> He would likewise attend public religious services throughout his Presidency.<sup>121</sup> In a similar vein, during his Second Inaugural Address, Jefferson confessed his need for "the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessaries and comforts of life,"<sup>122</sup> and he invited his countrymen "to join with me in supplications, that he will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations."<sup>123</sup> These are all indications that Kramnick and Moore may have painted an oversimplified picture.

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<sup>116</sup> *Id.* at 60.

<sup>117</sup> *Id.* at 57.

<sup>118</sup> *Id.* at 10.

<sup>119</sup> *Id.* at 21.

<sup>120</sup> *Id.* at 23.

<sup>121</sup> *Id.*

<sup>122</sup> *Second Inaugural*, *supra* note 112, at para. 15.

<sup>123</sup> *Id.*

### 3. Jefferson's Bill for Establishing Religious Freedom

There is no question that this statute, which was inspired by Jefferson, disestablished religion in the state of Virginia. It represented a milestone of libertarian accomplishment. No longer would religion be enforced by coercive means. No one would thereafter be compelled to support religious worship or, for that matter, any instrumentality of religion. Yet it cannot go unnoticed that the first protracted sentence of the bill reads, in some respects, like a confession of faith. The sentence refers to "Almighty God," to "his supreme will," and to "the plan of the holy author of our religion, who being lord both of body and mind."<sup>124</sup> The question that immediately comes to mind is whether the Bill demonstrates a conviction regarding disestablishment or one regarding separation. If the latter, then why the weighty religious references? Would Kramnick and Moore argue that these references are secular? Does the statute really, as they claim, amount to a "comprehensive call for a total separation of church and state,"<sup>125</sup> or is this characterization simply another indication of their inclination to exaggerate and to accentuate only a part of the evidence?

### 4. Separation versus Disestablishment

Indeed, when one examines the writings of leading eighteenth century Americans, men like Patrick Henry, Samuel Adams, Isaac Backus, George Mason, John Adams, Caleb Wallace, John Leland, Oliver Ellsworth, and George Washington, who are frequently thought to have subscribed to the secular theory of "separation of church and state," only the most meager evidence surfaces in favor of the theory.<sup>126</sup> Most of these persons do not so much as even use the word "separation" or any of its derivatives. There is a strong and viable argument one can make that these icons in American history supported disestablishment, which was not for them a notion synonymous with separation.<sup>127</sup>

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<sup>124</sup> 2 THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in THE PAPERS OF THOMAS JEFFERSON 545–46 (Julian P. Boyd ed., 1950), reprinted in ROBERT T. MILLER & RONALD B. FLOWERS, *TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT* app. A, at 584–85 (3d ed. 1987).

<sup>125</sup> GODLESS CONSTITUTION, *supra* note 4, at 92.

<sup>126</sup> See SEPARATION OF CHURCH AND STATE, *supra* note 7. I would challenge the reader to examine each of the selections in this work and to discover for him or herself the truth of my observation that the founders rarely, if ever, advocate "separation." One discovers in most of these writings an opposition to forced religion or to laws pertaining to worship, along with a commensurate favoring of the view that religious freedom is an inalienable right over which civil authorities have no power. But one does not find these men advocating the notion of separation or of a "godless" public life.

<sup>127</sup> This observation is generally in agreement with the observation of Hamburger, who describes the doctrine of separation as primarily a phenomenon of the nineteenth century. See SEPARATION, *supra* note 104, at 78, 111. The observation also agrees with



### 5. Closing Observation about Jefferson

There is significant evidence to suggest that Jefferson did not favor a secular public sphere of the sort that Kramnick and Moore envision and support. My purpose here, however, is not to state whether he did or did not do so, but simply to demonstrate that these authors do not convincingly prove their point about the third President. Appeals to Jefferson's beliefs and practices can militate as easily against a godless state as in favor of one.

### 6. The Subversion of the Secular Ideal

Madison supported the appointment of congressional chaplains when he served in the House of Representatives.<sup>128</sup> He also, during his Presidency, proclaimed a national day of public humiliation and prayer.<sup>129</sup> There is evidence that, after he left office, he came to regard both actions as violations of the Establishment Clause and as deviations from the godless Constitution.<sup>130</sup> The matter appears finally to boil down to a choice of whether to agree with the public or the private Madison. This choice resembles a leap into darkness, for there are no magical, brightly illuminated guideposts pointing one to the definitive meaning of the Establishment Clause. Yet the burden of proof, it should be remembered, is usually shouldered by the one whose thesis is under consideration. When Kramnick and Moore argue that Madison's religious proclamation was retrogressive and outside the orbit of the Establishment Clause, their assessment is based upon little more than a body of checkered evidence that just as readily lends itself to the opposite point of view.

Furthermore, when these authors describe the introduction of religious beliefs into the national currency, the movement and delivery of the mail, and the national Pledge of Allegiance as un-

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the analysis of Daniel Dreisbach, who points out that New England Baptists (like Isaac Backus and John Leland) did not regard "separation" and "nonestablishment" as interchangeable. See JEFFERSON AND THE WALL, *supra* note 114, at 51.

<sup>128</sup> See 1 ANNALS OF CONG. 104–05 (Joseph Gales ed., 1834). Compare GODLESS CONSTITUTION, *supra* note 4, at 105, where the authors state that Madison "also opposed, unsuccessfully, the appointing of chaplains to Congress." The statement glosses over the fact that Madison did not apparently oppose the action while he was in Congress.

<sup>129</sup> If the issuance of the proclamation was a mistake as Kramnick and Moore argue, it was one that President Madison continued to make. He issued such proclamations throughout his Presidency. See 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 513, 532–33, 558, 560–61 (1896).

<sup>130</sup> See James Madison, *A Detached Memorandum*, in SEPARATION OF CHURCH AND STATE, *supra* note 7, at 138, 141. In this writing, Madison stated that the appointment of chaplains for institutions of state "shut the door of worship [against] the members whose creeds and consciences forbid a participation in [the religion] of the majority." *Id.* at 139. He maintained that "[r]eligious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root . . ." *Id.* at 141.

dermining the godless Constitution and the secular state, one must ask when and by whom such a standard of measurement was ever conclusively established. Kramnick and Moore certainly have not established it. Unless and until godlessness in public life becomes the proven and/or accepted standard, episodes of religious expression in American public life undermine nothing.

If those like Robert Bellah<sup>131</sup> and Sidney Mead<sup>132</sup> are correct, there has always been a religious dimension in American public life. Whether one refers to this aspect of the country's communal existence as a "civil religion"<sup>133</sup> is not really important. What Bellah and Mead suggest is that there is a wellspring of national spirituality, which in turn involves a belief in a deity. Assuming that one agrees with them on this score, as many do,<sup>134</sup> the very episodes that Kramnick and Moore decry as departures from the standard, other commentators might applaud as reflective of it.

#### E. Conclusion of Analysis

It appears doubtful whether any historical inquiry into this matter will ever render an uncontested verdict. To expect another outcome would be naïve. Thus, for an answer to the queries of who determined the standard as well as how and when they did so, we must turn our attention elsewhere.

### III. SECULARIZATION AND THE SUPREME COURT

#### A. The Completed Revolution

One may at this juncture wish to ask, "Why, when the historical evidence in favor of a secular state is checkered and far less than conclusive, do we have a secular state, or a public

<sup>131</sup> See ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 12 (1975); and Robert N. Bellah, *Civil Religion in America*, in *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD* 168, 168–69 (Univ. of California Press 1991) (1970) [hereinafter *Civil Religion*].

<sup>132</sup> See SIDNEY E. MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA* 38–50 (1963) [hereinafter *LIVELY EXPERIMENT*].

<sup>133</sup> See *Civil Religion*, *supra* note 131, at 168. See also JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 176–87 (M. Cranston trans., Penguin Books 1968) (1762), where the author is the first to have used the term.

<sup>134</sup> See, for example, *THE FOUNDING FATHERS*, *supra* note 49, at 282 (quoting JOHN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 131 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762)), in which Lambert writes the following:

Many other Americans professed Christianity but, like Jefferson, embraced a civil religion that excluded or ignored many tenets central to Christian orthodoxy. Jefferson, Adams, Washington, Franklin, and Hamilton all expressed some version of what Rousseau called "civil religion": a belief in "the existence of a powerful, intelligent, beneficent, foresighted, and providential divinity; the afterlife; the happiness of the just; the punishment of the wicked; [and] the sanctity of the social contract."

sphere closely resembling one?”<sup>135</sup> The answer is that there has already been a successfully executed “secular revolution”<sup>136</sup> in this country. It was, except for some of its details, completed by the turn of the twentieth century and involved virtually every aspect of American culture, including but not limited to education, the natural sciences, and law.<sup>137</sup> The insurgents, comprising the nation’s intelligentsia, embraced naturalism, materialism, positivism, and the privatization, if not extinction, of religion.<sup>138</sup> They rebelliously gave birth to a novel social paradigm in this country that embodied their modes of thought and that soon came to dominate American public life.

Current culture skirmishes, which have been recently evidenced, may perhaps be interpreted as little more than a bothersome footnote to the culture war that has already been fought and won. But such skirmishes may also signal a new counter-insurgency, which is uneasy about the direction of American public life under a secular paradigm and ready to mount its overthrow.

### 1. Education

For more than five hundred years in Western Civilization,

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<sup>135</sup> The observation of Stephen B. Presser is correct. He reviews Kramnick’s and Moore’s book and states: “There is more than a little that is curious about this book, because its breathlessly-advanced thesis, that ours is a ‘Godless Constitution,’ now seems to be the well-established view of a majority of members of the United States Supreme Court.” Stephen B. Presser, *Some Realism about Atheism: Responses to The Godless Constitution*, 1 TEX. REV. L. & POL. 87, 89–90 (1997) (reviewing ISAAC KRAMNICK AND R. LAURENCE MOORE, *THE GODLESS CONSTITUTION* (1996)). The curiosity really concerns the Court. Why does it tend to favor secularization when an examination of the early history of the Republic on the matter of church-state relations does not lead ineluctably to the conclusion that secularization must be favored?

<sup>136</sup> See Christian Smith, *Introduction to THE SECULAR REVOLUTION*, at 1–4 (Christian Smith ed., Univ. of California Press 2003) [hereinafter *SECULAR REVOLUTION*], in which he uses and defends this term.

<sup>137</sup> Even Protestantism itself became a secularizing influence. Its Holy Scriptures were interpreted through the lens of the discipline of psychology. See Keith G. Meador, “*My Own Salvation*”: *The Christian Century and Psychology’s Secularizing of American Protestantism*, in *SECULAR REVOLUTION*, *supra* note 134, at 269, 296, where the author, describing the first few decades of Protestantism during the twentieth century, states that “parts of American Protestantism were becoming difficult to distinguish from the secular alternative of psychology, and many American Protestants began to forego traditional religious practices entirely in favor of a more direct alleviation of suffering from the psychologists, whom even churches hailed as the true ‘physicians of the soul.’” Charles Clayton Morrison, the first editor of the *Christian Century*, wrote retrospectively with regret in 1939 of the breakdown of his religious belief system in the immediate aftermath of the secular revolution: “Its [i.e., any religious phenomenon’s] objectivity as something given to me from beyond myself, had been reduced to my own subjective processes.” *Id.* at 297 (quoting *How My Mind Has Changed*, *CHRISTIAN CENTURY*, Nov. 8, 1939, at 1370, 1371). Morrison’s progressive brand of Christianity had brought him to an ideological place respecting religion the same as or similar to that of scientists, educators, and law professors.

<sup>138</sup> Christian Smith, *Introduction to THE SECULAR REVOLUTION*, *supra* note 136, at 1.

the Christian Church was in charge of education.<sup>139</sup> Throughout seventeenth-, eighteenth-, and most of nineteenth-century America, the Church's role in education predominated over all others. Harvard, Yale, William & Mary, and Princeton were established as religious institutions, the primary purpose of which was to produce and to train clergy.<sup>140</sup> Most American colleges established during this time were the work of Christian denominations, and so, naturally, their clergy possessed both teaching and administrative responsibilities in these educational institutions.<sup>141</sup> By the end of the nineteenth century, clergy involvement in colleges and universities had declined.<sup>142</sup> Higher education was, by then, no longer under the control of the Church.

A large part of this turn of events is explicable in terms of European modes of thought that began flourishing approximately a century earlier. Immanuel Kant propounded his critical philosophy in Germany during the late eighteenth and early nineteenth centuries. He distinguished between empirical knowledge and faith. The former was related to the world of sense perception and had to do with mathematical and physical science. The latter was unbounded by sense and had to do with the movements of the mind. Although Kant correlated the notions of God, freedom, and immortality with morality, it was clear that, for him, these and other moral ideas and maxims possessed a cognitive status fundamentally different from those of science. He limited knowledge, he professed, to make room for faith. It was this dichotomy of knowledge and faith that was of immense significance for the secular revolution.

Auguste Comte and Herbert Spencer, who followed Kant in the nineteenth century, built upon this dichotomy, each in his own way. Comte envisioned a progression in human knowledge, with the mind passing first through a theological stage, followed by a metaphysical one, and then attaining its fullest flower in the ideal of positivism, which he maintained is exemplified by natural science. No longer should one attempt to explain phenomena by resorting to the realm of the supernatural (theology) or to causal forces inherent within phenomena (metaphysics). Science of the kind that occupied Galileo, Kepler, and Newton is concerned with providing explanations, based upon observation, of the relations between observable facts. Positivism, then, for Comte, has to do with real, certain, and exact knowledge, which

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<sup>139</sup> Christian Smith, *Secularizing American Higher Education*, in *SECULAR REVOLUTION*, *supra* note 136, at 97.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 97–101.

<sup>142</sup> *Id.* at 101.

embodies mathematics, natural sciences, and sociology.

Spencer accepted the proposition that there is a realm of experience and a realm not experienced. The latter realm is the one properly associated with religious belief, which cannot be tested or quantified empirically. Theism, pantheism, and atheism all fail for the same reason: they cannot be related to or correlated with experience. Agnosticism, according to Spencer, is the only viable option religiously and metaphysically. Spencer also rejected all theological systems and was equally critical of the religious institutions promulgating them.

Christian Smith stresses the heavy impact of Comte and Spencer upon American academicians and higher education. He writes, "Both [thinkers] provided what proved to be key intellectual tools utilized by rising academic elites seeking to displace religious authority in order to make room for themselves as new, secular cultural authorities."<sup>143</sup>

Smith also points out that, during the nineteenth century, over ten thousand American scholars studied at German universities, the most secularized institutions in the world at the time, and brought back to this country German idealism, historicism, and rationalism,<sup>144</sup> each of which was opposed, if not outrightly hostile, to a traditionally religious worldview. Academic faculty members, like John Dewey<sup>145</sup> who had thoroughly immersed himself in Kant's philosophy and Hegelian idealism, resented any parochial or sectarian standard in education and thought of religion as belonging only to one's personal and private life. Such academicians fought for what they perceived as intellectual autonomy, opposing the denominational grip on higher education that was at its tightest during the 1880s and 90s.<sup>146</sup>

In addition, institutions like Harvard, Johns Hopkins, and Cornell were under the leadership of Charles Eliot, Daniel Coit Gilman, and Andrew Dickson White, respectively, all of whom were educational reformers who worked assiduously to marginalize religion in the academic curriculum and to further what they were convinced was genuine knowledge.<sup>147</sup>

Aside from the above-described ideological shift, the nineteenth century saw the flourishing of capitalism, which fueled secularization. Corporate capitalism was not interested in classi-

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<sup>143</sup> Christian Smith, *Secularizing American Higher Education, in* SECULAR REVOLUTION, *supra* note 136, at 97, 101.

<sup>144</sup> *Id.* at 101–02.

<sup>145</sup> *Id.* at 103.

<sup>146</sup> *Id.* at 102–03.

<sup>147</sup> *Id.* at 103.

cally-educated students, but in those who were trained in business, law, engineering, and the material sciences; in those who could, in short, generate capital.<sup>148</sup> As Smith puts it, “[c]apitalism thus undercut the justification for the scholarly task of a college system that privileged religious knowledge in its education, bolstering instead a rationale for a kind of technical, instrumental scholarship that was at the very least indifferent to religious concerns and interests.”<sup>149</sup> Secular research universities soon began to supplant denominational colleges as the dominant institutions of higher education.<sup>150</sup>

The marginalization of religion in higher education soon characterized the local public schools as well. During the middle of the nineteenth century, educators like Horace Mann were outspokenly in favor of religious instruction in public schools.<sup>151</sup> They believed, like James Pyle Wickersham once did, that “[s]chools in this country should train the young to be religious.”<sup>152</sup> But, by the mid-1870s and 80s, the National Education Association (NEA), which had become membered with those of a secular mindset, went on the attack against teaching religion, i.e., a common Protestant Christianity, in public schools.<sup>153</sup> Educational elites, consisting of many local school superintendents as well as faculty and administrators of many major universities, joined the NEA and worked to remove religion from public schools.<sup>154</sup> William Torrey Harris, superintendent of schools in St. Louis, Missouri, was one of those who fervently opposed religious teaching in public schools and became a fierce advocate for secular public education.<sup>155</sup>

By the beginning of the twentieth century, only hints of the old religious system remained in public schools. It had been a political struggle, Kraig Beyerlein maintains, and “the educational secularizers in the [NEA] had won.”<sup>156</sup>

## 2. Science

Secularization in the sciences unfolded during the nineteenth century as a conflict between positivism and Baconian-

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<sup>148</sup> Christian Smith, *Introduction*, in *SECULAR REVOLUTION*, *supra* note 136, at 76.

<sup>149</sup> *Id.*

<sup>150</sup> Kraig Beyerlein, *Educational Elites and the Movement to Secularize Public Education*, in *SECULAR REVOLUTION*, *supra* note 136, at 160, 176.

<sup>151</sup> *Id.* at 163.

<sup>152</sup> *Id.* at 165 (emphasis omitted) (quoting NTA Proceedings 606 (1866)).

<sup>153</sup> *Id.* at 169.

<sup>154</sup> *Id.* at 170.

<sup>155</sup> *Id.* at 174–75.

<sup>156</sup> *Id.* at 193.

ism.<sup>157</sup> The primary goal of the latter was to gather facts through close, honest, and refined observation.<sup>158</sup> The idea of Baconianism was that, as taxonomy grew, it would demonstrate the universal laws of God.<sup>159</sup> Yet just as facts came through observation, they could also be received from God through revelation.<sup>160</sup> According to Baconian science, science and religion were two sides of the very same coin.<sup>161</sup> There was a “permeable boundary” between the two.<sup>162</sup>

Men like Herbert Spencer, Charles Darwin, and Thomas Huxley were stalwart representatives of the positivist approach to scientific pursuit.<sup>163</sup> They flatly rejected Baconian premises. Religion, for them, had nothing to do with science; thus, the clergy had no right to speak with authority regarding scientific questions.

Edward L. Youmans, a personal friend and disciple of Spencer as well as an evolutionist, thought that it was time to disseminate positivist ideas on a popular basis. *Popular Science Monthly* was Youmans’s brainchild. He prevailed upon William Henry Appleton, of publishing fame, to underwrite the publication.<sup>164</sup> It sold at least eleven thousand copies a month and became the leading purveyor of popular scientific ideas during the last part of the nineteenth century.<sup>165</sup>

The various authors featured in this periodical, as well as in other periodicals such as *Scientific American*, declared war on biblical literalism.<sup>166</sup> Scripture, they argued, resembled poetry and art more than science,<sup>167</sup> and widespread religious claims demonstrate at best that humans possess spiritual faculties which generate such claims.<sup>168</sup> The result of such arguments against religion resulted in a slow, but devastating erosion of Baconianism’s credibility. The religious texts to which it subscribed came to be viewed by many as nothing more than an artistic accomplishment<sup>169</sup> and certainly not as a source of scientific truth.

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<sup>157</sup> Eva Marie Garrouette, *The Positivist Attack on Baconian Science and Religious Knowledge in the 1870s*, in SECULAR REVOLUTION, *supra* note 136, at 197.

<sup>158</sup> *Id.* at 198.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 199.

<sup>161</sup> *See id.* (commenting on the Baconian view that science (nature) and religion (the biblical text) are “complementary and absolutely noncontradictory,” and that “scientists and theologians could apply the very same scientific method to the study of both”).

<sup>162</sup> *Id.* at 200.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 201.

<sup>166</sup> *Id.* at 204.

<sup>167</sup> *Id.* at 205.

<sup>168</sup> *Id.* at 206.

<sup>169</sup> *Id.* at 205.

Later, as the subjectivity of language surfaced as a major problem in hermeneutics, criticism rose to a new height when such commentators expressed the idea that perhaps the words of Scripture were more about the thoughts of those who had written, and were presently interpreting, them than about the mind of deity.<sup>170</sup> The upshot of the matter was that positivists urged devotees of religion “to abandon the delusion that they possess facts”<sup>171</sup> and to withdraw from scientific discourse, especially when they have their Bibles in hand.

By attacking the religious basis of Baconian science, the positivists had “made themselves the sole inheritors of the right to control the intellectual territory from which they had successfully displaced religious interests.”<sup>172</sup> This accomplishment did not go unnoticed, but “reverberated through most other institutional fields in American society.”<sup>173</sup> Henceforth, scientific knowledge would be king of the realm, while religious claims would be relegated to virtual irrelevancy.

### 3. Law

The secularization of law was a drama that unfolded in two major parts. The first pitted the “science of law” movement, represented by men such as Christopher Langdell, Samuel Williston, and Jeremiah Smith, against a jurisprudence in which community and religious notions of justice were creatively incorporated into common law.<sup>174</sup> The science of law protagonists were struggling, as the name of their movement indicates, to define law as “science.”<sup>175</sup> Science, after all, had become the gold standard for knowledge. The champions of this new legal movement were law professors, who desired to view themselves as scientists and purveyors of knowledge. Their laboratories were none other than law schools that were located in or near the universities where they taught.<sup>176</sup>

The second part of the drama was cast as a conflict between so-called legal realists,<sup>177</sup> like Oliver Wendell Holmes, John

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<sup>170</sup> *Id.* at 207–08.

<sup>171</sup> *Id.* at 210.

<sup>172</sup> *Id.* at 213.

<sup>173</sup> *Id.*

<sup>174</sup> David Sikkink, *From Christian Civilization to Individual Civil Liberties, in SECULAR REVOLUTION*, *supra* note 136, at 310.

<sup>175</sup> *Id.* at 314. The author writes that “the classical reformers [those in the science of law movement] pursued a science of law that was meant to parallel botany or other physical sciences.” *Id.*

<sup>176</sup> Those representing the science of law were also convinced that “a university, and a university alone, can furnish every possible facility for teaching and learning” legal science. *Id.* at 315 (internal quotation marks omitted).

<sup>177</sup> See *id.* at 334. See also JURISPRUDENCE: TEXTS AND READINGS ON THE



Chipman Gray, and Roscoe Pound on the one hand, and formalists, like advocates of the science of law such as Langdell<sup>178</sup> on the other. The legal realists insisted that law was an organic phenomenon, the study of which could not be divorced from political and social fact. Law was not, as the formalists believed, about the meticulous gathering and organization of principles from legal reporters, because this approach undermined its nature as a living, breathing reality always shaped in a particular social context.

The winners of the first struggle were those representing the science of law. David Sikkink emphasizes that they succeeded in “delegitimizing the religious basis for legal decision making.”<sup>179</sup> They attacked the jurisprudence of the heart and its appeal to religion, substituting for it the “pure gaze of the scientific law professor.”<sup>180</sup>

But these legal reformers were not altogether dismissive of religion. The law, they insisted, must be “discovered.” It therefore possessed a transcendent aspect; it was as if they claimed a “direct line to God’s mind through their knowledge of the principles of legal science.”<sup>181</sup> But they were comfortable speaking only of “general religion” or “general Christianity.”<sup>182</sup> Although theirs

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PHILOSOPHY OF LAW (George C. Christie ed. 1973). Christie states that “legal realism” possesses the following four characteristics: (1) a desire to separate law from morality in legal analysis, (2) a distrust of legal formalism, i.e., deducing legal conclusions from rules of law, (3) a suspicion of all legal generalizations along with the desire to break them down into smaller units, and (4) a belief in the instrumental work that law can accomplish in society. *Id.* at 641–42. I use the term “legal realism” very broadly to include not only Holmes, Gray, and Pound, but also sociological jurists like Louis Brandeis, Benjamin Cardozo, Karl Llewellyn, Felix Cohen, and Jerome Frank.

<sup>178</sup> Langdell was dean of the Harvard Law School and initiated the “case method” system of instruction. This method, still followed in law schools today,

rested on the concept that the law could be scientized as neatly and efficiently as chemistry or biology. If one could isolate gases, observe their properties, and draw conclusions from which scientific principles could be developed, one ought to be able to bring the same logic to legal precedents, reach back into time for the earliest applicable cases and trace their progress, observe the properties of each, and from them develop constant legal principles . . . .

LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 208 (1991). Holmes, convinced that law could not be properly studied divorced from pertinent political and social realities, despised “case method” instruction, thought it largely worthless, and stayed in law school only a year. *Id.* at 208–09. *See also* JEROME FRANK, *COURTS ON TRIAL* 226 (1949), where he quotes Langdell, saying: “What qualifies a person to teach law . . . is not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law. . . .”

<sup>179</sup> David Sikkink, *From Christian Civilization to Individual Civil Liberties, in* SECULAR REVOLUTION, *supra* note 136, at 316.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 316–17. In *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892), the Supreme Court referred to this country as “a Christian nation.” But the reference, it

was not “that good old-time religion,” it was nevertheless one that molded character and conformed to the dictates of a general morality.<sup>183</sup>

The winners of the second struggle were the legal realists. They were convinced that judges did not discover law, but were policymakers who create it.<sup>184</sup> Holmes, who was representative of the group, argued that “[t]he ground of [a judicial] decision really comes down to a proposition of [social and political] policy.”<sup>185</sup>

He and other realists, like Louis Brandeis and Benjamin Cardozo, were also empiricists to the core. They were more impressed by social and political differences than by unities and similarities. Holmes believed, according to one biographer, that the “truth was only what he couldn’t help thinking on the basis of observation and experience, and his only absolute was an absolute abhorrence of absolutes.”<sup>186</sup> There were, for him, no eternal guideposts in law that imparted to it a transcendent dimension. It was and is located in a sea of relativism and, in the final analysis, is a product of human construction.

Needless to say, Holmes was, in terms of religious faith, an agnostic. There was little room in his judicial philosophy for a belief in God.<sup>187</sup> Law was, in his view, separate and distinct from religion and morality, and simply “embodies the story of a nation’s development through many centuries.”<sup>188</sup>

His attack on legal formalism began in the nineteenth century, but rolled onward, gathering momentum with new and powerful voices, through most of the twentieth century. The eventual demise of formalism thoroughly secularized law in America. Religion—general or otherwise—no longer had a protected place in this country’s public life. The autonomy of the in-

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should be noted, is couched in general, as opposed to sectarian, terms. David Sikkink, *From Christian Civilization to Individual Civil Liberties*, in *SECULAR REVOLUTION*, *supra* note 136, at 318.

<sup>183</sup> David Sikkink, *From Christian Civilization to Individual Civil Liberties*, in *SECULAR REVOLUTION*, *supra* note 136, at 320.

<sup>184</sup> *Id.* at 323.

<sup>185</sup> *Id.* at 328 (quoting WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 180 (1998)).

<sup>186</sup> *Id.* at 327 (quoting LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 11 (1991)).

<sup>187</sup> *Id.* at 324. Holmes was a well-read man, who had studied and been influenced by both Comte and Spencer. *See id.* at 325. In *Lochner v. New York*, he wrote, “The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.” 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>188</sup> David Sikkink, *From Christian Civilization to Individual Civil Liberties*, in *SECULAR REVOLUTION*, *supra* note 136, at 327 (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 *HARVARD LAW REVIEW* 457–78 (1897)).

dividual, along with the capitalization of individual civil rights, came to the forefront in jurisprudence. One's beliefs regarding religion amounted to a private, individual right. The state's function was to remain religion-neutral, while at the same time protecting those whose religious liberties were infringed.<sup>189</sup>

#### 4. Summary Observation

It should not be overlooked that the Court's emphasis upon individual autonomy and state neutrality coincided with the modes of thought of traditional liberalism. Just as the secularization of higher education ultimately owed a profound debt to Kant<sup>190</sup> as one of the primary architects of liberal thought, and the secularization of science built upon the dichotomy in his thought between empirical knowledge and faith, the secularization of law illustrated, first, the attempt to redefine itself as a formalistic science so as to be regarded as a discipline of knowledge that was worthy of the university and, second, after this attempt failed, to cast itself as the means of safeguarding individual autonomy against collectivist forces, such as those of religion, which were thought to militate against the spirit of the individual. The secular revolution was one, in the final analysis, about politics. It represented the triumph of political liberalism.

### B. Supreme Court Cases and Establishment Tests

Around the middle of the twentieth century, after the secular revolution was already won and the brightest legal minds in the country had effectively concluded that religion should have at best a marginal role in American public life, the Supreme Court received an opportunity to express its newfound sense of the relationship between religion and the state.<sup>191</sup>

#### 1. Constitutionalizing the Wall

The question before the Court was whether a township in New Jersey could, without violating the Establishment Clause of the First Amendment,<sup>192</sup> tax its citizens for the costs of transporting children to church schools.<sup>193</sup> Justice Black, speaking for the majority of the Court, answered the question in the affirmative,

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<sup>189</sup> Elsewhere I have described the strong emphasis upon autonomy in the Court's interpretation of the Religion Clauses. See *From Typology to Synthesis*, *supra* note 81.

<sup>190</sup> For a lengthy discussion of Kant's liberalism and its influence upon jurisprudence, see L. Scott Smith, *Religion-Neutral Jurisprudence: An Examination of Its Meanings and End*, 13 WILLIAM & MARY BILL OF RIGHTS JOURNAL 815, 823-39 (2005) [hereinafter "*Religion-Neutral Jurisprudence*"].

<sup>191</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>192</sup> U.S. CONST. amend. 1.

<sup>193</sup> *Everson*, 330 U.S. at 5.

but in the course of doing so spelled out the meaning of the Establishment Clause as follows:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."<sup>194</sup>

Justice Black emphasized that the individual is free to accept or to reject religious belief and that all governmental entities, whether local, state, or federal, must remain neutral, neither favoring nor disfavoring any religious persuasion.<sup>195</sup> In support of his opinion, Justice Black invoked not only Jefferson's celebrated metaphor of "a wall of separation," but also "Virginia's Bill for Religious Liberty," authored by the same patriot.

## 2. The Advent of the *Lemon* Test

In the cases that followed *Everson*, the Court declared unconstitutional a number of attempts by government to interject religion into public life. Based upon such decisions, the Court was able to formulate, almost a quarter of a century after *Everson*, what became known as the "*Lemon* test" for determining Establishment Clause violations. The test mandated that, in order to pass scrutiny (1) a statute have a secular purpose, (2) there be no evidence that the statute's principal effect is to advance or to inhibit religion, and (3) the statute not foster excessive entanglement between government and religion.<sup>196</sup> The primary goal of this three-pronged test was to ensure that religion and the affairs of state be separate from each other. Religion was relegated to a private sphere of American life separate and distinct from the public one, where issues of state are debated and decided and its business is administered.<sup>197</sup>

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<sup>194</sup> *Id.* at 15–16.

<sup>195</sup> *Id.* at 18.

<sup>196</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>197</sup> The following cases are but a few in which the *Lemon* test was applied: *Stone v. Graham*, 449 U.S. 39 (1980), where the posting of the Ten Commandments in public school classrooms was held to violate the Establishment Clause; *Wallace v. Jaffree*, 472 U.S. 38 (1985), where the authorization of a period of silence "for meditation or voluntary

### 3. The Endorsement Test

Thereafter, Justice O'Connor, in a concurring opinion in *Lynch v. Donnelly*,<sup>198</sup> a case that involved whether a crèche displayed on public property in Pawtucket, Rhode Island during the holiday season violated the Establishment Clause, suggested that the *Lemon* test be modified and recast as an "endorsement test." According to Justice O'Connor, the question to ask, first off, is whether the government intends by a specific practice to convey a message of endorsement or disapproval of religion; secondly, whether the practice has the effect of communicating a message of endorsement or disapproval of religion; and thirdly, whether there is institutional entanglement between religion and the government.<sup>199</sup> This test was subsequently utilized by the Court in *County of Allegheny v. ACLU Greater Pittsburgh*.<sup>200</sup> It is not appreciably different from the *Lemon* test in terms of attempting to insulate the state's business from any expression of religion. The goal was, at bottom, to safeguard the secular nature of all state endeavors, which are largely co-extensive with American public life.

### 4. The Coercion Test

Subsequently, the Court in *Lee v. Weisman*,<sup>201</sup> a case involving whether a rabbi offering a nonsectarian prayer at a school commencement ceremony violated the Establishment Clause, advanced its "coercion test." The Court explained that a state may not place any student at a school-sponsored event in the position of either participating in or protesting a religious activity. A person cannot, in short, be coerced; he or she cannot be made to feel

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prayer" was held to violate the Establishment Clause; *PEARL v. Nyquist*, 413 U.S. 756 (1973), in which New York statutory amendments providing for (1) maintenance and repair of school facilities and equipment to insure the health, welfare and safety of pupils, (2) a tuition grant program, and (3) a tax benefit program for those failing to qualify for tuition reimbursement, and largely for the benefit of Roman Catholic schools and their students were declared violations of the Establishment Clause; *Meek v. Pittenger*, 421 U.S. 349 (1975), where sections of the Pennsylvania Public School Code were stricken down as offenses against the Establishment Clause insofar as they provided instructional material, equipment, and auxiliary services to parochial schools; *Wolman v. Walter*, 433 U.S. 229 (1977), in which an Ohio statute was held to violate the Establishment Clause by providing instructional materials, equipment, and field trip expense to parochial schools; and *Edwards v. Aguillard*, 482 U.S. 578 (1987), in which a Louisiana statute providing that there could be no teaching of the theory of evolution unless it was accompanied by instruction in "creation science" was held a violation of the Establishment Clause.

<sup>198</sup> 465 U.S. 668 (1984).

<sup>199</sup> *Id.* at 689–93 (O'Connor, J., concurring).

<sup>200</sup> 492 U.S. 573 (1989) (holding that a crèche displayed by itself on public premises is a violation of the Establishment Clause).

<sup>201</sup> 505 U.S. 577 (1992). The Court followed *Lee* in *Santa Fe v. Doe*, 530 U.S. 290 (2000), in which the Court struck down a Texas school district's policy of allowing a student chaplain to pray at school football games.

like an outsider in an activity that is sponsored by an instrumentality of the state. The thrust of the coercion test was to defend individual autonomy by protecting the secular character of any activity in which the state is involved.<sup>202</sup>

### 5. The Historical Test

These three tests, whenever the Court desires, have been selectively used and then abandoned by it when considering establishment violations. A state act or practice can, rather mysteriously to some observers, be evaluated in terms of the antiquity of the practice involved. The Court, for example, decided that the Nebraska Legislature's eighteen-year practice of hiring a Protestant clergyman to open each day's legislative session with a prayer was not contrary to the demands of religious freedom or disestablishment.<sup>203</sup> Such decisions left pundits wondering what factors determined which test would be applicable in future contests. Predictability in Establishment Clause cases largely vanished and an apparent case by case approach fast became the predominant rule, if there ever was one.<sup>204</sup>

Could it be that the Court's wavering approach to the anti-establishment norm indicated a largely subjective jurisprudence that was more concerned, in the spirit of Justice Holmes, with charting political policy than with attempting to measure, according to the rationale of a Christopher Langdell, some supposed Constitutional truth? It is to the political implications of the Court's jurisprudence that we turn next.

## IV. ANALYSIS

### A. Justice Black and the *Everson* Decision

#### 1. *Everson* and the "Wall of Separation"

The *Everson*<sup>205</sup> decision does not demonstrate the slightest attempt to understand Jefferson's correspondence with the Danbury Baptists, nor does the decision acknowledge any possible differences between the meaning that Jefferson imparted to the "wall of separation" and that which the Court gave to it. It appears that Justice Black appropriated the metaphor in a manner that was not only foreign to the third President's meaning and purpose, but to his political philosophy as well.

Critics may hasten to observe that it is hardly remarkable

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<sup>202</sup> *Lee*, 505 U.S. at 588.

<sup>203</sup> *Marsh v. Chambers*, 463 U.S. 783, 785–86 (1983).

<sup>204</sup> *From Typology to Synthesis*, *supra* note 81, at 51–53.

<sup>205</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

for the Court, or for a Justice who has served on it, to make creative use of history and legal precedent in order to support or to oppose any given point-of-view. That is correct, but before incorporating a metaphor into the Religion Clauses of the First Amendment, is it too much to expect that a modest exegesis of the metaphor's meaning inform the endeavor?

When Jefferson utilized this phrase, there are numerous reasons to suggest he was attempting to point out that the national government had no power over religious concerns. Baptists, who had been sadly persecuted in New England and elsewhere for their dissident beliefs, desired assurances from the new President that he would support religious freedom and not the establishment of a national church. Might it be that he was attempting to give them this assurance in his now famous letter and, again, in his Second Inaugural Address? In the latter, he stated,

In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.<sup>206</sup>

In view of such evidence, it is at best problematic to advocate that Jefferson meant by the metaphor to propose a thoroughly secular public life. He appeared to believe that the regulation of religion was best left to the individual states and to religious institutions themselves.

I am not dogmatically urging that the meaning of Jefferson's letter to the Baptists is a settled one; it is an open question admitting of diverse historical judgments. One may even allow, for the sake of argument and in accordance with the view of some historians, that Justice Black's appropriation of Jefferson's language is on the correct side of the argument. This allowance notwithstanding, the point is that the Justice's treatment of the issue is far from historically serious. One can only guess how he might have responded to the observation made in this Article, that Jefferson took up the metaphor in an attempt to limit national power, while his (Justice Black's) own purpose was unquestionably to expand it.

## 2. *Everson* and Politics

This brings one to the crux of the matter: the most salient fact about the majority decision in *Everson* is that it was a politi-

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<sup>206</sup> *Second Inaugural*, *supra* note 112, at para. 7.

cal one. In its aftermath, the Supreme Court, thanks additionally to the doctrine of incorporation,<sup>207</sup> would be emboldened by its new authority to scrutinize all state action regarding religion and, in turn, to outlaw any manifestation of religious devotion that was co-mingled with a state-sponsored activity. The decision brought increased power to the Court by giving it a police function that allowed the Court essentially to redefine appropriate secular standards in the states and to assure that they be met. *Everson*, in short, had everything to do with politics and little, if anything, to do with a critical reading of history.

### 3. *Everson* and the Secular Revolution

The secular standards that *Everson* concretely laid down were far from new. They were not the product of the Court's ingenuity. They were part and parcel of the secular revolution that had already been accomplished in this country by the turn of the twentieth century and that had transformed Europe a century before that. Immanuel Kant had dichotomized reason, which, he insisted, had two spheres; one contained knowledge (with a sensible content), while the other comprised thinking (without it). The former was a theoretical realm of science and progress, whereas the latter was a practical one of metaphysics, morals, and religion. Science possessed a public character, while religion was relegated to personal and private life. The state, according to Kant, had no right to impose any religious or moral beliefs upon its citizens. It was to honor each person's individual autonomy.

The *Everson* decision constitutionalized not only Jefferson's metaphor, but also imparted to it the thought patterns of the secular revolution. *Everson* dictated that religious concerns and state concerns would forevermore be separate and distinct from each other. The state would not interfere with the autonomy of the individual in religious matters, but would be "a neutral in its relations with groups of religious believers and non-believers."<sup>208</sup> What was more, the public square would be free of religion; specifically, of any form of religious expression in schools and school-sponsored events. Nonsectarian prayer and devotional Bible-reading without comment, released time programs for religious instruction, and any religious holiday displays would henceforth be regarded as imposing and coercive, as the illicit importation of private matters of faith into the public square. What the *Everson* decision did not state, even though it was written in large print between the lines, was that the Establishment Clause was to be

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<sup>207</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>208</sup> *Everson*, 330 U.S. at 18.



construed through the lens of the political dogma of liberalism, dating back at least to Kant and provided new twists by Comte and Spencer.

#### B. The Central Notions of Liberalism

The problem with liberalism has to do with its central notions, such as state neutrality and individual autonomy. Elsewhere I have analyzed these ideas,<sup>209</sup> and I will not attempt to recapitulate here my previous discussions concerning them, other than briefly to point out that state neutrality constitutes an impossibility and that individual autonomy, when divorced from moral and religious boundaries, lends itself to anarchy and chaos.

Consider for a moment the situation in a public school classroom, in which there is no school prayer, devotional Bible-reading, singing of Christmas carols, display of the Ten Commandments, or group recitation of “under God” in the Pledge of Allegiance. The silence is unquestionably audible. Can even a distantly observant person think that this atmosphere does not convey a strong impression to a student concerning the significance (or, better yet, the insignificance) of these activities in the life of the community and in his or her life as a public citizen? If, on the other hand, such activities are part and parcel of the school curriculum, would any person dare defend them as “neutral”? State neutrality is a chimerical concept for law professors, philosophers, and Supreme Court justices to ponder and to make sense of, but it is a notion without clothing in the real world where people interact on a daily basis with one another.

Consider too a scene that has become commonplace on the streets of every major city in this country. A homeless drug-addict is offered, but refuses, the assistance of healthcare professionals. He or she “chooses” instead to continue living on a public sidewalk, where all his or her bodily functions are exercised. Does the idea of individual autonomy, unbounded by any and all moral and religious constraint, not inure to the society’s detriment? Is such a notion not tantamount to chaos? A realm of personal, private autonomy free of any such constraint cannot be defined consistent with the goals of freedom.

State neutrality and individual autonomy, as incoherent as both are, nonetheless constitute pillars of the secular ideal. It is this ideal that has inspired the *Lemon*, the endorsement, and the coercion tests. The “godless” state, which supposedly epitomizes

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<sup>209</sup> See “Religion-Neutral” Jurisprudence, *supra* note 190, and *From Typology to Synthesis*, *supra* note 81.

neutrality, exists to safeguard the individual autonomy of its citizenry by insuring that their decision-making process is untrammelled, however slightly, by the imposition of any moral or religious value that might, by happenstance or otherwise, creep into state-supported activity. Another name for this political regime, according to those who support it, is “the separation of church and state,” and among its many plaudits, is that it purportedly honors the memory of Thomas Jefferson and other American patriots. That is as historically suspect as its central notions are philosophically untenable.

### C. The Epistemology of Liberalism

The idea of two spheres, one secular, embodying the naturalistic pursuit of knowledge, and the other religious, encompassing unverifiable belief and ritualistic practice, is not only unworkable, but also rests upon epistemological premises that are thoroughly doubtful, if not altogether incorrect. Kant and the other thinkers who shaped the secular revolution in both Europe and America were convinced that belief in God amounted to thinking and not knowing.<sup>210</sup> Indeed, for Comte, religious belief of any kind was superstitious and infantile; and, according to Spencer, religious knowledge was impossible because there was no corresponding empirical datum. Without re-tracing arguments made elsewhere, it must suffice to observe that the argument that science is intellectually rigorous and defensible, while religion is not, does not pass muster. The “truths” of science are not eternal. They are not part of a sphere of certitude; hence, they cannot be differentiated from religious claims in that fashion. As Alvin Plantinga reminds us with a hint of humor, John Trowbridge, who was chairman of the department of physics at Harvard University in the 1880s, encouraged students not to major in physics since most discoveries in the field had already been made;<sup>211</sup> after all, there could be but one Newton as there was but one universe. Plantinga also underscores the temporary character of scientific truth, when he writes as follows: “We all know of scientific theories that once enjoyed consensus but are now discarded: caloric theories of heat, effluvial theories of electricity and magnetism, theories based on the existence of phlogiston, vital forces in physiology, theories of spontaneous generation of life, the luminiferous ether, and so on.”<sup>212</sup>

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<sup>210</sup> See “Religion-Neutral” Jurisprudence, *supra* note 190, at 836–39.

<sup>211</sup> Alvin Plantinga, *Creation and Evolution: A Modest Proposal*, in *DARWINISM, DESIGN, AND PUBLIC EDUCATION* 519 (John Angus Campbell & Stephen C. Meyer eds., 2003).

<sup>212</sup> *Id.*

It is most interesting to note that Richard Rorty, one of today's stellar proponents of liberal thought as well as a devout atheist, explains that he is opposed to religion, but not on epistemological grounds. He is quoted as stating the following:

I do not think that Christian theism is irrational. I entirely agree . . . that it is no more irrational than atheism. Irrationality is not the question but rather, desirability. The only reason I can think of for objecting to Christian theism is that a lot of Christians have been bigoted fanatics. But of course, so have a lot of atheists. . . .

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. . . Atheism is more practical only if you wish to form a pluralistic, democratic society. In that situation, the persistence of the theist who claims to know that this or that is against God's will becomes a problem. So atheists find themselves wishing that these groups would wither away.<sup>213</sup>

Is Rorty not effectively conceding, then, that it is indefensible to argue that Christian theism should partake of a separate sphere because it is more irrational and more fanatically supported than a godless ideology? His point appears to be simply that atheism is more conducive to the formation of a democratic society. But that is a strange argument, is it not, when most of those within American society describe themselves as "Christian?" Rorty criticizes "the persistence of the theist who claims to know that this or that is against God's will" but he does not disapprove of the atheist who claims to know that it is not.

#### D. A Political Choice

The truth that pervades Rorty's transparent observation is the same one that rose to the surface in our discussion of the secular revolution and in our consideration of the Court's embrace of the liberal, secular ideal. That truth concerns politics. When phrased in its most elemental fashion, the issue concerns the kind of state in which one desires to live. Does one want to live in a secular state under a "godless Constitution," where each individual is an autonomous end to him- or herself, and where autonomy may often move perilously close to chaos? Or, alternatively, does one wish to live in a state where basic moral and religious values, including the notion of deity, are upheld and promoted, but where such values may create resentment and be experienced as an imposition? There is nothing magical about this choice. It need not, as I have demonstrated, be covered over with layer upon layer of historical investigation, philosophical

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<sup>213</sup> Stephen Louthan, *On Religion—A Discussion with Richard Rorty, Alvin Plantinga, and Nicholas Wolterstorff*, 27 CHRISTIAN SCHOLAR'S REV. 177, 178, 183 (1996).

analysis, or judicial precedent-weighting. The problem is one that cannot be fully resolved by resorting to any of these modes of thought. Although they may contribute to the illumination of options, this does not alter the reality that the underlying problem involves making an easy to understand, even crudely simple, political choice.

The choice is not a lopsided one, where only one of the combatants comes loaded with historical and empirical evidence and heavy intellectual muscle. Except for the reality that traditional liberalism reigns as undisputed champion throughout most elite cultural institutions, like the academies of higher education, the media, and the Supreme Court, the match is, in most respects, an even contest. One searches in vain for an eternal truth dictating that higher education *must* marginalize the religious impulse, that the pursuit of science *must* be inextricably tied to methodological naturalism,<sup>214</sup> and that the law *must* be interpreted to mandate the secularization of the public square. Nowhere is it written, except in the political philosophy of liberalism and its cousins, such as naturalism and instrumentalism,<sup>215</sup> that religious thought has to be relegated to the nethermost regions of the mind and comprise what is ungraciously referred to, in political terms, as personal and private, or merely “sectarian,” belief.

The Supreme Court has not yet admitted what most pundits and political interest groups already know about it; namely, that the issues with which it, as an institution, must grapple boil down to a political struggle, pure and simple, and that the most significant measuring rod of where any Justice stands in the struggle concerns the way in which he or she understands the relation of religious values to the state. By and large, liberalism’s secular ideal still prevails on the Court, but there is reason to suspect that the ideal may no longer have the unconditional appeal it once had. To examine this contention, I now turn to the Court’s most recent decisions regarding the public display of the Ten Commandments.

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<sup>214</sup> See L. Scott Smith, *On Teaching Neo-Darwinism in Public Schools: Avoiding the Pall of Orthodoxy and the Threat of Establishment*, 11 ROGER WILLIAMS U. L. REV. 143, 175–78 (2005). See also Alvin Plantinga, *When Faith and Reason Clash: Evolution and the Bible*, in INTELLIGENT DESIGN CREATIONISM AND ITS CRITICS: PHILOSOPHICAL, THEOLOGICAL, AND SCIENTIFIC PERSPECTIVES 113, 136–39 (Robert T. Pennock ed., MIT Press, 2001).

<sup>215</sup> For an invigorating, thoughtful, and provocative discussion of the way in which education, science, and law have been conjoined with and defined by the philosophy of naturalism, see generally PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW & EDUCATION (1995). Naturalistic discourse is one of the byproducts of a public sphere from which religion is excluded.

## V. THE PUBLIC DISPLAY OF THE TEN COMMANDMENTS

### A. Introduction

The Supreme Court, during the summer of 2005, handed down two decisions concerning the public display of the Ten Commandments and did so with diverse outcomes. In the *Van Orden* decision, the Court held in favor of the display, but in the *McCreary County* decision held against it. A consideration of the various opinions by the Justices will aid one in understanding where each of them stands regarding the relationship between the state and its embodiment of religious values. More significantly, we will also be able to observe how the Justices are engaged in a political dispute, with the proponents of the liberal-secular ideal on the one side and the advocates of a state embodying some moral and religious values on the other.

### B. *Van Orden v. Perry*

In *Van Orden*,<sup>216</sup> the text of the Ten Commandments was displayed on a monument, six feet high and three feet wide, that was located on twenty-two acres surrounding the Texas state capitol and containing a number of other monuments and historical markers.<sup>217</sup> Van Orden, the petitioner, sought first a declaration that the monument violated the Establishment Clause, and second, an injunction for its removal.<sup>218</sup> Chief Justice Rehnquist wrote the plurality opinion, in which Justices Scalia, Kennedy, and Thomas joined.

#### 1. Chief Justice Rehnquist's Plurality Opinion

Chief Justice Rehnquist, rejecting Van Orden's claims, explained that the Court's decisions under the Establishment Clause attempt to address two concerns. The first is historical and consists of the positive role of religion and religious traditions throughout the country's history, while the second is philosophical and embodies the principle that state intervention in religious matters can impede religious freedom.<sup>219</sup> The challenge is to respect both concerns. "Our institutions," he reminded us, "presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens."<sup>220</sup> There must be a respect for history and for the principle of church-state separation.

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<sup>216</sup> 125 S. Ct. 2854 (2005).

<sup>217</sup> *Id.* at 2858.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 2859.

<sup>220</sup> *Id.*

The Chief Justice, for reasons he failed to explain, does not consider the *Lemon* test “useful in dealing with the sort of passive monument”<sup>221</sup> involved in this case. The test that seems to shape his opinion most was the one of *Marsh v. Chambers*<sup>222</sup> that tends to measure, according to the antiquity of a religious practice, whether it has a place in American public life. He recited profusely from President Washington’s Thanksgiving Day Proclamation, in which the President announced an official day of prayer and thanksgiving to observe “with grateful hearts, the many and signal favors of Almighty God.”<sup>223</sup> The Chief Justice further noted the public place of honor provided to Moses and the Decalogue within the Supreme Court’s own courtroom, as well as in the rotunda area of the Jefferson Building, on the floor of the National Archives, inside the Department of Justice, and in front of the Ronald Reagan Building.<sup>224</sup> He was, of course, equally cognizant of legal precedents, like *McGowan v. Maryland*,<sup>225</sup> in which the Ten Commandments have, at least in part, been upheld in public life. The Legislative and Executive branches, he maintained, have respectfully recognized the role of the Ten Commandments in America’s heritage.<sup>226</sup>

The religious character of the Decalogue is openly acknowledged in this opinion, but the Chief Justice stressed that “the Ten Commandments have an undeniable historical meaning.”<sup>227</sup> It is really upon this “historical meaning” that his opinion turns. That the case involved neither primary nor secondary education and that Van Orden walked by the monument for a number of years before bringing his lawsuit were also facts deemed highly relevant to the opinion.<sup>228</sup>

## 2. Justice Thomas’s Concurrence

Justice Thomas, concurring in the Chief Justice’s opinion, argued for returning “to the views of the Framers and adopt[ing] coercion as the touchstone”<sup>229</sup> for interpreting the Establishment Clause. In this context, “coercion” means one is compelled to take a particular action “by force of law and threat of penalty.”<sup>230</sup> In this sense, Van Orden was obviously not coerced, and there is

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<sup>221</sup> *Id.* at 2861.

<sup>222</sup> 463 U.S. 783 (1983).

<sup>223</sup> *Van Orden*, 125 S. Ct. at 2861.

<sup>224</sup> *Id.* at 2862.

<sup>225</sup> 366 U.S. 420 (1961).

<sup>226</sup> *Van Orden*, 125 S. Ct. at 2863.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 2863–64.

<sup>229</sup> *Id.* at 2867 (Thomas, J., concurring).

<sup>230</sup> *Id.* at 2865 (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (Scalia, J., dissenting)) (emphasis omitted).

no cognizable establishment violation.<sup>231</sup>

By recommending that the Court “return to the views of the Framers”<sup>232</sup> and to “the original meaning”<sup>233</sup> of the Establishment Clause, Justice Thomas supported a particular historical understanding of the Constitution; i.e., the view that it was written sympathetically to religion and was never intended to secularize all activities sponsored by the states. He reminded us of the doubt he expressed in the *Newdow* case concerning whether the Establishment Clause is applicable to the states by reason of its incorporation into the Fourteenth Amendment.<sup>234</sup> He continued to leave the door ajar for the entertainment of this theoretical possibility, by writing: “If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue.”<sup>235</sup>

Reasons for adopting the method of originalism, he asserted, have to do in part with the inadequacies of the *Lemon* and endorsement tests, which have brought even the most trivial vestiges of the religious to the federal courthouse for litigation.<sup>236</sup> Both tests save religious words and symbols from being stricken down as establishment violations only by “declaring them of little religious significance.”<sup>237</sup> His point is that, to pass constitutional muster, words and symbols, even when admittedly religious, must be justified in secular terms. Such a compromise is unfair to believers and nonbelievers alike and results finally in judicial incoherence and confusion.<sup>238</sup> The unintelligibility of the Court’s body of precedents in this area serves to highlight the eyebrow-raising specter that Establishment Clause cases turn finally on “judicial predilections”<sup>239</sup> or, in other words, on “the personal preferences of judges.”<sup>240</sup>

### 3. Justice Breyer’s Concurrence

Concurring in the plurality’s judgment, Justice Breyer asserted that Establishment Clause cases are fact-intensive ones<sup>241</sup> and that there was and is “no test-related substitute for the exercise of legal judgment.”<sup>242</sup> He highlighted the following facts that

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 2867.

<sup>233</sup> *Id.* at 2865.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 2865–66.

<sup>237</sup> *Id.* at 2866.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 2867.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 2869 (Breyer, J., concurring in the judgment).

<sup>242</sup> *Id.*

were important to him in reaching his decision: specifically, that the monument was donated by the Fraternal Order of Eagles to shape civic morality as a way of combating juvenile delinquency,<sup>243</sup> that its physical setting suggests little or nothing that is religious,<sup>244</sup> that for forty years the location of the monument on public property was unchallenged,<sup>245</sup> and that the display was not on public school grounds.<sup>246</sup>

After emphasizing what he regarded as decisive facts of the case, Justice Breyer weighed them against the *Lemon* test. The Texas display, he thought, demonstrated no religious purpose, illustrated that its primary effect was neither to advance nor to inhibit religion, and resulted in no excessive government entanglement with religion. Although his opinion happened to coincide with the three prongs of the *Lemon* test,<sup>247</sup> Justice Breyer insisted that the formulation of his opinion rested upon a consideration of the basic purposes of the Religion Clauses, i.e., to “assure the fullest possible scope of religious liberty and tolerance for all,”<sup>248</sup> rather than upon the application of any particular test.

#### 4. Justice Stevens’s Dissent

Justice Stevens, with whom Justice Ginsburg joined in dissent, took the position that the state of Texas, by agreeing to the placement of the monument on capitol grounds, endorsed “the divine code of the ‘Judeo-Christian’ God.”<sup>249</sup> Justice Stevens passionately opined, “[i]f any fragment of Jefferson’s metaphorical ‘wall of separation between church and State’ is to be preserved—if there remains any meaning to the ‘wholesome “neutrality” of which this Court’s [Establishment Clause] cases speak,”<sup>250</sup> then the subject display is unquestionably unconstitutional.

Not only does the display constitute Texas’s endorsement of a divinely-given Code, but the state, argued Justice Stevens, is also unwittingly fueling a sectarian conflict concerning which version of the Code is the proper one, since the display features one version of it to the exclusion of others.<sup>251</sup> If this were not enough constitutionally to condemn the display, one could likewise consider that it impermissibly prefers religion over irreligi-

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<sup>243</sup> *Id.* at 2870.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 2871.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 2868 (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963)).

<sup>249</sup> *Id.* at 2874 (Stevens, J., dissenting).

<sup>250</sup> *Id.* (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)).

<sup>251</sup> *Id.* at 2879–80.



gion, such that nonbelievers and polytheists are made to feel like outsiders.<sup>252</sup>

Justice Stevens reserved his most forceful criticism for those who advocate originalism. First, he stated that the Founders' speeches, some of them with prolific religious allusions, should not be interpreted as a direct reflection of the government's position on the church-state relationship, as would the "permanent placement of a textual religious display on state property."<sup>253</sup> Second, he reminded us that religious statements and proclamations were not espoused at the Constitutional Convention nor enshrined in the text of the founding document.<sup>254</sup> Third, he observed that historical investigation renders ambiguous results, noting that Jefferson refused to issue Thanksgiving proclamations and that Madison, in his *Detached Memorandum*,<sup>255</sup> later voiced disapproval of his public religious proclamations and of the appointment of Congressional chaplains at state expense.<sup>256</sup> Fourth, the Justice noted that many of the Framers understood the word "religion" in the Establishment Clause to include only Christian sects;<sup>257</sup> thus, a return to the original meaning of the word would necessitate the exclusion of those in other religions. Fifth, he argued that the Establishment Clause narrowly constricted to the national government and not applicable to state governments through the incorporation doctrine would mean that a state could "constitutionally adorn all of its public spaces with crucifixes or passages from the New Testament . . . [or] would also have full authority to prescribe the teachings of Martin Luther or Joseph Smith as *the* official state religion."<sup>258</sup>

Justice Stevens, in conclusion, emphasized, "[t]he principle that guides my analysis is neutrality."<sup>259</sup> It is a principle, he asserted, rooted in this country's history as well as in the text of the Constitution.<sup>260</sup>

##### 5. Justice Souter's Dissent

The thrust of Justice Souter's dissent, joined by Justice Ginsburg, was that the Establishment Clause "requires neutral-

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<sup>252</sup> *Id.* at 2881.

<sup>253</sup> *Id.* at 2883.

<sup>254</sup> *Id.*

<sup>255</sup> James Madison, *A Detached Memorandum*, in SEPARATION OF CHURCH AND STATE, *supra* note 7, at 138, 141.

<sup>256</sup> *Van Orden*, 125 S. Ct. at 2884 (Stevens, J., dissenting).

<sup>257</sup> *Id.* at 2885.

<sup>258</sup> *Id.* at 2887.

<sup>259</sup> *Id.* at 2889.

<sup>260</sup> *Id.*

ity as a general rule.”<sup>261</sup> Relying upon *Stone v. Graham*,<sup>262</sup> Justice Souter stated that there is no doubt the Ten Commandments amount to a religious statement.<sup>263</sup> When displayed on public property any such religious text constitutes a violation of the Establishment Clause, unless the circumstances of its display indicate that it is not placed there “with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others.”<sup>264</sup> In this instance, “the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it.”<sup>265</sup> Governmental neutrality, stressed the Justice, has been lost in this instance: “any citizen should be able to visit that civic home without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion.”<sup>266</sup>

Justice Souter distinguished between Texas’s display of the Decalogue and “any number of perfectly constitutional depictions”<sup>267</sup> of it, such as the frieze in the Justices’ own courtroom, on which Moses is secularly depicted as one lawgiver, among many, holding the tablets of the Commandments.<sup>268</sup> Although the Texas display is one of numerous ones on the state capitol grounds, Justice Souter doubted the secular purpose of it, since he did not think that it is tied by appearance, history, or aesthetic sense to the other monuments, but stands on its own.<sup>269</sup>

### C. *McCreary County, Kentucky v. ACLU of Kentucky*<sup>270</sup>

#### 1. Introduction

McCreary and Pulaski Counties, in the state of Kentucky, conspicuously displayed the King James version of the text of the Ten Commandments in their respective courthouses.<sup>271</sup> After litigation was instituted by the American Civil Liberties Union of Kentucky against the two counties seeking to enjoin the displays, the counties each altered their displays on two separate occasions, first by expanding the display<sup>272</sup> and, second, by installing

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<sup>261</sup> *Id.* at 2892 (Souter, J., dissenting).

<sup>262</sup> 449 U.S. 39, 42–43 (1980) (holding that the mandatory posting of the Ten Commandments in public classrooms violated the Establishment Clause).

<sup>263</sup> *Van Orden*, 125 S. Ct. at 2892 (Souter, J., dissenting).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 2893 (citation omitted).

<sup>266</sup> *Id.* at 2897.

<sup>267</sup> *Id.* at 2894.

<sup>268</sup> *Id.* at 2893–94.

<sup>269</sup> *Id.* at 2895.

<sup>270</sup> 125 S. Ct. 2722 (2005).

<sup>271</sup> *Id.* at 2728.

<sup>272</sup> *Id.* at 2729.

another display that still featured the Commandments.<sup>273</sup> In the second display, the Commandments were central to it, but were present along with eight small-framed documents bearing a religious theme.<sup>274</sup> In the third display, set up after the district court had ordered the removal of the second one in each county, nine framed documents of equal size were posted.<sup>275</sup> The third display was not set up pursuant to any new county resolution.<sup>276</sup>

## 2. Justice Souter's Majority Opinion

Justice Souter, with whom Justices Breyer, Stevens, Ginsburg, and O'Connor joined, emphasized that the counties' actions had no secular purpose and, hence, violated the "central Establishment Clause value of official religious neutrality,"<sup>277</sup> still as important "an interpretative guide"<sup>278</sup> as it was in *Everson*.<sup>279</sup> Reminding the two counties that "the world is not made brand new every morning,"<sup>280</sup> the Court, by means of the fictional "objective observer"<sup>281</sup> of the endorsement test, is free to examine the history of the counties' various displays and to conclude that, when considered together, they demonstrated a definite governmental purpose to advance a form of religion.

Justice Souter criticized the originalism of Justice Scalia, insisting that the latter's reliance upon the Framers is at best inconclusive as there is no compelling evidence of a consensus among them regarding the role of religion in public life. Justice Souter further lambasted his colleague's view that the deity of the Framers "was the God of monotheism"<sup>282</sup> and pointed out, *à la* Justice Story, that the purpose of the Establishment Clause was simply "to exclude all rivalry among Christian sects."<sup>283</sup> The original meaning of the clause, in other words, did not give a privileged place to monotheistic conceptions of deity "with Mosaic antecedents."<sup>284</sup>

## 3. Justice O'Connor's Concurrence

Justice O'Connor joined the majority's opinion. She main-

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<sup>273</sup> *Id.* at 2730.

<sup>274</sup> *Id.* at 2729.

<sup>275</sup> *Id.* at 2730.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 2733 (majority opinion).

<sup>278</sup> *Id.* at 2742.

<sup>279</sup> 330 U.S. 1 (1947).

<sup>280</sup> *McCreary*, 125 S. Ct. at 2736.

<sup>281</sup> *Id.* at 2735.

<sup>282</sup> *Id.* at 2744.

<sup>283</sup> *Id.* at 2745 (quoting Justice Story, *in* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 13 (1988)) (emphasis omitted).

<sup>284</sup> *Id.*

tained that the Establishment Clause prohibits government coercion, preference, and endorsement in matters of religion,<sup>285</sup> and opined that the counties' display "conveys an unmistakable message of endorsement to the reasonable observer."<sup>286</sup>

#### 4. Justice Scalia's Dissent

Justice Scalia was joined in his dissent by the Chief Justice, Justice Thomas, and Justice Kennedy in part, and proclaimed his desire to return to the original meaning of the Establishment Clause. To that end, he pointed out that the first actions by all three branches of the national government<sup>287</sup> were to foster morality and civil responsibility by encouraging religion.<sup>288</sup> He adduced supportive evidence from Presidents Washington, John Adams, Jefferson, and Madison<sup>289</sup> and asked, "With all of this reality (and much more) staring it in the face, how can the Court possibly assert that the "the First Amendment mandates governmental neutrality between . . . religion and nonreligion?"<sup>290</sup>

The principle of religion-neutrality has, he stated, been abandoned by the Court on a number of occasions.<sup>291</sup> The only "good reason"<sup>292</sup> why the Court occasionally ignores it has to do with the desire to save face with the American people who, he insisted, would not stand for an across-the-board application of it.<sup>293</sup> Because Justice Scalia rejects the principle, he found no reason to declare that the counties' displays of the Ten Commandments violated the Establishment Clause. According to his reading of the Clause, it permits the disregard of polytheists as well as of atheists.<sup>294</sup>

Justice Scalia pointed out that he has adduced in support of his position, in contrast to that of Justice Stevens, primarily official acts and proclamations of the United States, such as the First Congress's commencement of the practice of legislative prayer, its appointment of congressional chaplains, its proposal of a Thanksgiving Proclamation, President Washington's Thanksgiving Proclamation, and the invocation of God at the opening of sessions of the Supreme Court.<sup>295</sup> In further reply to

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<sup>285</sup> *Id.* at 2746 (O'Connor, J., concurring).

<sup>286</sup> *Id.* at 2747.

<sup>287</sup> *Id.* at 2748–49 (Scalia, J., dissenting).

<sup>288</sup> *Id.* at 2749.

<sup>289</sup> *Id.* at 2749–50.

<sup>290</sup> *Id.* at 2750.

<sup>291</sup> *Id.* at 2751–52.

<sup>292</sup> *Id.* at 2752.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 2753.

<sup>295</sup> *Id.* at 2753–54.

his colleague, Justice Scalia maintained that, even though the text of the Constitution may fail to elucidate the meaning of the Establishment Clause, such official state actions do.<sup>296</sup> In addition, the religious view supported by the Framers was, he opined, broadly monotheistic, since they proclaimed a single beneficent God, but never Jesus Christ.<sup>297</sup>

Justice Scalia of course took issue with the notion of the “living Constitution.”<sup>298</sup> He questioned why, if the Constitution is supposed to change in accordance with “democratic aspirations,”<sup>299</sup> the same are always found in the Justices’ own personal views of the Establishment Clause rather than in the current society’s dispositions.<sup>300</sup>

He likewise denied that his originalist position marginalizes the belief systems of millions of Americans who are not of a monotheistic persuasion. Far from it. Polytheism, he insisted, is completely protected by the Religion Clauses, but it does not follow from that fact that the state’s invocation of God is an establishment.<sup>301</sup>

Justice Scalia believed that the net effect of *McCreary* is to heighten the requirements of *Lemon*, first by justifying inquiry into legislative purpose as a means of ascertaining how governmental action would appear to an objective observer, and second by requiring that a secular purpose predominate over any purpose to advance religion.<sup>302</sup> In other words, no longer is the search for a secular purpose, but the search now consists of a rigorous and full-scale review of the facts with the idea that, in order to pass constitutional muster, any religious purpose must be subordinate to the secular one.<sup>303</sup>

Justice Scalia concluded his dissent with the observation that the exhibits in question were meant only to focus upon the historic role of religious belief in the country’s communal life. That role, he insisted, is permissible.<sup>304</sup> To outlaw them on that basis is to fall prey to what Justice Goldberg once called an “untutored devotion to the concept of neutrality”<sup>305</sup> and would, without question, “commit the Court (and the Nation) to a revisionist

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<sup>296</sup> *Id.* at 2754–55.

<sup>297</sup> *Id.* at 2755.

<sup>298</sup> *Id.* at 2756.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 2757.

<sup>303</sup> *Id.* at 2758.

<sup>304</sup> *Id.* at 2762–63.

<sup>305</sup> *Id.* at 2763 (quoting *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

agenda of secularization.”<sup>306</sup>

## VI. ANALYSIS

### A. Any Sure Verdict from History?

The opinions of the Justices concerning governmentally supported religious displays turn, in large part, upon a consideration of the role of religion in the earliest days of the Republic. Justices Scalia and Thomas are convinced that the Framers, including Thomas Jefferson, who was not in attendance at the Constitutional Convention, appreciated public religion and desired to encourage it. Justices Souter and Stevens, on the other hand, entertain doubts about that proposition. Yet they all cull through the pages of history, quick to highlight any evidence to support their respective points-of-view. There is a veritable mountain of evidence on either side of the issue, but these are separated by a canyon, both deep and wide, representing the historically unknown, and perhaps unknowable. The crux of the problem is that the Constitutional Convention did not explicitly and substantively address the role of religion in public. Nowhere within the paragraphs of the country’s founding document is there so much as a reference to God. We are left, ultimately, looking down into an abyss of silence, from and about which we are free to conclude whatever we wish. My contention is not that all historical investigations end in deadlock, but that the search for a consensual view among the Founders concerning the role of religion in public life is an investigation that has managed to disappoint more than it has satisfied hopeful expectation. The search has proven to be an historical dead-end.<sup>307</sup>

Arguing about that which is irresolvable raises a host of interesting questions, not the least of which is the following: “What do we hope to accomplish by the exercise?” The issues of the de-

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<sup>306</sup> *Id.*

<sup>307</sup> Steven G. Gey, in critical response to Carl H. Esbeck’s historical conclusions from history regarding the church-state relationship throughout the early years of the Republic, is not sanguine about the historical approach to the Religious Clauses. Gey astutely points out, “When all is said and done, the historical account of church and state in the early republic leaves us right where we started . . . .” See Steven G. Gey, *More Or Less Bunk: The Establishment Clause Answers That History Doesn’t Provide*, 2004 B.Y.U. L. REV. 1617, 1630 (2004). Gey further argues, “History frames the discussion about constitutional meaning and provides a context in which the various dimensions of constitutional questions can be viewed in sharp relief. History provokes us to ask the right questions, but it will never give us all the right answers.” *Id.* at 1631. With these comments, I generally agree. But then Gey, more than a bit mysteriously, adds, “However, an honest fealty to history will yield an Establishment Clause that no religiously pluralistic modern democracy would want or accept.” *Id.* This statement tends to assume that an “original meaning” is discoverable if the historical investigator is but honest in the pursuit of it. Gey has, whether he knows it or not, stated two positions that are not compatible.

bate may certainly be brought into stark, trenchant focus, but that in and of itself does not issue in a resolution. Perhaps one will be sufficiently impressed by particular strands of evidence that he or she will venture a conclusion and defend it in a two-fisted manner in a learned monograph. Yet others taking an antipodal position will do the same. The question is whether, given the state of the evidence, the kind of historical argument in which the Justices are engaged is not an exercise in futility.

I contend that it is, if the hope is for an answer beyond reasonable dispute. As the Justices' expressions of opinion about establishment matters have grown increasingly animated, the Court has become more deeply divided than ever. That is because the problem posed by the presence of religion in circles of state is not one that will ever be resolved by historical inquiry. Resort to the metaphorical mantra of "a wall of separation" solves nothing; it only triggers the historical reflection that has plunged the Court into its current morass. Historical investigation may certainly enlighten us by charting one or more plausible explanations, but it is farfetched to believe that such investigation will one day conclude the debate.

#### B. A Discussion of Justice Scalia's Originalism

Justice Scalia's determination to uncover the original meaning of the Establishment Clause purchases a variety of assumptions that are problematic. The first is that "original meaning" lends itself to discovery through meticulous historical investigation. This assumption is false; in fact, the "original meaning" that one derives from an investigation appears to have as much, if not more, to do with the historical investigator as it does the data investigated. How are we, for example, to assess James Madison's *Detached Memorandum*? Is it a group of idle reflections teetering upon irrelevancy by virtue of having been written by the man years after he left office? Or does the *Memorandum* provide us the profoundest kind of insight into Madison's most seasoned thoughts? In the same way, when William Williams of Connecticut, who suggested that the Preamble of the Constitution be modified to include reference to "the one living and true God, the creator and supreme Governour of the world,"<sup>308</sup> but nonetheless approved the document without this or any other such reference, what may we conclude by his action? Some may argue he came to accept the notion that the Constitution is an entirely secular document, while others may charge that, since the choice before the state ratifying conventions was either to ac-

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<sup>308</sup> See *William Williams to the Printer*, *supra* note 21, at 193.

cept or to reject the newly proposed Constitution, he chose to do the former in the hope that the document would later be amended. On what principled basis do we decide upon the “original meaning”?

Yet let us assume, *arguendo*, that the welter of historical questions that present themselves concerning the Framers’ thoughts, ideas, and intentions regarding the relationship between religion and the state readily lend themselves to original meaning analysis. What precisely are we to do with our conclusions? Are we free, in Pickwickian fashion, to transplant them into our contemporary state and culture, into post-modernity if you will? If so, how do we square original meanings with our radically expanded notion of the state, our changing demographics, and the advent of cultural problems the Framers could scarcely have imagined? Even Justice Scalia is not sufficiently audacious to suggest that original meanings can broadjump into the twenty-first century.

He has instead involved himself, perhaps unwittingly, in an exercise chock-full of assumptions and abstractions. Consider the progression of his argument—he defends public displays of the Decalogue by appealing to the Framers’ monotheistic vision of God, and then moves to a “disregard of polytheists and believers in unconcerned deities.”<sup>309</sup> The First Commandment states, “Thou shalt have no other gods before me.” It exemplifies a henotheistic faith, one defined as belief in a single deity without denying the existence of others, rather than a monotheistic faith, which holds to belief in a single god. Justice Scalia’s transition from the Ten Commandments to monotheism is unwarranted. His conclusion that “polytheists and believers in unconcerned deities” can be disregarded on the strength of the Establishment Clause does not follow, since he has not proven that the Commandments, which he believes shaped the Framers’ religious views, are built upon a monotheistic faith.

Even if the transition from the Commandments to the Framers’ view of God were perfectly sound, one still cannot move from Christian monotheism to monotheism in general without engaging a formidable abstraction and being transported a considerable distance from the Framers’ original meaning. Monotheism does not necessarily entail beneficence or grace. One may believe in a single deity who instructs his or her devotees to kill and to plunder their neighbors as infidels. Such a belief, I dare say, is light-years from the notion of deity entertained by any of the Framers. So Justice Scalia’s attempt to capture original meaning

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<sup>309</sup> *McCreary*, 125 S. Ct. at 2753 (Scalia, J., dissenting).



succeeds mainly in disclosing his own “judicial predilections” and “personal preferences,”<sup>310</sup> an endeavor that his comrade in arms, Justice Thomas, roundly criticizes.

### C. Justices Souter and Stevens on Neutrality

It is to Justice Breyer’s credit that he frankly admits the role of subjective “legal judgment” in Establishment Clause cases.<sup>311</sup> Those with whom he voted in both *Van Orden* and *McCreary*, to be sure, exercised such judgment. Justices Stevens and Souter did so, although they appeared to rest their judicial analysis on the principle of neutrality. Justice Souter declared, “If neutrality in religion means something, any citizen should be able to visit that civic home [the capitol grounds in Texas] without having to confront religious expressions clearly meant to convey an official religious position that may be at odds with his own religion, or with rejection of religion.”<sup>312</sup> Justice Stevens also insisted, “The principle that guides my analysis is neutrality.”<sup>313</sup> What they both mean by “neutrality” is that the state is to be indifferent to religion, relegating it to a private sphere. They mean that the Constitution is a godless document that was intended to create a godless state. If one can walk the capitol grounds in Austin, Texas and not be confronted by religious expressions, that suggests that religious expressions are banned there. “Neutrality,” for these Justices, bristles with hostility to religion. I have elsewhere analyzed the various meanings of this term and concluded, “The net effect of utilizing the concept of neutrality in religion cases amounts to little more than judicial legerdemain and obfuscation.”<sup>314</sup> What more can one say about judicial action that

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<sup>310</sup> *Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (Thomas, J., concurring).

<sup>311</sup> *Id.* at 2869 (Breyer, J., concurring in the judgment). Gregg Abbott, the Texas Attorney General who defended the constitutionality of the Decalogue display in the *Van Orden* case, comments that Justice Breyer’s “‘legal judgment’ rule may prove fulcrumatic in the future.” Gregg Abbott, *Upholding the Unbroken Tradition: Constitutional Acknowledgment of the Ten Commandments in the Public Square*, 14 WM. & MARY BILL RTS. J. 51, 59 (2005). Is it a “rule” or a judicial decision-making process? It is difficult for one to understand how this “rule” constrains a Justice to any outcome other than the one which he or she desires.

<sup>312</sup> *Van Orden*, 125 S. Ct. at 2897 (Souter, J., dissenting).

<sup>313</sup> *Id.* at 2889 (Stevens, J., dissenting).

<sup>314</sup> “*Religion-Neutral Jurisprudence*, *supra* note 190, at 815, 870. It is important to realize that “neutrality” is a term that conveys various meanings, depending upon the underlying political theory driving the interpretation of the Religion Clauses. Their opinions in these two Ten Commandments cases leave no doubt that Justices Souter and Stevens are using the term to mean indifference toward the religious, which for them has no constructive role to play in the public arena. Yet compare their opinions here with the majority opinion in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), emphasizing that a school voucher program was religion-neutral, because it conferred educational benefits to a large group of people “without reference to religion.” *Id.* at 653. Needless to say, Justices Souter and Stevens dissented. The latter stated that “the voluntary character of the private choice to prefer a parochial education over an education in the public school sys-

purports to be neutral toward the religious while prohibiting it in all state-sponsored activity and, at the same time, giving the irreligious free reign?

This rhetorical question brings me to a crucial point concerning the secular ideal. The kind of neutrality that Justices Souter and Stevens praise is that of traditional liberalism, which commits one to a secular revisionist agenda. Liberalism dichotomizes our lives into public and private spheres. Religious expression finds a home only in the latter. This means that congressional and legislative chaplains, references to God on the currency or in the Pledge of Allegiance, an isolated public display of the Ten Commandments or of a crèche during the holiday season, prayer and devotional Bible-reading in public schools, and all other references to God in the public sphere are misguided, out-of-place, and coercive. But why must the Establishment Clause of the Constitution be so interpreted? I have argued in Parts II through V of this Article that such a necessity is not real, but only imagined. Neutrality, as understood by Justices Souter and Stevens, is shorthand for the secular ideal of traditional liberalism. That ideal is not dictated by the actual text of the Constitution any more than Justice Scalia's original meanings.

#### D. Toward a Political Jurisprudence

If we reject traditional liberalism and its secular ideal and reject Justice Scalia's method of original meaning, where does that leave us? It leaves us in precisely the same place where we were following Part V of this Article. We have a political choice to make, either in favor of the godless state or against it.

It is not popular to regard Supreme Court Justices as propounding answers to political questions. Yet that is what they do when they confront Establishment Clause cases. Both "original meaning" and "neutrality" analysis are ways of expressing political positions. Original meaning is an expression of what I have elsewhere called "de facto establishmentarianism,"<sup>315</sup> and "neutrality" embodies, as I have stated, the philosophy of liberalism.<sup>316</sup> While neither is found in the actual text of the Constitution, both are typologies that are implied by the Religion Clauses.

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tem seems to me quite irrelevant to the question whether the government's choice to pay for religious indoctrination is constitutionally permissible." *Id.* at 685 (Stevens, J., dissenting). Justice Souter, in a similar way, viewed the Ohio voucher program to be in conflict with *Everson*. *Id.* at 688 (Souter, J., dissenting). The meaning of neutrality depends upon the political theory that is in place.

<sup>315</sup> 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).

<sup>316</sup> *Id.*

The Supreme Court, instead of engaging in what is at best a sophistic debate, where genuine political perspectives are camouflaged and obscured by glib discussions of “neutrality” and “original meaning,” could do much better to admit that the resolution of Establishment Clause cases is not to be found in historical investigation, philosophical analysis, or the examination of legal precedents, although all three may contribute to decisions. The essential, but missing, ingredient from the Court’s discussions is a frank acknowledgment of the importance of political typology.

“Political typology” does not suggest that there be an open, free-for-all discussion of politics in judicial decisions, but of only those political positions that result from combining the Religion Clauses of the First Amendment. What I mean by “combining the Religion Clauses” may be briefly explicated as follows: the Establishment Clause may be understood in terms of “accommodationism” or “separationism,” and the Free Exercise Clause in terms of “narrow” or “expansive” free exercise. The various combinations of these possibilities give rise to four political points-of-view: (1) separationism and narrow free exercise—classical liberalism; (2) separationism and expansive free exercise—communitarianism; (3) accommodationism and expansive free exercise—revised liberalism; and (4) accommodationism and narrow free exercise—de facto establishmentarianism.

These political typologies can contribute to an overarching synthesis, which allows one to recast the jurisprudence of religion in a straightforward and hardheaded political fashion. Elsewhere I have attempted to do this.<sup>317</sup> The primary advantage of such an effort is that, while it acknowledges that the Religion Clauses lend themselves to various forms of political analysis, it presses forward toward a comprehensive, synthetic approach of adjudication, without allowing any one typological position to be overwhelmed by the others. What is more, because the approach I am defending is balanced, it might well present itself as a helpful compromise for breaking the ideological and political logjam that presently divides the Court and that renders its jurisprudence of religion a “muddle.”<sup>318</sup>

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<sup>317</sup> *From Typology to Synthesis*, *supra* note 81.

<sup>318</sup> Michael W. McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?*, in *FIRST AMENDMENT LAW HANDBOOK* 269 (James L. Swanson & Christian L. Castle eds., 1990). One may ask about *Van Orden* and *McCreary*, “Where do these split decisions leave those desiring to post the Decalogue, or wondering if existing postings pass Constitutional muster?” See Sue Ann Mota, *Competing Judicial Philosophies and Differing Outcomes: The U.S. Supreme Court Allows and Disallows the Posting of the Ten Commandments on Public Property in Van Orden v. Perry and McCreary County v. ACLU*, 42 WILLAMETTE L. REV. 99 (2006), in which the author attempts to give the reader guidelines by which to chart constitutionality. *Id.* at 120. Such an effort is largely misspent. The fact is that there is a political tug-of-war occurring on

## CONCLUSION

“Does God belong in American public life?” is the question with which we began. The answer is nowhere explicitly set forth in the Constitution, nor is it unambiguously suggested by a study of the Framers’ ideas and actions. Any answer to the question derived from in-depth historical inquiry will, at best, receive only support from, not be necessitated by, that inquiry. Kramnick and Moore, as I have argued, will convince no one of the truth of their thesis who is not already convinced. After examining the historical evidence pertaining to whether the Constitution was intended to create a godless state, a fair-minded investigator, not given to tendentious examination of the sources, will admit that he or she is unsure.

The historical uncertainty that looms over this question compels one to ask another: Why, then, has the Establishment Clause, since *Everson*, been interpreted as if the Constitution were intended to give birth to a secular state? I have argued that this has little to do with the Constitution and most everything to do with the secular revolution that roared like a tsunami over Europe and began flooding into this country during the last half of the nineteenth century. By the end of that century, higher education, the pursuit of the natural sciences, and the study of law had begun functioning in a secular mode. By the middle of the twentieth century, the Supreme Court had interpreted the Establishment Clause as erecting a “wall” by which to protect the state from the slightest vestiges of religion. The Court, by means of the incorporation doctrine and a disregard for the balances of federalism, had essentially proclaimed itself the unconditional guardian of liberty, who meticulously polices the “high and impregnable wall” separating American public life from religious words and actions. I have suggested, categorically and unabashedly, that the Court’s secularization agenda was an attempt to enhance its own power as well as to walk in step with the intelligentsia’s secular revolution.

One’s answer to the question posed by this Article, I have also maintained, comes down in the final analysis to a political determination. Either one accepts the idea of a secular state or one rejects it. There is no place to look outside politics for a definitive answer.

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the Court, and Establishment decisions hang frequently by a mere thread. What is at stake is whether the secular ideal of traditional liberalism, as set forth in *Everson*, will continue to survive. There is little for the practitioner to do than to present the most compelling arguments he or she can on one side or the other, with the realization that the debate is essentially about politics, not interpreting the fine points of legal precedent.

The Supreme Court's recent adjudication of two cases involving the public display of the Ten Commandments demonstrates the inconclusiveness of any historical argument, since the same Justices in both cases adduced evidence to affirm one display and to outlaw the other. The thoroughly transparent arguments in behalf of "original meaning" and "neutrality" serve only to highlight the underlying political nature of the question before the Justices and their political treatment of it.

Finally, I have recommended that the Court break its blockage of discourse and self-consciously adopt a political theory of religion-jurisprudence, one that holds together the strongest points of the political typologies that emerge from a consideration of the Religion Clauses. Since the Court is involved in political policymaking anyway, such a theory would not be an extreme departure from its routine practice. Yet the theory would demand that the Court honestly acknowledge the political nature of the subject matter. The balance in the theory would also comprise a kind of compromise, since using the theory means holding all political perspectives in a synthetic unity without allowing one perspective to be overwhelmed by the rest. The notion of deity, conceived in a broad, but not explicitly Christian manner (de facto establishmentarianism), can and should belong to American public life, along with a respect for the values of individual autonomy (classical liberalism), freedom of association (communitarianism), and freedom of expression (new liberalism).<sup>319</sup>

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<sup>319</sup> See *From Typology to Synthesis*, *supra* note 81.