V: 2008 nr 1
Krakowskie
Studia
Międzynarodowe

Christopher Wolfe

CHURCH AND STATE: THE CURRENT CONSTITUTIONAL DEBATE IN THE USA[1]

Where do we stand today in the constitutional debate regarding Church and State? We are certainly *not* in the era during which the original understanding of the First Amendment religion clauses was dominant. In the Establishment Clause area, we are still in the *Everson* era, which began in 1947 and ushered in a new and quite different understanding of establishment. In the Free Exercise area, we are no longer in the *Sherbert* era, since the *Smith* case in 1990 – though I will discuss below the "accidental" character of that (partial) return to the original understanding.

In neither area, however, is there a truly settled law: the Court is deeply divided and many justices (of quite different views) are dissatisfied with where it stands.

The current constitutional law of Church and State is as polarized as the United States as a whole is on so many political issues – and it seems unlikely that the polarization will be going away any time soon. That is part of the bad news. The good news is that the modern approach to the religion clauses, which had departed so dramatically from the original understanding, and which was dominant a generation ago, is now deeply embattled in a way that it had not been for many years, and that a single vote could turn the Court's jurisprudence around pretty dramatically.

[1] This article was originally delivered as a keynote paper at the Hillsdale Center for Constructive Alternatives conference on "Church and State: History and Theory" Hillsdale MI, September, 2006.

The other part of the bad news is that I think we are unlikely to get that single vote any time soon. Let me start by giving a broad overview of each of the religion clauses, and then I will continue by commenting on the current situation, about the framers, and about religion and politics.

The Free Exercise Clause

I will begin with the Free Exercise clause, because I think that we have at least some clarity about where the Court is in this area today.

The original understanding of the Free Exercise clause is represented especially by the "secular regulation rule." Not prohibiting the free exercise of religion meant 1) government could not impose religious belief on anyone, 2) government could not compel people to engage in religious practices contrary to their conscientious beliefs, and 3) government could not, on religious grounds, prevent people from acting on their religious beliefs.

Those three principles were, however, compatible with the government insisting on obedience to secular laws that incidentally prohibited some people's religiously motivated actions. Human sacrifice is the paradigm case: no matter how sincere the religious belief behind it, human sacrifice will be punished. And, in the early or traditional era of U.S. constitutional history, during which judges identified kinds or categories of legitimate government power, rather than determining what degree of power it was legitimate to exercise, this meant that it was up to legislatures to decide whether to provide exemptions for religious minorities whose practices were inconsistent with law, e.g. whether to give pacifist religious believers exemptions from military service obligations.

The secular regulation rule was the legal norm until 1963. Questions about it were already being raised in the 1940s and 1950s, and, in some of these cases, free speech considerations were able to provide protection to religious minorities, as in the 'flag salute' case of 1943. But, as late as 1961, the Court upheld a Sunday closing law (interpreted now as a secular day of rest) against Orthodox Jewish arguments for a constitutionally mandated exemption to do business on Sunday.

In 1963, dissenters from the *Braunfield* case became the majority, and ushered in the *Sherbert* era. South Carolina's denial of unemployment benefits to a Seventh-Day Adventist who refused to take a job working on her Saturday Sabbath certainly had secular grounds: deterring spurious religious claims that would dilute the unemployment compensation fund and interfere with employers scheduling necessary work on Saturday. But the Court held that those valid secular interests were outweighed by the free exercise rights of Mrs. Sherbert. In fact, the Court said, only if the state interest were compelling, and less restrictive means were not available, could rights as important as free exercise be curtailed.

There is some debate as to what happened in the course of the next 17 years. Justice Scalia argued retrospectively that the Court had never during this period abandoned the general principle that neutral, generally applicable laws were legitimate, even when they curtailed religious exercise. Most observers, however (rightly, in my opinion), had no doubt that the compelling state interest test was the law of the land, though there were particular cases (e.g. the military, prisons) in which it might not be applied.

The compelling state interest test is a classic form of modern judicial review, in which the Court balances a constitutional principle against countervailing state claims to limit the principle, evaluating the importance of each in the circumstances of the case and determining which should take precedence. There is little in this process that is genuinely "judicial." It is effectively a legislative balancing of interests, with a heavy presumption on the side of the right being invoked and a heavy burden of proof on government to justify its impingement on the right. It had the effect of making the Supreme Court a National Conscientious Religious Action Review Committee.

That ended in 1990, in the *Smith* case. Drug counselors in Oregon who had engaged in Indian religious ceremonies involving the use of peyote were fired and denied unemployment compensation, and the Court upheld the government action. Justice Scalia did some fancy footwork with precedent, arguing that the *Sherbert* era was riddled with decisions that found that there *was* a compelling state interest, or found reasons *not* to apply that standard, or applied it in very limited and unusual circumstances, and so he concluded that the secular regulation rule – the principle that neutral, generally applicable laws were enforceable despite free exercise claims – had never actually been abandoned.

Scalia put the case starkly: the only alternative to maintaining the secular regulation rule was to adopt one of two positions: either the religious conscience was a law unto itself, or judges had to sort through religious and state claims and make policy judgments about where to draw the line. Neither of these options was tolerable. Scalia honestly recognized that religious minorities might be put in difficult situations, unable to muster the political power to secure exemptions for themselves that more powerful religions could achieve. But the alternative, he thought, was worse.

On the face of *Smith*, one might think that free exercise is that rare area in which the Supreme Court has actually jettisoned a modern judicial approach and returned to a more traditional form of judicial power. The fact of the matter is that the members of the Court majority (Scalia, Rehnquist, Stevens, White, Kennedy) could hardly be viewed as firm adherents of traditional judicial review. Scalia was, and Rehnquist was most of the time, at least in his opinions. White was more selective about his sense of judicial limits (and they were more prudential than principled), and Kennedy was new to the Court and had not yet had time to 'grow.' But, most importantly, the key fifth vote came from Justice Stevens, whose views in

the case reflected primarily his very strong Establishment Clause strict separationism. Most of the other members of the majority had Establishment Clause views that either favored broader accommodation, or at least leaned that way. Stevens's views across both clauses, however, reflected a deep hostility to public recognition or accommodation of religion.[2] It is ironic that, on the basis of his vote, the Court returned in the Free Exercise area to an approach that, if it were applied in the Establishment Clause area, would result in a great deal of public accommodation of religion that he would detest.

The Establishment Clause

The account of where we are today regarding the Establishment Clause is hopelessly complicated. I will have to ask you to tolerate even more than the usual over simplication in order to describe it.

The key to understanding the original meaning of the Establishment Clause is to recognize, as Gerry Bradley argued in his *Church-State Relationships in America*[3], that it did not reflect the meaning of any one group debating the matter during the Founding. There was a wide range of such groups and the key point is that, in its final form, the Establishment Clause satisfied *all* these groups, from the most separationist to the most accommodationist. (It is thus a serious misunderstanding to take Jefferson and Madison as representative figures of the Founding, which is far from the case in the area of religion.) The Clause is able to satisfy everyone because it was primarily a federalism provision. It prohibited the federal government not only to establish a national religion (providing public support or discriminating in favor of a religion or religions), but also to interfere with existing state policy toward religion (including establishments in some states).

The major limit on Congress and religious issues came in the form of the federal government's enumerated powers, which did not include any direct dealing with religion. Anything the federal government did in early American history that touched on religion was tangential to another power, e.g. the power to make treaties with Indians, or to establish armies.

Moreover, very few Americans at the time objected to various public religious symbols, such as "In God We Trust" on coins, thanksgiving proclamations, and prayers in public assemblies (such as Congress itself). These were not thought to be "establishments," any more than the references in the Declaration of Independence to "Nature's God," "Creator," "the Supreme Judge of the world," and "Divine Providence" were considered to be. These references to the Deity were sect-neutral ("non-preferential," in today's terms) and therefore did not single out a particular

[2] See: W. Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, www.bu.edu/dbin/law/chess/bio/realism.pdf, pp. 2–3.

[3] *Church-State Relationships in America*, Greenwood Press 1987.

Church (or Churches) for "establishment." The public religious symbolism reflected the Founders' beliefs that the political community needed religion – that, in some sense, it rested on a religious foundation. This was the meaning of Justice Douglas's comment in *Zorach v. Clauson* that "We are a religious people, whose institutions presuppose a Supreme Being." The Declaration's grounding of natural rights in endowment by a Creator bears this out. Most famously, this view found expression in Washington's Farewell Address, in which he pointed out that a republican government found essential supports in religion and morality, and that (whatever the success of education promoting morality in some people) it would be a mistake to think that society could have an adequate moral framework without religion.

Consistent with this original understanding, throughout the nineteenth century and well into the twentieth American public schools typically functioned as Protestant parochial schools, not only including school prayer as a matter of course, but also suffusing the whole curriculum with religious ideals. There were certainly religious conflicts, most notably the question of how to integrate immigrant Papists into the American nation and patterns of anti-Semitism in social life. On the whole, though, there was a great deal of religious liberty, and new groups were fairly successfully integrated into the nation over time.

The turning point regarding the Establishment Clause in American legal history was *Everson v. Board of Education*, in 1947. While the Court ultimately (over a vigorous dissent) upheld one form of religious accommodation (busing students to Catholic schools), the main thrust of the opinion marked a profound change in the public status of religion. From the sect-neutrality of the original understanding – which was perfectly compatible with generalized support for religion, as long as it was non-discriminatory – the Court moved to neutrality between religion and non-religion. (I will not go into how this change came about – on this matter, see Philip Hamburger, author of the magisterial *Separation of Church and State*.[4])

The Court was really only working out the logic of *Everson* in the early 1960s, when it outlawed public school prayer. Of course school prayer encourages religion, even if religion is serving a public purpose in promoting morality, and so it had to go. It extended the logic of *Everson* in the 1970s and 1980s, when it held that various forms of public financial support for the non-religious activities of parochial schools also constituted "establishment" (though it continued to allow busing and textbook support for parochial school children).

But the 1980s then saw the beginning of a swing in the Court on parochial aid issues, even as it clung to fairly strong separationist views with respect to public schools, and mixed signals in the public symbolism area.

The Court allowed financial support to parochial schools for state-required testing, state tax deductions for tuition, textbooks, and transportation for all schools (including parochial schools), state support for vocational education even when the vocation chosen by the individual was the ministry, and a sign-language interpreter

[4] *Separation of Church and State*, Harvard University Press 2002.

in a public school. There was a blip in the other direction once, in 1985, when the Court struck down certain kinds of aid to parochial schools, but those cases were effectively reversed in 1997, after the Court noted, in a 1994 case, that the program they were striking down in that case (state establishment of a school district that included only a small and unconventional religious minority that risked mockery in public school special education classes) had only been necessary because of the obstacles the Court itself had previously erected to other ways of dealing with that problem. The Court subsequently upheld certain forms of instructional aids going directly to parochial schools and, finally – the big question that had been lurking behind all the other ones – it upheld a school choice program.

On the other hand, the Court hunkered down in public school cases, for the most part. In 1985, and again in 1992 and 2000, it reaffirmed strict limits on public school prayer. In 1987, it struck down a Louisiana law that required teaching "creation-science" whenever evolution was taught in public schools.

In the area of public religious symbolism, the Court permitted a public crčche in one case, and then upheld a menorah but not a Christmas crčche in another (largely due to the messages conveyed by the public displays, taken as a whole). It upheld not only a prayer, but a specifically denominational prayer in state legislatures (presuming, one supposes, that state politicians are somewhat less impressionable than children). Only recently, it struck down one Ten Commandments display in a courthouse, and upheld another on the Texas State Capitol grounds, and it ducked a decision on the merits of "under God" in the Pledge of Allegiance.

Few people accuse the Court of excessive rigidity of principle in the Establishment Clause area, and various justices have noted their own dissatisfaction with the Court's jurisprudence. The fact that Justice Anthony Kennedy is the Court's swing vote today does not make it seem likely that the Court will draw very clear-cut lines in this area any time soon.

Some Observations on the Current State of Church and State

There is much that could be said about recent developments in the constitutional law of church and state. For now, I will confine myself to four observations.

First, if one is interested in serious *interpretation* of the Constitution, the typical liberal view of the First Amendment religion clauses looks pretty weak these days. Even when it was being elaborated in the strict separationism of the school prayer cases and in *Sherbert*, Justice Stewart diagnosed a serious, and really unanswerable, objection: so read, the Clauses contradict each other. The modern Establishment Clause prohibits any kind of even indirect benefits for religion, and the Free Exercise Clause requires that certain religious believers be exempted from certain secular laws. Justice Stewart, arguing that the Founders gave priority to religious liberty, would have curtailed the modern Court's reading of the Establish-

ment Clause in order to allow, without contradiction, an expansive view of the Free Exercise Clause. Justice Stevens, on the other hand, would have voted (and did vote) to curtail the Free Exercise Clause in order to avoid contradiction between it and his very separationist Establishment Clause. For a long time, the Court exercised one of the most important prerogatives of a court that has the last say: it simply ignored the contradiction.

Another variant of the problem of the contradiction between the two clauses involved the definition of religion. When the Founders provided for the protection of the free exercise of "religion," I think they understood religion to mean worship of a Deity. Accordingly, they were following Locke in providing religious freedom for religious believers, but not for atheists.[5] The modern liberal Court version of constitutional law reads "religion" in the Free Exercise Clause more broadly as "the various possible answers to religious questions," including the "no" answer (atheism or agnosticism).

With respect to the Establishment Clause, however, the modern liberal Court has been highly sensitive to any indirect support for religion in the traditional sense, as various forms of worshiping a Deity, but has not been particularly sensitive to the indirect benefits accruing to secularists (atheists or agnostics) from its exclusion of religion from public life. It is true that direct or explicit favoring of atheism or agnosticism would be considered unconstitutional: under modern strict separationist views, one could not 'preach' atheism over different religions. But, for example, hypersensitivity to the benefits to religion of public support for religiously-affiliated institutions (such as parochial schools, or, more recently, faith-based initiatives like the Prison Fellowship program that was the object of the 140-page ire of an Iowa federal judge recently) was never matched by sensitivity to the advantages to secularist views flowing from the exclusion of religion from public schools.

Justice Rehnquist was the first justice to make extensive use of current scholarship (in the 1985 *Jaffree* case) in order to cast doubt on – or, better, to completely undercut – the historical vision at the heart of *Everson*. Justice Thomas has carried that process further in his dissent in the Pledge case, emphasizing the federalist character of the First Amendment and pointing out that trying to 'incorporate' the Establishment Clause into the Fourteenth Amendment is nonsensical. (If the Clause was intended to prevent the federal government from interfering with state religious arrangements, how can the states be prohibited from 'interfering' with their own arrangements?) Moreover, the historical evidence against incorporation is overwhelming. For example, in significant later-nineteenth-century debates over proposed amendments to apply the Establishment Clause to the states, no one on either side suggested that this had already been done by the Fourteenth Amendment, though the amendment debates were relatively fresh in their minds.

[5] I think this is one explanation for why Madison, in a letter to Jefferson, argued that the Bill of Rights was a good thing, though he acknowledged that the "rights of conscience" were not as well secured as he would have liked.

In fact, while Justice Souter valiantly tries to hold up the historical strict separationist argument, in the end even he seems to lack the confidence to put all his eggs in that particular historical basket. In his Court opinion in *McCreary County v. ACLU* (the Kentucky Ten Commandments case), he gives separationist historical arguments, but then, apparently sensing that these arguments are not really compelling, he arbitrarily declares a draw and concludes that "the fair inference is that there was no common understanding about the limits of the establishment prohibition."[6]

This inference is made more easily in light of the assertion that the Founders were, after all, "a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined. And none the worse for that. Indeterminate edges are the kind to have in a constitution meant to endure." It would be interesting to see if he could come up with even one person in the debates over the original Constitution or the debates over the Fourteenth Amendment who made this assertion: that they deliberately intended to leave the edges "indeterminate," with that indeterminacy to be fleshed out by judges. Of course, one might ask, regarding this indeterminacy, "*cui bono*?" Whose power is magnified by this assertion of indeterminacy – especially if the historical evidence the Court wishes to ignore is quite strong? And the fact is that the historical evidence is powerfully anti-*Everson*, and so strict separationism requires an 'interpretive' method – really an 'anti-interpretive' method – that downgrades historical meaning and upgrades "judicial specification of allegedly vague constitutional generalities."

My second observation about current Court opinions regarding religion and politics concerns the great emphasis that contemporary strict separationism places on the 'divisiveness' argument: if religion has any public standing, that will inevitably lead to terrible political battles over religion, which is precisely what the Framers of the First Amendment intended to prevent. (This is a legal version of the argument found in John Rawls that public acknowledgment of religion raises the specter of the Reformation wars.) Justice Souter (again, in *McCreary County v. ACLU*) says that "public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now. We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of … requiring the Government to stay neutral on religious belief…"

Justice O'Connor goes further, perhaps: "By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themsel-

[6] This is a reprise of *Brown v. Board of Education*'s method of handling original intent. When the evidence is against you, just cite the "law office history" on your side, and declare a draw – assert baldly (and without serious grounds) that original intention is "inconclusive" – and move on to do what you want to do.

ves fortunate." She goes on to assert that "allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs." Apparently, allowing the Ten Commandments on Kentucky courtroom walls would mean opening ourselves up either to new St. Bartholomew Day massacres or to the American version of Islamic fundamentalism – the dreaded Religious Right, presumably – seizing political authority, with violent consequences. Any favoring of certain religious ideas, such as religion in general (vs. irreligion), or monotheism, will inevitably lead to curtailing free exercise, to suppressing some people's religious beliefs.

That could happen, I suppose. And allowing the government to tax us at all could lead to elimination of all private property. And allowing a standing army could lead to a successful coup d'état by current officeholders. And … allowing judicial review at all could lead to judicial imperialism. But, in each case, it could be pointed out that it does not have to be that way, that prudent political decisions could allow the former without the latter. The idea that current efforts to allow more accommodation of religion in public life will inevitably, or even likely, result in serious curtailments of free exercise is largely a phantom of hyper-imaginative secularists, whose vision of religion is not tainted by actually knowing many religious believers.

These justices do not stop to consider whether the 'divisiveness' they see arising from debates over religion in our society might just be the result of reasonable religious believers objecting to attempts to thoroughly secularize public life. In a classic article years ago, Nathan Glazer pointed out that the phenomenon of the "Religious Right" was not a militant theocratic offensive to seize power and impose religion on the nation, but a defensive reaction of heretofore politically passive evangelicals against the secularizing decisions of the modern Supreme Court, especially the decisions on school prayer and abortion.

Justice Breyer has a more balanced view than his brethren in *Van Orden v. Perry* (the Texas Ten Commandments case): "But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious … Such absolutism is not only inconsistent with our national traditions … but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."

It is hard to resist the tendency to believe that the "divisiveness" argument really consists in the Court handing down divisive decisions and then being taken aback when those whom they have tried to marginalize in public life respond by fighting back. Justice Souter is appalled – yes, appalled – at the "divisiveness of religion in current public life," which brings to mind visions of the St. Bartholomew's Day massacre. If only religious believers would have the decency to keep their belief private, everything would be so fine and peaceful. To the extent that he stops to think that the Founders of American government thought that religion had quite a significant role to play in public life, his response is, implicitly, that we can use the wiggle room that the Founders supposedly left in order to move beyond them,

and we are "none the worse for that." But many people doubt that substituting the views of Justice Souter for the Founders' views leaves us better off, and they will not be cowed into submission by charges of "divisiveness."

Third, strict separationists have a serious conundrum. Their history is weak, and this shows up concretely in the maintenance of practices that can only be explained by earlier (pre-*Everson*) ideas of the relation between religion and politics in our constitutional system, and not by their modern (post-*Everson*) reformulation of those ideas – or, better, replacements for them. They are aware, however, that public sentiment behind some of these practices runs very, very deep, and that it might not be so prudent for a branch of government that has no enforcement power of its own to try to uproot them. What to do?

One answer (to which Justices Stevens and Souter, for example, subscribe fairly consistently) is simply to power ahead and trust that the Court is sufficiently powerful, and the nation sufficiently deferential, to extirpate these vestiges of an earlier view of religion and politics and replace them with complete governmental neutrality (that is, complete privatization of religion).

Justice O'Connor has a more nuanced view. Her preferred approach has been to ask whether a reasonable observer would consider a practice to "endorse" religion, thereby sending a message to nonbelievers that they are outsiders in the political community, and to believers that they are insiders. Some practices may appear to do so, but in fact they do not; rather, they are simple acknowledgments of our historical religious origins, or they are adopted, not for truly religious reasons, but because they are the only way to solemnize occasions in a nation with our history and circumstances. That is, some practices can be regarded as 'ceremonial deism,' which is not really religious and therefore does not endorse religion and therefore does not violate the Establishment Clause. One example of this ceremonial deism is the inclusion in the Pledge of Allegiance of the words "under God."

It is hard to know with certainty whether Justice O'Connor a) really believes that ceremonial deism is truly non-religious – which is not implausible, since it may very well be so for her and most of the intellectual elites she rubs shoulders with – or b) adopts this view in order to avoid unpleasant consequences of ruling such practices unconstitutional – which is plausible, because there are many people who clearly do regard it as religious and might seriously question the Court's legitimacy if it chose to strike down such practices. I am inclined to take people at their word, so I think it is likely that Justice O'Connor really believes that ceremonial deism is non-religious.

But I am also inclined to wonder what it means to say that ceremonial deism is the only way a people like ours can solemnize an occasion. Some people seem confident that such solemnity as is truly necessary can make do with secular language and acts. If that is not enough – if many people find an occasion truly 'solemnized' only if the Deity is invoked – is not that because those people regard the invocation not as merely ceremonial, but rather as the expression of a profound,

and politically relevant, truth – a truth that is theological as well as political? My fourth, and last, observation about modern constitutional law on the subject of religion and politics concerns the place in the Constitution. Why exactly, one might wonder, does the Constitution single out religion for special treatment? Contemporary liberal jurisprudence has a tendency, I think, to answer this question by conceiving of religion as a variation of other, non-religious phenomena. For example, religious belief is protected because it is part of a broad category of free speech. Religious actions are protected because they are part of a broad category of privacy. (David A. J. Richards's *Toleration and the Constitution*[7] is a good example of this tendency, but it can also be seen in Court opinions, for example Justice O'Connor's opinion in the *Kiryas Joel* case…) And, both with respect to speech and actions, there is a special focus on 'the rights of unpopular minorities." The overall thrust is to view the First Amendment more as protecting individual rights, especially rights of minorities, without much attention to the distinctive activity being protected. If free speech rights were given a wide interpretation, and if privacy rights were given a wide interpretation, it is not clear that there would remain any reason for having the religion clauses, except perhaps that religion might be viewed as a particularly dangerous kind of thing, needing special restrictions.

Madison's *Memorial and Remonstrance*, however well-adapted to supporting separationist views in other respects, is quite different from most contemporary constitutional commentary in its discussion of the duties that man has toward his Maker. One of the important reasons for religious freedom is that man's religious duties – especially his duty to worship his Creator – are very important. There is an acknowledgment here of religion as playing a distinctive and important role in human life, as something more than simply one (optional) variation of a "lifestyle" or "life plan," and as more than a phenomenon that poses only special political dangers.

Conclusion

I want to end with a few observations about the Founders' views of religion and politics. My own view is that we are bound, in law, by the principles the Founders embodied in our Constitution. I also believe that a reasonable interpretation of those views provides us with a fairly workable framework for dealing with questions of religion and politics. Having said that, however, I think there are some significant caveats to be offered.

First, judicial recognition of constitutional principles is not, by itself, enough to provide us with sound public policy regarding religion and politics. In the area of free exercise, for example, it is right that judges should not intervene to declare some secular laws insufficiently compelling to override demands for exemptions from religious minorities. As Justice Scalia argued in *Smith*, judges have no warrant to balance

[7] D. A. J. Richards, *Toleration and the Constitution*, Oxford University Press 1986.

the importance of state interests versus various degrees of impingement on religious rights. But saying that judges should not be doing that does not mean that nobody should be doing it. Viewed not from the perspective of judicial power, but from the perspective of constitutional principle, some secular laws really should give way to some religious claims. Amish parents who want to keep their children out of public high schools and educate them in the Amish way of life at home (at least until they become adults) should be viewed as having a constitutional right to do so – a right to be enforced not by judges, but by legislators, and the people who elect them.

Whatever the impropriety of a "compelling state interest" standard enforced by judges, I would argue that *legislators* ought to feel *constitutionally bound* to provide exemptions to serious religious believers whose religious freedom is curtailed by secular laws, unless there are important state interests that justify the curtailment. Nor would this create any Establishment Clause problem, because one important *secular* purpose for laws would be the vindication of Free Exercise rights.

Second, with respect to incorporation, I think that the free exercise clause's incorporation into the Fourteenth Amendment, while originally an incorrect constitutional interpretation, has become so embedded in our constitutional jurisprudence (without being subject to objections that it is inconsistent with the overall constitutional design), that, as a matter of precedent, it ought to be accepted. The establishment clause, for reasons discussed above, has been badly misinterpreted, but, again, as a matter of precedent, the component of establishment that prohibits states from establishing a religion – that is, from departing from the principle of sect-neutrality – is so deeply embedded in our society (and not inconsistent with overall constitutional design), that it too is a precedent that ought to be accepted.

Third, the Founders' views on Church-State issues are not free from problems. Establishment consisted of giving preferences to one or more religions, and nonestablishment required sect-neutrality. But the very notion of sect-neutrality shares some of the defects of modern across-the-board neutrality: neither can achieve the neutrality it aspires to. Modern neutrality would privatize religion and generally expel it from the public sphere, leaving religion at a serious disadvantage in the culture-forming processes of public life, especially public education. While not explicitly advancing secularism as one religious view, it does so indirectly.

The Founders' sect-neutrality likewise did not achieve neutrality: it had the indirect effect of advancing the view that the broad outlines of religion were what really mattered and that differences among sects were secondary. But that view advances some religious views at the expense of others. It subtly and perhaps unintentionally promotes Protestant Christian denominations that view the differences among Christians as secondary matters that are not truly fundamental – so fundamental as to be part of the 'essential core' of Christianity. But, over time, a focus on "only the essential core" can subtly evolve in such a way that the essential core diminishes in content – perhaps helping to explain the tendency of the American religious 'least common denominator' to shrink over time. Part of that shrinkage

has important political effects. Tocqueville argued that Christianity was a very important political institution in America – despite, and even partly due to, a genuine and important separation of Church and State. Among the political benefits of Christianity that Tocqueville stressed was providing a common moral framework in a society where political and other arrangements were so fluid and volatile. Christians, he said, whatever their differences on certain dogmatic questions, shared a common morality.

Over time, however, one of the striking features of American life is the extent to which Christians' 'common morality' has diminished. Many Christians are on opposite sides of profoundly important moral issues in America today, perhaps especially with respect to fundamental issues regarding the sanctity of human life and sexual morality. At root, I think the cause of this is that certain democratic and modern tendencies have had a deeper influence in shaping the changing moral beliefs of some religious groups than others. But let me end briefly on one positive note. The United States is by far the most religious of the large and established modern Western democracies (though not so religious as some other Western countries, for example, Poland). As Tocqueville and many others have noted, part of the reason for this fact is, paradoxically, the strong institutional separation of Church and State that prevented religion from being caught up in the changing fates of political ideas and practices. There are strong forces working to undermine America's religious exceptionalism (especially intellectual elites and other elites for whom they serve as a reference point, including judges and the media). At the same time, however, American civil society also harbors a multitude of different groups working strenuously to protect and preserve the vitality of America's religious heritage and its indirect but powerful influence on public life.

In my recent book *Natural Law Liberalism*,[8] I argue that the United States offers non-Western nations evidence that liberalism does not require the abandonment of public commitments to foster religion and traditional morality. If all the West had to offer, say, Islamic nations, was a model of contemporary liberalism (such as that of John Rawls) that asked people to put their most fundamental political and moral beliefs to the side as they entered public life, the likelihood of liberalism being an attractive option to these peoples would be quite low. American liberalism, which has been, historically, in great measure, a natural law liberalism – a liberalism with strong elements of classical, not just Lockean, natural law, largely derived from its religious sources – potentially offers a much more attractive view of liberalism to the non-liberal nations of the world. If we can let them see America as something quite different from what is portrayed in American movies and on prime-time television – if, indeed, we can prevent America from becoming more like what is portrayed there – then America can become, with all its flaws, something of a model for a reasonable and morally decent liberalism.

[8] *Natural Law Liberalism*, Cambridge University Press 2006.