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HOW SECULARISTS HELPED KNOCK DOWN THE WALL OF SEPARATION BETWEEN CHURCH AND STATE

Steven D. Smith– [draft][1]

There are those who lament and those who celebrate, but an increasingly common view maintains that for better or worse, the legendary "wall of separation between church and state," once officially described as "high and impregnable,"[2] has fallen into a state of serious disrepair.[3] There is also a widely voiced opinion about who deserves the blame, or the credit, for this development: the people ostensibly responsible for the wall's decline are religious conservatives,

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[2] Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[3] In a prescient article published over a decade ago, Ira Lupu carefully reviewed developments supporting his conclusion that "[t]hough it may linger in the political and legal culture of constitutionalism, the image of separation of church and state is fading out." Ira C. Lupu, The Lingering Death of Separationism, 62 Geo. Wash. L. Rev. 230, 279 (1994). More recently, John Witte notes that "the United State Supreme Court has, of late, abandoned much of its earlier separationism." John Witte, Jr., God's Joust, God's Justice 211 (2006). Thomas Colby asserts that over the past quarter-century Supreme Court decisions have been "driving notions of separation of church and state to the constitutional periphery." Thomas B. Colby, A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause, 100 Nw. U.L. Rev. 1096 1115 (2006). See also Thomas C. Berg, Minority Religions and the Religion Clauses, 82 Wash. U.L.Q. 919, 921 (2004) (observing that "[s]trict church-state separationism has lost much influence among the courts recently."). More recently, Bruce Ledewitz reports: "In popular understanding, the wall is largely down. In the courts, the wall is breaking apart. In academia, the wall is only starting to fall." Ledewitz describes his own book as "a bridge to a post-fall world." Bruce Ledewitz, American Religious Democracy: Coming to Terms with the End of Secular Politics 1 (2007). See also Kevin Phillips, American Theocracy 99-262 (2006).

working through and upon the Republican Party and Republican appointees to the federal bench.[4] Common candidates for villain or hero include George W. Bush, Karl Rove, Pat Robertson, the late Jerry Falwell, Ralph Reed, and Antonin Scalia.[5]

It is hardly surprising that this assessment has become commonplace. For one thing, the assessment contains a large measure of at least local truth. In recent decades, conservative evangelists as well as politicians, writers and scholars associated with religious conservatism *have* often been outspokenly critical of the "wall" and the principle of separation, at least as the courts have articulated that principle.[6] Then-Justice Rehnquist wrote perhaps the most vigorous

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[4] Isaac Kramnick and R. Laurence Moore, The Godless Constitution: A Moral Defense of the Secular State 150-206 (2d ed. 2005). Susan Jacoby argues that "the Bush Administration could hardly have done more to demonstrate its commitment to pulverizing a constitutional wall that served both religion and government well for more than two hundred years." Susan Jacoby, Freethinkers: A History of American Secularism 353 (2004) "The Christian right," she asserts, has "financial power" and a "stranglehold on the Republican Party," and this combination "has produced decades of judicial appointments that have moved the entire federal bench to the right." Id. at 354-55. Kevin Phillips lays responsibility on religious conservatives, especially Southern Baptists, and the Republican Party. Phillips, supra note at 99-217.

[5] Kramnick and Moore, for example, assert that "what truly undermined the 1960-70 consensus on [separation of] church and state was the success of George W. Bush." Kramnick & Moore, supra note at 182. In addition, Kramnick and Moore assign responsibility to Pat Robertson, Jerry Falwell, Pat Buchanan, Ralph Reed, Newt Gingrich, James Dobson, and Karl Rove. Id. at 153-66, 184, See also Phillips, supra note at 215 (Robertson, Reed), at 204-08, 233-36 (Bush). For spirited criticisms of Justice Scalia's contribution, see Colby, supra note ; Garrett Epps, Some Animals Are More Equal Than Others: The Rehnquist Court and "Majority Religion," 21 Wash. U.J. L. & Pol'y 323 (2006).

[6] In this vein, Professor (now Judge) Michael McConnell has asserted that "the idea of 'separation between church and state' is either meaningless, or (worse) is a prescription for secularization of areas of life that are properly pluralistic." Michael W. McConnell, Five Reasons to Reject the Claim that Religious arguments should be Excluded from Democratic Deliberation, 1999 Utah L. Rev. 639, 640-41. (McConnell adds, however, that "some aspects of what can be called 'separation' are essential." Id. at 640.) More stridently, then-Representative Katherine Harris declared that church-state separation is a "lie we have been told" to exclude religious believers from public life. Jim Stratton, Rep. Harris Condemns Separation of Church,

criticism of the "wall" metaphor by a Supreme Court Justice– a sort of belated dissent to the seminal separationist decision in *Everson v. Board of Education*.[7] Since then, his conservative colleagues Justices Scalia and Thomas have been as energetic as anyone on the Court in resisting or undoing separationist doctrines and decisions.[8] And although Bill Clinton supported "charitable choice," George W. Bush surely stepped up support and publicity for the idea with his aggressive promotion of "faith-based initiatives."[9]

So there are good or at least understandable reasons for ascribing the decline of the wall of separation to religious conservatives.[10] Even so, that ascription is, to be candid, . . . near-

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State, Orlando Sentinel, Aug. 26, 2006, at A9. See also David Barton, Original Intent: The Courts, the Constitution, and Religion (1997); John Eidsmoe, Christianity and the Constitution 242-45, 406-11 (1987).

[7] Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting) (criticizing at length the interpretation of the establishment clause in terms of a wall of separation). Perhaps surprisingly, in *Everson* itself no Justice dissented from the proposition that the Constitution creates a "wall of separation": the four dissenting Justices favored an even stricter separation than the majority did. Hence, Rehnquist's dissent in *Wallace* might be viewed as the dissent that one would have expected someone to write in *Everson*.

[8] Leading manifestations would include Justice Thomas's plurality opinion, joined by Justice Scalia, in Mitchell v. Helms, 530 U.S. 793, 801 (2000), and Justice Scalia's dissenting opinion in McCreary County v. ACLU, 545 U.S. 844, 885 (2005).

[9] For explanation and discussion, see Ira C. Lupu & Robert W. Tuttle, The Faith-Based Initiative and the Constitution, 55 Depaul L. Rev. 1 (2005); Carl H. Esbeck, Charitable Choice and the Critics, 57 N.Y.U. Ann. Surv. Amer. L. 17 (2000).

[10] Political and financial motives might also support the ascription. Just as conservatives have famously appealed to religion to gain political support in recent elections, see Phillips, supra note , their opponents sometimes adopt the opposite strategy: thus, decrying the conservative assault on the wall of separation can be a means of gaining the financial or electoral or cultural support of more liberal or secular constituencies. As just one typical example, consider the website version of the September 2007 issue of *Church and State*, the publication of Americans United for Separation of Church and State. The entry on the top right column headlines and links to an article denouncing Judge Roy Moore for "Waging War on Church-State

sighted, simplistic, and fundamentally misleading. Complacently offered or accepted, it does a serious disservice to our understanding of the long-term causal influences that have combined to subvert the commitment to church-state separation and also, more generally, to our understanding of the situation we currently occupy and the prospects that may be available to us. Indeed, from a more detached perspective, the diagnosis ascribing the decay of the wall of separation to religious believers and their political representatives is almost exactly wrong. It would be more accurate, ultimately, to attribute the declining fortunes of the wall– and the principle of separation-- to secularists and secular influences than to religion.

This claim may seem paradoxical, to be sure.[11] It is commonly supposed, by both critics and proponents of the notions, that "separation of church and state" and "secularism" (or at least *governmental* secularism) go hand in glove[12]: how then can secularism be responsible for the erosion of separation? In this essay, I will nonetheless try to explain and support that claim.

The commitment to church-state separation, I will suggest, has a long, distinguished (albeit tumultuous and sometimes violent or even sordid) history– one that antedates Thomas

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Separation," and other articles noted on the cover highlight other perceived threats to separation. On the top right of the cover is an eye-catching red-white-and-blue block urging readers to "Help Support AU: Contribute Now," with links to pages detailing different ways to make contributions. http://www.au.org/site/PageServer?pagename=cs_2007_09

[11] It is hardly original, however. See, e.g., infra note [Bradley].

[12] See, e.g., Kramnick and Moore, supra note at 206 ("Jefferson's idea of the wall of separation between church and state remains the best possible metaphor to guide the American secular state."); Jacoby, supra note at 359-60 (describing how "[i]mportant . . . separation of church and state is to American secularists"); John Swomley, Religious Liberty and the Secular State 17 (1987) (explaining that "the constitutional doctrine of separation of church and state" means that "[t]he Constitution . . . provides for a wholly secular government"); Leo Pfeffer, Creeds in Competition 43 (1958) (equating "separation of church and state" with "the secular state").

Jefferson and the American constitutional experiment by many centuries.[13] And this commitment is indeed closely associated with what we might call the *classical* notion of the "secular." But the concept of the "secular" has undergone a radical transformation[14]: the modern conception is not only different than but is in some respects antithetical to the classical conception in which the commitment to church-state separation had, and has, its origins and it secure foothold. Far from providing a suitable foundation for any "wall of separation between church and state," modern secularism systematically erodes that foundation. Thus, proponents of separation and of secularism in its *modern* sense have inadvertently been promoting mutually antagonistic positions. And it is hardly surprising that at least one of those incompatible positions– in this case, the separationist position– might begin to totter.

Ambiguity in the meaning of the "secular" has served to conceal this difficulty. Even so, the difficulty has been obliquely manifest in the sorts of central and intractable problems that judges and scholars struggle with in this domain. How is government supposed to treat religion as a special legal category (as the separation principle would seem to demand[15]) and at the same time be neutral toward religion (as the modern concept of "secular" government is thought to

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[13] Cf. Witte, supra note at 211 ("Separation of Church and state is often regarded as a distinctly American and relatively modern invention. In reality, separationism is an ancient Western teaching rooted in the Bible.").

[14] See Nomi Stolzenberg, The Profanity of Law, in Law and the Sacred 35 (Austin Sarat ed. 2007) (describing the "modern cultural deformity that finds expression in frightening levels of mutual incomprehension between 'the religious' and 'the secular' that we see today").

[15] See infra notes [Gedicks].

require[16])? If "religion" speaks to all areas of life (as religious believers often say it does), and in an age in which government involves itself with almost all areas of human life– family, health, education– how does or could government keep itself "separate" from religion[17]? If citizens are themselves religious (as in this country a large majority profess themselves to be[18]) and if they think that their religious beliefs speak directly to the political issues of the day, should they and their political representatives be permitted to argue-- and vote-- on the basis of religious beliefs or church teachings? If so, how can the governments and governmental policies that emerge from this process be viewed as being either meaningfully "secular" or "separate" from religion? (And if citizens and their representatives are *not* permitted to vote and act politically on their deepest convictions, then how can the government be described as truly "of the people, by the people, for the people"?)

These questions have by now produced countless books, articles, symposia, and judicial decisions– but no very satisfactory resolutions (which is why books, articles, symposia, and judicial decisions addressing the questions continue to proliferate). I will suggest that the

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[16] See infra notes and accompanying text. On the dubious but typical equation of "secular" government with religiously "neutral" government, see Steven D. Smith, The Pluralist Predicament, 10 Legal Theory 51, 60-66 (2004).

[17] Cf. Mary C. Segers, In Defense of Religious Freedom, in Mary C. Segers and Ted G. Jelen, A Wall of Separation: Debating the Public Role of Religion 53, 53 (1998):

> The most fundamental beliefs a person holds are his or her religious beliefs. For many people, religion is the root of civilization and culture. It is a spiritual anchor in life; it provides an explanation and a justification for death. Religion often speaks to our need to find meaning in life and to the deepest human aspirations for peace, harmony, community, and spiritual sustenance. At the same time, religion supplies moral vision and undergirds ethical values. . . . Given these profound aspects of religiosity, how can religion be divorced from politics?

[18] See, e.g., American Piety in the 21st Century, The Baylor Religion Survey (Sept. 2006).

questions are in fact unanswerable, because they are products of a situation in which we have been attempting to explain and implement commitments inherited from an earlier world and worldview– a commitment to separation of church and state, and a derivative commitment to freedom of conscience– within an intellectual framework in which such commitments have only fragile footing and make little sense.

Lately, the conflict between separation and secularity has become more starkly manifest in the call by some *secular* thinkers– a recent book by Christopher Eisgruber, Provost of Princeton University, and Lawrence Sager, Dean of the University of Texas Law School, is perhaps the most conspicuous example[19]– for abandonment of the principle of separation of church and state in favor of an approach grounded in more contemporary commitments to equality and liberty generally. As forcefully as any evangelical preacher, Eisgruber and Sager denounce the wall of separation as misconceived, analytically useless, and substantively unjust.[20] Though it turns out that even Eisgruber and Sager do not fully follow out the implications of their more secular and egalitarian assumptions,[21] their wholly secular rejection of the separation principle should serve as, so to speak, the writing on the wall: the wall of separation simply has no secure footing in modern secular assumptions.

Whether this conclusion means that the wall should be demolished once and for all, as Eisgruber, Sager, and others insist, is less clear. Rather than abandoning the wall, we might

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[19] Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution (2007).

[20] Id. at 22-50.

[21] See infra notes and accompanying text.

instead undertake to rethink the secular assumptions that have worked beneath the surface to subvert it. So there are different paths open to us. But there are also beckoning paths that are in fact dead ends. And a prescription that seems untenable is one frequently heard in academic and public interest advocacy today– the insistence, that is, on simultaneously maintaining *both* the wall of separation *and* the modern assumptions about secular government.

So, that is the synopsis. Its elaboration will require a discussion of developments that have occurred not just over the last decade or two, or six (since *Everson v. Board of Education*[22]), but rather over the last millennium or so, and as a result I will be painting with a very broad brush and will be relying heavily on the work of others who have described these developments with more learning and care than I can deploy. We will of necessity be looking at the shape of the forest, and will have scant opportunity to inspect individual trees. But in the current climate of polemical and simplistic ascriptions of undue significance to particular trees (or shrubs)– Bush, Robertson, Falwell, Scalia– a more detached and deliberate look at the contours of the forest seems in order.

In carrying out this examination, Parts I and II will operate in parallel. Part I ("Foundations: Separation and the Classical 'Secular'") will attempt to explain three things: what "secular" meant in its premodern or classical sense, how the "secular" in that classical sense gave rise to a *jurisdictional* question affecting church and state, and how a commitment to "separation of church and state" and a derivative commitment to freedom of conscience expressed what came to be the generally shared classical response to that jurisdictional question. Part II ("Subversion: Separation, Conscience, and the Modern 'Secular'") will follow the same order, attempting to

[22] 330 U.S. 1 (1947).

explain how the concept of the "secular" was transformed into its modern sense of "not religious," how the modern sense of the secular dissolved the earlier question of *jurisdiction* and replaced it with a question of *justice*, and how this transformation has altered and significantly undermined the classical commitments to "separation of church and state" and freedom of conscience.

These sections involve a trade-off; they attempt to achieve clarity by smoothing over the complexities and messiness of history as it has in fact transpired. Part III ("Phasing out the Wall"), acknowledging such messiness, discusses the stages in which the reduction of the wall– of the commitments to separation of church and state and freedom of conscience– has in fact proceeded in modern American jurisprudence. The Conclusion reflects briefly on the alternatives that may be available to us now.

I. Foundations: Separation and the Classical "Secular"

It is a rarely-challenged commonplace, in constitutional discourse and academic theory generally, that the United States Constitution establishes a "secular" government.[23] But what does this idea mean, and how does the notion of the "secular" relate to the principle of separation of church and state? The questions turn out to be more complicated than we typically suppose, and they push us to consider how the dominant meaning[24] of the "secular" has changed over the

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[23] See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 199 (1992) ("Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all.").

[24] I say "dominant meaning" because, as I will need to emphasize from time to time, the older classical meaning, though marginalized, has not altogether disappeared.

centuries and how that change in meanings affects commitments to separation of church and state. In this Part, I will try to explain the classical meaning of "secular," the jurisdictional question which that meaning helped to generate, and the commitments to separation of church and state and freedom of conscience that emerged as an answer to that question.

A. The "Secular," Classical Style

Charles Taylor observes that "'[s]ecular' itself is a Christian term, that is, a word that finds its original meaning in a Christian context."[25] More specifically, the concept is rooted in the view, evident in the New Testament, that life and reality are divided into two realms or orders of reality that, though related in important ways, nonetheless have independent value and integrity. Different terms are used to denote these realms– "earth" and "heaven," the "temporal" and the "spiritual," "this world" in contrast to another world.[26] In this vein, Jesus is biblically declared to be in some sense a king, but his kingdom is "not of this world."[27]

In its more eschatological moods, the New Testament anticipates that the division between the realms will ultimately be healed. As the words made familiar by Handel's

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[25] Charles Taylor, Modes of Secularism, in Secularism and Its Critics 31,31 (Rajeev Bhargava ed. 1998). See also Bernard Lewis, What Went Wrong? Western Impact and Middle Eastern Response 96 (2002) ("Secularism in the modern political meaning . . . is, in a profound sense, Christian. Its origins may be traced in the teachings of Christ, confirmed by the experience of the first Christians; its later development was shaped and, in a sense, imposed by the subsequent history of Christendom.").

[26] See, e.g., Matthew 5:34-35 (KJV) (heaven is God's throne, earth is God's footstool); Matthew 12:32 ("this world" contrasted with "the world to come"); John 8:23 ("[Y]e are of this world; I am not of this world"); John 12:25 ("life in this world" contrasted with "life eternal").

[27] John 18:36.

"Hallelujah Chorus" declare, "the kingdom of this world" will become "the kingdom of our Lord."[28] But in the meantime (which is the very long time, from our mortal perspective anyway, in which we live as beings in human history), each realm makes its separate and valid claims on us. So we must "render unto Caesar the things which be Caesar's, and unto God the things which be God's."[29]

This two-realm teaching of the New Testament– and perhaps of the Bible generally, including the Hebrew scripture that Christians call the Old Testament[30]– persisted through Christian history. Thus, Augustine famously developed, at great length and with sophistication, the metaphor of the *two cities*– the City of God and the City of Man.[31] Medieval thinkers devoted much effort to explicating the metaphor of the "*two swords*."[32] Luther and Calvin emphasized the doctrine of the *two kingdoms*.[33] Christians generally contrast "time"– the here and now of mundane history-- with a more ethereal "eternity."[34]

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[28] Revelation 11:15.

[29] Luke 20:25.

[30] See Stolzenberg, supra note at 51-63. Stolzenberg argues that in this respect Christian and Jewish conceptions had many parallels and were in fact "mirror images of each other." Id. at 64.

[31] St. Augustine, The City of God (written 413-426).

[32] See Brian Tierney, The Crisis of Church and State 1050-1300, at p. 8 (1964). See also Witte, supra note at 214-15.

[33] See John Witte, Jr., Law and Protestantism: The Legal Teachings of the Lutheran Reformation 87-117 (2002); David Vandrunen, The Context of Natural Law: John Calvin's Doctrine of the Two Kingdoms, 46 J. Church & State 503 (2004).

[34] Cf. 2 Corinthians 4:18 (" . . . for the things which are seen are temporal; but the things which are not seen are eternal").

Within this two-realm worldview, the term "secular" denoted one of the two realms– the realm of "this world." The "secular," Taylor explains, described "profane time, the time of ordinary historical succession which the human race lives through between the Fall and the Parousia [or second coming of Christ]."[35] Thus, the "secular" existed as one enclosed component within a more encompassing reality that we could describe (with misgivings) as "religious." The secular domain, Nomi Stolzenberg notes, was "a specialized area of God's domain."[36]

> "The secular" was, in fact, originally a religious concept, a product of traditional religious epistemological frameworks. The concept of the secular always served the function of distinguishing religious from nonreligious domains. But nonreligious domains did not, in the premodern view, exist outside the religious epistemological framework. On the contrary, the framework of meaning was all-encompassing, overarching, comprehending within it every domain of human (and nonhuman) action and cognition, both the spiritual and the temporal, the holy and the unholy, the ecclesiastical and the secular, the sacred and the profane.[37]

Stolzenberg's observation is borne out by the familiar plea from the "Lord's Prayer" or "Our Father," regularly recited by Christians over the centuries: "Thy will be done on earth as it is in heaven."[38] Two realms are distinguished– "earth" and "heaven"– but both are (or ought to be) governed by God's will. Her observation is borne out as well by the familiar classification of priests into the "regular" and "secular" clergies. A "secular" priest is plainly not one who is "not

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[35] Taylor, Modes, supra note at 32. For Taylor's more detailed explanation of the relation of spiritual and secular time in premodern sensibilities, see Charles Taylor, A Secular Age 54-59 (2007).

[36] Stolzenberg, supra note at 51. The term "religion" here is apt to mislead, because it is used in different senses and because its own meaning is affected by the same changes that have altered the meaning of "secular," as discussed in this article. But there seems no escape from using the term.

[37] Stozlenberg, supra note at 30-31.

[38] Matthew 6:10.

religious"; rather, he is a priest who instead of retreating into a monastery serves in a parish– in "the world."[39]

In sum, the classical view recognized two realms, related but independent, each with its own valid claims.[40] As with other such pairs– teacher and student, parent and child– the realms are at the same time separate but also related, and the relations between them are real and important: indeed, they get their meaning in part from their relation to the correlative terms in the dichotomy. Thus, both the spiritual and the secular, as we have seen, are ultimately part of a single reality and are to be governed by a unified overarching truth.[41] As human beings, we are simultaneously subjects of both realms. And what happens in one realm can powerfully affect what happens in the other. Thus, deeds done within the temporal sphere– acts of charity or cruelty, blessings dispensed or curses inflicted, sacraments celebrated or refused or desecrated–

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[39] Jose Casanova, Public Religion in the Modern World 13 (1994).

[40] Jose Casanova suggests that the two-realm view oversimplifies. In fact,

> premodern Western European Christendom was structured through a double dualist system of classification. There was, on the one hand, the dualism between "this world" and "the other world." There was, on the other hand, the dualism within "this world" between a "religious" and a "secular" sphere.

Casanova, supra note at 15. Casanova's classification no doubt has advantages, but in addition to being slightly more unwieldy, it may tend to obscure the sense in which the church, though in "this world," was a sort of representative of the other or spiritual sphere. For present purposes, therefore, I will follow the simpler usage employed by scholars like Taylor and Stolzenberg, and hence will talk of two realms.

[41] Cf. Stolzenberg, supra note at 38 (classical view "conceives of the secular sphere as subject to the will of god and divine law, while being nonetheless 'nonreligious' and outside the jurisdiction of religious law in another sense"). See also Casanova, supra note at 20 ("The medieval dichotomous classification of reality into religious and secular realms was to a large extent dictated by the church. In this sense, the official perspective from which medieval societies saw themselves was a religious one.").

can have consequences in the spiritual sphere.[42] Conversely, earthly happenings are superintended by and subject to guidance and intervention from the heavenly realm.[43]

B. The Classical, *Jurisdictional* Problem: God and Caesar

The two-realm worldview, though a familiar part of our own heritage, may be distinctive to Western civilization,[44] and it has powerfully influenced Western culture, including conceptions of the state, law, and individual rights.[45] The view also gives rise to a distinctive challenge– one

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[42] Marie Failinger points out to me that this understanding is more characteristic of Catholicism than of Protestantism, in which this-worldly "works" may be seen as having no causal relation to spiritual salvation.

[43] For a detailed description, see Taylor, Secular Age, supra note at 33-41.

[44] Or at least the view that each realm has its principal institutional representative– the state representing the secular realm and the church the spiritual– seems distinctive. Bernard Lewis explains, for example, that "[c]lassical Islam recognized a distinction between things of this world and things of the next, between pious and worldly considerations." Bernard Lewis, The Crisis of Islam 20 (2003). But "[t]he dichotomy of *regnum* and *sacerdotium*, so crucial in the history of Western Christendom, had no equivalent in Islam."

> In pagan Rome, Caesar was God. For Christians, there is a choice between God and Caesar, and endless generations of Christians have been ensnared in that choice. In Islam, there was no such painful choice. In the universal Islamic policy as conceived by Muslims, there is no Caesar but only God, who is the sole sovereign and the sole source of law.

Id. at 6-7. See also Lewis, What Went Wrong, supra note at 96-104. In a similar vein, Mark Lilla argues that because of the commitment of ancient Judaism and medieval Islam to governance by "divine rather than human law," "[i]n neither faith could a struggle between 'church and state' arise." Mark Lilla, The Stillborn God: Religion, Politics, and the Modern West 56 (2007).

[45] Brian Tierney notes, for example, that "[n]atural rights theories seem to be a distinctively Western invention" and that "[m]edieval society was saturated with a concern for rights." Brian Tierney, The Idea of Natural Rights 45, 54 (1997). The two-realm worldview did not exactly generate this interest in rights, Tierney suggests, but it provided an intellectual climate in which such thinking could flourish. "Since neither the spiritual nor temporal power could wholly dominate the other, medieval government never congealed into a rigid theocratic

that manifests itself on both the personal and political levels.

The basic problem is this: because the realms are at once independent and yet significantly interrelated, and because both make their valid claims on us, we must somehow find a way to honor both kinds of claims. We must give both Caeasar and God their due. But exactly what *is* Caesar's, and what is God's? It would not be an exaggeration to say that addressing this challenge, or negotiating the complex demands of the temporal and the spiritual, has been *the* central ethical and existential problem for Christians from the religion's inception.[46]

In the political domain, each of these realms is represented by a dominant institution: we can say (somewhat anachronistically) that the secular domain is represented ultimately by "the state" while the spiritual domain is represented by "the church."[47] So the political problem, in this view, is to delineate the jurisdictional domains of these separate institutions.[48] What is the

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absolutism in which rights theories could never have taken root." Id. at 55.

[46] Among the countless efforts to address that challenge, H. Richard Niehbuhr's Christ and Culture (1951) is worth noting, both because it has achieved the status of a minor classic in modern Christian thought and because it highlights the tremendous diversity of responses that Christians have given over the centuries to the challenge of reconciling the spiritual and the temporal.

[47] See Taylor, Modes, supra note at 32 ("Government was more 'in the *saeculum*' by contrast with the Church, for instance. The state was the 'secular arm'.").

[48] Nomi Stolzenberg explains:

> Secular law was differentiated from religious law not on grounds of not being part of the divine order but, rather, on the grounds that secular and religious law served different practical (religious and political) functions and had different (religious and political) jurisdictions presided over by different (religious and political) institutions and rulers.

Nonetheless, these separate jurisdictions constituted "specialized parts of a single unitary (religious and political) whole." Stolzenberg, supra note at 50.

proper jurisdiction of the state? Of the church?[49] And how should these institutions deal with and relate to each other? This problem of delineating jurisdictions is simply the manifestation, in the political domain, of the central Christian problem of dealing with the independent, sometimes competing and sometimes overlapping claims of the spiritual and the temporal.

As we will see, the problem of church and state is no longer typically conceived of in this way. Even so, contemporary analogies are not hard to come by. International and constitutional law routinely address analogous problems of jurisdiction between independent or partly independent entities: different nations, different states, the states and the national government.[50] In the classical view, church and state were themselves independent jurisdictions, and an immense amount of effort was devoted to trying to sort out the jurisdictional lines.

Then and now, jurisdictional battles are fought on different levels. They are fought on an *intellectual* plane, as participants deploy whatever intellectual resources and authorities are available to delineate the respective jurisdictions of the different institutions. In the classical

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[49] John Witte explains that during the twelfth and thirteenth centuries,

> the Church came to claim a vast new jurisdiction– literally the power "to speak the law" (*jus dicere*). The church claimed personal jurisdiction over clerics, pilgrims, students, the poor, heretics, Jews, and Muslims. It claimed subject matter jurisdiction over doctrine and liturgy; ecclesiastical property, polity, patronage; sex, marriage, and family life; education, charity, and inheritance; oral promises, oaths, and various contracts; and all manner of moral, ideolgoical, and sexual crimes. The Church also claimed temporal jurisdiction over subjects and persons that also fell within the concurrent jurisdiction of one or more civil authorities.

Witte, supra note at 12 (footnote omitted).

[50] The federal analogy seems closer than the international one, because though church and state represented different jurisdictions, they applied to the same people living in the same geographical territory; in this respect they were more analogous to the national and state governments than to, say, England and France. Thanks to Marie Failinger for calling my attention to this point.

context, these intellectual resources were found in the overarching truths believed to govern both the temporal and spiritual realms. So arguments about the proper domains were commonly framed in theological terms, or in the form of interpretation of the biblical passages or other religious authorities thought be repositories of truth.[51] To be sure, advocates could also appeal to more pragmatic or political or philosophical considerations (especially after the revival of jurisprudence in the twelfth century and of Aristotle in the thirteenth century).[52] But the arguments were carried on to a significant extent in theological terms; indeed, though the extracts we typically read today may not disclose the fact, even a later theorist of the secular state such as Hobbes– recently lauded as the seminal rejecter of "political theology"[53]-- devoted more pages in his classic *Leviathan* to supporting his views on government through painstaking scriptural exegesis and theological exposition than through the more secular social contract reasoning we focus on today.[54]

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[51] For a helpful collection of such arguments, see Tierney, Crisis, supra note

[52] Id. at 2.

[53] See Lilla, supra note at 58-65.

[54] In the original, the primarily theological and scriptural section of the book begins on page 195 and continues for approximately 200 pages to the end of the book. Thomas Hobbes, Leviathan 78-79 (Penguin ed., C. B. MacPherson ed. 1968). Criticizing the common depiction of Hobbes as a purely secular thinker, Joshua Mitchell explains:

> The central feature of Hobbes's system of political order is the *unity* of sovereignty, political and religious, from which derives, among other things, the Leviathan's right to command obedience . . .; while reason can conclude for the unity of *political* sovereignty, it cannot conclude for the unity of political and religious sovereignty. Of religious sovereignty, as Hobbes insists again and again, reason must be silent; consequently, the unity of political and religious sovereignty must be established on the basis of Scripture . . . .

Joshua Mitchell, Luther and Hobbes on the Question: Who Was Moses, Who Was Christ?, 53 J. Politics 676, 677 (1991).

Jurisdictional disputes could, and can, also become "battles" in a more literal sense. Just as modern jurisdictional struggles sometimes generate not just political or legal analysis but also violence and bloodshed– the Civil War would be the horrific example in American history– so the classical jurisdictional debates stimulated outpourings of learning and polemic but also more physical and sometimes fatal thrusts and parries. Pope Gregory VII excommunicates the emperor Henry IV for interfering in the church's prerogative to appoint bishops, then forgives an apparently penitent Henry– only to be driven out of Rome by Henry's vengeful armies.[55] Archbishop Thomas Becket feuds with King Henry II over conflicts between the royal and ecclesiastical jurisdictions, flees Henry's wrath to spend years in exile on the Continent, but eventually returns only to be murdered by Henry's nobles in Canterbury Cathedral.[56] Henry VIII (rulers named Henry seem to have been especially prone to jurisdictional quarrels) sends his former friend and chancellor Thomas More to the scaffold for refusing to recognize the king's supremacy over the church.[57]

C. The Response: Separation of Church and State, and (later) Freedom of Conscience

Although princes and popes and bishops and scholars often disagreed, sometimes bitterly or violently, over the proper division of jurisdictions, they virtually all agreed on one thing: the jurisdictions of church and state were different, and separate. "There were through the mediaeval

[55] The episode is described in Tierney, Crisis, supra note at 53-55.

[56] For an extensive presentation of the conflict, see Frank Barlow, Thomas Becket (1986), chs. 6-11.

[57] For a recounting of the incident, see Steven D. Smith, Interrogating Thomas More: The Conundrums of Conscience, 1 St. Thomas L. Rev. 580 (2003).

centuries great overlap and great conflict between Church and state," Charles Taylor explains, "but in all versions, and on all sides, it was axiomatic that there had to be a separation of spheres."[58]

1. The varieties and complexities of separation

This is of course an oversimplification. Then as now, church and state did not inhabit separate universes; if they had, separation of church and state would simply have been a physical fact, not a problem or a principle requiring intellectual and political effort to achieve and maintain. Because church and state existed alongside each other, the jurisdictional challenge was to delineate both the ways in which church and state should be separate but also the ways in which they were related– the ways in which they might defer to but also cooperate with each other in exercising their respective jurisdictions. Nonetheless, separation was an essential part of the overall project. Indeed, the metaphor of the wall of separation is usually attributed to Roger Williams, who was working very much in the religious, two-realm worldview in which the "secular" state was contained in a more encompassing "religious" reality and was subject to the overarching religious truths.[59]

Not surprisingly, different thinkers, different political and ecclesiastical actors, and

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[58] Taylor, Modes, supra note at 32. See also Tierney, Crisis, supra note at 4 ("Underlying the overt political issues was a constant preoccupation with the essentially theological problem of defining the right relationship between spiritual power and the temporal order . . .").

[59] See Timothy L. Hall, Separating Church and State 9-10, 70-91 (1998); Edward J. Eberle, Roger Williams' Gift: Religious Freedom in America, 4 Roger Wms. L. Rev. 425, 453-64 (1999).

different eras developed this basic commitment to separation of church and state in different ways (and proponents of church or state, being human, sometimes naturally sought to expand their own jurisdiction at the expense of the other). Theorists during the High Middle Ages gave much thought to how church and state should be separate, but their conclusions differed drastically among themselves, with some thinkers giving more and others less scope to the church's jurisdiction *vis-a-vis* the state's.[60] Medieval conclusions differed as well from those of the Massachusetts Puritans, who much later also reflected carefully on the issue, and who established a polity based on a strict separation of church and state as *they* conceived it[61] (but not, of course, as their colleague and then later adversary Roger Williams conceived it, or as Jefferson and Madison would later conceive it.)

2. The derivative commitment to freedom of conscience

This is not the place for any survey of the huge variety in conceptions of separation that have been embraced over the centuries.[62] For present purposes, what matters is not *how* different thinkers in different contexts conceived of church-state separation but rather *that* the

[60] See generally the numerous selections in Tierney, Crisis, supra note

[61] See Witte, supra note at 160-66. See also Hall, supra note at 62 (footnotes omitted):

> Although they viewed the destinies of ecclesiastical and civil power as linked in the sovereign plan of God, [Massachusetts Puritans] insisted that these two spheres of power held separate offices and exercised "distinct and due administrations." They desired to assure that the boundaries between church and state were maintained free from erosion "either by giving the spiritual power which is proper to the church into the hand of the civil magistrate . . . or by giving civil power to church officers . . . ."

[62] For a helpful survey that attempts to distill the major positions into four main "models," see Witte, supra note at 210-24.

commitment to separation was widely shared by both religious and more worldly thinkers. However, one historical development– namely, the rise of an intense concern with the protection of conscience commonly associated with the Protestant Reformation -- deserves attention because it bears heavily on modern American jurisprudence.

Conscience is hardly a distinctively Protestant idea. On the contrary, the sanctity of conscience was recognized in medieval Catholic teaching and canon law,[63] and there has perhaps been no more eloquent and devoted champion of conscience than the fiercely Catholic Thomas More.[64] Nonetheless, the Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state.

The alteration can be understood as the product of two changes associated with the Protestant Reformation. First, the fragmentation of Christendom resulting from the Reformation, combined with the tendency of both Protestants and Catholics to resort to invoking the aid and protection of secular princes in the ensuing struggles, had the effect of bringing churches– it is no longer apt to speak simply of "*the* church"– under state control. Such arrangements came to be described as "Erastian."[65] Jose Casanova observes that following the Reformation, "[t]he

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[63] See Brian Tierney, Religious Rights: A Historical Perspective, in Religious Liberty in Western Thought 29, 36-37 (Noel B. Reynolds & W. Cole Durham, Jr. eds. 1996).

[64] See Smith, Thomas More, supra note

[65] Richard Garnett explains that "Erastus was a sixteenth-century Swiss theologian 'who taught that the church had no proper coercive jurisdiction independent of the civil magistrate.' His name is usually attached to the view that the state is or should be supreme over, and should control, the church." Richard W. Garnett, Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus, 22 J. Law & Relig. 503,513 (2006-07) (quoting Robert E. Rodes, Pilgrim Law 141 (1998)).

churches attempted to reproduce the model of Christendom at the national level, but all the territorial national churches, Anglican as well as Lutheran, Catholic as well as Orthodox, fell under caesaropapist control of the absolutist state." [66]

Second, in Protestant thinking the conception of the church itself changed. In simple and somewhat overstated terms,[67] the change was this: whereas Catholic teaching had emphasized the necessity of the church as an intermediary between God and humans, Protestants sought to cut out (or at least downsize) the middle man, so to speak, and to encourage a more direct relation between the individual and God. In the "priesthood of all believers," anyone could read the Bible for himself or herself and could commune with God directly without the intercession of priests,

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[66] Casanova, supra note at 22. Owen Chadwick explains that the "momentous change in the Reformation idea of the State appears to be a legal change– the subjection of clerical legislation to the secular."

> [I]t was widely held in Lutheran Germany that all the jurisdiction of the medieval bishop passed to the secular sovereign. . . [In England,] Archbishop Cranmer of Canterbury replied hesitantly that the jurisdiction of the bishop was derived from the sovereign just as was that of the Lord Chancellor.

Owen Chadwick, The Reformation 395 (1964). Chadwick explains that this subjection was qualified. "It was never contended that the king could control Word or Sacraments. In this he was subject, like everyone else, to the Word." Nonetheless,

> it was agreed that in a rightly ordered State the pastor must in a manner be an officer of the society. He was supervising the morals of the people, he was dealing in wills and births and marriages and deaths, he was responsible for the education of the children. It was inevitable that he should be an officer of the State, and as such his jurisdiction must be derived from the sovereign, or the sovereign would not be sovereign.

Id.

[67] In fact, the Reformers differed significantly among themselves in their conceptions of the church, and Luther's own views changed over time as he tried to distinguish his views of the church from those of Catholicism on one side and of more radical Reformers on the other. For a helpful overview, see Alister E. McGrath, Reformation Thought: An Introduction 130-38 (1988).

saints, or sacraments.[68] In Protestant thinking, John Witte explains, "[e]ach individual stands directly before God, seeks God's gracious forgiveness of sin, and conducts life in accordance with the Bible and Christian conscience."[69] In this spirit, Luther passionately and defiantly set his own understanding of scripture against the decrees and practices of the church-- "Here I stand; I can do no other"[70]– and thereby "liberated the Christian conscience . . . .."[71] Two-and-a-half centuries later, Thomas Paine, a radical protestant in temperament and outlook if not in substantive doctrine, put the idea in characteristically pithy form: "My own mind is my own church."[72]

This change can be overstated. For Protestants church remained important as a

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[68] For a feisty assertion of this view in the context of a plea for freedom of conscience, see Elisha Williams, The Essential Rights and Liberties of Protestants: A Seasonable Plea for the Liberty of Conscience, and the Right of Private Judgment, In Matters of Religion, Without any Controul from human Authority (1744). Williams argued for "so clear and obvious a Truth, as may well pass for a self-evident Maxim, *That a Christian is to receive his Christianity from CHRIST alone*." Id. at 11 (emphasis in original).

[69] Witte, supra note at 16.

[70] For a brief account of the incident (which may not have involved the exact famous words passed down in the legend), see Martin Marty, Martin Luther 67-70 (2004).

[71] Heiko A. Oberman, Luther: Man between God and the Devil 204 (1989). Oberman qualifies the usual assessment, however: "Appealing to conscience was common medieval practice; appealing to a 'free' conscience that had liberated itself from all bonds would never have occurred to Luther." Luther's innovation was to liberate the conscience "from papal decree and canon law." Id.

[72] Thomas Paine, Age of Reason 6, in The Theological Works of Thomas Paine (1882). Pufendorf similarly reasoned that "every body is obliged to worship God in his own Person, Religious Duty being not to be performed by a Deputy, but by himself, in Person . . . ." "From whence it is evident , That, Religion having its relation to God, the same may be exercised without the Communion of a great many . . . ." Samuel Pufendorf, Of the Nature and Qualification of Religion in Reference to Civil Society 13, 14 (Simone Zurbuchen ed. 2002) (first published 1687).

community of believers and as a vehicle through which the word of God is preached, and the sacraments of baptism and communion were typically retained. To some extent, however, the position and functions formerly controlled by the church came to be transferred to the individual and his or her conscience: God spoke to people most compellingly not through the church but through the conscience.[73] The idea, once debuted, was not confined to religious thinkers. Thus, Mark Lilla reports that for Rousseau, "[t]he closest thing we have to divine revelation is the revelation of our conscience . . . . Every time it speaks we are actually hearing the voice of God."[74]

As a consequence of these developments, the medieval commitment to separation of church and state, and hence to keeping the *church* independent of secular jurisdiction, was partially rerouted into a commitment to keeping the *conscience* free from secular control. "The old claim that the church ought not to be controlled by secular rulers," Brian Tierney explains, "was now taken to mean that the civil magistrate had no right to interfere with any person's choice of religion."[75] Thus, the medieval slogan proclaiming *libertas ecclesiae*--"freedom of the church"[76]-- begat the more modern theme of "freedom of conscience."[77] The generative

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[73] Cf. Andrew R. Murphy, Conscience and Community 111 (2001) ("According to the orthodox view, conscience represented the voice of God within an individual . . . ."); Eberle, supra note at 459 ("For [Roger] Williams, the essence of religion is conscience.").

[74] Lilla, supra note at 127

[75] Cf. Tierney, Religious Rights, supra note at 51 ().

[76] See id. at 35-36. For a recent attempt to revisit and revive the idea, see Richard W. Garnett, The Freedom of the Church, 4 J. Cath. Soc. Thought 59 (2007).

[77] For a critical discussion of this development, see John Courtney Murray, S.J., We Hold These Truths 201-15 (1960).

connection and jurisdictional emphasis are manifest in Yale president Elisha Williams's declaration that "if CHRIST be the *Lord* of *Conscience*, the sole King in his own Kingdom; then it will follow, that *all such* as in any Manner or Degree *assume* the Power of directing and governing the Consciences of Men, are justly chargeable with *invading* his rightful Dominion; He alone having the Right they claim."[78] This theme grew to be powerfully influential in Protestant societies and became a central component of the American version of religious freedom.[79]

3. America as legatee

By the time Jefferson and Madison took their places on the historical stage, therefore, the tradition of honoring– and sometimes fighting or even dying for– separation of church and state and freedom of conscience was already centuries old. Jefferson and Madison and their fellow citizens in turn accepted that inheritance and developed it in their own distinctive ways.

The American founders' commitment to religious freedom is often viewed as a decisive break from the past.[80] And in view of the more Erastian intermission that immediately preceded

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[78] Williams, supra note at 12.

[79] See generally Murphy, supra note ; Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 NYU L. Rev. 346, 354-98 (2002).

[80] See Sidney E. Mead, The Lively Experiment 60 (1963) (describing the American embrace of religious freedom as a "momentous revolution in the thinking and practice of Christendom" and as "one of the 'two most profound revolutions which have occurred in the entire history of the church'") (quoting Winfred E. Garrison). Cf. Taylor, Secular Age, supra note at 2 (describing the United States as "one of the earliest societies to separate Church and State").

the American founding,[81] this supposition is understandable. Nonetheless, the strand of continuity in the founding was as important as the fact of discontinuity.[82] As the preceding discussion has indicated, Jefferson and his contemporaries were in reality the heirs to a tradition that was already centuries old, and they still had at least one foot firmly planted in the classical worldview.[83]

Thus, unlike most modern commentators and Justices, Madison justified religious disestablishment in openly theological terms.[84] For his part, Jefferson officially argued for disestablishment and freedom of conscience on the classical premise that "Almighty God hath created the mind free," and that governmental coercion in matters of religion represented "a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propogate it by coercions on either, as was in his Almighty power to do."[85] And of course, Jefferson deployed the "wall of separation" metaphor in a letter to a group– New England Baptists– who were heirs of Roger Williams, and who had struggled for a version of

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[81] See supra notes and accompanying text.

[82] See supra note [Witte].

[83] See generally Daniel J. Boorstin, The Lost World of Thomas Jefferson (1993 ed.). For a study emphasizing the continuities between founding era and medieval and classical thought, see also Ellis Sandoz, A Government of Laws: Political Theory, Religion, and the American Founding (2001).

[84] See John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religion Freedom 86-89 (1998).

[85] Virginia Act for Religious Freedom, reprinted in McClear, supra note at 63, 64.

separation of church and state on unapologetically religious grounds.[86]

In addition, founding era separationist commitments retained the jurisdictional aspect of classical thinking, and of the Protestant adaptation of this thinking to the domain of individual conscience.[87] The Protestant emphasis on a relation– an *unmediated* relation– between God and the individual was central to the argument in Madison's famous *Memorial and Remonstrance.*[88] Madison was thereby led to conjoin church-state separation and free exercise of religion, and to conceive of both in strikingly *jurisdictional* terms. "Before any man can be considered as a member of Civil Society," Madison reasoned, "he must be considered as a subject of the Governor of the Universe." Consequently, duties to God are "precedent both in order of time and degree of obligation, to the claims of Civil Society," and entrance into society can only occur "with a saving of the allegiance to the Universal Sovereign." From these premises Madison drew his jurisdictional conclusion: "[I]n matters of Religion, no man's right is abridged by the

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[86] For descriptions of the incident, see Hamburger, supra note at 155-80; Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State 25-54 (2002).

[87] Cf. Witte, supra note at 227 (observing that "the founders sometimes invoked the principle of separation of Church and state as a means to protect the individual's liberty of conscience from the intrusions of either Church or state, or both conspiring together"). In his famous letter to the Danbury Baptists, Jefferson likewise described "the wall of separation between church and State" as working "in behalf of the rights of conscience." Dreisbach, supra note at 148. And Jefferson's letter and metaphor entered American constitutional law in Reynolds v. United States, 98 U.S. 145 (1878), a free exercise case.

[88] See, e.g., James Madison, Memorial and Remonstrance against Religious Assessments, reprinted in Church and State in the Modern Age: A Documentary History 59, 60 (J. F. McClear ed. 1995) ("The Religion then of every man must be left to the conviction and conscience of every man . . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.").

institution of Civil Society, and . . . *Religion is wholly exempt from its cognizance*."[89]

But if Americans were heirs to a centuries-old separationist tradition, can we at least say that the American constitutional system came to favor a *greater* or *more complete* separation than pre-Jeffersonian thinkers did? Alas, no– not in such categorical terms anyway. In reality, compared to the classical models, separation in the American constitutional system is indeed more complete or pronounced in some respects, but it is discernibly *less* rigorous in others.

In the medieval world popes wielded the potent weapons of excommunication and interdict (i.e., cessation of church services within a ruler's jurisdiction) to dictate to secular princes, and the princes at least sometimes felt obliged to comply; in that respect, modern separation does indeed seem more complete. In addition, in premodern and early modern times it was common to suppose that church officials could determine what heresy consisted of and who was guilty of it; it then became the task of the state actually to punish heretics.[90] At least in this country today, the prevailing assumption is that the state has no business with heresy at all.[91] In this respect as well, the distance separating church and state is considerably larger today than it once was.

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[89] Madison, supra note at 60 (emphasis added). Cf. Vincent Blasi, School Vouchers and Religious Liberty: Seven Questions from Madison's *Memorial and Remonstrance*, 87 Cornell L. Rev. 783, 789 (2002) (observing that the term "cognizance" as used by Madison could not have meant "knowledge" or "awareness" but must rather be understood to mean "responsibility" or "jurisdiction").

[90] See Edward Peters, Inquisition 67 (1988).

[91] See United States v. Ballard, 322 U.S. 78, 86 (1944) ("The law knows no heresy, and is committed to the support of no dogma . . . ") (quoting Watson v. Jones) However, critics of "political correctness," hate speech regulation, or antidiscrimination laws sometimes suggest that there are modern secular equivalents. See generally David Bernstein, You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws (2003).

Conversely, some older conceptions separated church and state by forbidding clergy to hold public office[92]; *that* severe sort of separation has been repudiated in modern American jurisprudence.[93] And the medieval notion that ecclesiastical courts have exclusive jurisdiction over some persons, crimes, and claims that are thus beyond the jurisdiction of the civil courts[94]– a notion for which Thomas Becket became a martyr[95]– reflects a commitment to an extreme kind of jurisdictional separation that would be almost inconceivable in modern jurisprudence. Likewise, the medieval notion of "the right of sanctuary," under which a person taking refuge in a church could claim to be beyond the reach of secular authorities,[96] has been peremptorily rejected when raised in tamer modern versions.[97] More generally, the classical separation of

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[92] See Philip Hamburger, Separation of Church and State 79-83 (2002). Laura Underkuffler explains that

> [a]lthough these [clergy disqualification] provisions often purported to be efforts to "encourage religion and religious teaching" or to ensure that religious teachers would "not . . . be diverted from the great duties of their function," the fact that such periods of disability often extended beyond the period of the actual holding of religious office indicates that they were motivated , at least in part, by a far greater concern– the danger of institutional merger of church and state.

Laura Underkuffler-Freund, The Separation of the Religious and the Secular, 36 Wm & Mary L. Rev. 837, 942 (1995) (footnotes omitted).

[93] McDaniel v. Paty, 435 U.S. 618 (1978).

[94] For a brief description, see Robert E. Rodes, Jr., Ecclesiastical Administration in Medieval England 56-59 (1977). See also supra note [Witte].

[95] For a detailed account of the jurisdictional dispute, see Barlow, supra note at 88-116.

[96] See Rodes, supra note at 53-54. Rodes observes that "[i]n some cases, [churches] became ultimately not a refuge but a center from which [the felon] could sally forth for further depredations or a hostel in which he could live in comfort on his ill-gotten gains." Id. at 54.

[97] See American Baptist Churches v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989); United States v. Merkt, 764 F. 2d 266 (5th Cir. 1985); United States v. Elder, 601 F. Supp. 1574 (S. D. Tex. 1985).

church and state had a jurisdictional quality that, as we will see, the modern notion largely lacks.

In the end, then, we can confidently say that a commitment to separation of church and state has a very ancient and distinguished pedigree, and that conceptions of how church and state should be kept separate have differed significantly from time to time and from thinker to thinker. But it is hard to capture those complex differences on any one-dimensional metric of *more* or *less*. Americans have to be sure developed the separationist tradition in our own distinctive ways.[98] But we have also witnessed and even presided over changes that threaten to bring the tradition to an end, as the next Part will explain.

II. Subversion: Separation, Conscience, and the Modern "Secular"

Part I explained how the commitment to separation of church and state, and the derivative commitment to freedom of conscience, arose under a classical worldview in which the "secular" described one component or realm within an overarching religious worldview. This Part will explain how that conception of the secular has been transformed, and how the commitment to separation has thereby been undermined.

A. The Transformation of the Secular

"[T]he concept of the secular has itself, ironically, been secularized and modernized," Nomi Stolzenberg explains, "which makes it hard to grasp the original meaning of the secular . . .

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[98] See generally Steven D. Smith, Separation as a Tradition, 18 J. Law & Politics 215 (2002).

."[99] The process by which this development has occurred has of course been complex. But, simplifying, we can discern the broad outlines of what has happened.

1. The reductionist temptation

As a starting point, we might recall the daunting challenge that the classical two-realm view poses on both the personal and political levels. God and Caesar, the spiritual and the temporal: both impose their valid claims on us. At times those claims appear to conflict. How then are we to negotiate them? Given the difficulty of this challenge, it should not be surprising that many have tried to deflect it by simply ignoring or rejecting one of the realms, or by reducing the two realms to one.[100]

One way to achieve this simplification would be to reject, to the extent possible, the temporal realm– to deny that this world with its demands and desires lays any valid claims on us. That would be the way of withdrawal– of asceticism, self-denial, and monasticism; its most natural political manifestation would be quiescence or passivity.[101]

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[99] Stolzenberg, supra note at 31.

[100] See Casanova, supra note at 14 (describing how conflict between the realms generated "attempts to put an end to the dualism by subsuming one of the spheres under the other").

[101] As an example, consider the position of Anselm of Canterbury, the eminent philosopher and theologian. His biographer, the distinguished historian Richard Southern, records that "liberty for Anselm had nothing in common with the liberty of being one's own master . . ." Rather, "[r]eal liberty lay in choosing the self-effacement of monastic life." R. W. Southern, Saint Anselm: A Portrait in a Landscape 169 (1990). And Southern explains:

> To the casual observer this may seem to argue a very contracted view of human life. But what others saw as confinement, Anselm saw as enlargement: this world is very small; only eternity is great, and the monastery is the gateway to eternity. All his mind was set on enforcing this truth, which alone gave human life any real enlargement. Those who enlarged the world by magnifying the importance of its concerns filled their field of vision with vain things. What they thought great was

Many Christian sages (or eccentrics) over the centuries have advocated or practiced this course to some extent: St. Simon Stylites sitting atop his pillar for 37 years in an attempt to escape the world is an extreme and exotic example.[102] And indeed it is central to Christian teaching that we should try to free ourselves from an undue concern with the goods of this world.[103] Even so, the Christian religion has characteristically cautioned against– indeed, has condemned as heretical-- an excessive negation of the claims of this world

Thus, in response to early "gnostics" who disparaged the physical world and the god of the Old Testament who had created it, orthodox Christianity emphasized that the world itself was made by a benevolent God for humans, and that even in its fallen condition the world is still fundamentally good.[104] Mortal life, beginning with birth and ending in death, may be infinitesimally short (from the perspective of eternity anyway), but it is precious nonetheless; the world visible to the eye and audible to the ear is full of horror and discord– but also of joy and beauty. It is a gift of God to be cherished, not despised.

That conclusion might point in the direction of a different, opposite (and, to most of us, more familiar and congenial) reductionist path to simplification, though one that orthodox Christianity also eschews. We might, that is, regard the secular realm-- "this world" and this life-

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> only vanity masquerading as grandeur; what they saw as enlargement was only a bigger prison.

Id. at 173.

[102] See Paul Johnson, A History of Christianity 141 (1976).

[103] See, e.g., Matthew 6:24-34.

[104] See Jaroslav Pelikan, 1 The Christian Tradition: A History of the Development of Doctrine: 1 The Emergence of the Catholic Tradition (100-600) 71-97 ((1971); Paul Tillich, A History of Christian Thought 33-36, 41-43 (1967).

- as the *only* reality, or at least as the only reality we can be confident of or need to concern ourselves with. And if the first way was that of monastic withdrawal, it would be natural to describe the opposite approach, which makes this "secular" world our exclusive concern, as . . . "secularist." But now the term comes to have a different meaning than it had in its original or classical context. "Secular," rather than denoting one realm within an encompassing and ultimately "religious" reality, now describes an encompassing view of life and the world[105]– a view in which the "spiritual" or the "holy" or "supernatural" are denied, subordinated, or at least reduced to this-worldly terms. "Modern secularism," Nomi Stolzenberg observes, is "reductive." It "eliminates the tension between [the sacred and the profane] by simply preserving one and discarding the other."[106]

2. The "secular" as "not religious"

In this way, we would arrive at the modern core meaning of the "secular," in which the term means, basically, "not religious"[107]-- so that secularism describes a sort of worldview that is fundamentally naturalistic rather than religious. Owen Chadwick describes the common usage in which "'secularization' is supposed to mean, a growing tendency in mankind to do without

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[105] See Casanova, supra note at 15 ("But from now on, there will be only one single 'this world,' the secular one, within which religion will have to find its own place.").

[106] Stolzenberg, supra note at 35.

[107]Cf. John Ayto, Dictionary of Word Origins 465 (1990):

> **secular** Latin *saeculum*, a word of uncertain origin, meant 'generation, age.' It was used in early Christian texts for the 'temporal world' (as opposed to the 'spiritual world') . . . . The more familiar modern English meaning 'non-religious' emerged in the 16th century.

religion, or to try to do without religion . . . ."[108]

The historical developments that have led to the dominance of this understanding are of course complex[109]: typical accounts emphasize theological developments of the late Middle Ages and early modern period,[110] the Protestant Reformation,[111] the political reaction to the wars of religion,[112] and the spectacular achievements of science.[113] Other scholars call attention to the organized efforts of thinkers and movements of the nineteenth and twentieth centuries.[114] Under such influences, countless social thinkers have predicted the advent of a world in which religion

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[108] Owen Chadwick, The Secularization of the European Mind in the Nineteenth Century 17 (1975).

[109] Chadwick's book, id., is a masterful exploration of the variety of causes, both social and intellectual, that contributed to modern secularization. Chadwick concludes that the term "secularization" "describes an objective process, still obscure in its causes and consequences but a matter of history." Id. at 264.

[110] For a magisterial study of such developments, see Louis Dupre, Passage to Modernity (1993). Charles Larmore puts the claim succinctly: "The repudiation of idols, the respect for God's transcendence, is what has led to relieving God from the task of being the ultimately explanation for the order of nature and the course of history." Consequently, "God's transcendence, if thought through consistently to the end, must lead to secularization." Charles Larmore, The Morals of Modernity 41, 43 (1996).

[111] Casanova, supra note at 21-22; Taylor, Secular Age, supra note At

[112] See Taylor, Modes, supra note at 32 ("The origin point of modern Western secularism was the wars of religion; or rather, the search in battle-fatigue and horror for a way out of them.").

[113] See Chadwick, supra note at 161-88; Lilla, supra note at 58-65.

[114] See Hamburger, supra note at 287-334, 360-71; David A. Hollinger, Science, Jews, and Secular Culture (1996); Christian Smith, Introduction: Rethinking the Secularization of American Public Life, in The Secular Revolution 1 (Christian Smith ed. 2003). Smith stresses the collaborative efforts of "waves of networks of activities who were largely skeptical, freethinking, agnostic, atheist, or theologically liberal; who were well educated and socially located mainly in knowledge-production occupations; and who generally espoused materialism, naturalism, positivism, and the privatization or extinction of religion." Id.

has largely withered away.[115] And although those predictions have by now been to a significant extent discredited, it does appear that a "secular" worldview has come to dominate some areas of life– especially law and the academy.[116] The common, almost axiomatic assumption in those quarters is that this world and this life are all there is, or at least all that we can know, or at least all that we have any business concerning ourselves with or appealing to, in public settings anyway. The other more spiritual domain, if it exists at all, is a matter for private concern and devotion.

It is in this modern sense– of the "secular" as the encompassing framework that is "not religious"– that scholars and lawyers typically expect the state to be "secular." A "secular" government, in other words, is one that acts purely for this-worldly purposes and is "not

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[115] Jose Casanova explains:

> In one form or another, with the possible exception of Alexis de Tocqueville, Vilfredo Pareto, and William James, the thesis of secularization was shared by all the founding fathers: from Karl Marx to John Stuart Mill, from Auguste Comte to Herbert Spencer, from E.B. Tylor to James Frazer, from Ferdinand Toennies to Georg Simmel, from Emile Durkheim to Max Weber, from Wilhelm Wundt to Sigmund Freud, from Lester Ward to William G. Sumner, from Robert Park to George H. Mead. Indeed, the consensus was such that not only did the theory remain uncontested but apparently it was not even necessary to test it, since everybody took it for granted.

Jose Casanova, Public Religions in the Modern World 17 (1994).

[116] Peter Berger points out that although predictions of the decline of religion have largely proven to be mistaken, "[t]here exists an international subculture composed of people with Western-type education, especially in the humanities and social sciences, that is indeed secularized." Peter Berger, The Desecularization of the World 10 (1999). Cf. Taylor, Secular Age, supra note at 428-29 (observing that "an outlook which holds that religion must decline . . . is very strong among intellectuals and academics, even in countries like the U.S.A. where general religious practice is very high").

religious" in its assumptions, motivations, and deliberations.[117] Once again, this statement is too simplistic to capture the messier reality in which we actually live; we will reintroduce at least some of the real world complexities in Part III. Nonetheless, it is on approximately this assumption– that the state is supposed to be secular in the sense of "not religious"– that contemporary jurists and scholars typically debate problems of church and state.

But in this respect, the slippage in meanings is apt to trip us up.

B. Problem and Non-problem: From Jurisdiction to Justice

In the classical, two-realm worldview, as we have seen, the problem of church and state was one of delineating jurisdictions. But suppose now (simplifying the much messier historical developments that have in fact occurred) that we discard the classical worldview, with its conception of the secular as "a specialized area of God's domain,"[118] and embrace instead a more modern view and conception. Now the "secular" describes an encompassing worldview or framework, and the state is supposed to be "secular" in the sense of "not religious." What will happen to the classical problem of church and state?

Well, in the first place, it seems that the problem of jurisdiction will disappear. We might to be sure still at times describe issues using jurisdictional language in an attenuated or

[117] Though this seems to be overwhelmingly the most common judicial usage, the older sense of the secular still appears from time to time even in the case law. See Steven D. Smith, Nonestablishment "Under God"?: The Nonsectarian Principle, 50 Vill. L. Rev. 1, 4-6 (2005).

[118] Stolzenberg, supra note at 51.

metaphorical sense.[119] But the bottom line is that actual legal and political jurisdiction– sovereignty– will now belong to the state, period.[120] The state may defer to the church for various reasons and in various ways, but the church will ultimately enjoy as much freedom or immunity, and *only* as much, as the state sees fit to allow it. And when disagreements arise, it is the state that will decide them. Churches, of course, may sometimes be severely critical of governmental decisions or policies. But the possibility that a church authority might refuse to recognize the validity of a secular legal decision, backing its refusal with threats of excommunication and interdict, and that the government might feel obliged to back down in deference to the church: such a scenario will now seem almost inconceivable.[121]

In short, in the modern secular state the problem of *jurisdiction* effectively disappears. Instead, we now have a problem of *justice*, broadly conceived.[122] If the state is or aspires to be

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[119] See, e.g., Ira C. Lupu & Robert W. Tuttle, Sexual Misconduct and Ecclesiastical Immunity, 2004 BYU L. Rev. 1789, 1805-07.

[120] Of course, the state may be divided into jurisdictional subdivisions– states, counties, and so forth– and so jurisdictional questions will still arise; but the church will not be thought to be one of the jurisdictional subdivisions.

[121] Cf. Taylor, Secular Age, supra note at 427 ("And of course, no Pope or bishop could bring a ruler to beg penance on his knees, as happened to Henry II of England and Henry IV of the Empire.").

[122] For Eisgruber and Sager, for instance, the central problem (which they think metaphors and slogans about "walls of separation" can only obscure, see infra notes), is that of "finding fair terms of cooperation for a religiously diverse people." Eisgruber and Sager, supra note at 4. See also id. at 53 (arguing that the challenge is not to keep church and state separate but rather to "seek[] terms of fair cooperation for a religiously diverse people"). Their formulation closely tracks John Rawls's description of "the problem of justice," which addresses this question: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?" John Rawls, Political Liberalism xxvii (paperback ed. 1996).

liberal and just, that is, it will be committed to respecting citizens' rights, to treating them as equals, and to promoting the public interest. The church will be one unit or association among many that are within the state's legal and political jurisdiction, and that the state will seek to treat as liberal justice requires.

In addressing the demands of justice, moreover, and thus in determining the proper treatment of churches, the modern liberal state will be expected to act on grounds that are "secular"– secular, once again, in the sense of "not religious." [123] Thus, the sorts of theological or biblical arguments that once dominated discussion of the proper relations between church and state[124] will now seem suspect or inadmissible.

In sum, though we might talk about something like "the problem of church and state" in both the classical and modern settings, such language is apt to mislead. In reality, we are talking about two distinctly different problems: a problem of *jurisdiction* has given way to a problem of *justice*– one that will be addressed and resolved within the state's secular jurisdiction and in secular terms. That fundamental (though perhaps unnoticed) transformation has crucial implications for the issue of "separation of church and state."

C. The Wall as Relic?

One such implication is that the legitimacy of the classical "wall of separation" between

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[123] As developed by theorists like Rawls, the proper discourse of "public reason" may exclude not only religious convictions but other "comprehensive doctrines" as well, though Rawls qualifies this constraint in complicated ways that we need not pursue here. See Rawls, supra note at 224.

[124] See supra notes

church and state is called into question. The venerable construction may come to seem reminiscent of Hadrian's Wall, built in the second century to protect Roman civilization against the Picts and now running in time-worn, weather-beaten fragments across northern England: it is a hoary holdover from earlier times and earlier needs– charming and quaint, perhaps but functionally obsolete with respect to the world we live in now.

This is not a proposition, to be sure, that will or should be accepted casually. Doubt will be fed in part by the fact that the world is not in fact anything like thoroughly secular in the modern sense.[125] But it will be helpful to begin by abstracting from the more cluttered reality we inhabit and trying to consider the pure case.

In performing this thought experiment, we must suppose that although the assumptions that regulate governance are purely secular, the society as a whole is not. If society itself were wholly secular in the sense of being not religious, religion would presumably simply dwindle or disappear (as so many thinkers over the last century or so have predicted or perhaps hoped it would[126]), and the question of church-state separation would recede along with it. We must also suppose that the government, although secular, is also liberal and tolerant; otherwise it might view religion in the way Communist governments often did[127]– as a sort of reactionary and irrational element that should simply be suppressed to the extent possible. So we must imagine a situation in which some citizens are religious while the government itself is wholly secular, but also liberal and tolerant. In this situation, what stance would government take– as a matter of

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[125] See Part III, infra.

[126] See supra note

[127] See, e.g., Maclear, supra note at 360-63.

secular logic– toward the idea of separation of church and state?

In such a society, government would of course be little influenced by the church as a *religious* organization, or as a repository of religious truth; government's secularity would immunize it against that sort of influence. Nor would government have any apparent incentive to *establish* a religion as the official religion for the society. So church and state would *be*, as a matter of fact, separate from each other. At the same time, there would be very little reason to embrace any notion of separation of church and state as a distinctive and constitutive commitment. Instead, religious citizens and religious groups or organizations– churches– would simply be one class among many that the government would need to deal with, and government would presumably deal with them in basically the same ways it deals with other citizens and groups– no better and no worse.

Thus, to the extent that government regulates, say, voluntary associations of various sorts to protect and serve the public interest (to prevent tortious conduct, for example, or race and sex discrimination), government would presumably impose similar regulation on religious organizations. If government taxes other comparable associations, it would likewise tax religious associations (and vice versa).[128] Doctrines of privacy or freedom of association might provide some limited immunity from regulation for religious organizations in the same way that such doctrines partially insulate other sorts of private or charitable organizations.[129] But there would be no special claim to immunity arising simply from the fact that an organization is *religious*. By

[128] This is roughly the position prescribed by current constitutional doctrine. See Texas Monthly v. Bullock, 489 U.S. 1 (1989).

[129] See Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

the same token, insofar as the state is viewed as having authority to dispense benefits– financial subsidies, for instance– to citizens and groups that it deems meritorious (or that have the political clout to extract such benefits), there would be no special reason to prohibit religious citizens and groups from receiving such benefits.[130]

A church, in short, would be much like General Motors– or, perhaps more precisely, like the Rotary Club, or maybe the Red Cross. These organizations are all independent of government, and in that sense "separate" from it, but no special constitutional barrier prevents government from regulating, or subsidizing, or working in cooperation with them. The same would be true of the church: there would be no place for any distinctive constitutional commitment to "separation of church and state."[131] More particularly, the claim that anchored the commitment to separation of church and state in the classical context– the claim, namely, that the church is beyond the jurisdiction of the state because it is the representative of a different realm of reality that transcends the secular and hence the state– would now become

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[130]Kathleen Sullivan attributes this sort of view to Justice Scalia. See Kathleen M. Sullivan, Justice Scalia and the Religion Clauses, 22 U. Hawaii L. Rev. 449, 461-65 (2000). On the "assimilationist" view espoused by Scalia, Sullivan maintains, "religious associations are not so different after all from other garden-variety interest groups . . ."; consequently, "organized religion might as well be allowed to participate openly and freely in politics on a par with other groups and bring home its fair share of the spoil." Id. at 462.

[131] Cf. Feldman, Cal, supra note at 694-706, 723-30 (arguing that modern Supreme Court jurisprudence has largely converted protection for religious freedom into equality terms and that the equality formulation offers no persuasive justification for a commitment to separation of church and state). "[T]he equality approach," Feldman argues, "just gives up the ghost and admits that there is no particular reason why church and state should remain separate, so long as conditions of equality are maintained." Id. at 730

noncognizable, even nonsensical.[132] On modern secular assumptions, there *is* no realm of reality– no realm cognizable by the state, at least-- that transcends the secular.[133]

Similarly, insofar as a commitment to the freedom or sanctity of conscience was derived from the more jurisdictional claims made for the church (conscience having partially assumed the position formerly occupied by the church), that commitment would likewise be undermined. There would be no plausible justification for "free exercise exemptions"– that is, for exempting citizens from some laws just because the laws happen to burden their religious practice. On the contrary, such special treatment would seem a departure from the liberal requirement that all citizens be treated equally.[134]

Although we have been conducting a thought experiment based on the assumption of completely secular governance, significant support for our analysis appears in the fact that at least some scholars already advocate essentially this same analysis for our actual, present, more

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[132] In this vein, Gerard Bradley has observed the "necessary relation between a Christian cultural matrix and 'separation of church and state'." Gerard V. Bradley, Church Autonomy in the Constitutional Order: The End of Church and State, 49 La. L. Rev. 1057, 1086 (1989). Operating outside such a matrix, "we constitutionalists are not constructively engaging with the church-state issue and have practically obliterated it." The constitutional commitment "has become opaque . . ., either because it has lost all meaning, or because it is an empty vessel into which one pours whatever meaning is desired." Id. at 1075.

[133] Cf. Stolzenberg, supra note at 74 ("Bereft of a religious sensibility, there is little to temper the confidence of secular liberals in their own judgments. . . . Lacking the religious mindset to function as a constant reminder and heightener of the awareness of the limits of the human mind, liberal secularism all too readily displays a hubris that galls religious believers and other critics of an overweening liberalism.").

[134] See , e.g., William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 319 (1991) ("Granting exemptions only to religious claimants promotes its own form of inequality: a constitutional preference for religious over non-religious belief systems.").

complex world.[135] We will inspect that confirming analysis more closely in Part III.

III. Phasing out the Wall.

The preceding section has suggested that *if* government operated in purely secular fashion (in the modern sense), there would be little or no justification for any special constitutional commitment to "separation of church and state" or the free exercise of religion– or indeed for treating "religion" as a special legal category at all. In our actual world, however, that "if" condition is only imperfectly realized, for various reasons. It is true that a secular, non-religious worldview prevails in some sectors of our society, including academia and law. But most American citizens, presumably including some academics and judges, remain religious,[136] and so inevitably religious beliefs and more classical notions of the secular continue to infiltrate and influence academic and public discourse.[137]

In addition, neither government nor the academy in fact operates in the coolly detached and rationalistic manner implied by the preceding discussion, in which basic assumptions are soberly and dispassionately articulated and then specific practical conclusions are worked out in some merely logical and disembodied fashion. Human thinking and practice rarely work in that

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[135] See infra notes and accompanying text.

[136] See, e.g., supra note [Baylor study] For discussion of some of the complexities, see Steven D. Smith, Law's Quandary 34-36 (2004).

[137] Cf. Frederick Mark Gedicks, The Rhetoric of Church and State 4-5 (1995):

> It is as if public religious discourse were driven into the mountains by public secularism, which then decided that it was not worth the trouble to complete the messy task of total eradication. As a result, religious discourse now makes periodic, guerilla-like forays into the public domain of secular neutrality.

way. Instead, as William James explained, typically "we keep unaltered as much of our old knowledge, as many of our old prejudices and beliefs, as we can. We patch and tinker more than we renew."[138] If James's observation holds for philosophical and academic endeavors, it is even more true in politics and law, where expectations and constituencies typically develop around, and thus serve to solidify and maintain, entrenched doctrines and principles.

Not surprisingly, thinking about religious freedom and the wall of separation has unfolded in this more lurching and haphazard fashion. In this context, we are the heirs of centuries of thought and action– some of it violent or heroic, resulting in sacrifice and even martyrdom– in which separation of church and state, freedom of religion, and the sanctity of conscience have been struggled for. These notions are by now central to our intellectual universe and our national self-understanding,[139] and they are not about to be lightly cast aside just because a theoretical reflection on the implications of modern secular assumptions does not readily yield satisfying justifications for them. Ancient commitments and assumptions can be eroded, but the

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[138] William James, Pragmatism, in Pragmatism and Other Essays 74 (Joseph L. Blau ed. 1963). See also id. at 112 ("We plunge forward into the field of experience with the beliefs our ancestors and we have made already; these determine what we notice, what we notice determines what we do; what we do again determines what we experience . . . ."). In a similar vein, Charles Taylor argues that our beliefs are the product not solely or even principally of the rational arguments we may on occasion offer for them as by the background assumptions, beliefs, and practices that he describes as the "social imaginary" and the "cosmic imaginary." Taylor, Secular Age, supra note at 171-76, 346-51.

[139] Gerard Bradley remarks that "'[s]eparation of church and state' is right up there with Mom, apple pie, and baseball in the American iconography." Bradley, supra note at 1057. As one vivid if amusing manifestation, Bradley quotes the first President Bush's statement:

> Was I scared floating around in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them-and God and faith and the separation of Church and State. Id.

erosion is likely to occur gradually, as the implications of more contemporary assumptions are worked out and assimilated, sometimes peacefully, sometimes through litigation or political conflict.[140] This erosion has occurred in part through the efforts of Justices and scholars to articulate reasons for maintaining a wall of separation between church and state (and more generally for treating religion as a special legal category)– and through their failure to discharge that task with anything like manifest success.

In fact, the modern project of justifying the special constitutional treatment of religion began somewhat belatedly. Thus, when the modern Supreme Court entered the field in *Everson*, the Court purported simply to enforce the historical decision made in the founding period[141]; the Court did not pretend to offer any contemporary justification for the wall of separation. And indeed, as late as the 1980s, and even more recently, scholars noticed that surprisingly little attention had been given to providing convincing justifications for treating religion as a special constitutional category.[142] In fact, a few legal scholars *had* addressed that issue,[143] however, and

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[140] For valuable though quite different overview accounts of these various judicial and political developments, see Noah Feldman, Divided by God 150-234 (2005); John C. Jeffries, Jr. and James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279 (2001).

[141] Everson v. Board of Educ., 330 U.S. 1 (1947). Of course, *Everson*'s historical account has been much disputed. Noah Feldman observes that Everson "distorted the historical record by projecting the concerns of the post-World War II era back to the eighteenth century." Feldman, Cal, at 675. For my own effort to ascertain the original understand of the establishment clause, see, e.g., Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 17-54 (1995).

[142] See, e.g., John H. Garvey, Free Exercise and the Values of Religious Liberty, 18 Conn. L. Rev. 779, 779-82 (1986). Michael Smith noted that "[n]one of the Justices has written at length on the justification for the special constitutional place of religion. The Justices tend to be unreflective or reticent on the larger issues." Michael Smith, The Special Place of Religion in the Constitution, 1983 Sup. Ct. Rev. 83, 88. Writing in 2002, Noah Feldman observed that "the

the project of justifying the special treatment of religion has accelerated in recent years.[144] But the results have been less than satisfying.[145]

The project is by now extensive, and no detailed review or assessment is possible here. But it may be helpful to divide the project into three stages: rationalization, revision, and renunciation. The division is artificial, because the stages blur into each other, and in fact arguments of all classes are made in all periods. Even so, the schema may provide some illumination.

A. Rationalization

In the first stage, judges and theorists forego appeals to classical or religious arguments but nonetheless attempt to support traditional commitments– to separation of church and state, to free exercise of religion or freedom of conscience– on secular, non-religious grounds. In this vein, for over half a century judges and theorists have advanced secular rationales– albeit often

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Establishment clause has generated comparatively little academic writing about why (as opposed to how) church and state should be kept distinct." Feldman, Cal, supra note at 674.

[143] For thoughtful treatments from the 1960s, for example, see Alan Schwarz, No Imposition of of Religion: The Establishment Clause Value, 77 Yale L.J. 692 (1968); Paul Kauper, Religion and the Constitution (1964).

[144] A list of a number of such works is provided in Alan Brownstein, Taking Free Exercise Seriously, 57 Case W. Res. L. Rev. 55, 61 n. 16 (2006). I discuss possible contemporary justifications at greater length in Smith, Foreordained Failure, supra note at 77-117; Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Penn. L. Rev. 149, 196-225 (1991).

[145] For a recent critical discussion concluding that there is no satisfying reason for giving religion special legal treatment, see Anthony Ellis, What is Special about Religion?, 25 Law & Phil. 219 (2006).

casually or in haphazard fashion-- to explain the distinctive treatment given to religion in American constitutional law.[146] Usually such rationales are not wholly lacking in plausibility. But they tend to be overbroad and underinclusive, and they often leave one with the sense that the advocate embraces a doubtful premise because of the cherished conclusion it leads to, not vice versa.

For example, one of the most familiar rationales for attempting to separate religious arguments and symbols from the public sphere is that religion is dangerously divisive. Among current justices, Justice Breyer in particular has stressed this rationale.[147] And these Justice have a point: religion *can* be divisive. But then other interests, subjects, and perspectives besides religion can also be divisive; religion, conversely, is not always divisive, and can in fact be a source of unity, especially times of national crisis or tragedy.[148] Moreover, even insofar as religion *is* distinctively divisive, there is no obvious solution to the problem. It seems likely that efforts to exclude religion from the public sphere often provoke as much contention and conflict as religion itself would: think of the furor provoked by the Ninth Circuit's attempt to excise the words "under God" from the Pledge of Allegiance.[149] In the end, it is hard to resist the suspicion

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[146] Michael Smith provided a helpful survey of the rationales that Justices had employed as of the early 1980s. See Smith, supra note

[147] See, e.g., Van Orden v. Perry, 125 Sup. Ct. 2854, 2868 (2005) (Breyer, J., concurring in the judgment).

[148] See William P. Marshall, The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy, 78 Notre Dame L. Rev. 11 (2002). For my much lengthier discussion of religion's potential both to divide and to unify, see Steven D. Smith, Our Agnostic Constitution, 83 NYU L. Rev. ____ (forthcoming).

[149] Newdow v. Elk Grove School District, 328 F.3d 466 (9th Cir. 2003), vacated in Elk Grove School Dist. v. Newdow, 542 U.S. 1 (2004). For a brief account of the widespread

that the divisiveness rationale, though not wholly lacking in plausibility, is embraced by its proponents to support conclusions or policy preferences arrived at in other ways or on other grounds.[150]

In a similar way, theorists have tried to develop secular rationales for a special constitutional commitment to free exercise of religion, or freedom of conscience, but these efforts have not been notably successful. One scholar, John Garvey, after surveying the inadequacies of familiar rationales, tentatively suggested that perhaps free exercise of religion is specially protected because religion is like insanity: both are immune to rational influences and considerations.[151] Later, Garvey abandoned this rationale and candidly concluded that the only plausible justification for giving special constitutional protection to religious exercise is a religious rationale.[152]

It would rash to conclude, of course, that the effort to give secular rationales for commitments to separation of church and state, or freedom of conscience, is predestined to fail. Thus, theorists continue to develop and debate such rationales, as they should.[153] And yet a

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political and popular denunciation of the decision, see Lori A. Catalano, Comment, Totalitarianism in Public Schools: Enforcing a Religious and Political Orthodoxy, 34 Cap. U.L. Rev. 601, 601-02 (2006).

[150] For a thorough examination that finds the divisiveness rationale largely unpersuasive, see Richard W. Garnett, Religion, Division, and the First Amendment, 94 Geo. L.J. 1667 (2006). For earlier, similarly critical assessments, see Michael W. McConnell, Political and Religious Disestablishment, 1986 B.Y.U. L. Rev. 405, 413; Schwarz, supra note at 711.

[151] Garvey, supra note at 794-96.

[152] John H. Garvey, What Are Freedoms For? 42-57 (1996).

[153] For a recent sustained effort, see Timothy Macklem, Independence of Mind (2006). Thomas Berg argues that separationism can be justified in part on a *Carolene Products* type

persistent question looms over these efforts: would we– would anyone– really find these rationales compelling if we were not already strongly predisposed to embrace separation of church and state or freedom of conscience?

B. Revision

To the extent that secular rationalizations of traditional commitments seem less than satisfying, judges and theorists may adopt a different strategy: rather than trying to *justify* a commitment, they may quietly *revise* it to fit more current conceptions. The result of this sort of revision may be that the commitment is effectively converted into something different– something more cognizable and acceptable in contemporary terms– but the conversion is largely concealed because the new commitment still goes under the traditional title.

Perhaps the most ingenious such revision with respect to the venerable commitment to separation has been offered by Douglas Laycock.[154] Laycock's basic commitments, forcefully and articulately expounded in a variety of articles,[155] are to religious voluntarism and

concern for protecting discrete and insular minorities. Berg, supra note For a recent essay approvingly discussing a variety of the familiar rationales and suggesting that in combination they justify special protection for religion, see Steven H. Shiffrin, The Pluralistic Foundations of the Religion Clauses, 90 Cornell L. Rev. 9 (2004). I myself occasionally attempt to contribute to the project. See, e.g., Steven D. Smith, The Tenuous Case for Conscience, 10 Roger Williams L. Rev. 325 (2005).

[154] Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 Emory L.J. 43 (1997).

[155] See, e.g., Laycock, supra note ; Douglas Laycock, Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155 (2004); Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 Depaul L. Rev. 993 (1990).

governmental neutrality towards religion. In this vein, while acknowledging that "separation" has been and continues to be an authoritative principle, Laycock proposes that the principle should be interpreted to require separation *not*, as virtually everyone had supposed, of *church and state*, exactly, but rather of *governmental influence* from *religious choice.*[156] Governmental "neutrality" toward religion, Laycock argues, is the best way to achieve that sort of "separation." On this interpretation, the common assumption that "separation" means that government should not give aid to religion turns out to be mistaken. In some contexts, on the contrary, government may or even must affirmatively support or subsidize religious causes and institutions, so that they will not be disadvantaged relative to non-religious causes and institutions that government also supports or subsidizes.[157]

This is position that many will find attractive. And it preserves the *word* "separation." But this sort of separation is a distinctly different sort of animal than the classical or traditional American versions of separation of *church and state*.[158]

Laycock's suggestion is only one noteworthy instance of a much broader movement that would re-render classical commitments to both church-state separation and freedom of conscience in the terms of equality, nondiscrimination, or "neutrality." Indeed, the Supreme

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[156] Laycock, Unity, supra note at 69.

[157] Laycock, Theology Scholarships, supra note at ca notes 167, 168. The logic here is clear: "Funding secular programs, but not religious equivalents that provide the same secular benefit, is rank discrimination." Laycock, Harv., supra note at 199.

[158] Recently, Laycock has suggested that "we should give up the phrase ['separation of church and state'] altogether" because "the phrase has no agreed core of meaning that will enable anyone to communicate." Douglas Laycock, The Many Meanings of Separation, 70 U. Chi. L. Rev. 1667, 1700 (2003) (reviewing Philip Hamburger, Separation of Church and State (2002)).

Court itself has largely converted its doctrines under both the establishment and free exercise clauses into this more fashionable idiom.[159] Thus, the "no aid" corollary of nonestablishment, which at least in the American tradition has been closely associated with "separation of church and state,"[160] has evolved (or, depending on one's perspective, degenerated) into the requirement that the state be "neutral" or "even-handed" in dealing with religion, neither favoring nor disfavoring it relative to "non-religion" (whatever that is).[161] Similarly, free exercise doctrine, which once ostensibly protected religious exercise even against unintended state-imposed

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[159] For useful overviews of these developments, see Patrick M. Garry, Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion, 57 U. Fla. L. Rev. 1, 3-15 (2005); Daniel O. Conkle, The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future, 75 Ind. L.J. 1, 6-24 (2000); Feldman, Cal, supra note at 694-706. For an earlier article already discerning this transformation, see Lupu, supra note at 23-67. Michael McConnell suggests that this shift was inevitable, and desirable.

> [T]he old paradigm of "strict separation" under the Establishment Clause has had to give way to ideas such as "equal access," "neutral funding," and "accommodation." If it had not, the expansion of government power, combined with the old insistence on "strict separation," would have been a relentless engine of secularization.

Michael W. McConnell, Why Is Religious Liberty the "First Freedom," 21 Card. L. Rev. 1243, 1261-62 (2000). Of course, McConnell is talking about "separation" as it has been understood by its modern proponents and, sometimes, by the Supreme Court.

[160] Although the notion of "separation" has clearly been closely linked to the notion of "no aid to religion" in the American constitutional tradition, see especially Noah Feldman, Divided by God 33-42, 244-49 (2005), the relation between these ideas is complicated, both historically and analytically. For further discussion, see Steven D. Smith, Taxes, Conscience, and the Constitution, 23 Const. Comm. 365 (2006).

[161] See, e.g., McCreary County v. ACLU, 545 U.S. 844, 860 (2005); Everson v. Board of Educ., 330 U.S. 1, 18 (1947). But cf. Frederick Mark Gedicks, Religions, Fragmentations, and Doctrinal Limits, 15 Wm. & Mary L. Rev. 25, 39 (2006) (arguing that "it makes utterly no sense to talk about neutrality between religion and nonreligion, or no-religion, irreligion, or any other means of expressing the opposite of 'religion'.").

burdens,[162] has now been reinterpreted to mean only that government must act under generally applicable, religion-neutral laws, not "targeting" or discriminating against religion.[163]

In these ways, classical commitments to separation of church and state and freedom of conscience have been refashioned in the enormously influential language of equality and neutrality. But the basic commitments themselves have been substantially transformed in the process, because "separation" and "neutrality" have divergent and inconsistent implications. Frederick Gedicks explains that "[s]eparation requires that the government sometimes treat religion worse, and sometimes better, than comparable secular activities." By contrast, "government satisfies neutrality when it treats religious beliefs and practices no better, but also no worse, than comparable secular activities."[164] A full embrace of "neutrality" would thus amount to a repudiation of traditional "separation."[165]

One small but significant manifestation of the discrepancy is the so-called "ministerial

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[162] See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

[163] Employment Division v. Smith, 494 U.S. 872 (1990).

[164] Frederick Mark Gedicks, A Two Track Theory of the Establishment Clause, 43 B.C. L. Rev. 1071, 1073, 1074 (2002). While noting the tension, however, Gedicks attempts to develop a "two-track" doctrine that can accommodate both commitments.

[165] In this vein, Alan Brownstein observes that "the growing acceptance of formal neutrality as a framework for protecting the free exercise of religion" represents "part of the evolving replacement for Separatism," and he goes on to criticize this development as a regrettable departure from important constitutional commitments. Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 J. Law & Politics 119, 120, 186-213 (2002).

exception" to employment discrimination laws.[166] The problem is this: both state and federal anti-discrimination laws typically prohibit employers from discriminating on the basis of sex, but some churches hold as a matter of doctrine that women cannot serve as priests or clergy members. So, aren't these churches in stark, officially proclaimed violation of the laws? And if so, do they have any constitutional immunity?

In a classical "separationist" framework, the answer to these questions would seem to be quite clear (in theory, if not in political practice). Drawing jurisdictional lines can be difficult in many cases, as we have seen already, but it seems that this would not be one of those difficult cases: one sovereign clearly oversteps its jurisdiction if it attempts to dictate to another who can and cannot be appointed to important offices within that other sovereign's own jurisdiction. Thus, under a classical, jurisdictional notion of "separation of church and state," the state could no more dictate to the church that it must employ women as priests than the United States could order England to revise its qualifications for membership in Parliament.[167] And indeed, some such conclusion was plausibly (if contestably) explained under free exercise doctrine as it was

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[166] An insightful discussion of this and closely-linked problems is provided in Ira C. Lupu and Robert Tuttle, The Distinctive Place of Religious Entities in our Constitutional Order, 47 Vill. L. Rev. 37 (2002).

[167] The medieval situation was, to be sure, much more complicated than this analysis indicates, in part because bishops and priests often served both temporal and spiritual functions. See William C. Placher, A History of Christian Theology 136 (1983):

> In theory, everyone agreed that the church and the empire or kingdoms had separate tasks, both given by God. But in practice, when the church owned vast stretches of land and provided many governmental officials, it was hard to know where to draw the line between the two. Gregory [VII] saw lay investiture as illegitimate interference in the church, but to Henry [IV] it seemed necessary to have some right to choose his own leading landowners and officials.

understood until 1990.[168]

Under current doctrine, by contrast, this conclusion seems anomalous. As noted, in *Employment Division v. Smith*, the Supreme Court famously held that so long as laws burdening religion are "neutral" toward religion and generally applicable, no exemptions from such laws are constitutionally required.[169] Anti-discrimination legislation is applicable to employers generally; it does not discriminate against churches or single them out for special burdens. Why then should churches be entitled to a constitutional exemption permitting them to discriminate against women in the clergy? Richard Garnett notes the obvious question: "If . . . it would be illegal for Wal-Mart to fire a store-manager because of her gender, then why should a religiously affiliated university be permitted to fire a chaplain because of hers?"[170]

Some scholars would indeed draw this conclusion: sex discrimination by churches *should*

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[168] A seminal article developing this theme was Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981). In a similar vein, see Frederick Mark Gedicks, Toward a Constitutional Jurisprudence of Religious Group Rights, 1989 Wisc. L. Rev. 99.

[169] Employment Division v. Smith, 494 U.S. 872 (1990).

[170] Richard Garnett, Are Churches (Just) Like the Boy Scouts?, attp://ssrn.com/abstract=1017590, at pp. 6-7.

be forbidden.[171] Most courts, however, continue to shield churches in this respect.[172] But under current constitutional doctrine, explanations for *why* churches enjoy this immunity seem strained.[173] The "ministerial exception" looks like an aberration[174]– a holdover from a more classical framework that has now been officially abandoned. The anomalous quality of the exception is testimony to the transformation that has in fact occurred as old commitments have been (incompletely) recast in more modern molds.

Equality and neutrality, however, do not provide the exclusive vocabulary into which

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[171] See, e.g., Jane Rutherford, Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion, 81 Cornell. L. Rev. 1049 (1996). In a curious concession to traditional separationist concerns, however, Rutherford suggests that in discrimination suits against churches in which churches are acting for religious reasons, remedies should be limited to damages (including punitive damages) and should not include injunctive relief. Id. at 1125-26. For criticism of the exception, see Marci A. Hamilton, God vs. The Gavel 189-98 (2005).

[172] For an instance as well as for discussion and a listing of similar decisions, see Combs v. Central Texas Annual Conference, 173 F.3d 343 (5th Cir. 1999).

[173] The Third Circuit, adopting the exception, followed precedent but noted that "[a]lthough our sister circuits seem to agree that the ministerial exception is grounded in the First Amendment, their rationales for adopting the exception . . . is [sic] often less clear." Petruska v. Gannon University, 462 F.3d 294, 305 n. 8 (3d Cir. 2006). Courts have distinguished *Smith* by saying that *Smith* eliminated mandatory free exercise exemptions for *individuals* but did not remove religious *institutions'* right to be free from governmental interference in their internal affairs. See, e.g., *Combs*, 173 F.3d at 349-50. *Smith,* however, did not acknowledge any such limitation on its ruling. And before *Smith*, the case for institutional free exercise rights seemed even less clear or established than the case for individual free exercise rights, see generally Laycock, supra note , so it is not clear why institutional rights would now be more extensive than individual rights. But see Kathleen Brady, Religious Organizations and Free Exercise: The Surprising Lessons of *Smith*, 2004 BYU L. Rev. 1633 (arguing that *Smith* supports a broad right of church autonomy).

[174] Richard Garnett notes that the ministerial exception is related to the "church autonomy" doctrine, but this doctrine suffers from "the lack of a clear doctrine and textual home" and hence "has something of an imprecise emanations-and-penumbras air about it." Garnett, Boy Scouts, supra note at 11-12.

classical commitments can be converted. Revisers may instead turn to the language of "personal autonomy"[175]: this seems an especially apt idiom for presenting the classical commitment to freedom of conscience. But, once again, the traditional commitment is radically transformed in the revision. Thus, Marie Failinger remarks that freedom of conscience "began as an argument that government must ensure a free response by the individual called distinctively by the Divine within" but by now "has come to mean very little beyond the notion of personal existential decision-making."[176] In a similar vein, Ronald Beiner suggests that a book on the subject by David Richards alters– and demeans-- the concept of conscience.

> The spuriousness of this recurrent appeal to the sacredness of conscience is very clearly displayed in the discussion of pornography. How can this possibly be a matter of *conscience*? What is at issue here, surely, is the sacredness of consumer preferences.

And Beiner goes on to scoff that "[b]y [Richards's] contorted reasoning, the decision to snort cocaine constitutes an act of conscience."[177]

C. Renunciation

As it becomes apparent that current constitutional commitments, though passing under the same names as more classical commitments, are substantially different in substance, an obvious question arises: wouldn't it be better just to drop the facade? Why not admit that we no

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[175] Cf. Bradley, supra note at 1076 ("Liberalism . . . joins the whole problem of religion to that of individual autonomy, so that the former is at best an aspect or accent of the latter.").

[176] Marie Failinger, Wondering After Babel, in Law and Religion 94 (Rex J. Adhar ed. 2000).

[177] Ronald Beiner, Philosophy in a Time of Lost Spirit 30 (1997).

longer can give persuasive reasons for the older commitments and that we do not in fact adhere to those commitments? Might not this candid renunciation be a promising first step toward reducing the confusion that notoriously prevails in religion clause jurisprudence?

For obvious institutional and rhetorical reasons, courts may be reluctant to announce that they are repudiating principles long thought to be contained in the Constitution. So usually it is critics of the Court who complain that the wall of separation and corollary principles or commitments have been scaled back or abandoned.[178] Scholars, by contrast, have more freedom to acknowledge and embrace changes that seem indicated. And recently, some scholars have openly and enthusiastically noted and advocated the renunciation of classical commitments to religious freedom and the separation of church and state.

Thus, in a provocative article called "Who Needs Freedom of Religion?", philosopher and law professor James Nickel offers a list of nine "basic liberties" that deserve legal protection; these include such liberties as "freedom of belief, thought, and inquiry," "freedom of association," and "freedom to follow an ethic, plan of life, lifestyle, or traditional way of living."[179] "Freedom of religion" does not appear on the list; however, Nickel argues that whatever is valuable about the traditional commitment to freedom of religion will be protected by the other "basic liberties." It is better to dissolve religious freedom into other liberties, Nickel contends, among other reasons because this approach "can gain widespread acceptance in a religiously and ethnically diverse society that includes many nonreligious individuals."

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[178] See supra notes

[179] James W. Nickel, Who Needs Freedom of Religion?, 76 Colo. L. Rev. 941, 943 (2005).

> Religious liberty is more secure when nonreligious people see it, not as a special concession to the orthodox, but rather as simply an application of liberties and rights that all enjoy.[180]

Nickel's position is not hostile to religion– nor, for that matter, favorable to it. His argument amounts to a plausibly-presented claim that under modern assumptions and commitments, there simply is no adequate reason to treat religion as a special legal category for purposes of protection.

Though Nickel does not specifically call for renunciation of the principle of separation of church and state, his logic surely points in that direction. And what is left implicit by Nickel is made explicit in a book by Christopher Eisgruber and Lawrence Sager. Explaining that both establishment clause and free exercise doctrine have been powerfully influenced by an ideal of "separation," Eisgruber and Sager comment on "how odd and puzzling the idea of separation is."[181] For one thing, the idea has wreaked conceptual havoc. "[M]etaphors and slogans about 'walls' and 'separation' can never provide a sensible conceptual apparatus for the analysis of religious liberty,"[182] they contend. "The result has been a crazy quilt of special privileges and restrictions that seem ad hoc at best and incoherent at worst."[183]

In addition to causing confusion, however, church-state separationism is, in the view of

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[180] Id. at 951.

[181] Eisgruber & Sager, supra note at 6.

[182] Id. at 22-23.

[183] Id. at 29. See also id. at 282 ("From the moment of its inception in the Everson case, the separation-inspired 'no aid' principle has sown confusion and incoherence.").

Eisgruber and Sager, simply unjustifiable– and unjust.[184]

> The separation-inspired approach to Establishment Clause questions is the mirror image of the separation-inspired approach to the Free Exercise Clause questions about special exemptions for religiously motivated conduct. They form an odd couple. Both insist that religion is an anomaly, requiring exotic constitutional treatment different from anything else. Yet in free exercise cases, the idea of special immunities demands that religious believers be given an extraordinary benefit enjoyed by no one else; in Establishment Clause cases, the idea of separation insists that religion and religion alone be starved of public benefits available to everyone else. . . . The result is a curious position that requires government both to grant religion special privileges and to impose upon it special restrictions . . . .[185]

From a classical perspective, of course, what Eisgruber and Sager view with puzzled disdain as a "strange, two-faced constitutional response"[186] and an "injustice"[187] in fact seems utterly unremarkable. If church and state are viewed as independent jurisdictions, then it is no more odd– no more anomalous or unjust-- that governmental noninterference will sometimes relieve churches and their disciples of both the benefits and the burdens of the state's law than it seems odd that citizens of Mexico are neither subsidized nor restricted under many laws and programs of the United States. Conversely, once the two-realm, jurisdictional perspective is discarded or forgotten, the point made by Eisgruber and Sager seems apt. Within this framework, there is indeed no obvious rationale for what looks like a sort of schizophrenic constitutional love-hate complex extending to religion and the church both special immunities and special disabilities.

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[184] Id. at 17-18, 22-50, 55, 283-84.

[185] Id. at 17-18.

[186] Id. at 24.

[187] Id. at 283.

In place of separation, Eisgruber and Sager propose a principle of "Equal Liberty." The core idea is that "minority religious practices, needs, and interests must be as well and as favorably accommodated by government as are more familiar and mainstream interests."[188] Most of their book is devoted to elaborating on this idea and applying it to a range of familiar issues involving religion or churches.

Whether Eisgruber and Sager fully grasp and embrace their own insight is debatable. At times they seem influenced by a lingering commitment to classical separation, or at least to its residue.[189] Thus, they defend an exception to employment discrimination laws allowing churches to discriminate against women in the selection of clergy, but their explanation seems less than convincing.[190] At another point, they raise an intriguing question: If religion is not a special

[188] Id. at 13. A proposal to treat religion "equally" with other interests contains and important ambiguity that should be noted, though we need not pursue it here. In the American constitutional regime, most interests are subject to the vicissitudes of politics, subject only to something like a "rational basis" limitation as protection against unfavorable laws, but a few concerns– race, sex– give rise to so-called "heightened scrutiny" from the courts, meaning that unfavorable laws directed against them must be justified by something like a "compelling interest." Would treating religion "equally" with other interests mean that religion is thrown into the political pot along with most other interests, or that it would still call for some sort of "heightened scrutiny" by the courts? Eisgruber and Sager give the latter answer. But (referring to their earlier writings), Noah Feldman argues that they fail to justify this choice, and that "there is no better reason to protect the political equality of religious minorities than the political equality of anyone else." Feldman, Cal, supra note at 677, 714-16. For a careful discussion of the issue, see Thomas C. Berg, Can Religious Liberty Be Protected as Equality?, 85 Tex. L. Rev. 1185, 1194-1204 (2007).

[189] For a careful development of this objection, see Berg, supra note [TX].

[190] Eisgruber and Sager attempt to defend the exception as an application of "associational freedom." Eisgruber & Sager, supra note at 63-66. But since other comparable associations (comparable on secular criteria, at least– private schools, for instance) usually do not enjoy any such immunity from anti-discrimination legislation, this rationalization seems frail. For more detailed criticism, see Ira C. Lupu & Robert W. Tuttle, The Limits of Equal Liberty as a Theory of Religious Freedom, 85 Tex. L. Rev. 1247, 1268-70 (2007).

category subject to special burdens and restrictions, and if the government is free to establish a National Endowment for the Arts to subsidize what it regards as valuable work in the arts, should the government be equally free to create a National Endowment for Religion to subsidize important work in that sphere as well?[191] Their response is that such a program would be constitutionally forbidden, even under an "Equal Liberty" approach that had abandoned the separation and "no aid" principles. But their explanations for this conclusion seem less than compelling.

Thus, Eisgruber and Sager observe that a National Endowment for Religion would "put government in the position of saying what religion is, what is good for religion, and, ultimately, something very much akin to what is a good religion."[192] They may be right,[193] and it is surely true that these could be difficult and controversial questions: but then the same can be said of the arts. If there is no constitutional prohibition on aiding religion, why should the existence of such questions preclude a program of selective subsidies?

Eisgruber and Sager add that government funding would be particularly perilous in the area of religion because "[i]n our society, religious belief and affiliation are important

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[191] Eisgruber & Sager, supra note . at 60-62.

[192] Id. at 60.

[193] I say they "may be" right because it is not obvious that the hypothetical NER would have to purport to answer these questions. Just as a program for aiding the arts can limit itself to making (admittedly controversial) judgments about what subsidies for work fitting under the general heading of "art" would serve the public interest without pretending to offer profound or definitive judgments about "what is art?", so a program for subsidizing religion might make similar judgments without purporting to reach any ambitious or definitive conclusions about "what religion is, really" or what religious truth is in any deep or ultimate sense.

components of individual and group identity."[194] Again, they are right, but their conclusion remains insecure.[195] It is hardly obvious that religion is the only, or even uniformly the most important, component of personal and group identity. Many other elements can figure prominently in a person's or group's sense of identity– language, education, aesthetic values, moral commitments, even recreation or sports[196]– but no one (including Eisgruber and Sager) supposes that government is therefor precluded from making judgments or providing support in these areas.[197] Thus, government establishes schools, sets curricula, promotes the arts, preserves wilderness and recreation areas, and supports the construction of sports stadiums, even though all of these projects touch on often controversial matters central to various citizens' sense of identity. In the end, therefore, it is hard to resist the suspicion that Eisgruber's and Sager's particular reluctance with respect to aid for or judgments about religion reflects a residual– and

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[194] Id. at 61.

[195] For criticism of the "identity" rationale for giving special treatment to religion, see Feldman, Cal, at 716-18.

[196] For further critical discussion, see Smith, Penn, supra note at 202-04. See also William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 320-21 (1991) ("[R]eligious belief cannot be qualitatively distinguished from other belief systems in a way that justifies special constitutional consideration. For example, bonds of ethnicity, interpersonal relationships, and social and political relationships as well as religion may be, and are, integral to an individual's self-identity.") (footnotes omitted).

[197] Cf. Ellis, supra note at 236-37:

> The fashionable talk of "self-identity" gives this argument rhetorical edge to which it is not entitled. One's religious beliefs are not part of who one is, unless one thinks that an object possesses all of its attributes necessarily. . . . Of course, religious belief may be a central focus of a believer's life. But this can hardly be to the point, since any sort of belief can be central to a person's life.

"separationist"-- sense that religion and government simply are not supposed to go together.[198]

Whether or not this is so, however, Eisgruber's and Sager's book at least purports and attempts to renounce the "wall" metaphor, the separation principle and its corollaries, and the derivative commitment to special protection or immunity for the free exercise of religion. In that respect, the book may be the starkest current manifestation of the conclusion this essay has argued for– namely, that the wall of separation lacks any secure foundation in modern secularism.

IV. Conclusion: Out of the Rubble?

Both in the popular press and in more academic writing, the complaint has been much bandied about of late that religious conservatives and Republicans are responsible for the crumbling of the wall of separation of church and state. I have tried to show in this essay how that complaint, though not wholly unfounded, seriously distorts and oversimplifies our situation.

It is true that some religious conservatives have been severely critical of the "wall" metaphor, and of the post-*Everson* Supreme Court's construction of the separation of church and state. And this conservative influence is discernible in the policies of the Republican Party, and in the jurisprudence of some Republican appointees to the bench. But if religious conservatives have succeeded in knocking down the wall, or portions of it, that is because secularists and

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[198] The point is developed in Lupu & Tuttle, supra note at 1252-54, 1263-64. Eisgruber and Sager respond, however, with a complex account of "disparagement" under which government-sponsored religious messages arguably effect a sort of disparagement that other government-sponsored messages would not. See Christopher L. Eisgruber & Lawrence G. Sager, Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle, 85 Tex. L. Rev. 1273, 1281-83 (2007).

secularism in its modern sense had already been at work, for generations, loosening up and removing the foundations on which the wall had been constructed. Thus, the wall has been tottering for a very long time; it has long been vulnerable to critical pressure, whether from religious conservatives or from secular scholars like Eisgruber and Sager.

So, should we treat the pending collapse of the wall of separation as cause for alarm (in the way, say, that the Chinese would likely have viewed the breach of the Great Wall by the Mongol armies of Genghis Khan), or rather for celebration (in the way, say, that many on both sides greeted the fall of the Berlin Wall)? And what sort of remedy or action does our situation call for?

The analysis offered in this essay suggests that *if* the persistent prophets of inevitable secularization had been correct, the collapse of the wall would most plausibly be viewed as a natural and perhaps even inevitable feature of secular progress. And the proper response to that collapse would be to applaud the removal of one long-standing obstacle to clear thinking-- and then to proceed to work out how the state ought to treat church and conscience on the basis of contemporary secular assumptions. The recent book by Eisgruber and Sager is a good reflection of this sort of response.

This is surely one possible diagnosis of our situation: the difficulty with it lies in the italicized "if." Secularization of the sort that so many thinkers and social theorists predicted has not occurred[199]; on the contrary, it now appears (in this country at least) that religion is as vital as

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[199] Rather than simply reject the secularization thesis, however, some thinkers have refined it. Charles Taylor, for example, argues that although religion has not disappeared or significantly declined, as many predicted, nonetheless there has been a significant change in "the conditions of belief." We have moved "from a society where belief in God is unchallenged and indeed, unproblematic, to one in which it is understood to one option among others, and

ever, at least in the general population, and is not about to wither away any time soon.[200] In addition, there seems to be a real attachment to at least some portions of the wall of separation,[201] not just from the secular side but from the religious side as well[202]: the "ministerial exception" to employment discrimination laws, discussed above, is just one example. Richard Garnett observes that "the much-maligned and often misused idea of church-state 'separation' remains at the heart of our thinking not only about the Constitution's religion-related provisions, but also and more generally about religious freedom under limited government."[203]

So if there is a conflict between "separation" and "secularism" in its modern sense, we might want to retrench by reaffirming the historic commitment to separation and rethinking our ostensible commitment to secularism. Perhaps the country rushed into the assumption that government must be secular too hastily. The Supreme Court *said* government must be secular[204]; but it seems that neither the American people nor the Justices themselves really wanted that– not

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frequently not the easiest to embrace." Taylor, Secular Age, supra note at 3. Taylor's recent study attempts to trace the course, causes, and implications of this change.

[200] See supra notes

[201] Douglas Laycock opines that "most Americans support separation of church and state"). Laycock, supra note (Chi 2003) at 1698 John Witte observes that despite retrenchment by the Supreme Court, "the wall of separation has lived on in popular imagination as the salutary source and summary of American religious liberty." Witte, supra note at 211. A large-scale study of American evangelicals– a group sometimes perceived as opposing separation– is consistent with these observations. See Christian Smith, Christian America? What Evangelicals Really Want 21-60 (2000).

[202] See, e.g., Daryl Hart, A Secular Faith: Why Christianity Favors the Separation of Church and State (2006).

[203] Garnett, Boy Scouts, supra note at 17.

[204] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

in any thoroughgoing way, at least.[205] And so the Court has been forced to backtrack and to give embarrassingly implausible explanations of how what looks like religion and religious expression in government isn't really religion after all.[206] Perhaps our project now should be to think hard about what our basic beliefs and assumptions *really* are, and then to defend or rebuild

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[205] Some years ago, David Smolin pointedly depicted the conflicted conditions that prevail:

> In January 1997 a hundred million Americans . . .will watch a United States Supreme Court Justice once again ask a President-elect to place a hand upon a Christian Bible and swear an oath of allegiance to the Constitution of the United States. The candidate will end the oath with "so help me God" and mention God somewhere in the inaugural address; prominent clergy will lead the nation in prayer. Then that Supreme Court Justice, along with others in attendance, will return to the job of considering whether allowing graduation prayers, prayers at football games, or government assistance at religious schools is unconstitutional because of the danger of "confusion" by young people, the "imposition" of religious practice, or a message of "endorsement" of religion.
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> One response to this incongruity is laughter. Another appropriate response, however, is a deep cynicism about both modern Establishment Clause jurisprudence and those government officials who claim to support it.

David M. Smolin, Cracks in the Mirrored Prison: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics, 29 Loyola-LA L. Rev.1487, 1501 (1996).

[206] Perhaps the starkest example is Justice O'Connor's labored explanation in the Pledge of Allegiance case of how the words "under God" in the Pledge do not send a religious message. See Elk Grove School District v. Newdow, 542 U.S. 1, 33-45 (2004) (O'Connor, J., concurring). Cf. Douglas Laycock, Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 235 (2004) (observing that "[t]his rationale is unconvincing both to serious nonbelievers and to serious believers"). Steven Shiffrin observes, "I am sure that a pledge identifying the United States as subject to divine authority is asserting the existence and authority of the divine." And he adds that "pretending [that this and similar expressions] are not religious is simply insulting." Shiffrin, supra note at 70-71. With reference to the use of religion in Presidential inaugurations, David Smolin comments, "I suppose that Justice O'Connor might say that such use of the Bible and prayer are merely 'solemnizations' bereft of religious or sectarian content. If she really were to believe such a thing it would evidence a remarkable capacity for self-delusion akin to the capacity of tobacco companies to somehow avoid knowing that smoking causes lung cancer." Smolin, supra note at 1504-05 (footnote omitted).

or remodel the wall of separation in accordance with those beliefs and assumptions (some of which might well be religious).

In sum, one diagnosis suggests that we are better off without the wall, and that we should get to work figuring out what justice requires without the impediment of an archaic metaphor and commitment. An opposite assessment maintains that we should defend the wall and rethink our supposed commitment to secularism.

In reality, of course, we are unlikely to follow either prescription-- not in any consistent way, at least. Among other reasons, both prescriptions ascribe to us greater rational grasp of and control over our course than we actually possess (judging from all past human experience, at least). And indeed, not only has history not unfolded in accordance with the "secularization" script; it has disregarded as well expectations for or descriptions of a linear or logical development of *any* kind.

Driven by the desire for clean exposition, scholars may want to say– as I myself have been saying, with intermittent caveats-- that a "premodern" classical and religious worldview was succeeded by a "modern" and secular worldview (which perhaps in turn evolved into a "post-modern" worldview, which developed into . . .what? A post-post-modern worldview?). Scholarship demands such generalizations and classifications, perhaps. But the reality seems to be that religious and secular beliefs, and classical and modern assumptions, have continued to flourish alongside each other– in varying proportions, no doubt-- in an unruly, unholy, but sometimes fearfully fertile mix.[207] Moreover, this sort of messiness is likely to continue.

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[207] A first-rate historical study such as that of Owen Chadwick amply demonstrates the almost unfathomable complexity and subtlety of such developments. See Chadwick, supra note

Consequently, our thinking and theorizing have been– as they always are, and as they will continue to be– obstructed but also anchored by partly suppressed assumptions and traditional though supposedly foresworn commitments.

But although we can acknowledge such complexities, they are no excuse for continuing to think and assert what is not so. And one thing that is not so, as I have tried to argue, is that religious conservatives and Republicans are primarily responsible for leveling the wall of separation between church and state. So at least if we desire to enhance understanding rather than to score political points, we would be well served to rid ourselves of that gratifying (for many academics and advocates at least) but shortsighted notion.