

The “Paradoxical” Relationship between Religion and Liberal Democracy in the United States

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Religion has been, and remains, a strong bulwark of liberal democratic culture in the United States. This salutary relationship is by no means inevitable. Quite the contrary; it is entirely contingent on the historical, social, and political facts of a particular community. That religious zeal, organization, and authority can threaten democratic values is all too evident in the history of numerous countries. My argument, then, is not that religion and democracy are necessarily compatible; they emphatically are not. Rather, I contend that certain specific features of contemporary American society and law, which I shall discuss, have rendered religion and liberal democracy mutually reinforcing and have strengthened both. I also maintain that these features are so deeply rooted in American life that this circumstance -- relatively rare, fortunate, and somewhat inexplicable (even accepting the social scientific analyses of measurable variables)¹ -- is likely to endure.

I begin with three apparent “paradoxes” concerning the relationship between religion and democratic politics in America (Part I). The word “apparent” and the scare quotes around “paradoxes” are designed to suggest, none too subtly, that in the American context (I discuss no other), these are not paradoxes at all. Instead, they are social facts that are shaped by the distinctive character of American cultural and political institutions, ideals, and practices.² The remainder of the paper purports to resolve these paradoxes. Part II shows how religious groups and principles have played an essential, sometimes leading role in almost every progressive movement – and a few retrograde ones -- for social and political reform throughout American history. In Part III, I describe five defining features of contemporary

¹ See, e.g., KENNETH D. WALD AND ALLISON CALHOUN-BROWN, *RELIGION AND POLITICS IN THE UNITED STATES* (6th ed., 2011).

² For a detailed analysis of these institutions and practices, see PETER H. SCHUCK and JAMES Q. WILSON, eds., *UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION* (Public Affairs, 2008).

American religious life -- diversity, decentralization, fragmentation, individualism, and pragmatism -- that help to explain its compatibility with liberal democratic values. Part IV discusses the intimate and extensive role that religious groups play in administering American public policy, especially in the delivery of vital social services and the integration of immigrants. Part V briefly summarizes the complex ways in which American law, especially the United States Constitution, regulates the relationship between religion and democratic politics. The discussion in Part V uses a stylized, obviously oversimplified dichotomy between “separationists” and “accommodationists” in order to highlight the arguments that they characteristically tend to make on some of the legal and political issues that often arise in this area.

I. Three Paradoxes Concerning Religion and Democratic Politics in the United States

A Post-Modern Society, Yet Deeply Religious

The U.S. is perhaps the most advanced technological society on earth, boasting unequalled levels of higher education, economic rationalism, and scientific research. In almost all other countries, such conditions conduce to secular values and the weakening of religious beliefs and institutions, yet the opposite has occurred in the United States, where a resurgent vitality in its religious life has occurred. To be sure, America has many secularists, atheists, and agnostics, but a far higher percentage of its people attend religious services than in Europe (except for Ireland and Poland). Some scholars believe that the gap is smaller, arguing that fewer Americans actually go to church than the number who tell pollsters that they do. But no analyst disputes the fact that Americans are much more deeply involved with religion than are Europeans.

Indeed, the most famously perceptive foreigners have emphasized this aspect of American life. Alexis de Tocqueville: “Religion never intervenes in the government of American society,” but it should be considered the first of their political institutions.” To G.K. Chesterton, America was “a nation with the

soul of a church.” Gunnar Myrdal characterized it as the most “moralistic and moral conscious branch. . .of Western Civilization.” Tocqueville and Myrdal intended this as praise; Chesterton did not.³

Separation of Church and State, Yet Religion Deeply Involved in Politics

The separation of church and state in the U.S., mandated by its Constitution, is as rigorously enforced as anywhere in the world. At the same time, religion plays, and has always played, a very important and quite explicit role in U.S. politics, as Part III demonstrates. Taken together, these two facts generate many constitutional controversies, as exemplified in Part V, about how law can and should regulate the conditions under which the continuing struggle between religion and secularism in American life is to be conducted.

Religion, Often Anti-Democratic Elsewhere, Supports Democracy in the United States -- and Vice-Versa

In almost all other countries, religion has been feared as democracy’s adversary – and that fear has often been warranted. Indeed, the various democracy-threatening elements of religious influence – clericalism, powerful church establishments, lay deference to clergy in political matters, theological obscurantism, and ecclesiastical complicity with authoritarian regimes -- have been a major target of liberal democratic revolutions at least since the French Revolution and even today in much of Latin America and Europe. (As of now, we have no examples of liberal democratic revolutions in the Mideast, although – writing in April 2011 -- one entertains hopes, likely to be disappointed, for the ones in Egypt, Tunisia, Libya, and elsewhere).

Here, as in so many other respects, the United States is an outlier. Jon Meacham shows that “religion shapes the life of the nation without strangling it,” which he rightly calls the American good news, its gospel.⁴ In the U.S., religion has never seriously threatened democracy, although many Americans have understandably feared that it could. In fact, religion has nourished our democracy, and the opposite is

³ The quotations appear in JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY (2003), p. 4.

⁴ AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION (2007).

also true: American religions today flourish amid, and in part because of, democratic politics. This is not to deny, however, that the relationship between them has been fraught in the past. At times, democratic (and pre-democratic) majorities have been fiercely hostile, and even violent, toward Catholics, Mormons, and other religious minorities. Nor do I deny that the relationship carries potential risks to each. As a leading study of American religion and politics concludes after canvassing the historical and social science evidence, “[R]eligion in politics is neither an unvarying source of good nor a consistent evil influence. . . . [R]eligion has the capacity both to ennoble and to corrupt political life.”⁵

Since the early colonial period, numerous wise commentators have warned that a poorly-managed relationship between democracy and religion can endanger the vitality and independence of each of them.⁶ This ominous warning remains a constant refrain in public debates over the nature of this relationship, and rightly so. So far, however, the risks have not materialized in any enduring way. From a comparative point of view, this equilibrium between vibrant, passionate religious life and the stability of

⁵WALD AND CALHOUN-BROWN, p. 345.

⁶ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) (“We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause.”); *id.* at 608 (“Madison warned that government officials who would use religious authority to pursue secular ends ‘exceed the commission from which they derive their authority and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.’” (quoting James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), in *THE COMPLETE MADISON* 300 (S. Padover ed. 1953))); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 219 n.8 (1948) (Opinion of Frankfurter, J.) (“‘The manifest object of the men who framed the institutions of this country, was to have a State without religion, and a Church without politics -- that is to say, they meant that one should never be used as an engine for any purpose of the other Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. For that reason they built up a wall of complete and perfect partition between the two.’” (quoting Jeremiah S. Black, *Religious Liberty* (1856) in *BLACK, ESSAYS AND SPEECHES* (1886) 51, 53)); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 291 (Henry Reeve trans., The Lawbook Exchange, Ltd. 2003) (1838) (“Religions, intimately united to the governments of the earth, have been known to exercise a sovereign authority derived from the twofold source of terror and of faith; but when a religion contracts an alliance of this nature, I do not hesitate to affirm that . . . in obtaining a power to which it has no claim, it risks that authority which is rightfully its own.”); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

a rough-and-tumble democracy is a highly salutary, seemingly miraculous fact about the United States.

As I shall argue, however, it is no accident.⁷

II. Immigration, Social Reform, and Politics

The zealous Puritans who founded American society were neither liberals nor advocates of democratic politics – although some of their practices, including the Mayflower Compact itself, contained the seeds of such politics. Soon reduced to a minority even in the Plymouth Colony, their descendants conducted a constant and for the most part unsuccessful struggle with secularism, indifference, and declining church attendance. The only doctrine they valued was their own – or as the 19th century minister Henry Ward Beecher put it, “Orthodoxy is *my* doxy and heterodoxy is *your* doxy, if *your* doxy is not like *my* doxy.” Although they were themselves antiestablishment dissenters, many colonists did not shrink from persecuting, expelling, and even killing those whose worship differed from theirs – an intolerance widely practiced in other colonies.

Immigration, more than toleration, engendered religious diversity in America. The colonies desired immigrants primarily for their economic value to thinly-settled frontier communities with the colonies’ entrepreneurial merchants and real estate speculators. Toleration for the strange beliefs and practices of other Christians, not to speak of non-Christians and non-believers, came only slowly and, even then, incompletely. Americans, literally repelled by the religious wars that had butchered and benighted so many of their ancestors in Europe, gradually found their way to the live-and-let-live acceptance of heterodox beliefs and disparate practices that marks our constitutional tradition – and, today, our dominant social ethos. The dramatic declines in anti-Catholicism and anti-Semitism during the last half of the 20th century were important signs of this attitudinal change.⁸

⁷ Much of what follows is taken from PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE (2003), which contains extensive sources for the claims that I make here. Accordingly, this paper is only lightly footnoted.

⁸ If any more proof of the new ethos were needed, one need only look to former President Bush’s speech to the nation only two days after the September 11 terrorist attacks, praising Arab-Americans and Islam while declaring

In the United States, always a nation of immigrants, religion has played an invaluable role in fostering immigrant assimilation. Historically, the religious identities nourished by the churches, synagogues, mosques, and other communities of worship that immigrants join upon their arrival have played important, often decisive roles in orienting them to American civil society, smoothing their integration into it, and eventually incorporating them into the political culture and as citizens. Religious groups provide emotional and spiritual resources that newcomers desperately need in order to endure the wrenching experiences of casting off the familiar. As in the 19th and 20th centuries, the groups also constitute communal enclaves that can provide immigrants the essential breathing room and mundane integrative resources and associations that they need in order to learn English, access social services, gain job, social, and networking skills, consolidate their families in America, and adapt their distinctive liturgical, linguistic, and ethnic traditions to the mores of their new society.

This process of change, moreover, is a two-way street. Even as American religion alters the immigrants, the immigrants alter their religions, both in the U.S. and back in the home countries. American social and ideological conditions helped to liberalize the Catholic Church, itself a change of world historical significance. Similarly, Judaism was “Americanized” during the 20th century, and much the same is occurring today with Islam, Hinduism, Buddhism, and other world religions. Their diasporas in America are not only transforming their religions here but are also catalyzing religious changes in their civilizational homes. For example, countless local, ethnically-defined churches founded by immigrants during the pre-World War I period of massive migration helped to smooth the always rough path of assimilation.⁹ Today, a large proportion of new Catholic priests come from families that came to the U.S. from Mexico, Vietnam, and other Catholic source countries.

war on their violent co-religionists – and to the election of Barak Hussein Obama, whom a significant number of Americans persist in believing is Muslim (and foreign-born).

⁹ Although most of these religiously-conditioned group adaptations succeeded, many failed (at least in secular terms), particularly among the more millenarian and socialistic sects.

Religiously-inspired moralism and political action have been central in most of America's most idealistic public causes and social reforms, and this remains true today.¹⁰ The burst of evangelical energy known as the Second Great Awakening, beginning in the early 1800s and continuing through most of that century, sought to educate the public on a massive scale about the need for moral uplift, religious enthusiasm, and social institution-building. Their many causes included the abolition of slavery, Bible literacy, temperance, prohibition of child labor and other workplace abuses, control of vice and crime, Progressivism and urban political reform, public health, universal public education, female suffrage, financial support and moral tutelage of the indigent and wayward, missionary work here and abroad, and many others. More recently, religious groups have propelled the anti-war, anti-abortion, and civil rights movements, as well as campaigns for arms control and a nuclear freeze, environmental protection, international human rights, corporate responsibility, end-of-life safeguards, elimination of the death penalty, and protection of immigrants. Perhaps more selfishly, they are also prominent in the campaigns for school choice and public voucher financing of private schools.

American religions possess three important features that have been, and remain, particularly conducive to the formation and maintenance of a democratic culture, particularly in a society like ours that is famously competitive and isolating in some respects, as in David Reisman's Lonely Crowd. First, our religions are by nature *communal*. Any religion is a set of beliefs and practices that, perhaps by definition, are shared by and constitutive of a faith community that elaborates institutions designed to perpetuate that community's highly particularistic ways of life, death, memory, learning, interpretation, childrearing, family relations, worship, and so forth. Religious communities place distinctive demands on their members and promise them soulful rewards and consolations. They provide the discipline and structure of relationships, expectations, routines, reciprocities, and moral codes.

Second, American religions tend to be highly *inclusive* in their recruitment of new members, imposing few if any of the kinds of ascriptive barriers that might exclude or alienate their recruits in other societies

¹⁰ See generally, Morone, *supra* note __.

or settings. Instead, these religions usually offer acceptance and at least a notional love to anyone who is prepared to subscribe to their tenets. For individuals whose poverty, isolation, crime, or other antisocial conduct has cut them off from any spiritual life and community of meaning, a religious connection may offer emotional, psychological, spiritual and social survival, literally a godsend. Even more striking, members can hope to find this fellowship regardless (within very broad limits) of the specific content of a religion's beliefs and practices. Small wonder, then, that religious ministries have been established, with varying success, in American prisons, hospitals, skid rows, addiction treatment centers, and other venues in which outcasts congregate. In particular, Catholic schools' success in educating students who would probably fail in the secular ones they would otherwise attend seems to reflect many of the same factors that I have just discussed – particularly the discipline, structure, clear expectations, and a pervasive sense of communal esprit, shared moral values, pedagogical seriousness, and mission.

Third, as noted below, American religions, even Catholicism in its way, are to a marked extent *non-hierarchical* in their structure and governance. Typically, they are participatory, locally organized and financed, self-governing and congregational, egalitarian, pragmatic, dogmatically flexible, internally diverse, and experimental – all important liberal democratic virtues that they tend to both exemplify and practice. This equips them well to engage in the rough-and-tumble, give-and-take of democratic politics.

III. American Religion: Diverse, Decentralized, Fragmented, Individualistic, and Pragmatic

Traditionally, most religious believers have wanted others to embrace their faith. They have seen religious diversity as a troublesome social reality to be managed and, if necessary, suppressed -- as with the federal government's war on Mormon polygamy and thus on the Mormon church itself.¹¹ What is decidedly untraditional is to regard religious diversity as an affirmative social good. Indeed, until quite recently, only a relative handful of visionaries held this view and some of them were not themselves religious people. Rather, their ideal of diversity proceeded mainly from practical concerns. They hoped

¹¹ *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

that civil society, by harboring many contending beliefs, might neutralize and domesticate their dangerous propensities. Peace-keeping motives for protecting religious diversity have long existed -- although it is worth recalling that the Supreme Court did not protect a minority religion under the Free Exercise Clause until the 1940s.

Historically, Steven Smith notes, “the ferment that caused religious diversity to flourish—and that is largely responsible for the condition of religious freedom we enjoy today—was a product of pluralism; it owed little or nothing to judicial review, or to the legal elaboration and enforcement of any constitutional ‘principle of religious freedom.’” In the face of this religious pluralism, the government has been constrained, both by the Constitution’s religion clauses and by the realities of liberal democratic politics, to pursue a policy of neutrality among religions, and as between religion and non-(or anti-)religion. But defining neutrality in a way that decides hard cases without appealing to some non-neutral value is more than difficult. It is “mission impossible,” according to Stanley Fish, because a non-neutral appeal is in the end inescapable -- whatever those who wish to universalize the contested value may choose to call it.

Religious groupings have always been diverse in America, and immigration has vastly magnified it. Native-American religious practices were diverse before the Europeans arrived and remain so today. European settlers brought with them quite disparate cultural, linguistic, and confessional traditions, and the churches they established in America were ethnically parochial in these senses. For example, Catholic immigrants from France, Italy, Bavaria, Puerto Rico, and South America naturally preferred to worship with co-religionists from the old country -- although they used the Latin liturgy until after Vatican II. These imported religious traditions have achieved a critical mass in the U.S. that is now more easily sustainable than ever before -- although the assimilation process may in time efface some of their ethnic distinctiveness. Globalization, Diana Eck notes, “enables an immigrant from India to read the *Times of India* every morning on the Internet, to subscribe to Indian cable news on the satellite dish, to

bring artisans from rural India to work on Hindu temples in suburban America, and to return home for a family wedding.”

But the encounter between diverse religions and American democratic culture is not always mutually enriching, nor does it always promote liberal ideals. One might argue that America absorbs all religions by assimilating them to a democratic culture that demands fealty to individualism, formal equality, common morality, and other liberal orthodoxies. Respect for religious diversity, in this view, embraces only those practices and beliefs that are broadly consistent with these orthodoxies, but does not extend to exotic ones like polygamy, the sacramental use of peyote, and withholding of medical care from children – to name some of the practices whose restriction have been upheld by the Supreme Court. It is in this sense a domesticated, denatured, compromised diversity that is confined to what does not genuinely threaten the majority.

America’s religious diversity also reflects the fierce, fractious ethos of its Protestantism, an ethos refined through almost four centuries of sectarian struggle as well as by American society’s distinctive racial, class, ethnic, and regional cleavages. This history has precipitated a vast number of sects and denominations. This heterodox pattern was apparent as early as the 17th century with the migration of Huguenots, Quakers, Mennonites, and other dissenting groups to the American colonies. Nor is this fragmentation diminishing. During the 20th century, the Pentecostal movement produced more than 300 distinct denominations, and a significant dissident faction has recently arisen within the Southern Baptist Convention, by far the largest Protestant group.

Another dimension of religious diversity in America is geographical. As Mark Silk and Andrew Walsh explain, “There are Catholic zones and evangelical Bible Belts, a Lutheran kingdom and a Mormon Zion, metropolitan concentrations of Jews and Muslims, and (in a different dimension) parts of the country

where religious affiliation of whatever kind is very high and parts where it is far below the norm.”¹² This fact is particularly salient for the subject of this paper because sharp geographical differences, including religious ones, drive national and regional politics.

James Madison, in his Federalist #51, advanced what is perhaps the most powerful defense of the role of religious diversity in maintaining a liberal polity. His defense is notable not just because of his prominence in the framing of the Constitution but also because of his instrumental view of religious diversity. Madison likened religious diversity to the diversity of social interests more generally, which he thought would best secure liberty and justice in both government and civil society: “In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects” Just as a plethora of competing parties and secular interests would forestall majoritarian tyranny by placing them at cross-purposes, so a “variety of sects dispersed over the entire face of [the country], must secure the national Councils against any danger from that source.”

Further diversification and fragmentation seem likely as the forces of competition amid a secularizing mass culture transform the nature, function, and relationships of religious groups. Thirty-five years ago, Peter Berger described them as “marketing agencies” working in a “system of free competition very similar to that of *laissez-faire* capitalism,” one in which “[r]eligious contents become subjects of ‘fashion.’” On the supply side, denominations seek more distinctive niches or “brand identities” with which to hold and attract members. On the demand side, individuals in what Wade Clark Roof calls the “questing culture” pursue a bewildering variety of customized mixes of meditation, therapy, counseling, self-help, behavior modification, fellowship, and a search for “spirituality without religion.” The power of

¹² Silk & WALSH, ONE NATION, DIVISIBLE: HOW REGIONAL RELIGIOUS DIFFERENCES SHAPE AMERICAN POLITICS (2008), p. ix.

this competitive, individuating impulse helps to explain why so little has come of formal ecumenical efforts among American churches, most of which have involved restoring relations broken by the Civil War a century earlier.

These centrifugal forces extend far beyond Protestantism. American Judaism, for example, long ago split into four major streams -- and a fifth, "humanistic Judaism," is now seeking recognition. As this example suggests, the fragmentation is by no means confined to liberal, congregational-oriented, and decentralized groups; it also extends to the more hierarchical Catholic and Orthodox Christian churches and especially to the evangelical and Pentecostal sects, which are the fastest growing of all in the U.S. and are rapidly expanding overseas. Indeed, the largest gains in the evangelical sector have occurred in non-denominational groups, which have tripled as a percentage of the total since 1965. The fragmentation of American religions is further underscored by the fact that once we set aside a few large denominations -- Catholics (22%), Baptists (18%), and Methodists (9%) -- no single religious group exceeds 5% of the population.

Even within the most hierarchical of American religions, diverse views abound. Today's Catholic Church has been described, perhaps hyperbolically, as "a federation of internally divided quasi denominations. . . . [P]eople who identify as Catholic are more liberal on sexual morals than Protestants as a whole. Birth rates and opinions on abortions are virtually the same. Like Protestantism, the American Catholic Church today seems to be many denominations, loosely united" A 1996 survey finds an almost even split between "traditional" and "progressive" Catholics on basic issues of faith, and much the same is true among other putatively conservative groups:

For example. . . one-third of committed evangelicals and 41% of committed Catholics believe that legal abortions should be available to women in at least some circumstances other than rape, incest, or to save the life of the mother, and well over half of the members of these two groups support the distribution

of birth control information in public schools. Thirty-three percent of committed evangelicals – and nearly as high a percentage of Mormons – believe that government regulation is necessary for the public good, and 28 percent of both groups think that the federal government does a better job than it is often given credit for. Similarly, about one-fourth of committed black Protestants believe that the government cannot afford to do more for the needy, and almost one-third feel that African Americans are largely responsible for their own economic circumstances.

In addition, the religious practices and views within most religious groups in America are far more heterogeneous liturgically, doctrinally, organizationally, demographically, and in their geographic distributions than the same groups are elsewhere in the world -- and this diversification is accelerating. For each church that amalgamates with others today, many more are born afresh or separate from their parent congregations. An estimated 1600 religions and denominations exist in the U.S., a far cry from the “three-religion country” proclaimed by Will Herberg in the 1950s. About half of them were founded after 1965. Indeed, as Richard Ostling points out, each of two dozen denominations has as many local congregations today as made up the whole of American religion in 1776. Here, as elsewhere in American life, technological and market forces have played their part in spawning diverse forms of worship -- tele-churches, mega-churches, and pastoral teachings on the Internet.

Reflecting international trends, the mainline Protestant denominations – predominantly white, relatively affluent, ecumenical, affiliated with the liberal National Council of Churches, and leaders in college and seminary education – have declined markedly since the 1960s. Some denominations and regions have lost more than others. Catholicism is holding its own demographically with the help of immigration; about 3% of its seminarians are Vietnamese. At the same time, the shares of fundamentalist, evangelical, Pentacostal, and charismatic sects have grown dramatically; the Mormons’ has doubled, the Assemblies of God has more than tripled, and the Church of God in Christ’s has risen almost nine-fold. Ecstatic Christianity is resurgent. These dramatic demographic and ideological shifts within Protestantism, as we shall see, are having far-reaching effects on the balance between secular and religious values in contemporary American politics.

Christianity still utterly dominates religious affiliation throughout America. In 2001, 82% of those polled described themselves as Christians; this share, although down from 89% in 1947, represents 100 million more adherents. Indeed, more Christians live in the U.S. than in any other country in the world, and virtually every county in the U.S. is predominantly Christian. Even so, non-Christian, non-Jewish religions have grown rapidly. Most of the world's diverse Hindu traditions are practiced in the U.S., as are the Sikh, Jain, and other offshoots of Hinduism. There soon will be more Muslims in the U.S. than in the small Arab countries. As with Hinduism, all branches of Islamic worship can be found here. An estimated four million practicing Buddhists live in the U.S., representing the whole range of Asian Buddhist traditions, along with many indigenous American ones. The Federation of Zoroastrians in North America has established many Zoroastrian temples here, and more Baha'i live in the U.S. than in Iran. Even pagan religions seem to flourish in the U.S.; the Pagan Educational Network estimates 600,000 practitioners.

But even this denominational variation understates the amount of religious diversity in America. Worshipful energy, liturgical innovation, and even governing authority have gravitated steadily from the national organizations to their regional and local units -- a devolution that religious organizations in America share with secular ones. Even the Jesuits, the most disciplined, hierarchical, and orthodox of Catholic groups, have come under the spell of these fragmenting, individualizing conditions of modern American religious life. To an extent, the devolution of even highly centralized religious authority rests on practical, structural, and ideological considerations. The Episcopal Diocese of New York, for example, conducts its Sunday worship in 14 languages, and Catholics, who are increasingly Spanish and Asian language speakers, come from 23 different countries of origin.

Another powerful diversifying force is Americans' traditional personalization of their religious practices, whether as members of organized denominations or not. No other society on earth has experienced this

vast proliferation of sects, which usually break away from more mainstream denominations, and “new religions” or cults, usually centered around charismatic leaders. In Alan Wolfe’s study of middle-class suburbanites, he found that “this strong strain of individualism. . .helps explain why, as religious as Americans are, they also distrust organized religion: in 1990, as few as 23 percent of the American population expressed a great deal of confidence in religious institutions. . . .Americans would be more comfortable living next to blacks than to religious sectarians. . . .” Even traditional sectarianism cannot wholly satisfy this radical religious individualism, which Wolfe finds to be distinctively privatistic, voluntaristic, non-dogmatic, and separate from organized religion.

Indeed, sociologists have argued that all religions in America, including Catholicism and others with strong hierarchical organizations, become *de facto* congregationalist in form and practice. Still further along in the process of congregational fragmentation is the apparently growing number of “home churches” where a single family, sometimes joined by a few others, constitutes its own unique congregation and liturgy. The ultimate destinations of this implacable individualism, it appears, are the narcissistic, spiritual wanderings of the individuals (not families) who populate the growing questing culture discussed earlier.

This chronic dissatisfaction with religious institutions bears a striking resemblance to the populist, anti-hierarchical, maverick, and competitive impulses that Americans exhibit in other spheres. Their mistrust of mainline religions probably springs from many of the same social, psychological, and ideological sources as their suspicion of large corporations, political parties, professional expertise, and government. This may help to explain a striking fact: Americans profess strong religious convictions but appear to know little about basic religious ideas and facts. Fully 96% of them say that they believe in God – about the same as fifty years ago -- with 90% believing in heaven, 65% in the Devil, and 75% in angels that affect human affairs. In 1996, religion accounted for 16% of all TV programming in the U.S. and appeared on 257 stations, up from 1% and nine stations in 1974. Sales of “Christ-honoring products” had

quadrupled to \$4 billion since 1980. In 2001, 25% of adult Internet users, about 28 million people, had gone online to find religious and spiritual material – more than the number who had visited gambling sites, participated in online auctions or traded stocks online, and a sharp increase from the number in 2000.

Given Americans' religious enthusiasm and participation, Americans' theological ignorance is all the more remarkable. Although 93% of their homes contain at least one Bible and a third claim to read it at least once a week, 54% cannot name the authors of the Gospels, 63% do not know what a Gospel is, 58% cannot name five of the Ten Commandments, and 10% think that Joan of Arc was Noah's wife! Indeed, a recent survey found an astonishing number of born-again Christians whose views seem to flatly contradict the Bible.

Although some regard this religiosity, especially the growth in evangelical membership, as proof of another "great awakening," the data suggest otherwise. Mainline denominations, now quite liberal theologically, are losing members to indifference or to more conservative breakaway groups. Secularism continues to rise, most notably among influential university and media elites. The share of those self-describing as atheists, agnostics, and "no preference" has almost doubled since 1965 and a large and growing minority of younger Americans consider themselves "spiritual" rather than religious. Even among the religious, a significant decline in traditional religious beliefs, practices, and commitment has occurred during this period. For example, Gallup polls indicate that in 1993 only 46% of Catholics in the U.S. said they regularly attended mass, down from 74% in 1958. At the same time, however, many religious beliefs seem to have intensified. Today, some analysts think, America's great cultural divide is not among different religions but between believers and non-believers.

Whether all of this amounts to a paradox, a deeper consistency, crude survey techniques, or arrant hypocrisy is uncertain. What is clear is that Americans profess respect for the religious diversity around

them, and that this diversity seems to promote church attendance and religious commitment. Perhaps religious pluralism sends a social signal that a robust norm of belief exists, one that confers status regardless of what the beliefs are. Alternatively, this diversity may trigger a more straightforward economic dynamic in which churches and sects compete for parishioners by emphasizing their differences – their unique “brand identities” – in contrast to the similarities that ecumenical movements emphasize.

IV. Religious Groups, the American Administrative State, and Immigrant Assimilation

Social Services. Churches and other “faith-based organizations” (FBOs) have provided an array of social services for as long as religious communities have existed in America. Today, the volume and variety of these services are astonishing. A recent study sampling the country’s approximately 300,000 congregations found that 91% offered some sort of social service and that most offered five or more. Each congregation donated an average of 148 work-hour equivalents per month, the work-equivalent of \$140,000 a year. Another study, however, found that fewer than 10% of these programs, concentrated in the larger churches, took on persistent problems of poverty like drug abuse, health care, domestic violence, and lack of job skills, while the smaller ones emphasized soup kitchens and other short-term emergency programs. “The hard social work can be done only by big congregations,” according to one commentator on these findings, “and they are already doing a lot.” FBOs also vary enormously in how intensely their faiths are infused into their social services.

Governments have been supporting FBOs’ communal efforts since America’s earliest days. For example, the Massachusetts colony appropriated funds for Harvard College, Congress sent Congregational ministers to proselytize among the Cherokees, and state and local governments supported religious schools through most of the 19th century, stopping only when immigrant Catholic schools demanded their fair share of any such funds and their own sectarian teachings. Governments funded private religious agencies for a broad range of child welfare services, care of the sick and destitute, education and training

of Native Americans and low-skill workers, relief of war refugees, and community-based programs for the mentally and physically disabled, elderly, homeless and hungry, and other needy populations. An extensive 1993 survey of nonprofit organizations suggests that two-thirds of all voluntary, charitable giving went to nonprofit entities with a religious base, a third of all child care providers were church organizations, the New York Roman Catholic archdiocese obtained 75% of its \$1.75 billion budget from government (most of it from federal Medicare and Medicaid payments to Catholic health care agencies), and Jewish organizations received roughly the same share from government sources. Some 63% of child welfare agencies receive at least 20% of their budgets from public funds.

During the 1980s and 1990s, political pressures to increase federal government funding of FBO social service programs grew. This pressure came not only from church groups that hoped to use the new resources to expand those programs but also from politicians of all ideological stripes seeking to identify themselves with religious values, the vibrant, expanding evangelical movement, and the many religious swing voters who had supported both Jimmy Carter and Ronald Reagan. President Clinton won the 1992 election with the support of many former Reagan voters in the evangelical movement and joined forces with, indeed mobilized, religious conservatives on many domestic and international free exercise issues. In 1996, Clinton signed into law Charitable Choice provisions that encouraged states to use FBOs in moving the needy “from welfare to work” under federally-funded antipoverty and social welfare programs. The new law made them eligible to receive various forms of government funding on an equal basis with other private providers, and protected “the religious integrity and character” of FBOs providing these services while barring FBOs from religious teaching, proselytizing, or coercing clients into participating in religious practices. Charitable Choice was a largely conservative initiative in Congress and most liberals opposed or ignored it. Its political appeal became so obvious, however, that Al Gore endorsed the idea, though not all the details, of George W. Bush’s proposal in the 2000 presidential campaign. This liberal support may not be so surprising. A year earlier, sociologist Mark Chaves had predicted that politically conservative congregations were much less likely to apply for these funds than

middle-of-the-road or liberal congregations, especially predominantly black ones with strong traditions of social services to the poor and support for government spending. This prediction seems to have been borne out.

No one can seriously doubt that FBOs should receive public funds to do the public's secular work. The U.S. wisely took this road a long time ago; indeed, as time goes on FBO services become more and more indispensable to our social well-being. The real questions are about the terms on which they should receive government support, whether the law can specify and enforce those conditions effectively, and whether, in light of them, FBOs will be prepared to participate.

Several of these conditions seem clear enough, although interpretation and implementation problems are inevitable. First, the service must be secular in the sense of having a predominantly non-religious purpose (serving the disadvantaged). Very often, however, this secular purpose coincides with a religious one (doing God's work on earth), a fact that should not, without more, disqualify the FBO. Second, client participation must be voluntary and uncoerced. This means, for adult clients, that an FBO must clearly disclose its religious orientation before rendering the service. The government must give clients secular alternatives wherever possible; if none is available, the government must devise other ways to assure voluntariness. Children served by FBOs must look to parental choice to protect their autonomy interests. If no competent parent exists, a legal guardian must fill the gap. Protecting children against FBO overreaching, abuse, or neglect is a daunting challenge; indeed, even legal fiduciaries for children sometimes abuse their trust. The relevant comparison, however, is to public agencies and other secular alternatives whose performance in this respect may be no better, and possibly worse.

Third, FBOs must have equal opportunity to compete for social service funds under established, objective criteria that neither favor nor disfavor religion. To make this competition most meaningful and responsive to clients' interests, government should give those funds in the first instance not to the service

providers but to the eligible clients to spend on the program-qualified providers and services they prefer, along with information about the various providers. Where a client's condition impairs this kind of autonomy, a legal guardian or protective agency must decide on the client's behalf. Fourth, if these limits are observed, the law should not bar FBO services that mention God, display sacred symbols (e.g., a cross, crescent, or cassock), or include other religious elements. Both common sense and anecdotal evidence suggest that religious appeals sometimes increase the effectiveness of prison ministries, youth workers, and other programs. Flat bans are hard to enforce. They require factual distinctions that government is ill-equipped to make and that entangle it with religion in undesirable, perhaps even unconstitutional ways. By the same token, and consistent with the Civil Rights Act exemption discussed earlier, an FBO should be able to prefer co-religionist employees where this affinity promotes its mission, but should have to disclose this policy.

A harder question concerns proselytizing. As a legal matter, no government funds should be used to support FBO efforts to recruit new members. The difficulty is that using religious appeals in an effort to induce moral conduct can be tantamount to recruitment. A law allowing a FBO to exhort clients to abandon child abuse or some other depravity only if it calls the behavior "anti-social" rather than "sinful" or "against God's will" would be foolish. And since applying such a test would turn on the speaker's precise wording and intent, it would be even harder to enforce and more entangling even than a ban on displaying religious symbols. Indeed, it is not clear that the Constitution would permit government to distribute public funds on the basis of neutral secular criteria but then proscribe spending those funds on a service provider that spoke approvingly of God's will. Perhaps the best the law can do in this situation is to (1) bar the use of federal funds to proselytize, defined as recruitment activity exceeding what is necessary to provide the secular service effectively; (2) monitor FBO compliance, perhaps through unidentified market testers; and (3) focus enforcement on FBO overreaching rather than challenging, say, a caseworker's invitation to clients to attend a meeting held in a church basement or her mention of God's blessings. This solution, to be sure, is neither neat nor altogether satisfactory. Rule (1) is somewhat

ambiguous (how much praise of God is “necessary” and when does it constitute “recruitment”?), which will make rules (2) and (3) indeterminate. But it strikes a prudent balance between two compelling but competing goals: exploiting the immense social value of FBO-provided services in a spiritually inclined, religiously diverse society where the sacred and secular often converge, and keeping religion and government in their appropriate spheres.

Immigrant Assimilation. If immigrants to the U.S. have integrated well into American life relative to their counterparts’ experiences in other receiving societies, much of the credit should go to the American religious groups that have actively recruited and helped to settle and assimilate them. This is certainly not to deny the sordid history of deep hostility to immigrants generally or, more commonly, to those immigrants associated with those faiths, especially Catholicism and Judaism, whose adherents many Americans particularly vilified.¹³ Today, however, such prejudice against those faiths has largely disappeared, limited largely to marginal extremist groups of little social or political consequence such as skinheads and the Ku Klux Klan.¹⁴ Americans’ hostility to immigrants as such – nativism and xenophobia -- is at low levels, although opposition to illegal immigration is very high.¹⁵

Indeed, religious groups in the U.S. view immigrants of their faiths as current or potential co-religionists who promise to infuse their congregations with new members, enthusiasm, and even leadership, as with Catholics from Latin America, Vietnam, the Philippines, Korea, and other source countries who have slowed the sharp decline and rapid aging of the American priesthood.¹⁶ Religious organizations also play an essential role in the selection and resettlement of refugees in the United States, working closely with

¹³ The classic sociological review of traditional prejudice against Catholics and Jews is WILL HERBERG, *PROTESTANT-CATHOLIC-JEW* (1955).

¹⁴ Some defense groups such as the Anti-Defamation League (ADL) (for Jews) and the U.S. Conference of Bishops (for Catholics) are vigilant for more subtle indicia of such prejudice. For example, the ADL views the fierce hostility to Israel on many college campuses as evidence of disguised anti-Semitism. *See, e.g.,* Kenneth L. Marcus, *Anti-Zionism As Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J., 837, 842-856 (2007).

¹⁵ See discussion of these distinctions in PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* (1998), chap. 1.

¹⁶ See, e.g., Kirk Semple, “As Mexicans Fill Pews, Church Leaders Are Slow to Welcome Them,” N.Y. Times, Mar. 25, 2011.

and financed by the federal and state governments to provide income maintenance, health care, child welfare, literacy and education programs, job training and placement, naturalization support, and many other social services needed to help newcomers adjust to the demands of American life. As noted earlier, these groups compete intensively with one another for membership and funds, using the marketing skills for which American companies and non-profit organizations are noted (and criticized). Immigrants are among their target audiences.

V. Religion and the Constitution

The constitutional law governing religion in America is very complex and constantly evolving. Accordingly, only the most selective and superficial treatment of the subject is possible here.

Three clauses of the United States Constitution explicitly mention religion. Two of them – the Establishment and Free Exercise Clauses -- are the very first ones in the First Amendment, which provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” The third, the Religious Test Clause in Article VI, provides that all federal and state officials are bound by oath or affirmation to support the Constitution; “but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

Americans are divided on what these clauses mean in defining the legally proper relationship between religious beliefs and values, on the one hand, and our political, collective life, on the other. Indeed, the vigorous debates over this issue during the last quarter-century have served only to underscore the chasm separating the disputants. As Alan Wolfe puts it, “[t]wo hundred years after the brilliant writings of James Madison and Thomas Jefferson on the topic, Americans cannot make up their minds whether religion is primarily private, public, or some uneasy combination of the two.”

We can best map this chasm by exploring what it is that seems to divide the disputants. The polar positions are “separation” and “accommodation,” but people’s positions ultimately depend on how they define and apply the neutrality principle (discussed below) that the courts require government to observe, and in which contexts. For example, justices William Brennan and Thurgood Marshall were strong separationists in Establishment Clause cases but vigorously favored accommodation to religious practices in Free Exercise cases.

Separationists tend to think that religion is a potentially divisive force when brought into public life; they wish to consign it to the private realm where, like other forms of expression and activity, law should protect it on the same neutral terms that liberalism applies to other views. Invoking Jefferson’s famous metaphor, which the Court adopted only as recently as 1947, separationists believe that both religion and politics gain when the law erects between them “a wall. . .which must be kept high and impregnable.” They also draw on Jefferson’s equally significant distinction between belief, which the government cannot regulate, and conduct, which in this view it can regulate. In 1990, the Court affirmed this distinction in the Smith decision¹⁷ after having criticized it in the Yoder¹⁸ and Sherbert¹⁹ cases. I briefly discuss these decisions below.

Accommodationists believe that religion generates enormous public and private benefits (a claim many separationists concede -- up to a point) but insist that it can only retain its meaning-creating, value-conferring force and integrity if it has considerable breathing space in which to pursue distinctive beliefs and practices. The law, accommodationists say, should create a strong presumption favoring even those practices that seem illiberal or in some cases are illegal -- although just how strong it should be is a question that divides Congress and sets it against the Court. Separationists reply that such

¹⁷ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

accommodation is not neutral as between religion and non-religion or perhaps even as among religions; far from merely tolerating religion, they say, accommodation may unconstitutionally “establish” it.

Beneath these antipodal positions lie deeper conceptual, empirical, normative, and political cleavages.

As an initial matter, separationists and accommodationists differ over three things: what neutrality means, whether it is really possible in religiously diverse America today, and if so whether it is a defensible public value or legal standard where religion is concerned. Because these three issues are sometimes conflated, separationists like Stephen Macedo, a liberal defender of civic values against the inroads of religion, and accommodationists like Stephen Carter, a religious conservative who wants to broaden religion’s role in public life, can end up agreeing on a number of points even as they present their positions as strongly antagonistic. I shall use recent work by Carter and Macedo to sharpen the debate.

The first commonality is that, as Carter approvingly puts it, “religion has no sphere. It possesses no natural bounds. It is not amenable to being pent up. It sneaks through cracks, creeps through half-open doors. . . and it flows over walls. . . . Rushing past boundaries is what religion does.” Macedo acknowledges this leakage but decries it, warning that it poses a mortal danger to the ideal of civic liberalism. They also agree that strict state neutrality – basing government policy solely on secular ideas and disregarding its effects on religion -- is illusory. Religion is inevitably political in that it helps shape our public and private values. To Carter, “[n]eutrality is a theory about freedom of religion in a world that does not and cannot actually exist” because the state cannot act without taking account of religion. A pretense of neutrality, Carter argues, is used to override deep convictions for little state gain, as when the Supreme Court invoked neutrality to uphold military discipline against an Orthodox Jew for wearing a yarmulke while in uniform. Macedo too doubts the possibility of strict neutrality but wants to contain this leakage lest it contaminate both sides, especially the liberal polity which needs inoculation against

certain sect-values. The state, he argues, must promote civic virtues, not comprehensive ideals of the good life, but even affects religious beliefs and practices non-neutrally.

Carter also claims that the neutrality norm favors big, influential religions over small, defenseless ones. (Interestingly, separationists say the same about the beneficiaries of accommodation, although this theory has trouble explaining Yoder's accommodation of the Old Order Amish precept requiring children to leave school at an early age; this sect is hardly a political powerhouse, even in Pennsylvania).²⁰ Historically, prohibition laws did allow mainstream believers to drink sacramental wine and Smith did refuse to extend unemployment benefits to drug counselors for a minor, peyote-eating Native American sect. Carter's larger hostility claim, however, is very weak. Long before Smith, many federal and state laws gave religions in general and small sects in particular special consideration. The Religious Freedom Restoration Act ("RFRA") was enacted in 1993 to overrule Smith and to protect (among others) the same obscure Native American sect, as both Congress and some states had already done. Courts, to be sure, tend to be less accommodating than legislatures; even under the pre-Smith compelling interest test, courts almost always upheld the government. But this may be changing; in the 1990s the Supreme Court upheld a small sect's ritual practice against a local ban even as it rejected a claim, strongly supported by Congress, by America's largest denomination, the Catholic Church.

Separationists like Macedo also agree with accommodationists like Carter on religion's manifold virtues. Indeed, Macedo maintains that the separatist project "depends upon the support of religious reasons and religious communities—a support that can be encouraged by a liberal public philosophy but not altogether justified by it." Liberalism, he says, depends on the reasons, norms, and moral convictions generated by religious communities, and also on the political and moral education that such communities

²⁰ See also, Gregory C. Sisk, "How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases," 76 U. COLO. L. REV. 1021 (2005) (finding that traditional Christian religions do not fare better in the federal courts on religious liberty claims).

provide. Even Catholicism, whose earlier illiberalism he strongly condemns, has strengthened the American polity. Its natural law doctrine checks the moral excesses of democratic majoritarianism, its “subsidiarity” principle supports devolution of power, and it rightly insists that human values transcend the political, justifying why one should not invest politics with all one’s moral energies.

Beyond these convergences, however, separationists and accommodations disagree sharply. To someone like Carter, the state that Macedo wants to protect poses a far greater threat to religion than religion does to the state, and the state’s putatively civic projects, which Macedo wants to promote, are in fact pervaded by assumptions of value and fact that are hostile to religion. To Carter, these assumptions cohere to constitute a comprehensive, secular world view that not only competes with religion in defining the meaning of life but remorselessly deploys its monopoly of coercive power, together with a conviction of the state’s superior rectitude, to establish and maintain its dominance. To Macedo, in contrast, this competition is disciplined by the ground rules of separation, and the hegemony of an activist state is required to sustain his vision of “liberalism with spine,” which goes beyond promoting tolerance, freedom, order, and prosperity. It must also secure “the preconditions of active citizenship,” including the state’s “educative” interests in citizens’ character, in order to pursue society’s collective ends. Some religions, notably fundamentalist groups that insist on subordinating the state’s educational and moral authority to that of the group and family, are anathema to this vision and must be overridden in the name of civic liberalism. Which values civic liberalism includes, of course, is itself a hotly disputed issue.

I am tempted to suggest that despite these sharp rhetorical conflicts, and except at the extremes, most separationists and accommodationists differ only in degree. Militants of both stripes doubtless will reject this pacific suggestion. Unlike Macedo, for example, many separationists categorically oppose the use of vouchers in religious schools, and unlike Carter many accommodationists demand school prayer. Nor do I mean to deny that such differences can produce quite disparate views about particular cases or

policy disputes, as with the charitable and school choice proposals discussed in the last section of this chapter. My suggestion, rather, is that in the end the precise location of the lines that the law must draw depends on principles that come down to matters of degree, of more or less.

Carter, for example, concedes that there are limits “beyond which no claim of religious freedom will be recognized,” citing the case of religiously-mandated murder. One could cite more difficult cases like church-sanctioned child and spousal abuse, racial segregation, and female genital mutilation, but the point would be the same: lines must be drawn and someone with temporal authority must draw them. But having acknowledged this, Carter then complains that it is the courts which eventually will do this and that they inevitably “center their concern on the needs of the state, not the needs of the religionist.” In fact, as we have seen, Congress and the states often do precisely the opposite. Courts, moreover, must review these legislative choices. The real issue for the courts, then, is the legal standard for reviewing them.

And disputes over the standard for judicial review is where we can see the *casus belli* dissolving into a difference of degree, albeit a consequential one. Carter seems to favor the “compelling governmental interest” standard that the Supreme Court applied until its controversial 1990 Smith ruling, a standard he says most accommodationists endorse. According to this standard (also called the Sherbert-Yoder test, after earlier decisions that elaborated it), a law may substantially burden the exercise of religion only if that burden furthers a compelling governmental interest and is the least restrictive means of doing so. Macedo argues that this test is too demanding of the state, too accommodating of religious practices that run afoul of secular law. This ignores the fact, emphasized by the Court first in Smith and later in City of Boerne v. Flores,²¹ that the government almost always prevailed under the compelling interest standard, unless the restriction implicated some other constitutional right -- and no federal statute has failed to satisfy it. Macedo proposes instead an “intermediate standard” now used to assess

²¹ 521 U.S. 507 (1997).

discrimination claims asserted by some non-racial minorities; it would ask “whether the law being challenged advances important governmental objectives in a reasonable manner.” Both Macedo and Carter, then, support tests under which courts draw lines by identifying, weighing, and balancing competing interests much as legislatures do. They differ only over whether the state’s interest must be “compelling” or merely “important” and whether the burden must be “the least restrictive means” or merely “reasonable.”

Let me be clear. In calling attention to the small differences between the two standards’ operative phrases and to the even smaller differences between how judges might actually apply them after identifying, weighing, and balancing interests, I am not denying that outcomes in particular cases may turn on these differences. The Mozert case, a much-discussed 1987 appeals court ruling, is a telling example.²² Mozert involved the claims of fundamentalist Christian parents who wanted to opt out of a mandated public school reading program designed to teach tolerance of diverse views. They insisted that the readings contradicted their understanding of God’s word, which denied the truth of other views. The required readings, they argued, would lead the children astray. As an alternative, the parents proposed that their children use other state-approved texts, cover any missed work at home, and take the same reading tests as other students. Although the court applied the accommodating compelling interest standard, it rejected their claim because the texts taught only tolerance and did not assert the truth or falsity of any particular view. Merely exposing children to diverse views, the court felt, could not be constitutionally objectionable.

Macedo and Carter, our proxy separatist and accommodationist, take opposing views on Mozert. Macedo notes that the parents’ proposed accommodation “did not seek to impose their ideas on anyone else through the public school curriculum and did not (apparently) challenge the general legitimacy of secular public schooling. They wanted only to opt out of a particular program while remaining in public

²² Mozert v. Board of Education, 827 F.2d 1058 (6th Cir. 1987).

schools—how much harm could there be in that?” Macedo quickly answers his own question: “And yet, the Mozert objections went to the heart of civic education in a liberal polity: how can tolerance be taught, how can children from different religious and cultural backgrounds come to understand each other and recognized their shared civic identity, without exposing them to the religious diversity that constitutes the nation’s history?” In a liberal polity, he argues, fundamentalist parents have “[no] right to shield their children from the fact of reasonable pluralism. . . . [w]e are dealing with children who are not mere extensions of their parents. The parents’ religious liberty does not extend with full force to their children.”

Carter, however, will have none of this. Rejecting the Mozert court’s view that teaching tolerance could not be objectionable, he asserts the primacy of the parents’ claims: “We flout the ideal of genuine diversity when we strip mothers and fathers of their freedom to limit the exposure of their children to what is not, according to the judgment of the parents, true and noble and right. . . . [T]he religious should unite behind a very strong norm elevating parental interests above the interests of the state (except in extreme cases, such as physical abuse), so that dissenting religious communities have the chance to survive and thrive rather than drowning in the cultural sea that, if left unchecked, will eventually overwhelm them all.”

Note that although Macedo and Carter would have decided Mozert differently, their views seem quite unrelated to any difference between the “compelling governmental interest” and intermediate scrutiny legal standards. It is not the legal standards that do the analytical work for them but their deeply-held moral convictions about the competing claims of family, state, and community. Note also that both would countenance exceptions: Macedo would justify some accommodation of the parents’ claims on prudential grounds, while Carter would override parental sovereignty in “extreme cases, such as physical abuse.” But these concessions raise further questions. To Macedo: why is the reasonableness of a proposed accommodation a merely prudential consideration? Why is it not also relevant to defining the

parent's constitutional right under the intermediate scrutiny balancing test that he supports? To Carter: why is state intervention justified for conduct that the state considers physical abuse but that the parents consider divinely-ordained discipline? Would he also justify state intervention to prevent what it considers psychological abuse or unusually harsh but presumably loving rigor? Carter might reply that we have laws, reflecting a moral consensus, against physical abuse but not against the others, but this response, of course, simply begs the same question that he purports to be answering: what is the legitimate scope of the state's power to regulate religiously-motivated diversity?

Both Macedo and Carter might concede that their grandly opposed separatist and accommodationist principles ultimately come down to largely subjective judgments about relatively small differences of degree. This, I believe, is true – and also is cause for celebration. Like Carter, I think that accommodation was warranted in Mozert. The notion that all diverse ideas about truth, morality, and authority should be treated with equal respect and given equal time is itself a distinctive and dubious ideal, one that even the most orthodox liberals – or at least anyone who has been responsible for putting together a school curriculum for students who have only limited classroom time -- cannot persuasively defend. In the real world, we must choose among competing versions of truth, and neither flat-earthism nor cannibalism (to pick extreme examples) should be taught in a public school – at least until the state gives parents who favor those subjects a genuine choice, through tax dollars, to send their children elsewhere. The state can and should provide this choice, as I strongly argue elsewhere. But until it does, the public schools have a special obligation to accommodate parents in cases like Mozert.

It is true that diverse religious beliefs “are as infinite as the imagination,” and that the genie of opt-outs and exceptions to general rules (or standard curricula) cannot easily be confined once it is out of the bottle. Indeed, this was one of the strongest arguments against RFRA, where Congress sought to resurrect the more accommodating “compelling interest” standard that Smith had jettisoned. (After the Court in City of Boerne struck RFRA down as unconstitutional, Congress enacted a much narrower

version, The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The Court upheld RLUIPA in 2005 in a dispute over inmates' religious practices in prisons.²³). In these cases, the Court expresses a legitimate anxiety about line-drawing in an area fraught with constitutional constraints. This concern is best addressed, however, not by barring accommodationist exceptions, as *Smith*'s legal standard seemed to do, but by requiring those who seek them to present strong supporting evidence both of religious need and of the absence of slippery slope dangers to legitimate governmental regulatory interests.

Conclusion

In America, the struggle to define the appropriate relationship between democracy and religion continues. Indeed, Noah Feldman has claimed that "The deep divide in American life. . .is not primarily over religious belief or affiliation – it is over the role that belief should play in the business of politics and government."²⁴ But as the long and redemptive history of religiously-driven social and political reforms discussed in Part II shows, this is not a new development; it is old wine in new bottles. Continuing battles over the proper role of religion there will certainly be, but their outcome cannot seriously be doubted. Americans will continue to respect and preserve the balance between private faith and public law that has served our democracy so well for so long.

²³ *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

²⁴ DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT (2000), p. 6.