Religion, Political Culture, and the Law

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INTRODUCTION

A noteworthy development has occurred over the last several decades, namely a marked opening up of inquiry into the nature of law in our society. This means that attention has been directed to the broader cultural setting in which law is located. Before reflecting on this development as a background, it first makes sense to indicate the nature of my interests.

If not a specialist in the law, I am one of many scholars in related fields who have been drawn, we might even say compelled, to recognize its increasing importance in our common life at the end of the twentieth century. As a student of religion in our culture, I have been directing a project for much of the last decade. Essentially it is a historian's undertaking, dedicated to creating a small library of studies concerned with religion and law, or the church-state issue, as it has developed in the United States as a modern nation. The earliest publication was an innovative casebook constructed by Judge John Noonan before he was appointed to the bench, entitled The Believer and the Powers that Are.¹ Two volumes of bibliographical essays on periods and issues in our national history followed.² Now they are being supplemented by monographs on critical epochs in our national history, and studies of several other cultures as well.³ These will provide points of comparison and contrast to explore how

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political and religious authority necessarily interact, as they do, in this and other societies. This essay, then, will draw on the perspectives undergirding the Project on Church and State at Princeton University.

As mentioned previously, an opening up of inquiry into the nature of law in our social life has taken place. This surely reflects the relentless course of litigation in American society across the last half century. In turn, the law narrowly considered has offered an idiom or paradigm (if we may still use that term) for the extraordinary expansion of bureaucratic and administrative structures to make possible government programs in which citizens have very specific interests and against which they make claims. This includes not only such obvious examples as the Social Security and Veterans Administration programs but also others that reach restricted subsets of the population—such as dairy farmers, to take one case. Successive disruptions of the society—for example, the Great Depression and the great mobilization for war following it—had the effect of eroding, perhaps destroying altogether, many of the community mechanisms that had provided supporting structures for human life—in family crises, sickness, old age, whatever. Among those community structures decisively weakened were religious institutions and related agencies with varying degrees of independence from them. In sum, by this last decade of the twentieth century, the law has become ubiquitous in our common life in at least two senses. First, the direct role of the law narrowly conceived has expanded to enable us to cope with the unprecedented enlargement and complexification of the national society. But second, and no less important, the indirect role of the law serves as an idiom or way of framing the relationships of citizens to each other as well as to governments that have been elaborated, especially in this century.

Accordingly, there has been a much-enlarged interchange concerning "law" in our culture, and it has taken many forms. In a broad sense, it has entailed simply more extensive teaching about the law and greater familiarity with it. Examples run a gamut, with one end in the academy. For instance, it is now taken for granted that the traditional constitutional interpretation course, offered to undergraduates in politics departments, should be supplemented by historians' offerings about the law. At the other end, in popular culture, we might instance such a popular television program as "L.A. Law." But in a narrower sense, striking, indeed arresting developments internal to the study of law have emerged. For example, specialists in law schools seek out such arcane fields as hermeneutics, the science of interpretation of texts in literature or theology, or the interpretive strategies of the Talmudic tradition to understand more effectively the nature of law as a cultural activity. And there has been self-conscious appropriation from such diverse fields as moral philosophy and Marxian social criticism to comprehend the internal logic of the law, on the one hand, and the social determinants of its decisions on the other. To an outsider, such developments as these surely mark a new era in our legal traditions. An interesting question arises at this point: Do such interpretations of the law, presupposing it is within and not above the network of social reality, work to demystify it, to diminish it, and finally to lessen its claim upon mem-
bers of the society? Another query necessarily follows: If the authority of law is reduced in this way, will our society eventually find some other authority to ground the order of the common life?

Against the background of such reflections, one subject strikes me as fundamental: the changing relationship in our society between religion and law. Perhaps we can be more precise and stipulate the undoubted particularism of religion together with its increasingly private qualities (which translate directly, whether or not we like it, into cultural pluralism) and the ubiquity of and increasing competence attributed to law (in both restricted and elaborated senses). A term like "political culture," for example, identifies a medium within which we may comprehend this shifting relationship in our society. This essay hopes to explore, and thus emphasizes, the side of the picture concerning religion—its institutions, its ideological claims, its social roles. The corresponding story might, indeed must, be traced out with respect to law. Perhaps a better qualified student of the law than I can be induced to undertake that task. No doubt the topic is there to be limned with care and skill.

The basic theme of this essay, then, concerns the decisive shift between the late eighteenth century and our own time with respect to the place and role of religion in the political culture. This subject discloses more discontinuities than continuities. For example, the constitutional clauses concerning religion are made to serve very different purposes in our era than they did two centuries ago. To be slightly contentious for a moment, this means a quest for their original intent is misconceived if we presume that once discovered that intent can be readily transposed into our time and made directly applicable to it. Discovery of their original intent, at least as one might apply it to the subject of the religion clauses, is an investigation fraught with many challenges. But, if pursued and finally concluded, the quest is not ended. Such a discovery does not produce an obvious understanding of what the founders might have meant for us to do could they have imagined our world. With respect to religion, the founders' world was markedly different from ours. As a result, any direct application of their "intent," however determined, would assuredly have different consequences in our time. No one denies that the quest for original intent behind the religion clauses is difficult. It is less frequently recognized, however, that even if successfully concluded it could not directly inform us as we enter the third century of the American polity. Thus, my theme cuts very directly to the fundamental issue of how law shapes and is in turn shaped by this society, albeit in terms of the relation of law and religion.

How may we understand and conceptualize the role or roles played by religion in the political culture that sustains the American national community? This issue arose at the outset of the national experience, specifically when the Constitution was framed. Close attention to it at that point is the necessary starting point for illuminating American practices even in the last decade of the twentieth century.
I. CONSTITUTIONAL ORIGINS

It is misleading to look at the two religion clauses of the First Amendment, where the issue is thought to be joined, without also considering the religion clause of the Constitution proper: Article VI, Section 3. "[N]o religious Test shall ever be required as a Qualification to any Office of public Trust under the United States." This provision has been largely ignored in modern writing about the context and origins of the Establishment and Free Exercise Clauses of the Bill of Rights. The good reason for this is that the Article no longer has currency. In 1961, the Supreme Court effectively ruled on the religious test issue at state and local levels, subsuming it under the First Amendment as applied through the Fourteenth. For purposes of historical interpretation, on the other hand, it retains its significance. For, at least as much as the First Amendment, and perhaps more, it helps us get at how the Founding Fathers viewed religion and the place they thought it would have in the new United States they were attempting to construct.

In the context of the Constitutional Convention, the founders believed that with Article VI, Section 3, they had said all that was required about the relationship of religion to the proposed federal government. The two additional clauses of the First Amendment supplemented that basic provision already in the Constitution. Implicitly, Congress had been prohibited from legislating about religious establishment or abridging the free exercise of religion in Sections 8 and 9 of Article I, which respectively enumerated the powers vested in, and detailed certain limitations upon, Congress. Thus, the burden of the two religion clauses in the Bill of Rights was to make explicit what was already assumed, namely that religion was a subject beyond the power of the Congress to regulate, even as Article VI had specified that religion should not be a criterion for eligibility to hold public office under the United States.

The treatment of religion in Article VI is noteworthy in the context of the founders' work. The Article requires both state and federal officeholders to take an oath of allegiance to the federal government. But while it explicitly rules out a religious test for federal offices, it is silent about such tests at the state level—where they were in fact common. In this, the Article anticipates the eventual language of the First Amendment clauses; they placed no limit on the states with respect to actions concerning either the "establishment" or the "free exercise" of religion—while denying any authority in the matter to Congress. Thus, both the Constitution proper and the First Amendment clauses treat religion as simply beyond the reach of the federal government in both executive and legislative branches.

Understood in this way, the three clauses clearly cohered around a premise

5. Torcaso v. Watkins, 367 U.S. 488 (1961); see also NOONAN, supra note 1, at 308-09 (excerpting the Torcaso case).
that the new federal government would stand independent of religion. This represented a calculated course of action that was a departure for its time and at odds with practices recently codified in many state constitutions. Such practices differed widely. Many of the new states included a religious requirement or test for office holding—although the construction of the tests and the rigor with which they were applied varied. The states' practices also varied greatly with respect both to provision for public support of religion through taxation and to guarantees for religious liberty.8 But of three typical points of interaction between governments of the day and religion—religious tests for office, mandated support for religion, and protection of religious liberty—only the first was conceivably of concern to the founders as they constructed a form of government to replace the Articles of Confederation. Hypothetically, the founders might have proposed a broad-gauged religious test—let us say they might have required a general affirmation of Christianity, or perhaps a statement of belief in God, whether held to be revealed in Scripture or portrayed as the god of Nature. These would have been consistent with other actions they took. But if such might have been plausible, it was entirely unthinkable that the founders should propose that Congress have power to legislate concerning religion. Why should this have been so?

The overriding and certainly most critical issue of the day was to gain acceptance for, and thus ratification of, the new federal structure, a government designed to have a reach adequate to the needs of the new nation—that is authority and power over finance, commerce, and the conduct of war. In part at least, this new government would, unlike the Articles of Confederation, draw its mandate directly from the people. Such a scheme challenged the briefly sovereign states, each newly liberated from colonial status. The only conceivable strategy available to the founders in seeking to secure support for their proposal was to champion limitations upon the authority of the new federal government with respect to matters not critical to achieving this essential objective.

Religious practices and opinions were a kind of social and cultural activity over which the extension of federal authority would only serve to weaken the new government. Much the same might be said about education (which is unacknowledged in the Constitution), for the beginnings of concern for common schooling can be traced to this period.9 To have proposed that the federal government should have jurisdiction over either education or religion would have assured rejection of the Constitution in the process of its ratification by the states. Unless we recognize the political necessity—and the theoretical import as well—of these calculations necessary to secure the federal structure of the new government of the United States, we cannot understand why the three


particular religion clauses (and none on education) are present, or why they remained largely unapplied, and essentially unexplicated, for a century and a half.

Much has been made recently of seeking the "original intent" behind the First Amendment religion clauses. That phrase itself is equivocal, for it suggests the quest is not disinterested but is, indeed, directly motivated by modern objectives and convictions. One such conviction is that the First Amendment clauses have been misused in modern jurisprudence. That is, positions have been elaborated in decisions under both the Establishment and Free Exercise Clauses that have summed to erroneous modern policies and practices. Another commonly held conviction is that there was a single-minded understanding of religion in relation to the polity that took for granted accommodation between them. But in my view there was neither a simple programmatic intent (separationist or accommodationist), nor a single mind behind the clauses. Rather, the three clauses represent a fundamental consensus that the new national government had to be developed independent of the question of religion—for religion was so potentially divisive as an issue that to have attempted to constitutionalize its place and role surely would have brought the new United States down, indeed prevented it from being formed.

From this perspective, we should not be surprised that no one of these three clauses received significant attention from the Supreme Court until well into the twentieth century. Of course, the question whether Article VI, Section 3, ruling out religious tests for federal office, governs state and local office-holding as well was finally addressed by the Torcaso case, in which the Supreme Court found Maryland's vestigial requirement of an oath invalid under the First Amendment. In the last half-century, the First Amendment clauses themselves have become important through incorporation by means of the Due Process Clause of the Fourteenth Amendment. This means that the original

10. See Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting). Justice Rehnquist's dissent offers the clearest expression of the "original intent" objective of any Supreme Court opinion. Id.; see also NOONAN, supra note 1, at 422-26 (excerpting the Wallace decision). Of course the term "original intent" has been used very extensively and in different literatures.


12. This incorporation of the First Amendment religion clauses through the Fourteenth was first made explicit by the Supreme Court in the Jehovah's Witnesses cases. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105 (1943) (holding that a license tax violated the First and Fourteenth Amendments when applied as a precondition to religious canvassing and leaflet distribution); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (affirming an injunction against the West Virginia Board of Education to restrain enforcement of a regulation requiring public school children to salute the flag); Cantwell v. Connecticut, 310 U.S. 696 (1940) (holding that a Connecticut statute prohibiting solicitation of money for religious purposes violated the First and Fourteenth Amendments). But see Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (refusing to enjoin school district from prohibiting children who chose not to salute the flag from attending public school). See generally NOONAN, supra note 1, at 233-54 (excerpting the above-cited
prohibition on congressional legislation has been extended in two modes. First, the Establishment Clause has become a provision regulating the operation of all levels of government, a reach certainly never envisioned in, and indeed directly counter to, its original formulation. And second, the clause protecting free exercise is construed as a right to, or guarantee of, religious liberty on the analogy of other First Amendment rights, like those of speech and assembly. So, through incorporation, the Establishment and Free Exercise Clauses have been transformed, singly and interactively, to regulate numerous institutional arrangements and to protect individual behaviors in ways simply unimaginable in the late eighteenth century.

This abbreviated summary of the modern reconceptualization of the three religion clauses is cast in an essentially narrow jurisprudential framework. Our inquiry concerning these clauses must begin, but cannot end, there. Much broader perspectives are required to understand why this occurred, that is to say, how the actual place of religion developed from the founding to the mid-twentieth century. For, as we have noted, in their original context these clauses made sense of a specific sort because they expressed the political reality undergirding the new nation—a reality that subsequently changed dramatically. In this perspective, it is not sufficient to focus on court decisions; we must understand the social aspects of religion that were taken for granted, and thus largely uncontested, as the United States developed. Such a window on the social world permits us to observe the terms in which individuals and groups have continued to work out the place of religion in the common life.

This is a very large subject indeed, and in one essay we cannot begin to explore it adequately. We can, however, sketch out a line of inquiry that will suggest, first, how the clauses were synergistic with social characteristics of the early nation. But, in turn, that approach leads us to recognize the changing status of religion through the nineteenth and twentieth centuries. Inevitably, this leads us to observe how the clauses have been reconceptualized.

II. RELIGION IN EARLY AMERICAN CULTURE

Hegemony is a useful term to help delineate the cultural synthesis of the new nation, suffused as it was with Protestant versions of Christian ideals. The concept serves several purposes. One is to contrast this construct with the relatively well-defined and limited institutions of government that it encompassed and through which it exerted influence. Another purpose is to suggest that this cultural reality, while derived from and imbued with largely Protestant ideals and interests, was not identical with the institutional life of churches—neither a particular subset of them nor an inclusive grouping. Finally, such a concept permits us to identify several kinds of social change: changing relationships

among governmental and religious institutions, changing relationships between both kinds of institution and the hegemonic culture, and, most basically, change in that culture itself through time.

Turning the subject in this way provides one means of analyzing the place of religion in the new nation: What do the three clauses we have been discussing disclose about early national society? For example, Article VI, Section 3, put the proposed provisions for the federal government at odds with the practices of many state governments that routinely required religious tests for office-holding and demanded oaths of office. It would be naive for us to imagine, however, that in the founders' views the constitutional prohibition of a religious test for office at the federal level would strip from the still-required oath-taking its traditional grounding in religion and its presumed linkage to morality. Indeed, in his Farewell Address (September 17, 1796), George Washington spoke at some length on the importance of virtue, or morality, as "a necessary spring of popular government." Making the connection explicit, he framed a rhetorical question: "Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?" So even while declaring impermissible a religious test for federal office, the founders believed that sanctions deriving from religion most certainly empowered oaths in the courts, and presumably those entailed in office-holding as well.

In similar fashion, it would also be naive for us to imagine that the prohibition of a religious test for federal office secularized the conduct of politics at the national level, let alone at the state and local levels. One of the more encouraging strands in the scholarship of the last generation has been recognition that in the new nation, party alignments largely coincided with the society's religious divisions. From the outset of the new nation, religious convictions mixed together with perceived interests and ethnic loyalties in political parties—although this basic American political institution was not envisioned by the founders. Federalists provided a political program under which members of the reconstituted Church of England and the Puritans of New England could join, while various disestablished groups (Baptist, Catholic, Methodist, and Presbyterian) clustered in the Democratic ranks. A considerable body of

14. NOONAN, supra note 1, at 132 (quoting George Washington, Farewell Address (Sept. 17, 1796), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 220 (James D. Richardson ed., 1896) [hereinafter MESSAGES AND PAPERS]).

15. Id.

16. For an early discussion of this phenomenon, see Seymour M. Lipset, Religion and Politics in the American Past and Present, in RELIGION AND SOCIAL CONFLICT 69 (Robert Lee & Martin E. Marty eds., 1964) [hereinafter Lipset, Religion and Politics]; see also JOHN L. HAMMOND, THE POLITICS OF BENEVOLENCE 20-25 (Gerald M. Platt ed., 1979) (discussing the relationship between religious belief and political behavior); SEYMOUR M. LIPSET, THE FIRST NEW NATION 289 (1963) (stating that the two-party system in the United States is divided along religious, as well as class, ethnic, and regional lines).

17. Lipset, Religion and Politics, supra note 16, at 72-76. This is the underlying pattern Lipset finds in the antebellum configuration. See id.
scholarship now has explored the changing configurations of party politics through the remainder of the nineteenth century. The constant is that ethno-religious issues were correlated to a marked degree with both electoral divisions at specific points in time and party alignments through time.18

The basic insight is that religious allegiance continued as an important independent variable in the dynamics of the political process; this in spite of the prohibition of a religious test for federal office and the atrophy of the practice at state and local levels. A paradox? Certainly not. The explicit exclusion of a religious test for federal office in no significant way challenged, or even qualified, divisions of the electorate along lines of religious preference any more than it removed traditional religious sanctions from oaths. In this larger sense, the assumption that religion has been separated from politics in America has been one of the more enduring fictions in our history as a nation.

These perspectives on cultural construction lead to parallel observations relating to the Establishment Clause in the early United States. Congress was strictly enjoined from legislating "respecting an establishment of religion."19 Certain no serious proposal was advanced to give systematic preference to a particular religious body at the national level, or to challenge such an arrangement where it existed at the state level. But this explicit legal understanding did not call into question in any significant way the deep Protestant hegemony of the culture. Indeed, to the minds of many, the nation had an indelibly Christian character (the more substantial for being informal) that alone made possible the formal independence of government and churches. This insight was what later led G. K. Chesterton to term the United States "a nation with the soul of a church."20 In the young nation, this commonplace linkage was displayed in numerous ways and through actions both major and minor. The point will gain force through concrete illustrations.

Possibly the most arresting exhibit is that of collective prayer on behalf of the nation. Ironically, in retrospect, on the day after the House of Representatives joined with the Senate (September 24, 1789) to adopt the language that would eventually become the religion clauses of the First Amendment, it resolved to join the Senate in urging the President to recommend to the people of the United States a day of thanksgiving, especially for the new "Constitution of government."21 Of course, such a "Day of Thanksgiving" seems very much like official sponsorship of a religious ceremony. One member of the House grasped the disjunction, if not outright contradiction, between this recommendation and the proposed prohibition on congressional action with respect to both religious establishment and the free exercise of religion: St. George Tucker of South Carolina, famous for his edition of Blackstone's Commentaries, sardonically opined that the people would not know whether to be

20. GILBERT K. CHESTERTON, WHAT I SAW IN AMERICA 11-12 (1922).
21. 1 CONG. DEB. 913-14 (1834).
thankful for the Constitution until they had experienced life under it; he added
the comment that "it is a business with which Congress have nothing to do; it
is a religious matter, and, as such, is proscribed to us."2

Nevertheless, Washington issued a proclamation authorizing that Thursday,
November 26, 1789, be observed as "a day of public thanksgiving and prayer."2 As significant, John Adams followed suit in recommending that
Wednesday, May 9, 1798, be so observed because "the safety and prosperity
of nations ultimately and essentially depend on the protection and the blessing
of Almighty God, and the national acknowledgment of this truth is . . . an
indispensable duty which the people owe to Him."24 Although later in his life
Madison came to believe that such proclamations were wrong, while president
he actually designated the second Thursday of September 1813 as such a
day.25

Parenthetically, these early national "thanksgivings" are not to be under-
stood as annual harvest festivals, early versions of the routine Thanksgiving
Day festival that we now celebrate yearly in November. The presumed proto-
type of the twentieth-century holiday is found in the Plymouth Colony's legen-
dary feasting with the Native Americans who helped them survive the initial
harsh winter in the wilderness of the New World. Rather, these thanksgivings
were collective ritual events, whose prototype, as the language of the early
proclamations attests, was Israel's privileged access to Jahweh, a god believed
to lead and protect his special nation, a relationship chronicled in the script-
tures of that ancient people. This practice had been perfected by the English
Puritans who, as hebraized Englishmen, brought it to the New World where,
as Perry Miller emphasized, covenantal constructs were instrumental in bind-
ing together the new nation.26 Such a collective national relationship to God,
at least in atrophied form, was premised in occasional thanksgiving celebra-
tions up through the Civil War. The modern annual harvest festival began
shortly thereafter. Indeed, Thomas Jefferson himself used language of this sort
most explicitly in his second inaugural address, making of the nation a corpo-
rate personality in relation to the God of ancient Israel27—this despite the
"wall of separation" he advocated for the benefit of the Danbury Baptists.28 In
the same vein, the two Houses of the new government arranged to be served
by chaplains even as they worked to refine the wording of the religion clauses

22. Id. at 915.
23. Noonan, supra note 1, at 128 (quoting George Washington, Proclamation: A National
Thanksgiving (Oct. 3, 1789), in 1 Messages and Papers, supra note 14, at 64).
24. Noonan, supra note 1, at 129-30 (quoting John Adams, Proclamation of Thanksgiving
(Mar. 23, 1798), in 1 Messages and Papers, supra note 14, at 268, 268-70).
26. This theme was explicitly worked out in Perry Miller, From the Covenant to the Revival, in
27. Noonan, supra note 1, at 131 (quoting Thomas Jefferson, Second Inaugural Address
(March 4, 1805), in, 1 Messages and Papers, supra note 14, at 382).
28. Noonan, supra note 1, at 130-31 (quoting Thomas Jefferson, Letter to the Danbury Bap-
tists (Jan. 1, 1802)).
of the Bill of Rights.\textsuperscript{29}

These manifestations of the underlying religious (and decidedly Protestant Christian) hegemony in the early nation and its repeated expression in and natural links to the political culture suggest the complexity of our topic. The extension of religious influence over into political activity, and its taken-for-grantedness in the culture, may surprise us. But early nineteenth-century Americans, unlike some of the French intellectuals who were their contemporaries, did not think their revolution had set out to purge the society of superstition in the guise of religion. While the First Amendment provisions (joined to Article VI) clearly provided a limitation on federal power, they did not signal an intention to substitute a secularized culture for one that was markedly religious.

This point is elucidated by noting the somewhat ambiguous place of religion in Congress' discussion of the framework for government in the new western territories.\textsuperscript{30} Congress reserved the central section of each township for the support of schools. The proposal to reserve an adjacent section to support churches eventually failed,\textsuperscript{31} but the conjunction of these two provisions in the assumptions of the founding generation is clear. As they envisioned the peopling of the land and the development of society in these protostates, they found it unthinkable that religion and education should not provide their foundation. Thus, the general importance of religion for the western lands was not questioned (even if public funding for it was withheld), and the prevailing hegemony authorized additional, and more explicit, cultural norms that expressed religious interests. Two examples will make this point. One is a prescription, the treatment of blasphemy; the other a prescription, that the institution of marriage was to be conformed to a monogamous model.

For the first, a highly publicized blasphemy case, \textit{People v. Ruggles}\textsuperscript{32} was decided on appeal in New York and it held against the defendant. Ruggles claimed that the New York constitution's no preference and free exercise clauses—roughly parallel to the First Amendment religion clauses—protected him in opining that Jesus was illegitimate and his mother a whore.\textsuperscript{33} Chief Judge James Kent asserted that blasphemy was part of the common law because religion, moral discipline, and virtue were necessary to secure social solidarity and good order.\textsuperscript{34} Kent was explicit that Americans were "a Christian people," and the guarantee of "free, equal and undisturbed enjoyment of religious opinion" was not a license to "revile, with malicious and blasphemous..."
contempt, the religion professed by almost the whole community." So, despite the New York constitution's ideal of no preference and its guarantee of religious liberty, the court forged a linkage between the broadly Protestant hegemony and proscribed behaviors. A comparable position evolved with respect to proper observance of Sunday.Manifestly, at least to nineteenth-century Americans, general Christian values sanctioned the proscription of both blasphemy and inappropriate worldly activity on Sunday.

On the other hand, religious traditions prescribed the specific cultural shape of the institution of marriage. This is a point of special interest because the Protestant colonial traditions had desacralized marriage, making it a civil contract and thus withdrawing it from traditional ecclesiastical control. Nevertheless, as a cultural construct, marriage as defined in civil law presupposed a broadly Protestant Christian form for marriage. Much later, at the end of the nineteenth century, Philip Schaff commented explicitly on this point, arguing that the Supreme Court's then-recent polygamy decisions proved that religious (Christian) and political interests inevitably intersected at certain points. He believed that in prescribing monogamy (as well as public schooling and Sunday as a day of rest) "the American government and national sentiment have . . . protected the principles and institutions of Christianity as essential elements in our conception of civilized society."

These practices point to the synergy between the Protestant religious hegemony of the early nation and the society created by actions of its government; the force of the examples is the greater because so many originate with the generation of the founders who drafted the three key provisions of the Constitution (including the Bill of Rights) and were involved in the early elaboration of the new government.

I have described and analyzed to this point the spare provisions and the limited reach of the federal framework of government for controlling the nineteenth-century American nation. These traits were especially marked with regard to interaction between the federal government and cultural institutions, prominent among them religious and educational ones. This did not mean, however, that the early and evolving cultural substance of the nation was anti- or even a-religious. The founders denied the new federal government competence in religious matters. But this denial was compatible with vital religion in the national life; indeed, increasingly the national life presupposed the effects of the prevailing Protestant cultural hegemony that understood itself as Christian in substance. Certainly, where that hegemony seemed to be challenged directly—blasphemy or polygamy being prime examples—no constitutional

35. Id. at 294.
36. See Way, supra note 32, at 516 (stating that in early state court cases "courts responded to litigation challenging the constitutionality of Sunday laws by reminding claimants that America was a Christian nation").
38. Id.
provisions at federal or state levels protected deviant behavior.

Fortunately, we have a very fine literature on many aspects of these larger questions. Several highly regarded historical studies have probed the relationship of Protestantism to the question of hegemony. Martin E. Marty's *Righteous Empire* suggests through its title both the scope of Protestant aspiration—an imperial civilization with a Protestant core—and its peculiarly uncritical moral presumption. For Marty, the failure of Reconstruction is the hinge on which this story turns; in our terms, the Protestant hegemony slowly dissolved as that program fragmented and especially Catholic and, to a lesser degree, Jewish interests increased in power and influence.

An alternative delineation of this outcome by Robert T. Handy proposes a different timetable for conceiving of this relationship of Protestant forces to the hegemony. He believes Protestant Christian civilization reached its apogee in the Antebellum period, but its vision was cruelly dashed in the bloodshed of civil war. For Handy, the work of the next generation was twofold. On the one hand, it continued the effort to sustain and extend the hegemony; on the other, it redefined the hegemony to incorporate Catholic and, to some degree, Jewish interests. Of course, this resulted among other things in an increasingly alienated and fragmented Protestantism as it was displaced from its privileged location in the culture. For Handy, then, these changes eventually worked themselves out between the two World Wars as a "second disestablishment." The first had been the legal detachment of religious institutions from the federal government in the founding period followed by a similar outcome at the state level; the second was the displacement of American Protestantism from preeminence in the cultural hegemony.

### III. RELIGION IN MODERN AMERICAN CULTURE

No doubt these scenarios could be elaborated to suggest specific stages in, and certainly the details of, the evolving place of religion in the United States over this period. That is clearly beyond the scope of this essay, although the kinds of religious phenomena that need to be considered are evident. These include the extraordinary multiplication of religious traditions and movements (limited but growing numbers non-Christian), an increasing degree of organization among them, rising emphasis on distinctions between them, and a broad range of religious innovations, not excluding rank entrepreneurialism. In one respect, these developments produced the religious pluralism we have come to take for granted. But they are obvious, so well known as to make recounting them pedestrian. What may be more interesting is that the appeal of religion,
taken as particular and as generic, seems to have become increasingly private and detached from common public concerns except possibly when consensus emerged on occasions like mobilizing for or against war. For this reason, we also need to come to terms with the question of religious subcultures—how groups operate independently within the broader society. That is less obvious and yet possibly more important, for through these groups a great deal of religious influence was flowing directly into political life. This consideration also reinforces choice of the hegemony concept; it indicates at once that the place or role of religion in the political culture changes over time, and that, whatever else its significance, religious influence also operates at or below the level of consciousness.

To identify the precise stages in the religious evolution of the original culture is difficult. Roughly, by the early years of this century, the culture’s religious cast was increasingly understood to be inclusively Christian,” its specific Protestant construction diminished in light of the dramatic growth and increased influence of Catholic Christianity. By mid-twentieth century one highly regarded analysis proposed that the religious hegemony was basically tripartite, explicitly incorporating Jewish-Americans into a Judeo-Christian cultural construct.” This evolution surely has continued in the subsequent decades. The religious components of the hegemony have been diversified well beyond these limits. Elements of extra-Western traditions—Asian, Indian, and Islamic, not to speak of Native American—are included and, as important, there is far greater variety within its Jewish and Christian components.

At least until recently it was taken for granted in sophisticated circles that what I am describing as the progressive religious enlargement of the hegemonic culture was in fact a process of secularization. The stages that took the United States from embodying Protestant versions of Christianity through an inclusively Christian phase, subsequently enlarged to include Jewish traditions as well as others, seemed to point to an American culture that finally would be self-explicating without transcendent reference.46 But such liberal intellectual presumptions are, at least on first review, rudely called into question by events in and beyond the United States. The dramatic discovery of politics by the Religious Right in particular, coinciding with the resurgence of militant traditions in other societies, has put a question mark against simple progressive interpretations. Conservatism has broadly gained strength and there has been a rearrangement of religious positions within each tradition along a liberal-conservative axis.47 Thus the culture seems to have become more diversified in

44. See the discussion by James Bryce, who in the late nineteenth century thought Christianity was the “national religion.” 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 770 (1911).
45. See WILL HERBERG, PROTESTANT-CATHOLIC-JEW 52 (1955) (stating that Protestantism, Catholicism, and Judaism are the “three great . . . divisions in America”).
47. See WUTHNOW, supra note 3, at 132-41, 317-22 (discussing religious alignment along political lines).
terms of its religious sources and also to have become significantly polarized within itself.

An argument with a different spin is also made, however, that—in its effect at least—the revitalization of contemporary religious life has been primarily private. The enhanced religious pluralism of modern America has developed in the realm of personal choice. By contrast, the cultural hegemony has had a reduced religious content. In this view, “secularization” has occurred at the level of the hegemonic culture, for our complex governmental structure increasingly resembles other modern states and is supported by corporate and educational monopolies from which religious impulses, movements, and institutions, however revitalized, have been notably excluded.

In a longer view, it may be premature to conclude that the public arena has been decisively secularized, religion’s influence—beginning with that of Protestantism—radically diminished. But at a more mundane level what is clear is the significantly changed relationship, beginning in the 1940s, between the First Amendment provisions regarding religion and the current social and cultural context. In the founding of the nation, all three religion clauses amounted to explicit guarantees that the new federal government would forgo the typical and explicit religious linkages available to it—although the clauses did not explicitly acknowledge that the religious hegemony of the culture would be presupposed. In the last half of the twentieth century, the First Amendment provisions were resurrected, first as limiting all levels of government, and second as grounds for individuals and groups to claim rights to religious liberty. Intended or not, these clauses have been transformed into prospective ground rules for negotiating the pluralism of the culture. Indeed, the motivation behind modern separationist—and also to some extent accommodationist—readings of the Establishment and Free Exercise Clauses has been to enlist them as articles of common agreement in the new, self-conscious, religiously plural social order of the last half-century. This historically new role, which has become so familiar to us, is marvelously ironic. For the clauses that were crafted to keep Congress from interfering with the various regional expressions of religious hegemony in the states have become the basis for challenges to vestiges of that hegemony—whether they be legislative or school prayers, creches, or military authority over dress codes. Thus, at one level of irony, the religion clauses of the First Amendment have become appro-


The collapse of the cultural hegemony of pre-twentieth-century Protestantism has taken place in two principal stages. The “first disestablishment” took place in the last decade of the nineteenth century and the first two and a half decades of the twentieth century, and was primarily concerned with the theological facet of the cultural system.

The second disestablishment has involved the decline of the moral and familial facets of the traditional Protestant world view.
priated to specific purposes directly opposed to those that led to their adoption. At the same time, however, to discover another level of irony, they may have come in a quite different way to serve comparable broader objectives—to leave religious practice unhindered and to make institutional religion independent of government.

IV. RELIGION IN THE FUTURE

From this point of view, our inquiry might turn in at least two different directions. One would be to the extensive and ramifications of the last half-century under these clauses, whether taken singly or as interactive, which has charted the contours of current church-state law. Fortunately, distinguished scholars have explored the particulars of this story as well as its range. Another direction of inquiry that opens out from our framing of the question is boldly to ask several larger questions in light of this historical perspective. From a vantage point we might project into the future, shall I say safely into the next century, how will developments in our era be interpreted in terms of changing relationships among religion, the political culture, and the law?

First, we might ask whether the religion clauses will continue to operate independently and in some degree of tension (assuming that Article VI, Section 3, will have no further independent existence). At the very least, the constitutional provision for religion is highly anomalous, for other fundamental freedoms, like those of speech and assembly, have become construed as straightforward rights. It could be argued that the original denial to Congress of authority to legislate "respecting an establishment" was effectively to protect the religious freedom of the states. Since such free exercise with respect to religion is now denied to the states, in a narrow sense the Establishment Clause might be pronounced redundant. Is it the logic of developing jurisprudence that the Establishment and Free Exercise Clauses will be effectively merged? Will the original three clauses eventually reduce to function as one? An arresting proposal that the two First Amendment clauses were closely yoked was made some years ago by Philip Kurland. He argued:

The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or in-


50. This is the most compelling interpretation of the process of revising the language of the religion clauses that took place in the First Congress. For general colonial background, see THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986). In this connection, for a different view see also LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 89, 95-99 (1986) (rejecting the nonpreferentialist view in favor of the belief that the government has no power at all to legislate on the subject of religion); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1511-12 (1990) (arguing that the Free Exercise Clause mandates religious exemptions from secular laws).
action because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.\textsuperscript{51}

Because it denies any general force to the claims made under the category "religion," the net outcome of such an approach is effective secularization. It seems to render the clauses altogether superfluous—they become devoid of content—and to lodge any significant content of the clauses under other liberties. At least to this point the Court has not taken this path.

Since the Kurland proposal was made, of course, litigation has continued to come forward under each clause separately and often has been resolved in isolation. Further, the current Chief Justice in a 1981 dissent explicitly reflected on the "'tension' between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution."\textsuperscript{52} Indeed, he introduced a possibly unfortunate classical image in commenting, "By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny."\textsuperscript{53} Until recently we might have expected that in this changing interaction between the clauses, the free exercise provision would emerge as primary. But at a minimum the decision in Employment Division v. Smith\textsuperscript{54} signals that their relationship is far from settled.\textsuperscript{54} So the interaction of the two clauses remains a continuing question. Thus, one open-ended set of issues concerns the religion clauses, their status, and how we conceptualize them. As if to mock the quest for their "original intent," the construction currently given to them and the range of their application make clear the distance they have travelled from their original context.

In the perspective this essay has urged as a thought experiment (looking back on our era from the twenty-first century), another arresting issue surely will concern the matter of hegemony in the culture. We have already noted that the clauses originated as denying to the federal government competence with respect to religion. But this move left the hegemony, including its religious elements, in place and operative. But by the late twentieth century the clauses have come to be construed in such a way as to limit severely government involvement with religious aspects of the contemporary hegemonic culture (begging for a moment the question of its shape). Construed in this way, the clauses have lent themselves to secular trends in the culture and thus may actively serve to reduce the place and influence of religion. Surely this is an ironic disposition for provisions enacted to secure existing religious practices in the original states. On this point, one line of reconsideration suggested by the

\textsuperscript{51} Philip B. Kurland, Religion and the Law 111-12 (1962).
\textsuperscript{53} Id. at 721 (Rehnquist, J., dissenting).
\textsuperscript{54} See Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not prohibit application of Oregon drug laws to ceremonial use of peyote, and thus Oregon could deny the claimants unemployment compensation based on their drug use).
Chief Justice among others is to modify, qualify, or reverse the logic by which these clauses have been incorporated. In his view, a nonpreferentialist outcome would be a truer application of their original genius.55

I have made much of the largely Protestant Christian cast of the religious hegemony in the early nation. And the evolution I have sketched has decisively taken us toward a radical pluralization of the religious components of the culture. Does this mean that the hegemonic culture has become increasingly secular? To adapt Robert Handy's terms, will our era subsequently be seen as that of a "third disestablishment" of religion,56 this time from its place in the hegemonic culture? As a result of late-twentieth-century religious pluralism and the related transposition of religious belief and practice into private space and time, has religion now become decisively marginalized? To adopt Washington's posing of the question, do oaths any longer rest on a sense of religious obligation? Have other institutions—educational, corporate, governmental, cultural—become the effective locations (if there are any) for transmitting, inculcating, and enforcing the moral foundations for modern social life? In asking such questions we probe the fundamental framework of the American national community, and the degree to which the society may now have become a basically secular political culture.

Here we make the transition to a third and final set of questions flowing from our vantage point in the new century. Separate from these questions about the relationship between and status of the clauses, and from reflections concerning cultural hegemony and the political culture, lies the issue of the theory of government and society. One of the characteristically American qualities of the founders was that they knew their theorists—and drew on them; they might best be described as "practical theoreticians." Their practical step in proposing to place religion beyond the competence of the new government rested on theoretical grounds. Put another way, the independence of religion and government they constitutionalized was part of a consistent program. This had to do with the founders' ideal of limiting government and their choice of specific institutional means to make such a government more likely to endure. Thus, devices like separating powers, creating checks and balances, and crafting schemes of representation were means through which they went about their constitution-making. While there is little direct evidence, with the exception of James Madison, that locates their thinking about religion and government in this framework, logic drives us to do so, that is, to reflect on the religion clauses in relationship to the design of the broader polity.

Even when and where it has become thoroughly plural and largely private, religion is after all, like politics, concerned with power. Rendering government independent of churches was one expression of that drive to limit power and hedge it around with adequate safeguards that we find throughout the founders' work. So beyond the interpretation of the clauses, and in addition to the

56. See supra notes 43, 48 and accompanying text (discussing the "first" and "second disestablishment").
recognition of the new problems posed by the changing place of religion in the society’s hegemonic culture, is this theoretical issue: How does the founders’ concern for separating powers and limiting the abuses of power translate into our contemporary polity as it relates to religion, a polity in which positive functions have transformed the nature and scope of governmental action? Some term like “cultural federalism” may be the best means for us to approach understanding of the fundamental ground rules law codifies with respect to religion in our society.

In important respects, such a concept as cultural federalism must be seen as directly challenging that of cultural hegemony. The latter is an analytic understanding of the powerful dynamics at work in every society to limit conflict and dissent in the interests of stability; the former is essentially a constitutional construct to provide “elbow room” in the society for dissent, diversity, and finally cultural change. Treating republican theory as if it reached only to the political instrumentalities of society effectively reduces its implications and makes the national experience of the United States seem accidental and without relevance elsewhere.

This issue of “cultural federalism” is infrequently if ever broached by constitutional scholars, and certainly not by many political theoreticians or even journalists as they reflect on religion in modern America and its status in law. Most have tended to accept prevailing intellectual currents that dismiss religion as socially unimportant and lacking in potential influence. Neither does it seem to be an issue explicitly reflected upon by the courts as they have faced a rising tide of litigation. In fact, however, the broad sweep of decisions the Supreme Court has produced under the First Amendment religion clauses has actually summed to a fair attempt to keep religion independent of government so as to frame and respect something like cultural federalism. No one of the Court’s opinions taken by itself clearly exemplifies this deeper theoretical insight into the design of the polity, but their net effect might be read in such a light.

CONCLUSION

One interesting aspect of approaching a subject as a cultural construct is that unexpected or contradictory, if not paradoxical, elements emerge to view. Thus, historians love the category of irony or contradiction, for—like tellers of stories or recounters of tales—they attempt to deal with untidy events and ambiguous motivations. In our late-twentieth century, it is important for the American people to take note of how relevant religion has in fact been to our national community. We must join to this insight an appreciation for the founders and the broader implications of their thought. What they bequeathed to

57. Of course this balancing act has been called into question by the logic of Employment Div. v. Smith, 494 U.S. 872 (1990). For a searching discussion of its implications, see generally Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1 (discussing the implications of the Smith case and arguing for exemptions for most religious minority groups).
us with respect to thinking about religion is much less explicitly formulated than we might wish. Certainly, that thinking is less usefully conceived of as abiding principles crafted into Olympian clauses than as wise provisions for their time arising out of clashes in their immediate and diverging experiences. But however much the formulations bear the stamp of their origins, they were not ad hoc. In this sense they were of a piece with their entire constitutional achievement. Thus, we need to learn from and appropriate the founders' wisdom even as we study and seek to apply their provisions. To understand the formulations we must place them in the setting of the original hegemony even as we ask how to translate them into our time. Above all, we must recognize that to have application, now and in the future, they must address the place of religion in our political culture. Only in such a fashion can the founders' consensus about religion and its place in the polity constructively inform modern American society. We can surely hope that specialists in both law and religion, among others, will share in this task.