

## ABSTRACT

*E Pluribus Unum:*

The Limits of Religious Pluralism in American Liberal Democracy

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“Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.” Often inferred from the religion clauses of the First Amendment of the United States Constitution are the absolute right of religious liberty and the subsequent necessity of a religiously pluralistic society. Religious pluralism has become a norm of American society and, in many cases, a norming value—seen as a founding principle of the United States and a keystone of liberal democracy.

In the ongoing dialogue regarding religion and its role in democracy, however, religious pluralism’s assumed position in society is one deserving of scrutiny. As religion itself is considered within the intricate balance of republican government, so must all aspects of religion—including religious pluralism and its trusted fortress: religious liberty. Such assessment illuminates and demonstrates the extent and limits of religious liberty and, subsequently, religious pluralism in liberal democracy.

*E Pluribus Unum:*  
The Limits of Religious Pluralism in American Liberal Democracy

by

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A Thesis

Approved by the J.M. Dawson Institute of Church-State Studies

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Submitted to the Graduate Faculty of  
Baylor University in Partial Fulfillment of the  
Requirements for the Degree  
of  
Master of Arts

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## ACKNOWLEDGMENTS

Anytime I complete a major project, it is because of the people around me that I am able to do so. Completing this thesis is no different. I have relied on many individuals and without their help and support you would not be reading this today. I owe much to each of these friends and, since they would say nothing of all they did for me, I will take the opportunity here to publically thank and acknowledge them.

Dr. Francis J. Beckwith, Associate Professor of Philosophy and Church-State Studies and Resident Scholar of the Institute for the Studies of Religion, served as the director for this thesis. He challenged me at every turn, required my best work, and pushed me to stay focused and dedicated to the end. In addition, he has been an instrumental in my coming to Baylor and in my development during my time here.

Dr. Perry Glanzer of the School of Education and the J.M. Dawson Institute of Church-State Studies served as the second reader for the thesis. He has been instrumental in helping me seek a robust and comprehensive understanding of church-state relations by challenging my thinking through sharing his expertise on religion and society.

Dr. David K. Nichols of the Political Science Department at Baylor University served as the outside reader on the thesis committee. As both my professor and the director of my undergraduate honors thesis, he never let me off easy and was instrumental in forming my understanding of constitutional theory as well as in my development of my reasoning and my writing.

Dr. Daniel Payne, formerly of the J.M. Dawson Institute of Church-State Studies, heavily influenced this thesis as well as the course of my studies during both my undergraduate and graduate years at Baylor University. His constant demand for excellence along with his pastoral care for students allowed me to grow as a student and a person during my time at Baylor—helping me to stay grounded while simultaneously pushing me towards higher success.

Additional thanks to the many other professors who helped me along the way with my thesis by providing me with both direction and encouragement throughout the process: Dr. Al Beck (Honors College), Dr. Timothy Heckenlively (Classics), Dr. Thomas S. Hibbs (Distinguished Professor of Ethics and Culture, Honors College), Dr. Thomas Kidd (Institute for the Studies of Religion, History), Dr. J. Mark Long (Honors College, Middle East Studies), Dr. Jerry Park (Institute for the Studies of Religion, Sociology), and Dr. William Mitchell (J.M. Dawson Institute of Church-State Studies, Political Science). Thank you, also, to Dr. Kevin P. Jackson (Vice President of Student Life), Mr. Matthew Burchett (Director of Student Activities), and Mr. Keane Tarbell (Student Activities) for their continual encouragement and advice.

Thank you to the faculty and staff of the J.M. Dawson Institute of Church-State Studies. Special thanks to Dr. Christopher Marsh, director of the institute, who took a chance on me two years ago and admitted me into the institute for graduate studies; Associate Director Dr. Charles McDaniel, who showed me how to struggle with the complex and intricate matters of church-state relations; and Ms. Suzanne Sellers and Ms. Janice Losak, who were a constant help to me with everything from scheduling to course requirements. Thank you, also, to Ms. Sandra Harman of the Graduate School and Ms.

Marilynn McKinney of the Philosophy Department for their assistance with many of the logistics with this thesis and the oral defense.

A special thanks to the Baylor Collection for Political Materials in the W.R. Poage Legislative Library, who funded my graduate research. I am especially grateful to Director James Benjamin Rogers, who always reminded me to take initiative and to do my best work. Thank you, also, to Ms. Benna Vaughn of the Bullock Archive and Ms. Mary Goolsby for all their help and encouragement.

Thank you to the Honors Residential College, where I served as a graduate fellow during the years of my graduate studies. A special thanks to Dean Thomas S. Hibbs of the Honors College for his constant hospitality towards me during my years as an undergraduate student in the Honors College and a graduate fellow of the college. Dean Hibbs exemplifies the excellence of higher Christian education.

A special thanks goes to my fellow graduate students in the J.M. Dawson Institute of Church-State Studies, especially Robert Basaldu, Brittany Fitz, and William Peery III as they have all painstakingly listened as I explained various concepts of my thesis and as they offered comments, critiques, and challenges to help improve my arguments and deepen my understanding of the issues discussed. Additional thanks goes to my fellow graduate fellows in the Honors Residential College: Matthew Moser (religion), David Wilmington (religion), and Jerome Foss (political science) as they have all been to me a mentor of sorts over the years.

Thanks to my roommate, Isaiah Pan, who patiently reviewed various portions of the thesis for coherency and fluidity. Additional thanks to Emily Colarusso for the countless cups of coffee and for allowing me to stay late writing at Starbucks. In a

particular difficult year for me, my heartfelt gratitude goes to Matthew Bergstrom, Matthew and Sarah Berry, Anna Castleberry, Emily Ehlers, Katherine Kester, Rebecca Patterson, Tessa Lyn Shockey, Harry Smith, Tiffany Treadaway, and Michael Wright for their continual encouragement. Additional thanks goes to William Caylor, John Kitch, Karalynn Reynolds, Briana Treadaway, and Leisel Rebecca Walters for always keeping me grounded and for always reminding me of the larger picture. These are the friends that everyone needs and I am most blessed to consider them my close friends.

Additional thanks goes to Dr. Rick Noecker, who has been to me a mentor over the years. I cannot thank him enough for all he has done for me.

My family deserves great thanks for the outcome of this thesis. My father has always supported my education and my research, never hesitating to financially support me in all of my academic endeavors. His concern that I always perform my best and have the resources to do so was true through his final week on this earth. I can only hope that I have earned it. My mother has always challenged me to think deep and ask the hard questions, a practice that has guided me through my studies and during the writing of this thesis. My older sister, Deborah, has always been there to support me and my research, helping me to reach my dreams and realize my calling.

As always, the highest praise and thanks is for my Lord Jesus Christ, without whom I am nothing. It is through Him and for His glory that this thesis is completed.

Many others are not mentioned here but deserve high praise and sincere gratitude. To each person who aided me in this process, I owe sincere thanks and appreciation. All shortcomings here are my own.

SAMUEL CHEN  
Baylor University



*In loving memory of my father,  
Rev. David F. Chen,  
who was ever supportive of my  
education and my research.  
Thank you, Dad.*

“However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.”

- *Lyng v. Northwest Indian Cemetery Protection Agency* (1988)

## CHAPTER ONE

### Introduction

“Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.”<sup>1</sup> Perhaps no other line in the United States Constitution has been more often quoted or is more controversial. Often described as the foundation of America and the democratic experiment, the religion clauses of the First Amendment have found themselves at the center of over a century of controversy, in which the greatest of minds—from scholars to jurists—have clashed over the role of religion in democracy.

Clearly articulated in the religion clauses of the First Amendment is the prohibition of any legislative establishment of religion.<sup>2</sup> Often inferred from the same clauses is the belief that a democratic government necessitates and defends a truly religiously pluralistic society. So much so is this the case that religious pluralism has become normalized as a founding principle of the United States and a keystone of liberal democracy. Religious pluralism has permeated modern thought to the point that some consider it a norming value of democratic society. As the American Civil Liberties

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<sup>1</sup> First Amendment. United States Constitution.

<sup>2</sup> While the First Amendment only prohibits Congress from legislatively establishing religion, the 1947 Supreme Court case of *Everson vs. Board of Education* incorporated the First Amendment to the states through the Fourteenth Amendment, effectively issuing a complete legislative prohibition on the establishment of religion by the government.

Union states: “for hundreds of years...religious pluralism and tolerance have sustained and helped define our nation.”<sup>3</sup>

In the ongoing dialogue regarding religion and its role, if any, in democracy, however, religious pluralism’s assumed position in society is one deserving of scrutiny. As religion itself is considered within the intricate balance of republican government, so must all aspects of religion—including religious pluralism and its trusted fortress: religious liberty. The existence of both parties—church and state—in the conversation is undeniable. The role that each plays in society and the interaction of the two parties become the focus of this scrutiny. Such assessment illuminates and demonstrates the extent and limits of religious liberty and, subsequently, religious pluralism in liberal democracy.

Much of the confusion over religious liberty and pluralism in liberal democracy arises over incomplete comprehensions of liberal democracy, religion, or both entities. Liberal democracy serves as the framework for these considerations, as it is in such that the role of religion and the interaction of church and state are sought. In order to understand the conversation between church and state, then, one must first have a fundamental understanding of liberal democracy. The same is true of religion—without a clear understanding of what religion is and is not, any assessment on its interaction within the state is, at its best, skewed and misleading. In fully understanding liberal democracy and religion, one can consider the altering effect that each has on the other, both in a complementary relation as well as in disparaging competition.

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<sup>3</sup> “ACLU and NYCLU Statement on Controversy Over New York City Islamic Center.” <<http://www.aclu.org/free-speech-religion-belief/aclu-and-nyclu-statement-controversy-over-new-york-city-islamic-center>> 16 December 2010.

In seeking such an understanding of both liberal democracy and religion, the focus is centered upon the fundamentals of each. The merits of liberal democracy are not central to the conversation, but the identity and essence of liberal democracy are. In the same way, religion must be understood not in terms of various expressions or descriptions of certain religions but, rather, as a whole entity. Upon a coherent understanding of both liberal democracy and religion and a close examination of the fundamentals of each, the remainder of the puzzle seemingly falls into place naturally.

Liberal democracy, according to its nature, works to strike a delicate balance between church and state. This balancing act flows from the realities of religious conflict to dissention between church and state to the rise of civil religion. A close examination of a variety of United States Supreme Court decisions and the various constitutional tests and standards developed demonstrate this very balancing act while illuminating the potential limits of religious liberty and pluralism in American liberal democracy. With a proper perspective on both liberal democracy and religion, the realities of religious conflict and the subsequent conflict between church and state, as well as the rise of civil religion as a response within liberal democracy, confirms such limits and clearly identifies the role that religion—both in general as well as particular religions—plays in a liberally democracy.

The journey of church and state through liberal democracy illuminates and attempts to answer the questions of religious liberty and pluralism in a liberal democratic state, such as the United States. The challenge remains as how to best balance church and state, the answer, to which, draws an accurate illustration of religious pluralism and its boundaries within liberal democracy.

## CHAPTER TWO

### Liberal Democracy and Republican Government

Thomas Jefferson's famed 1801 letter to the Danbury Baptist Association is often cited in the ongoing conversation and debate over church and state. What is often overlooked, however, amidst the positioning of church and state and their respective roles in society, is the backdrop to the conversation—one which Jefferson assumes and treats as a basis for his letter. Such is the backdrop that is liberal democracy and republican government. To understand fully, then, the role that church and state may play in society, it is important to understand liberal democracy and its multiple facets.

The disagreement and controversy certainly does not begin with matters relating to church and state, but even the merits of liberal democracy and how it ought to be conducted find themselves debated by scholars throughout history. Yet, that debate itself is a vital part of the essence of liberal democracy. The role that religion, or any other comprehensive doctrine, may or may not play in liberal democracy cannot be understood without a proper understanding of liberal democracy itself, both what it is and its role and purpose. Two dominant perspectives in seeking this understanding have developed: one seeks a more historic understanding, tracing liberal democracy to the state of nature; the other seeks a more futuristic understanding, concerning itself with the structure and subsequent procedures of democracy, establishing its stability for the future.

In both the historic as well as the futuristic approach to liberal democracy, there exist opposing camps, separated by their assessments on the merits and direction of

liberal democracy. Yet, at the foundation of each view is an agreement over the fundamental essence of democracy—the essence that provides the backdrop for all discussions of democracy and society.

*The Historical Perspective: Democracy through a State of Conflict*

The purpose of any government, including liberal democracy, can be traced back to what is commonly referred to as the “state of nature.” How one sees the natural state of humanity is very telling of how one sees how humanity ought to be governed. This central question of the state of nature finds itself at the center of a rich history of political thought, on which a vast variety of perspectives have triggered centuries of debate. In a historic understanding, government itself, how humanity interacts with each other, is directly born from an understanding of the state of nature and the natural state of humanity.

Such is no different when considering the rise of liberal democracy. One’s view of the state of nature and its origins directly leads to one’s view of democracy, both its purposes and its merits. Accordingly, two dominant and opposing camps have arisen—those who see the original state of nature as one of conflict and those who subscribe to the opposite, that the original state of nature was one of peace, harmony, and unity. From both are derived radically different views as to the merits of liberal democracy but, ironically, a seeming consensus on the purposes of it.

*A Natural State of Conflict*

One of the two competing views within a historic understanding of liberal democracy holds that it arises from a natural state of conflict among humanity. The

degree of conflict and exact trigger for its development varies among political philosophers. Agreed upon, however, is that a government is needed that can account for the conflicted state of humanity by maintaining law and order, a process which finds itself in the balanced preservation of both equality and individual liberty.

British political philosophers Thomas Hobbes and John Locke, upon whose philosophy liberal democracies are often established, both describe a state of nature that is based in conflict between the members of society. In his work *Leviathan, The Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil*, Hobbes describes a state of nature that is reflective of the English Civil War, which was being waged during the time Hobbes was writing. For Hobbes, humanity exists in a state of nature where each individual has a natural right, or license, to everything and anything in the world. Moral grounding is absent in the state of nature and, thus, each individual instinctively seeks to possess what is rightfully his. This results in inevitable conflict, or what Hobbes calls “*bellum omnium contra omnes*,” or “a war of all against all.”<sup>1</sup> Hobbes’s state of nature is a state of war. He writes that “during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man.”<sup>2</sup>

Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time;

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<sup>1</sup> Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil*. (London: Cambridge University Press, 1904), 151.

<sup>2</sup> Ibid. Page 81.



no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.<sup>3</sup>

For Hobbes, the state of natural war precludes, by necessity, the cardinal virtues and any coherent sense of morality. The concepts of justice and injustice, right and wrong, virtue and vice are not understood, let alone differentiated, and have no place in the natural state. Rather, individual survival and rule become the prevailing human senses.

Like Hobbes, John Locke, often seen as the father of liberalism<sup>456</sup>, also proposed a state of nature from which he derived a fundamental concept of liberal democracy. In his *Two Treatises of Government*, Locke introduces a gentler state of nature than that of Hobbes. Rather than a natural state where humanity's savage desire leads to a "solitary, poor, nasty, brutish, and short"<sup>7</sup> state, Locke argues that humans, in their natural state, are individually governed by reason and tolerance. The state of nature, however, remains one of conflict. The conflict is not driven by innate brutishness of humanity but, instead, by the selfishness that drives and, is in turn further driven, by the quest for individual survival and autonomy. It is for this reason Locke finds that humanity serves as fair judges between one another but, also, that such fairness only exists from a third-party

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<sup>3</sup> Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil*. (London: Cambridge University Press, 1904), 151.

<sup>4</sup> John Horton and Susan Mendus, eds, *John Locke: A Letter Concerning Toleration, in Focus*. (New York: Routledge, 1991), 5.

<sup>5</sup> Tim Delaney, *The March of Unreason: Science, Democracy, and the New Fundamentalism*. (New York: Oxford University Press, 2005), 18.

<sup>6</sup> Kenneth Godwin et. al. *School Choice Tradeoffs: Liberty, Equity, and Diversity*. (Austin: University of Texas Press, 2002), 12.

<sup>7</sup> Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil*. (London: Cambridge University Press, 1904), 151.

judicial perspective. The state of nature, then, is a driven by selfish survival yet government by human reason, be it one's own or that of a third-party judge. Locke writes, "Men living according to reason, without a common superior on earth, to judge between them, is properly the state of nature."<sup>8</sup>

Hobbes and Locke alike articulate the view that humans in the state of nature have a natural and individual claim to "life, health, liberty, or possessions."<sup>9</sup> It is both one's natural right and instinct to defend these claims and when these rights are simultaneously exercised by separate and competing individuals, conflict ensues. Seeing that government arises from such conflict, it is, then, the role of the government to limit, if not prevent, that conflict.

#### *A Fallen State of Conflict*

Hobbes and Locke's view that the natural state of humanity is one of conflict is not one that is universally accepted. Perhaps most notable among their dissenters is the Anglo-Catholic school of thought called radical orthodoxy. Led by theologians John Milbank of the University of Nottingham and William Cavanaugh of the University of St. Thomas, radical orthodoxy proposes a state of nature radically different from that of Hobbes and Locke. For Milbank and Cavanaugh, the original state of nature is not one in which conflict ensues but, rather, one of perfection and completion—the unity and harmony found in the Creation in Eden. Yet, despite holding contrary views as to the state of nature, Milbank, Cavanaugh, and the radical orthodox still attribute the rise of liberal democracy to a state of conflict.

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<sup>8</sup> John Locke, *Two Treatises of Government*. (New York: Cambridge University Press, 1960), Section 2.19.

<sup>9</sup> Ibid. Section 2.6.

A state of nature that is corrupt and brutish, as Hobbes stated, or even self-seeking, as Locke proposed, implies that the conflict which permeates humanity is innate—being fully present in the natural state of humanity, a state that can, perhaps, be traced back to the beginning of humanity. For the radical orthodox, man was created “...in our [God’s] image, according to our likeness...”<sup>10</sup> and without sin, leaving no room for human selfishness. The state of nature is one of harmony and community, created both complete and perfect, as depicted by the Garden of Eden prior to the fall of man.

The emphasis placed on *imago Dei* necessitates that the natural state of humanity be both perfect and complete. Prescribing to a state of nature as described by either Hobbes or Locke trades a perfect and harmonious unity for rampant and self-serving conflict as the original state of humanity, resulting in either an acceptance of a conflict-driven God or the rejection of any conception of *imago Dei*. What Hobbes and Locke describe, then, is not the state of nature but, instead, the fallen state of humanity. The conflict ever evident in society and throughout history is not as a result of humanity’s innate instincts but, rather, is attributed to the introduction of sin and the consequent fall of humanity.

Thus, even given the radical orthodox account of the state of nature, the state and society still ends up in a position of conflict. Like Hobbes and Locke, radical orthodoxy holds that it is from this state of conflict that liberal democracy arises. While Hobbes and Locke embrace liberal democracy for its ability to mediate in the state of conflict and, thus, preserve the state, radical orthodox such as Milbank and Cavanaugh caution against the advances of liberal democracy for the same reason: that it rises from and preserves

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<sup>10</sup> Michael D. Coogan et al., eds, *The New Oxford Annotated Bible: New Revised Standard Version with the Apocrypha*. 3<sup>rd</sup> ed. (New York: Oxford University Press, 2001), Genesis 1:26.

the fallen state of humanity. To them, such is not a solution to the conflict, as can only be found in the Church.

### *The Rise and Aim of Liberal Democracy*

It is from an understanding that the state exists in conflict—be it natural or corrupted—that liberal democracy rises. The difference between Hobbes and Locke and the radical orthodox is not a disagreement over how or why liberal democracy arose or even the purpose that it serves in a conflicted society. Rather, the central point of dissention is the merits of liberal democracy and how such a government system ought or ought not be used. While Hobbes and Locke defend the need for liberal democracy, the radical orthodox choose to remain distant from it. Both, however, provide a fundamentally unified account for how liberal democracy comes to be. It rises from a need discovered in a society of conflict and it does not provide a permanent solution to such conflict but, rather, serves to mediate a temporary truce between the factions.

Given the state of conflict that society finds itself in, it is the role of government “to live peaceably among themselves, and be protected against other men.”<sup>11</sup> For Hobbes, this entails a strong, centralized governing force, which he calls “the Commonwealth,” with an authoritative sovereign as its head, who, once selected by the people cannot be challenged. The Commonwealth is a representative form of government, where the public selects their leader. The leader, in turn, is given near absolute authority to govern. His duties are to “authorize all the actions and judgments”<sup>12</sup> of those in the Commonwealth. In this system, the state becomes the protector and all

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<sup>11</sup> Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil*. (London: Cambridge University Press, 1904), Page 151.

<sup>12</sup> Ibid.

actions are either delivered by the state or absorbed into it. Actions, thus, are either dictated by the state, in a top-down model, and are required of all or they arise from the people, in a bottom-up model, and are eventually absorbed into the state (if they are not first rejected and quashed) and become a dictum of the state. Regardless of what model any particular action may follow, all actions ultimately end with the state.

For Locke, the strong, dominant, centralized government that Hobbes describes is unnecessary, since the natural man is tolerant and reasonable, not brutish and rude. Rather, humanity can govern itself seemingly well, requiring a strong governing authority only in situations of conflict; and not one that dictates law; rather one that serves as an arbitrator between the two conflicting parties. Locke writes:

That in the state of nature every one has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that selflove will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men.<sup>13</sup>

Since law and government are only needed for just conflict resolution, Locke seeks a government that protects and defends individual liberties through a strong judiciary but otherwise respects those liberties.

The need for governance in a state of conflict, as described by Hobbes and Locke, naturally leads to the rise of liberal democracy. Liberal democracy is a minimalist form of government that seeks not the moral or ethical betterment of its members but, rather, the stability of the state itself, a stability that cannot afford continued and never-ceasing

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<sup>13</sup> John Locke, *Two Treatises of Government*. (New York: Cambridge University Press, 1960), Section 2.13.

conflict. A liberal democratic government, then, aims only to do as much as is necessary to mediate such conflict and provide stability for the state.

*The Futuristic Perspective: Democracy through Structure and Process*

A second perspective on liberal democracy and its purposes and aims distances itself from the historic debate over how liberal democracy arose. It does not necessarily reject either position concerning the state of nature and the state of conflict; rather, it finds these positions non-consequential to the question of what liberal democracy is and it seeks. The discussion, thus, focuses strictly on the purposes and aims of liberal democracy and how it attains those ends, specifically with regards to modern societies and their futures.

Like with the historic debate over liberal democracy and its beginnings, two distinct and opposite camps arise when considering the futuristic perspective of liberal democracy. One camp triumphs the defense of justice, seeing liberal democracy as a victor in defending and preserving justice, while the other sees identifies the offense of justice, holding that liberal democracy is, in fact, in obstruction to true justice.

*The Defense of Justice*

Few modern political philosophers have the influence that John Rawls has when seeking to understand liberal democracy primarily through understanding its purpose and aim. Rawls describes the aim of liberal democracy to be, “a political conception of justice that we hope can gain the support of an overlapping consensus of reasonable religion, philosophical, and moral doctrines in a society regulated by it.”<sup>14</sup>

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<sup>14</sup> John Rawls, *Political Liberalism*. (New York: Columbia University Press, 2005), 10.

A liberal democracy is concerned primarily with the state and its survival. It seeks to create good citizens but not for the virtue of goodness—for the goodness of the state. Other than this end, the state seeks simply to let humanity be. Liberal democracy, then, seeks to maximize the liberty of individual citizens and intervenes with boundaries to assure equality towards a stable state and society. Political philosopher Robert Audi properly articulates, “Liberal democracy is properly so called because of its two fundamental commitments: to the freedom of citizens and to their basic political equality.”<sup>15</sup>

Liberal democracy’s pursuit for freedom and equality is exemplified in the system of freedom and responsibility so often displayed in liberal democratic states. The success of such a system is vital to the success of any liberal democracy. By granting individual liberty and autonomy and, consequently, letting humanity be, the state keeps itself from being bothered with every action and complication in society. Yet, it seeks to regulate equality within a society to create a level playing field and, subsequently, preserve the liberty and autonomy of individual members of society. The state seeks to be passive in order to preserve individual liberty and, thus, the state, while it seeks to be active in order to preserve equality and, thus, preserve individual liberty and, therefore, preserve the state. It is for this reason the state seeks to maintain law and order—in order that it might maintain the delicate balance between social equality and individual liberty and, thus, preserve its own existence.

In seeking this delicate balance and the law and order that maintains it, a liberal democracy seeks to establish itself in a political conception of justice. In doing so, Rawls

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<sup>15</sup> Robert Audi, *Religious Commitment and Secular Reason*. (New York: Cambridge University Press, 2000), 4.

articulates, in his book *Political Liberalism*,<sup>16</sup> the position that liberal democracy is not a comprehensive doctrine, but allows for the existence of many conflicting and reasonable comprehensive doctrines, each with their own conception of the good. A liberal democracy has two consistent factors: first, that it is a relationship of persons within a basic structure of society; its members enter by birth and exit by death. Second, it consists of coercion by the government (remembering that, in a liberal democracy, the government has the sole authority to coerce its members)<sup>17</sup>. Given these factors, and the notion that a liberal democracy exists to maintain law and order that it might preserve its own existence, all comprehensive doctrines within the society must divorce their beliefs from their practices. It is the practices, not the beliefs, with which a liberally democratic state is primarily concerned. Members of the society may believe however they choose, but their actions must be strictly constitutional, in accordance to and within the limits of the law of the state. While this does not make liberal democracy a comprehensive doctrine itself, since it claims no beliefs, it does play the role of a comprehensive doctrine by dictating what actions are and are not permissible and, consequently, denying all unconstitutional acts. Comprehensive doctrines, then, find their actions limited, often severely, and, in certain cases, completely void. The revocation of the freedom to act, thus, renders all such doctrines as non-comprehensive, leaving only the liberal democratic state to rule supreme, assuming the natural role of a comprehensive doctrine.

The aim of liberal democracy is to maintain stability in the state. A liberally democratic state seeks this end by seeking and preserving a political conception of

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<sup>16</sup> In his earlier work, *Theory of Justice*, John Rawls articulates a position that political liberalism is indeed a comprehensive doctrine. It is not until he wrote *Political Liberalism* that he adjusted this theory.

<sup>17</sup> John Rawls, *Political Liberalism*. (New York: Columbia University Press, 2005), 135.



justice. Justice is then preserved by maximizing individual liberty as well as societal equality among the members of the state. It is this delicate balance, maintained by policy of law and order, that provides stability to the society and, in turn, preserves the state and liberal democracy.

### *The Offense of Justice*

There is not, however, unanimous consent over political justice as being a good that ought to be sought and defended. Theologian Stanley Hauerwas and philosopher Alasdair MacIntyre are among those who reject the notion that a political conception of justice is needed in society. While Rawls and Audi argue for law and order beginning in the state and trickling down through, and subsequently changing, society, Hauerwas and MacIntyre take the opposite approach, arguing that change begins with individual persons and builds its way up through society and, ultimately, to the state. Responsibility for society, then, rests not in the state, but responsibility for the state rests in society. Society and its individual members, then, are responsible to an outside force which, for Hauerwas and MacIntyre, is the Church.

Despite rejecting the top-down model of Rawls and Audi in favor of a bottom-up approach, Hauerwas and MacIntyre do not reject the notion that liberal democracy seeks liberty and equality en route to seeking a political conception of justice, all towards attaining and stability and preserving the state. Rather, it is the notion that this pursuit of justice and, thus, liberal democracy itself, is good and should be desired that these scholars reject. In his book *After Christendom*, Hauerwas contends that justice begins in the Church, not the state, which leads to his advocacy of the bottom-up approach of

government. He holds that the state's pursuit of justice actually undermines true justice, which is nothing less than the Church's care for others. He writes:

Therefore, to argue for economic justice by balancing equality, even complex accounts of equality such as Rawls's, with liberty may only be underwriting presuppositions about social life that are incompatible with how Christians are taught to regard and care for one another.<sup>18</sup>

While Hauerwas and MacIntyre reject the notion that liberal democracy's pursuit of justice is good, they both acknowledge that the aim of liberal democracy is a political conception of justice, pursued through the maximization of individual liberty and equality.

#### *The Future and Aim of Liberal Democracy*

Agreed upon by both the Rawlsian and the Hauerwasian camps is liberal democracy's need to be grounded in a political conception of justice, which leads to its defense of individual liberty as well as social equality. Based upon this assessment, the two sides also agree on the future of liberal democracy and where, by nature, it will lead. A liberally democratic state will be selfish, seeking its own survival and preservation by holding the society and its individual members accountable through a top-down model of governance. For political philosophers such as Rawls and Audi, this development is the progress of democracy. For Hauerwas and MacIntyre, however, this is same understanding of democracy signifies usurpation of and competition for authority that rightfully belongs to the Church.

The debate, then, centers not on the need for a liberally democratic state to preserve itself but, rather, over whether this preservation is right or wrong and whether it is beneficial or detrimental to society and its individual members. Despite the dissention

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<sup>18</sup> Stanley Hauerwas, *After Christendom*. (Nashville: Abington Press, 1991), 48.

over its merits, the aim of liberal democracy itself remains the same, as witnessed by both friend and foe alike.

### *Identifying Liberal Democracy*

Despite the different approaches to understanding liberal democracy and the competing perspectives with each, there seems to exist a general consensus concerning liberal democracy, both what it is and what its purpose and direction is. Liberal democracy, ultimately, serves to preserve the state. The need for this is found in the conflict-ridden society in which humanity currently resides. The means for this is found in maintaining regulations of law and order, that both individual liberty and societal equality might be maximized and preserved in a delicate balance. This balance finds itself in a political conception of justice which, though it is not itself a comprehensive doctrine, plays the role of one as it allows the state to reign supreme.

There may likely never be a consensus on the validity or merits of liberal democracy. Those who defend it as the best form of government available see it as the path for the preserving society while others fear the power that the state may render in such a society, holding that liberal democracy will prevent the redemption of society. The disagreements, however, are ones of merit, not identity. Ironically, for all the dissension over liberal democracy, there does exist a general consensus worthy of note. Agreed upon are the identity, purpose, and direction of liberal democracy. From this understanding of liberal democracy, the backdrop of the conversation on religion and liberal democracy is now set.

## CHAPTER THREE

### Religion

It is no surprise that religion often finds itself at the center of a plethora of deep and robust debates throughout history. It is the one aspect of society that, justly or unjustly, has been blamed for wars and unrest as well as credited with peace and humanitarian deeds. From wars between religion to schisms within religion to outright opposition to religion, religion itself seemingly holds a unique role in society of both being mystic and transcendent yet seemingly well-understood.

Yet, before any conversation on religious pluralism, religious liberty, or the effects of religion can be had, it is imperative to understand fully religion—what it is and is not and what its aims and purposes are. Careful consideration of what religion is and is not helps to illuminate a clear distinction between how religion is described and often viewed and what religion, at its core, actually is. Without a proper understanding of this distinction and of religion, any further conversation on religious pluralism, religious liberty, or the effects of religion is misleading and, at best, becomes a moot point.

#### *What Religion is Not*

Much of the difficulty in comprehending religious liberty and religious pluralism, as well as both their reach and their limits, is a perplexed understand of what religion is and what it is commonly mistaken to be. A vast variety of definitions for religion exist, from the basic definitions found in dictionaries to complicated and comprehensive definitions debated by theologians and philosophers of religion. There exists, however,

an imperative distinction between the various components or descriptions of religion or any particular religion and the actual identity of religion. This distinction appears, at times, to be a fine line but stretches into a great chasm when the conversation moves from the definition of religion to the role that religion plays and the various issues adjacent, such as religious liberty and religious pluralism. The various definitions often assigned to religion find themselves in one of two categories—those that express religion and those that characterize it. While both are imperative to a proper understanding of religion, neither suffices in identifying and defining the essence and core of religion.

### *Expressions of Religion*

*Beliefs and practices.* Perhaps the most common misunderstanding of religion is the notion that religion is the combination of beliefs and practices or, as some say, belief put into practice. It is easy to see the reason in defining religion as such, as all religions, theistic or not, hold some belief (even atheism holds some belief, namely, the belief that there is no deity) and expresses that belief through some form practice, some institutionalized and some not. Furthermore, it is indeed the case that both are central to any definition of religion; it is categorically impossible to have a religion that consists of neither belief nor practice. It is imperative, however, to remember that neither, alone, is sufficient to define religion, nor is the combination of the two.

It is common to see religion defined in terms of beliefs and practices or, even, primarily in terms of one aspect or the other. Christianity serves as a clear example of this trend. The Religious Right movement in the United States during the latter half of the Twentieth Century is characterized by an emphasis on the beliefs of Christianity.

This is reflected in their continued advocacy for laws that reflect moral and ethical values that correspond to what they view as the central beliefs of Christianity. The more progressive wing of Christianity, however, places their primary emphasis on the practices of their religion. This is reflected in their continued advocacy for social justice and actions that they claim model the life of Jesus Christ. While both factions often accuse the other of being misled, it appears that both are opposite sides of the same coin: Christianity. The issue is not over which faction is the true religion but, rather, the issue centers around the notion that both factions are incomplete, seeing only one fraction of the picture, as religion is not merely a set of beliefs or a system of practices. While the two factions combined provides a clearer and more complete picture of religion, even then, they only shed light on certain aspects of how religion is expressed and professed. As belief and practice together cannot constitute religion, it is difficult to see how either one, alone, is able to define religion.

The centrality of both belief and practice to religion often leads to the mistaken identity of religion as one or the other or both. To identify religion as such, however, is to catch only a slight glimpse and not a complete and coherent picture of what religion is.

*Sets and systems.* Another common religious theme is to express it in terms of sets and systems. Having a certain set of beliefs or following a particular system of practices is often how religions are classified. However, while this may be sufficient for everyday conversation, it is nothing more than a mere classification, or reclassification, of previously established component of religion.

Religion is not something that can be confined to a set or a system. A set is a mathematical concept that even mathematicians struggle to define. Mathematician Ralph

P. Grimaldi, in his book *Discrete and Combinatorial Mathematics*, describes a set to be “a well-defined collection of objects.”<sup>1</sup> The objects are called elements and the elements are said to be members of the set. Some sets are finite (for example, the set of all odd numbers between 1 and 10) and some sets are infinite (for example, the set of all real numbers). A finite set constrains religion and truncates its scope, forbidding those who subscribe to a particular religion to grow deeper in their respective faith. An infinite set does not have this problem, but it still limits religion in that it reduces it to little more than a laundry list—though an infinite one—of rules. Sets are well-defined with respect to their members. Religion may be well-defined and particular religions may be identified by their members, but it is not itself defined through its members.

The same problem arises when religion is defined by systems. Different systems exist in different fields of study, but in no field can a system properly describe religion. In computer science and engineering, a system is very well defined, immediately excluding religion from being classified as such. An economic system is one which deals with the production, distribution, and consumption of goods in a society—an explanation that, even if accurate, would, at best, describe some of the actions of some religions. Again, religion does not fit. Still other types of systems are best categorized as methodologies and models, but while certain religions may possess methodology and act as a model, these are, at best, descriptions of components or actions that a particular religion may include.

Cultural and social systems, however, deal with the interaction of various parts of culture and society. Many consider religion one such part, deeming it a social structure

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<sup>1</sup> Grimaldi, Ralph P. *Discrete and Combinatorial Mathematics: An Applied Introduction*. Fifth Edition. Upper Saddle River, NJ: Addison-Wesley. 2003. Page 123.

and claiming that religion is heavily influenced by and is little more than the culture that surrounds it. This, however, improperly and severely limits the scope of religion.

Culture makes no truth claims and it is, therefore, difficult, if not impossible, to assess if a culture is true or not, as is often done with religion. There are similarities between culture and religion and one's culture may help to influence what religion one chooses as well that a preeminent religion in any society may influence and guide the culture. There also exists, however, a clear and imperative distinction between culture and religion.

It is clear that despite their commonality, sets and systems cannot properly contain nor describe religion, let alone define it; rather, religion transcends these limitations.

*Unity and community.* Another common expression of religion is that it unites its members in one moral community those who adhere to such beliefs and practices. This view, like so many others, is just one of many expressions of religion, but not a definition of it.

While many religions emphasize unity, it is hardly the case that all religions share strong unity. The sharp dissent within many religions illuminates this glaring problem. Certainly, unity is held on certain beliefs and practices, but differences, however slight, often exist between the adherents of any religion. These differing views cannot be merely eliminated or forgotten, as they make the religion what it is, or in the least, they make the many denominations of the religion what they are.

A greater problem than unity, however, is the concept of religion functioning in community. Again, many religions do function in community, but what defines community? It is very possible to conceive of a religion that has only one adherent.



How, then, would this adherent's views be classified? How many adherents must a religion have for it to have a community? Religion cannot be defined by how many adherents it has.

The ideas of unity and community describe many religions. They can be, however, very misleading when used to describe religion and they do not serve as good definitions for religion.

*Zealous pursuit.* Another characteristic of religion often used when defining it is the zealous pursuit of some view or cause. It is true that many people who are devoutly devoted to their religion pursue their respective religious teachings with great zeal. Modern English has even seen the terms "zealously" and "religiously" used interchangeably. Zealous pursuit, however, is neither necessary for religion nor indicative of it.

It is easy to see how a member of a religion could not be zealous concerning its tenets. One may adhere to all the tenets of the faith, but not pursue them zealously. It is also the case that one may pursue a non-religious cause with great zeal. For example, a doctor or pharmacologist may zealously pursue a cure for cancer. It would be a far stretch, however, to call a cure for cancer a religious tenet, let alone a religion.

Members of various religions may be zealous in their pursuit of the tenets of their faith. This does not mean that the particular religion, or religion in general, is zealous. For one, it is the people, not the religion, that is doing the pursuing and, thus, it is the people who are or are not zealous. In addition, unless the specific religion teaches zealous pursuit (it is conceivable that some may), then the lack thereof cannot be deemed

as unreligious. Thus, it seems that zealous pursuit may classify some religious people, but it does not help in defining religion.

### *Characteristics of Religion*

*Supernatural and the divine.* Another common depiction of religion is one invoking the supernatural or the divine. As a generalized description, this is not necessarily wrong, as most religions do indeed invoke the supernatural or the divine. A description, however, is not a definition, and, even as such, a religion need not invoke the supernatural or the divine.

While many religions do invoke and involve the supernatural and the divine, this is not the case for all religions. Many religions disregard the supernatural, committing themselves, instead, to natural forces and, at times, even to the worship of nature. For example, Taoism and many branches of Buddhism do not invoke any supernatural being, power, or force but, yet, are still considered religions. Religion can and often does invoke the supernatural but there certainly is no requirement for it to be predicated by such.

Thus, while it may be common to generalize all religions as believing in some deity or, in the least, invoking some form of the supernatural or the divine, this certainly isn't always the case. Rather, such terms serve better in describing, not defining, religion. Even so, however, they describe particular religions and not necessarily religion in general. Placing such a burden as involvement of the supernatural and the divine as requirements for religion inaccurately narrows the field for what constitutes a religion.

*Set apart and forbidden.* Others have contended that religion is beliefs and practices that are, in some sense, sacred. These beliefs and practices are seen as being set apart and forbidden. Such a view is, again, not necessarily wrong, as the beliefs and practices are often considered sacred to the home religion. As with other characteristics, however, it appears that being set apart and deemed as sacred describe various portions of particular religions. For example, in the Christian religion, the taking of the Eucharist is considered to be set apart—forbidden for those not of the Christian faith. Attending a worship service, however, is not, though the practice remains an integral part of the Christian faith. Such terms, thus, are not sufficient in identifying or defining religion.

Even if all religions and their various components, such as beliefs and practices, are sacred in their being set apart and forbidden, not all things set apart and forbidden are also religious in nature. For example, it is easy to see how cookies, or any dessert, could be set apart and forbidden, especially before a meal. This does not, by any means, make the dessert religious. The term sacred carries with it a religious connotation in our language today, but the term does not in any way define religion or even a religious act.

Here, again, is a quality that may help to describe various aspects of certain religions but it proves useless in larger conversation on religion.

*Empirical verification.* Some have claimed that in order to constitute a religion, the claims made by the religion must be verified empirically. This view comes about that since religions make truth claims, the claims should be able to be empirically verified. This attempt to define a religion, however, is too narrow of a scope.

The existence of a religion cannot depend on the empirical verification of each of its claims. If such were the case, then only one religion would exist. The ability to verify

each claim of any religion would demonstrate that religion to be true (and perhaps the one true religion), but the failure to do so most certainly does not relegate the religion to non-religion status.

A second problem that arises with this approach to defining religion is that empirical verification is not necessary for a claim to be true. Mathematics is one field where this is the case. Mathematical axioms are accepted as truth and play an integral role in many branches of mathematics, including geometry and calculus. Yet, these axioms, unlike theorems, are not and cannot be empirically verified.

For example, Euclidian geometry is based upon five key axioms. One of the axioms, Playfair's Axiom, a corollary to Euclid's fifth axiom, also called the parallel postulate, states that on a plain, given a line and a point not on the line, only one line can be drawn through that point that will not intersect the line. The line drawn is called a parallel line. There is no empirical proof for this axiom; the entirety of Euclidean geometry rests upon its being true. In hyperbolic geometry, however, this fifth axiom does not hold. Instead, there are an infinite number of lines that can be drawn through the point and do not intersect the line. In elliptical geometry, Playfair's Axiom also does not hold. There exist no parallel lines and thus any line drawn through the point will intersect the line. In absolute geometry, Euclid's fifth axiom is neutral. It does not need to hold (as it does in Euclidean geometry) nor does it need to be disproved (as it does in hyperbolic and elliptical geometry). It merely has no bearing on absolutely geometry.

This is the same with religion. The acceptance of Jesus of Nazareth as the Messiah is imperative to the validity of Christianity. This belief is either true or false, but the validity of it does not determine whether Christianity is a religion, only whether

Christianity is correct (with regards to this claim). For Islam, Jesus of Nazareth cannot be the Messiah for he is a great prophet, but less than Mohammed. For Jesus to be the Messiah, Islam would be incorrect, but it would not cease being a religion.

Thus, while empirical verification assures validity, the lack of such verification does not terminate as religion's status as such. Empirical verification of all claims is a common but gravely misplaced burden on religion. It does not help in defining it as, if it were true, it would severely distort religion.

### *What Religion Is*

Understanding that many of the definitions provided for religion are, instead, descriptors and components, the task comes in defining, or at least identifying, what religion is. A robust definition of religion will illuminate the discussion over religious liberty and religious pluralism, providing clarity that may be lost when religion is demeaned to little more than then a description of one or two of its components. Philosopher of religion Paul Griffiths seeks such a definition for religion in his book *Problems of Religious Diversity*. He writes, "A religion is a form of life that seems to those who belong to it to be comprehensive, incapable of abandonment, and of central importance."<sup>2</sup> In articulating such a definition for religion, Griffiths moves away from outer descriptions of religion, capturing the core essence of its identity. Unlike the various aforementioned descriptions and components of religion, understanding religion in these terms paints an all-encompassing yet coherent picture of what religion is.<sup>3</sup>

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<sup>2</sup> Griffiths, Paul J. *Problems of Religious Diversity*. Malden, MA: Blackwell Publishing. 2001. Page xiv.

<sup>3</sup> Griffiths proposes a functional definition of religion, as opposed to a substantive definition, which is generally used by the state. Griffith's definition acknowledges the substantive aspects of religion

## *Form of Life*

The common mistake of identifying components and descriptions of religion as religion itself begins with not understanding religion as a form of life. Rather than being comprised of various components, these components and descriptions are expressions of religion. As a form of life, a particular religion is not dictated by its components but, rather, it dictates what its components are. For this reason, it is viable to identify any particular religion by its components or descriptions but it is inconceivable to use such to define the essence of religion itself. Religion is not built piece by piece, component by component but, instead, it is expressed outwardly in various factors, as such is the nature of a form of life.

Griffiths explains a form of life as a “pattern of activity that seems to those who belong to it to have boundaries and particular actions proper or intrinsic to it.”<sup>4</sup> Marriage, for example, is a form of life. A form of life touches every aspect of one’s being, both consciously and subconsciously, influencing, either directly or indirectly, one’s daily life. The particular actions, patterns of activity, and various boundaries are “intrinsic to [the religion]”<sup>5</sup> and, thus, they do not define the form of life but are, instead, defined by the form of life. The end, then, is not the knowledge of such religious aspects, but the lifestyle that encompasses them in its living. Griffiths, thus, explains this lifestyle as “comprehensive, incapable of abandonment, and of central importance.”<sup>6</sup>

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through its comprehensive nature, but it focuses primarily on the functions of religion. While it may provide a more accurate depiction of how religion engages society, it is not the view of religion that most states—including the United States Supreme Court—currently hold.

<sup>4</sup> Paul J. Griffiths, *Problems of Religious Diversity*. (Somerset, NJ: Wiley-Blackwell Publishing, 2001), 7.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

### *Comprehensive*

The majority of attempts to define religion rely heavily, if not solely, upon the components of belief and practice. While religion does indeed encompass both belief and practice and while both play integral roles in identifying specific religions, such a description provides an incomplete image of religion. Religion is more than one's beliefs or actions; it is a comprehensive form of life.

In being comprehensive, religion encompasses all components, both identifiable and unidentifiable. For example, beliefs and practices are central and integral to any religion. What would a religion be that held no views, no beliefs, and no convictions? It is not irony that people who hold none of these are referred to as non-religious. More so, one can partake in certain practices of a religion and not be a member of that religion. For example, playing in the yard, walking on all fours, eating from a dish, and sleeping in doghouse does not make one a dog. In the same manner, attending church does not make one Christian, reading the Torah does not make one Jewish, and praying towards Mecca does not make one Muslim. Religious practices are merely an external expression of the beliefs already held within. Merely cycling through the actions of any religion does not make one a member of that religion.

The same is true if the situation is reversed. What would a religion be without actions and practices that reinforce its beliefs? The beliefs would become effectively null and void. In the least, they would be useless. For example, a drowning man can believe in the life-saving ability of a lifesaver thrown to him. What use would such a belief be, however, if the same man chooses to ignore the lifesaver floating next to him? It would be no different if there was no life saver or had he believed the life saver was ineffective.

Unless he takes hold of it, his beliefs are useless to him and his survival. In the same manner, unpracticed belief has the same effect as no belief at all. In such a situation, adhering or belonging to a religion would make no difference.

It is clear, then, that for beliefs and practices to have significant meaning, they must exist in accordance with each other. This is no different in religion, where religion must encompass both belief and practice. The two rely upon each other and are inseparable with regards to religion. They play a central role together in all religions and cannot be separated or removed. Any attempt to divorce the two from each other or divorce either one from religion results in something other than religion.

Such is the comprehensive nature of religion. While the integration of beliefs and practices illustrates this nature, the comprehensiveness of religion reaches well beyond the limits of such components, however integral and central they are. Any view, then, that seeks to define religion in terms of its components, such as beliefs and practices, or in terms of its descriptors, such as sets and systems or zealous pursuits, provides only an incomplete understanding of religion. Religion is not defined by such terms but, rather, these components and descriptions are outward expressions of the comprehensiveness of religion.

### *Incapable of Abandonment*

Being a comprehensive form of life, Griffiths identifies religion as being “incapable of abandonment.”<sup>7</sup> While it is true that people switch religions or abandon religion all together, it is the case that those actively adhering to a religion find apostasy to be a non-option. This is because the religion is not defined by its components, but it is

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<sup>7</sup> Griffiths, Paul J. *Problems of Religious Diversity*. Malden, MA: Blackwell Publishing. 2001. Page xiv.



a fully-adopted identity, becoming wholly and completely who someone is. Religion is much more than what one believes and how those beliefs are put into practice and outwardly displayed. Limiting religion to such is to limit a comprehensive form of life to little more than a job or hobby.

The comprehensive and intrinsic nature of religion directly lends itself to being incapable of abandonment. For this reason, some particular religions find apostates as never having been a true member of the religion. To abandon one's religion is to divorce one from oneself—an impossible task barring a complete change of identity.

### *Central Importance*

While Griffiths accounts for the comprehensive and intrinsic nature of religion he completes his definition by addressing its position “of central importance”<sup>8</sup>—something that is not understood in its aforementioned aspects. Being central to one's life, religion is not merely unshakable and all-encompassing, but it is the center focus of one's life—the aspects and components of one's life comes from this center and, in return, point back to it.

The centrally important role that religion plays in one's life directly lends itself to its sacredness, zealous pursuit, and other descriptions of its expression. While such descriptions fall short of defining religion, they do point to the inescapable role that religion plays in a person's life. The many disputes over and between various religions do not nullify religion but only further confirm the comprehensiveness and central importance of religion.

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<sup>8</sup> Griffiths, Paul J. *Problems of Religious Diversity*. Malden, MA: Blackwell Publishing. 2001. Page xiv.

A commonly adopted, either consciously or subconsciously, view of religion and its role is the reductionist view articulated by atheistic biologist PZ Myers and encompasses many of the misconceptions popular with religion:

Religion is naiveté that gives some people comfort and we don't want to take it away from them. It's like knitting, people like to knit. We are not going to take their knitting needles away, we are not going to take away their churches, but we have to get it to a place where religion is treated at a level that it should be treated. That is something fun that people get together and do on the weekend, and really doesn't affect their life as much as it has been so far.<sup>9</sup>

Myers's misunderstanding of religion and the role that it plays results in relegating it to something inconsequential, which effectively negates religion (something that Myers, as an atheist, actually seeks to do<sup>10</sup>).

Knowing what religion is and is not, it becomes clear that religion plays a central, not an outlier, role and its various components and descriptions do not define its essence, yet remain crucial in any understanding of religion, due to its comprehensive nature. The removal of any part of religion or the relegation of religion to a mere hobby or activity results in the nullification of religion. Only with this understanding, with religion as a form of life, can one truly understand religious pluralism and its place in society.

### *The Aim and Purpose of Religion*

A proper understanding of what religion is lends itself to a better understanding of the aim of religion, which allows for a better understanding of the role religion plays in society and the interactions between the state and religion. While religions vary from

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<sup>9</sup> P.Z. Myers, Interview, interviewed by Ben Stein, *Expelled: No Intelligence Allowed*, Premise Media. 2008.

<sup>10</sup> In the same interview, Myers states his desire to see “greater science literacy, which is going to lead to the erosion of religion.” As an atheist, in the school of “new atheism,” Myers, and his contemporaries such as Richard Dawkins and Sam Harris, have made clear that the role of religion, should it have one at all, must be an “appropriate side dish rather than a main course.”

each other and have different, often radically different, means to their end, they seemingly possess the same end. Religion serves the purpose of forming, structuring, and developing people. This end encompasses the entirety of the person and is not affected by the state or any other surrounding entity.

In this process of structuring and developing the human life, religion makes three distinct claims: 1) claims about the setting of human life, 2) claims about the nature of persons, and 3) claims about proper conflict of human life.<sup>11</sup> The first claim describes the environment in which one lives. An example of such a claim is, “the world is the theater of God’s glory.”<sup>12</sup> The claim can be broad or narrow, but it will describe the human setting as “of a certain sort.”<sup>13</sup> This claim understands the world around humanity (which would include the state) with respect to the particular religion.

The second claim describes the nature of persons, or the inhabitants of the setting described by the first claim. An example would be the Levites, of the Christian Old Testament or Jewish Scriptures, as a group of people called to the work of God in Israel. As with the claim concerning the setting of human life, this claim can be termed broadly or narrowly and the understanding sought is unique to the particular religion (implying, thus, that it will vary from religion to religion). Here, religion is seeking an understanding of the humanity that is in the world the first claim seeks to understand.

The third claim suggests or recommends (or in some cases even demands) a certain pattern of action. An example would be Muslims being required to pray five

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<sup>11</sup> William S. Christian, Sr., *Doctrines of Religious Communities: A Philosophical Study*. (New Haven, Connecticut: Yale University Press, 1987).

<sup>12</sup> Paul J. Griffiths, *Problems of Religious Diversity*. (Somerset, NJ: Wiley-Blackwell Publishing, 2001), 21.

<sup>13</sup> Ibid.

times a day, bowing towards Mecca or a set of moral codes that one is expected to follow (for example, the Ten Commandments). For this reason, it is impossible to have a religious form of life that makes no claims—explicit or implicit. Such people (those who believe in no claims) are those who have no religious form of life at all.

The essence of religion, from its comprehensiveness to the central role that it plays, is seen clearly through these three claims, which all religions make. The first claim explains the nature of the world, the second claim explains the nature of those in the world, and the third claim explains the interactions of those in the religion to the world and those in it. By assenting to these claims, members of a particular religion become structured and developed in accordance with that religion. The claims are comprehensive and assent and adherence to them creates a form of life.

As a comprehensive and central form of life, religion has an aim of a perfection or completion of some sort. There is a necessary order to life and persons that any particular religion dictates and its adherents' seeks. The interruption of such order is a transgression to the religion, as it attempts to divorce various components from the whole, which, due to the nature of religion, results in nullifying religion and making any conversations on such a moot point. Yet, here exists the challenge of religious pluralism and liberal democracy. A variety of religions, by nature, find themselves in conflict with each other. The preservation of individual liberty in a liberal democracy allows for such plurality of religion, but it also seeks to limit conflict and, in order to preserve liberty, maintain societal equality through the preservation of law and order. Given the nature and aims of both liberal democracy and religion, what, then, is the nature of religion

conflict within a liberally democratic society and where are, if any, the limits of religious pluralism?

## CHAPTER FOUR

### Religious Conflict and Government Neutrality

A proper understanding of both religion and liberal democracy sets up the perplexing and paradoxical question of religion's role in a society government by a liberally democratic state. To understand the interaction of church and state, it is imperative to identify the reality of religion in society, from religious pluralism to religious conflict, and to keep mindful of the aims and purposes of both religion and liberal democracy in addressing that reality. Emanating from such understanding and attempting to maintain both religious liberty and the sovereignty of the state within a liberal democracy, a position of government neutrality towards religion and, subsequently, religious conflict, is often articulated. Such a neutrality, theoretically, allows for any religion to function fully and freely while preserving the authority and sovereignty of the state. A closer look at a policy of neutrality and how it is applied in the United States, however, demonstrates that such policy is not immune to the continual struggle over balancing church and state, constantly tipping the scales to one side or the other and not maintaining a harmonious balance.

#### *Religious Pluralism and Religious Conflict*

When religion is understood as “a form of life that seems to those who belong to it to be comprehensive, incapable of abandonment, and of central importance,”<sup>1</sup> one of two possible realities exist for religion: either there exists one religion to which all adhere

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<sup>1</sup> Griffiths, Paul J. *Problems of Religious Diversity*. Malden, MA: Blackwell Publishing. 2001. Page xiv.

or there exists multiple religions that are necessarily contradictory to each other in at least one aspect. If the former was true and there existed only one religion to which all were adherents, then there would exist no inter-religious conflict as there would exist no other religions with which to have such conflict. The existence of multiple religions, however, necessitates that they be contradictory with each other; otherwise, there would be no need for such pluralism as the former case of one religion would be sufficient.

The nature of religion is such that if complete consensus exists, there exists only the need for one religion; should any dissention exist, religious pluralism, and conflict, will necessarily follow. Religious pluralism, then, is predicated on religious dissention and contradiction which inevitably leads to conflict between religions. The comprehensiveness and central importance of religion necessitate that any alteration to any aspect of any religion creates a separate religion. The incapability of abandonment of religion, along with its aforementioned central importance, necessitates that multiple, separate religions lead to conflict between the religions. For this reason, while any number of similarities may exist between various religions, even the slightest difference between religions will result in religious conflict. For example, both Judaism and Islam are monotheistic religions that have prayers and seasons of fasting, yet the two religions find themselves in seemingly constant conflict with the other. Even within minute differences, religions remain in conflict with each other. For example, consider the debate over the *Filioque* that has separated the Catholic and Orthodox Churches within the Christian religion for the past thousand years.

### *The Challenge of Liberal Democracy*

The simple reality of society today is that religious pluralism both exists and is widespread throughout the world. It is inevitable, then, that there exists inter-religious conflict which displays itself both inwardly and outwardly in society. Such is not very different from the state of conflict from which democracy arises in the historic view of liberal democracy. In this condition of pluralism and conflict that liberal democracy finds itself; it is the challenge of democracy, then, to maintain individual liberty (in this case, religious liberty) while preserving the state through providing law and order.

It is imperative, then, in order for any government to effectively defend and preserve the individual autonomy and religious liberty of its members to be unbiased in its approach to religion. Such is the driving force behind John Locke's notion that all men can be good judges on matters not involving themselves—a concept that has become the base for judiciaries in many liberal democracies such as the United States. Thus, as the reality of religious pluralism meets the backdrop of liberal democracy, the policy of government neutrality inevitably arises—seeking a government that can be unbiased with regards to religion and, thus, preserve both religious liberty as well as state sovereignty.

### *Government Neutrality*

Neutrality, regardless of the issue at hand, requires the neutral party to be entirely unbiased concerning the issue. Given the nature of liberal democracy, this becomes a difficult task—since democracy is based upon a conflicted and imperfect populous. It is for this reason, John Locke calls upon a non-involved, third-party to mediate or judge such matters of conflict. When the issue of conflict is religion, however, the situation becomes further complicated. Given the reach of both religion and liberal democracy,



the two entities often contain the same members. It is, then, nearly impossible for any member of liberal democracy to be unbiased towards another entity of which he is a member, in this case, religion. Locke's proposal for a third-party judiciary becomes a moot point since there exists no third party.

Given the complications of remaining within a liberal democracy, government neutrality generally takes two forms—both complete and opposite of each other. The first approach is a strict ban on the members of society from all involvement with the matter at hand while the second approach is a strict libertarian, laissez-faire approach that calls for a strict ban on the state itself from becoming involved with the issue in question. Both these approaches are used on a variety of issues and both find themselves applicable when the issue of government neutrality towards religious pluralism and conflict arises.

#### *Neutrality through Prohibition of the Members*

Perhaps the simplest method for neutrality is a simple prohibition of the matter at hand. This is seen never more clearly than when a parent, in the interest of being fair, prohibits both children from eating cookies prior to dinner. The same function occurs when a government seeks neutrality. Generally applicable laws are a prime example of such government neutrality. For example, driving while intoxicated laws are neutral in that they do not discriminate against who they prohibit from operating a vehicle while intoxicated; all persons, regardless of age, gender, race, religion, and so forth are under the same law—a law that exists separate of those aforementioned factors.

There exists, however, severe limitations to a prohibitive neutrality in a liberal democracy. The aim and purpose of a liberal democracy is to preserve individual liberty and autonomy. In doing so, government seeks to maintain a degree of law and order that

will preserve such freedoms by not being oppressive to the point of trampling individual rights while providing enough oversight to maintain an equal society so that such freedoms can continue to be maintained. The extent of limitation on any particular matter varies depending on the issue. In order to maximize individual liberty and autonomy, such limitations are developed gradually and as needed in a liberal democracy—new regulations arise on a case-by-case basis. This can be seen clearly, for example, in the various constitutional tests developed by the United State Supreme Court. These tests serve to preserve the individual’s autonomy while limiting various actions deemed detrimental to such freedoms. By being generally applicable to all, these limitations remain neutral.

A complete prohibition, however, works against the very liberty and autonomy that liberal democracy seeks to protect. In certain situations, such prohibitions are deemed as appropriate for the same reason a government may want to establish limitations and boundaries on certain actions. It is impossible in such situations, however, to defend liberty when the issue at hand is under a complete prohibition. For example, in the United States, there exists child predatory laws that issue a complete prohibition on any child predation. There exist no freedoms or individual autonomy on the matter. As a result, such laws reflect the highest form of government neutrality—all child predators are equally guilty under the law. While such laws are appropriately in place, it would be impossible to argue that the United States federal government defends child predation liberty or, even, sexual autonomy and liberty.

The same pattern applies when discussing religious liberty and pluralism. Religious pluralism is the simple reality of society today but it only continues to exist

because of statutes guaranteeing religion liberty. With religious pluralism, however, comes religious conflict—conflict that a liberal democracy is tasked with resolving. For the state to take a neutral position through prohibition would be to enact a complete ban on religion—no member of the state can participate in any religion. While this would certainly keep the state the neutral with respect to religion, such prohibition would eliminate all religious liberty and any individual autonomy with respect to religion would also vanish.

### *Neutrality through Prohibition of the State*

A second approach to government neutrality is the opposite of prohibition or limitations on the members of society but a more libertarian approach that places the prohibition or limitations on the state itself, giving the members of society complete liberty with regards to the issue at hand. This is the neutrality ice hockey referees display when they allow for two players to fight on the ice during a game. If the referees never intervened and simply allowed the fight to continue to the end, such would be pure neutrality. This is the same neutrality that government often displays in an attempt to preserve individually liberty and autonomy. Free markets exist as a prime example of this neutrality. An individual has the autonomy to shop where he may choose. Though businesses may fight to influence that decision, the government remains neutral of the issue by withdrawing and taking neither side.

As with neutrality based upon the prohibition of the members of society, there exist severe limitations to prohibitions on the state. While a liberal democracy does aim to maximize the individual liberty and autonomy of its members, such cannot be had if there exists no state. Therefore, liberal democracy serves as the compromise and, at

times, fine line between tyranny and anarchy. With respect to freedoms and autonomy, liberal democracy serves as the mediator between prohibition of all individual liberty (tyranny) and the prohibition of all state action, which then leads to chaos that reigns in Thomas Hobbes's war of all against all (anarchy).

This same concept applies with neutrality towards religious pluralism. The guaranteed conflict that ensues from a plurality of religions in society cannot be left unchecked, just as Hobbes and Locke found it unviable to leave the conflict in the state of nature unchecked. The state simply cannot prohibit itself from intervention in such conflict on the grounds of religious liberty. To do so would risk the sovereignty of the state which, in turn, would end the law and order that guarantees religious liberty. This is the struggle that exists in the century-old debate over the separation of church and state; a debate brightly illuminated by looking closely at the First Amendment of the United States Constitution and the long line of Supreme Court cases that attempt to interpret it.

### *Separation of Church and State*

Given the nature of religion and the aims and purpose of liberal democracy, neither form of neutrality, in its complete form, is viable. The end result is either a complete revocation of religious liberty or a complete destruction of liberal democracy itself. With neither being acceptable for a liberal democracy, the notion of government neutrality moves towards a establishing a delicate balance between both forms of neutrality. The end goal of such a balance is a liberally democratic state that can both maintain religious liberty as well as preserve the sovereignty of the state.

This goal can be conceived in Thomas Jefferson's famed letter to the Danbury Baptists, in which he calls for "building a wall of separation between Church and State."<sup>2</sup> It is clearly articulated in the First Amendment of the United States Constitution, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof," which sets up liberal democracy's attempt for balance, as well as the two sides of the church-state debate: establishment and free exercise. It is towards this very balance that Justice Hugo Black moves in his ruling in the landmark case of *Everson v. Board of Education* in 1947, where the Establishment and Free Exercise Clauses of the First Amendment became incorporated to the states through the Fourteenth Amendment.

#### *Everson v. Board of Education (1947)*

In their ruling in *Everson v. Board of Education*, the Supreme Court addresses the constitutional question of whether a particular New Jersey statute that lends aid to religiously affiliated schools violates the Establishment Clause of the First Amendment as applied to the states through the Fourteenth Amendment. To address this issue, Justice Hugo Black establishes, as judicial precedent, a high wall of separation between church and state. Since Black establishes the incorporation of the religion clauses of the First Amendment to the states through this case, he also attempts to lay out general guidelines to fulfill the requirements that both the Establishment and the Free Exercise Clause address. In the subsequent religious liberty cases, the United States Supreme Court seeks to work out the boundaries set on the both the establishment and free exercise sides of the wall.

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<sup>2</sup> Jefferson, Thomas. "Jefferson's Letter to the Danbury Baptists." 1802 January 1. <http://www.loc.gov/loc/lcib/9806/danpre.html>

## *Establishment*

Black establishes three provisions in his majority opinion in *Everson v. Board of Education* that, if fulfilled, preserve the Establishment Clause of the First Amendment:

1. The government (federal, state, or local) cannot set up a church.
2. The government cannot pass laws which aid one religion, aid all religions or prefer one religion over another.
3. The government cannot levy taxes in any amount, large or small, to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

The first provision prohibits any form of a state church. A government-run church, such as the case in England, where the ruling monarch is the head of the Church of England, is prohibited under this provision. Even though citizens of England are not compelled to be Anglican, or even Protestant or Christian, the Church of England remains a government operation. A government-established church, as is the case in the People's Republic of China, is also unacceptable. Here, there exists no official state religion but there are government-established churches, such as the Three-Self Church, which are the only churches legally permitted in the country. This form of a state church is also prohibited by this first provision.

The second provision Black creates narrows the scope of establishment even more. Not only is the government prohibited from establishing and operating a church, the government also cannot aid one religion over another; this is also the case for general religious support: the government cannot aid religion in general. Thus, any law that

shows favor towards religion, regardless of religious preference, is deemed unconstitutional under this provision.

The third provision further narrows the scope of establishment by prohibiting any taxes that would be used, in any way, to support, not just religion, but all and any religious institutions or even activities. This, joined with the second provision, makes for the “no-aid-to-religion” rule that permeates the courts for the next several decades. Quite simply, no form of aid, financial or otherwise, is to ever pass from the government to any religiously affiliated activity.

With these three provisions, the *Everson* standard sets the guiding precedent on church and state relations with respect to the establishment of religion. The subsequent establishment cases and constitutional tests the high court develops all help these general provisions to take practical form. They exemplify a practical example in government neutrality with regards to religion in liberal democracy.

*Lemon Test: Lemon v. Kurtzman (1971).* In his ruling, Chief Justice Warren Burger created the “Lemon Test,” a three-prong test that seeks to determine if a particular statute is in violation of the Establishment clause due to being overly religious. The three prongs to the Lemon Test are:

1. The government’s action must have a secular legislative purpose.
2. The government’s action must not have the primary effect of either advancing or inhibiting religion
3. The government’s action must not result in an “excessive government entanglement” with religion.

If a statute passes the test, then it is permissible for it not so religious in nature that it would be a violation of the Establishment Clause. However, if any statute fails to meet just one of the three prongs of the test, then it fails the test and is in violation of the wall of separation between church and state.

What is directly evident from the Lemon Test is the Supreme Court's attempt to achieve government neutrality by placing restrictions on individual actions that may involve the state. The three prongs of the Lemon Test seek to determine the limits of individual autonomy and religious liberty. In the case *Lemon v. Kurtzman*, the Supreme Court found that non-public schools, including parochial schools, could not be reimbursed by the state for services and materials. Here, while an individual has the freedom to attend a non-public school, the state places limitations on the financial aspects of this freedom. Simultaneously, the Lemon Test restricts the state from advancing or inhibiting religion, thereby preserving the individual's autonomy on the issue.

*Establishment Test: Lynch v. Donnelly (1984).* In 1984, the Supreme Court issued a landmark ruling in the case *Lynch v. Donnelly*, in which they created the Establishment Test as a corollary to the Lemon Test. In his majority opinion, Chief Justice Earl Warren Burger, creator of the Lemon Test, finds that a crèche in an annual Christmas display in Rhode Island did not violate the Lemon Test. In a concurring opinion, however, Associate Justice Sandra Day O'Connor agrees with Burger's finding that the Christmas display passes the Lemon Test, but attempts to simplify and clarify the Lemon Test by introducing the Endorsement Test.

The Endorsement Test effectively combines the purpose and effect prongs of the Lemon Test. O'Connor argues that the purpose and effect of a statute, as questioned in



the Lemon Test, is best read as a question of “whether the government intends to convey a message of endorsement or disapproval of religion.”<sup>3</sup> A statute would fail this test, and subsequently the Lemon Test, if it is found to be an endorsement or expressed disapproval of religion.

O’Connor holds the neutrality of the government in high esteem, holding that public perception for a reasonable observer cannot be that the government has either endorsed or disapproved of a religion.

What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.<sup>4</sup>

Thus, for a statute to pass the Endorsement Test, it must not result in the government’s expressed approval (endorsement) or disapproval of religion. Whether this is the case or not rests in the eyes of a reasonable observer as assessed by the courts.

*Coercion Test: Lee v. Weisman (1992).* In his ruling in *Lee v. Weisman*, a case centered on school prayer at a middle school graduation, Justice Anthony Kennedy creates what he calls the Coercion Test. It is important to note that, like Sandra Day O’Connor’s Endorsement Test, the Coercion Test does not replace the Lemon Test as a new standard, but seeks to add to it. In Kennedy’s case, his Coercion Test narrowly tailors the effect prong of the Lemon Test.

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<sup>3</sup> *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (concurring opinion)

<sup>4</sup> *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (concurring opinion)

The Coercion Test is best described by Kennedy himself:

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." *Lynch, supra*, at 678; see also *Allegheny County, supra*, at 591 quoting *Everson v. Board of Education of Ewing*, 330 U.S. 1, 15-16 (1947).<sup>5</sup>

Kennedy points out that there is no question that the Constitution forbids the government to coerce, in any way, participation in any religion or in religion in general or in any exercise of religion. To Kennedy, any form of coercion is absolutely unconstitutional. In the case of *Lee v. Weisman*, Kennedy acknowledges the absence of physical coercion but finds the psychological coercion of attending graduation equally as compelling.

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Statement of Agreed Facts ¶ 41, App. 18. Petitioners and the United States, as *amicus*, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation<sup>6</sup> is formalistic in the extreme. True, Deborah [Weisman] could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point.<sup>7</sup>

The Coercion Test attempts to restrain both government and individual action from infringing upon any individual's autonomy and religious liberty. While many questions arose during the oral arguments in *Lee v. Weisman* that pertained to the nature of the prayer—was it sectarian or universalist—the permeating issue for Kennedy is that

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<sup>5</sup> *Robert E. Lee, Individually and as Principal of Nathan Bishop Middle School, et al., Petitioners v. Daniel Weisman etc.*, 505 U.S. 577 (1992)

<sup>6</sup> It is worth noting here that Kennedy's arguments for the significance of a high school graduate are inapplicable as this was a middle school graduation.

<sup>7</sup> *Lee v. Weisman*, 505 U.S. 577 (1992)

no one, either government entity, such as the school, or an individual, such as the rabbi, is permitted to coerce any other individual into religious action.

The Establishment Clause of the First Amendment of the United States Constitution establishes the sovereignty of the state with regards to religious liberty. No individual action may be permitted that would engage the government in a sectarian manner. While this certainly limits the religious practices of individuals, it also seeks to protect religious liberty but forcing the government to remain separate and, thus, neutral of all religious matters. As the state cannot be used to promote or advance religion, it likewise is restrained from inhibiting religion—creating some balance towards government neutrality. The various constitutional tests created by the U.S. Supreme Court to test for violations of the Establishment Clause all center around this singular focus.

### *Free Exercise*

Black also provides provisions in his ruling in *Everson v. Board of Education* regarding the Free Exercise Clause of the First Amendment, finding an infringement upon an individual's free exercise is as egregious as a violation of the Establishment Clause. Black describes the balance necessary between establishment and free exercise:

Of course, cutting off church schools from these services so separate and so indisputably marked off from the religious function would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.<sup>8</sup>

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<sup>8</sup> *Arch R. Everson v. Board of Education of the Township of Ewing, et al.*, 330 U.S. 1, 18 (1947)

In order to preserve the free exercise of religion, Black makes a distinction between aiding *religious* persons, because of their religion, and religious *persons*, because of their personhood. He then provides, as he did with establishment, a list of provisions in order to protect this constitutional right of free exercise:

1. The government cannot force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.
2. The government cannot punish a person for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

The first free exercise provision seeks to guarantee religious liberty for the individual by restricting the government from influencing any person on their choice of religion or lack thereof. This not only eliminates the use of force, which is explicitly listed in the provision, but it also broadly, and vaguely, eliminates any influencing that may be done. This severely restricts the actions of the government and also leaves the clause open to further interpretation, as virtually all actions the government may commit can be argued to be influential. The vagueness, however, may have been intentional on Black's part as it allows for the provision to be far-reaching, granting more free exercise to individual citizens. Black's second provision prohibits any repercussions against those who choose to express belief in a religion or those who choose to refrain from such an expression of belief. This clause prohibits the state from engaging in any form of religious persecution, giving each individual the right to choose his own religion or none at all.

Just as was the case with the Establishment Clause, the U.S. Supreme Court would create a series of tests and standards to test for violations of the Free Exercise Clause, seeking clarity on the provisions that Black articulates in his *Everson* ruling.

*Sherbert Test:* *Sherbert v. Verner (1963)*. In his majority opinion in *Sherbert v. Verner*, Justice William Brennan, Jr. formulates the Sherbert Test, which determines if government action runs afoul against the Free Exercise Clause of the First Amendment. The Sherbert Test is broken into two parts, each part consisting of two questions that must be properly answered. The former places the burden of proof on the individual while the latter places the burden of proof on the government. If any question in the first part is answered in the negative, then the government action is constitutional for the individual fails to provide substantial evidence to meet the burden of proof. If, however, all the questions in the first part are answered in the affirmative, then the burden of proof shifts to government and the second part of the test.

The two provisions Brennan lays out with respect to the individual are:

1. Does the individual have a claim involving a sincere religious belief?
2. Is the government action a substantial burden on the person's ability to act on that religious belief?

For the statute or government action to be constitutional, both questions must be answered in the affirmative. If the government acts in such a way as to substantially burden an individual's sincere religious belief, then the government action is unconstitutional, unless it can answer in the affirmative to Brennan's latter two provisions:

3. Is the government acting in furtherance of a compelling state interest?
4. Has the government pursued that interest in the manner least restrictive or least burdensome to religion?

The Sherbert Test exemplifies a liberal democracy's work towards government neutrality towards religion. Brennan first attempts the neutral position by revoking the state's ability to judge the legitimacy of any particular religion, setting the standard on the question of the sincerity of the individual. The Sherbert Test then places severe restrictions on the state, preserving individual religious liberty. Yet, it also seeks to establish the sovereignty of the state by creating exception for compelling state interests that are pursued in the least restrictive means possible.

*Balancing Test: Wisconsin v. Yoder (1972).* In 1972, the Supreme Court issued a ruling in *Wisconsin v. Yoder* that introduced a new test in helping to define the free exercise side of the First Amendment. As was the case with the Sherbert Test, the Balancing Test, as its name suggests, seeks to find the proper balance between establishment and free exercise and to keep the state neutral.

The Balancing Test adopts the first part of the Sherbert Test, seeking evidence for a sincere religious belief that is substantially burdened by government action. Rather than proceed with the second part of the test, however, Chief Justice Warren Burger, who authored the majority opinion, moves away from the compelling state interest standard of *Sherbert* and shifts to a less-stringent, and vaguer, standard of weighing the religious practices against the government interests. Burger writes,

It follows that, in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the

free exercise of religious belief by its requirement or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.<sup>9</sup>

With the Balancing Test, even more religious liberty is granted to individuals in society, by further loosening the standard established in *Sherbert v. Verner*. Burger does not, however, completely prohibit state intervention, as true neutrality would seemingly dictate, but calls for the state to seek balance by weighing the sides of religious practice and government interests against each other. Without granting full autonomy to the individual, the Balancing Test gives the state the authority to meddle on religious matters in order to balance the interests of both religion and government. This is very a situation that a liberal democracy attempts to avoid by moving towards a policy of government neutrality.

*Lyng v. Northwest Indian Cemetery Protection Agency (1988)*. In both *Sherbert v. Verner* and *Wisconsin v. Yoder*, the Supreme Court ruled with the individual and against the state, holding that the government's actions, in both cases, were an unconstitutional infringement upon the individual's right to free exercise of religion. However, the question remains as to what situations, if any, would tip the balance lead the court to decide in favor of government action and against the individual. In 1988, the Supreme Court heard such a case in *Lyng v. Northwest Indian Cemetery Protection Agency (CPA)*.

In her ruling, Justice Sandra Day O'Connor makes a clear distinction between two different types of inhibition of free exercise. The first is what is ruled unconstitutional in *Sherbert v. Verner* and *Wisconsin v. Yoder*, namely, the government cannot inhibit free

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<sup>9</sup> *State of Wisconsin v. Jonas Yoder, Wallace Miller, and Adin Yutzy*, 406 U.S. 205, 214 (1972)

exercise by forcing an individual to violate his own religion. The second, however, is when the government itself violates a religion but does not force to the adherents to do so. O'Connor finds this to be the case in *Lyng v. Northwest Indian CPA* and rules it as within the government's constitutional rights. O'Connor writes,

In both cases,<sup>10</sup> the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.<sup>11</sup>

This new standard set in *Lyng* does not replace or throw out the Sherbert and Balancing Tests. Rather, it adds to the standard, holding that if the Sherbert and Balancing Tests can show that there exists a sincere religious practice and that a legitimate government interest, then the next question is whether free exercise is being violated by the government or by the religion's own adherents by force of the government. If the government's interest in legitimate, then it trumps the religious practice and the action is constitutional. The government action, however, should be sought in a manner that does not force a religion's adherents to violate their own religion.

O'Connor recognizes that the state cannot allow for its granting of individual liberty and autonomy to undermine the ultimate authority of such rights—the state itself. Thus, she argues that a distinction must be made between the government violating free exercise in a necessary situation and the government forcing the religion's adherents to

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<sup>10</sup> O'Connor is referring to the case *Bowen v. Roy*, 476 U.S. 693 (1986), where Native Americans had applied for financial assistance from the government but refused to provide social security numbers, claiming it was against their religion. The Supreme Court ruled that the usage of a social security number does not infringe upon one's right to believe and exercise their religion freely.

<sup>11</sup> *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449 (1988)



violate their own religion. The former is always allowable while the latter should be reserved for certain, particular circumstances.

*Religious Freedom Restoration Act (1993)*. In 1990, the Supreme Court issued a somewhat surprising decision in *Employment Division, Department of Human Resources of Oregon v. Smith*. The case concerned two members of a Native American church and religion that ingested peyote, a powerful and illegal hallucinogen, as a part of their practice, worked as drug rehab counselors. Due to their smoking of peyote, the rehab center fired both counselors. Upon filing for unemployment compensation, the state denied their requests and both counselors filed suit. The case oscillated back and forth between the sides, illuminating the struggle that is often had when attempting to achieve the balance necessary between establishment and free exercise.

The state courts initially ruled with the state, finding the actions of the government constitutional in protecting a compelling state interest. The United States Supreme Court then vacated and return the ruling to the Oregon State Supreme Court, where upon a second investigation, the court concluded that the government's decision to deny the counselors unemployment benefits was indeed a violation of their right to free exercise. While the government did not coerce the Native American's into violating the practices of their own religion, they made it difficult by making the counselors choose between their jobs and their religion, much in the same way Sherbert did. The Oregon state law prohibiting illegal substances in religious practices was then overturned and the decision appealed by the Employment Division of the State of Oregon to the United States Supreme Court, which would overturn the ruling of the Oregon Supreme Court in a controversial 6-3 decision. In his ruling, Justice Antonin Scalia rejects both the

Sherbert Test and the Balancing Test and holds that the decision rests in whether the government's action are general in scope (the government cannot pass a law solely to target religion or a particular religion) and, if they are, then the government action always takes precedent over religious practice, with no regards to which religion or which practices.

Scalia's ruling in *Employment Division v. Smith*, caused an uproar as people in all parties began to protest the decision. The reaction in the United States Congress came in the form of the bi-partisan passage of the Religious Freedom Restoration Act (RFRA) in 1993. The act, which passed unanimously in the House of Representatives and faced only three votes of opposition in the Senate restored the standard for the free exercise of religion to that of *Sherbert*, finding that the standard established in *Employment Division v. Smith* to be equivalent with granting the state supremacy over religion. With the return of the Sherbert Test and strict-scrutiny and compelling state interest, the United States Congress effectively nullified the Supreme Court's standard set in *Employment Division v. Smith*.

Shortly after the hoopla over the decisions in *Employment Division v. Smith* and *Church of Lukumi Babalu v. City of Hialeah* was calmed by the passage of the Religious Freedom Restoration Act, a case arose in Boerne, Texas that called on the Supreme Court to decide between their standard set in *Smith* and the recently passed RFRA legislation.

In another controversial 6-3 decision, the United States Supreme Court held that the Religious Freedom Restoration Act did not apply to the states. In his majority opinion, Justice Anthony Kennedy argues that the passage of RFRA is an unconstitutional overstepping of boundaries by the U.S. Congress. According to

Kennedy, Congress has no right to overturn a U.S. Supreme Court ruling by passing a law reversing the decision. Kennedy writes, “The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress’ power.”<sup>12</sup>

With this decision, the Supreme Court returns the constitutional standard for the free exercise of religion to that decided in *Smith*. Nearly ten years after *Boerne*, however, the Supreme Court ruled in the case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* where they held that the Religious Freedom Restoration Act is still applicable federally. Today, matters of free exercise at the national level are required to follow the Sherbert or Balance Test while matters of free exercise at the state level must follow the *Smith* standard, unless the state passes its own version of the RFRA legislation, which many have.

Not lost in the hoopla from *Smith* to the Religious Free Restoration Act to *Boerne* and thereafter, however, is the difficulty of striking the appropriate balance between religion and government. The various constitutional tests for free exercise, like their counterparts on establishment, demonstrate the continual struggle to understand the proper relation between the sovereignty of the state and religious liberty.

The U.S. Supreme Court came down heavily divided in *Everson v. Board of Education*—struggling over the delicate balance between establishment and free exercise and between church and state. The provisions that Black provides, for both establishment as well as free exercise, seek to arrive at a balance on neutrality with respect to religion. In summation of these provisions, Black provides one more that reaffirms the wall of

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<sup>12</sup> *City of Boerne, Petitioner v. P. F. Flores, Archbishop of San Antonio, and United States*, 521 U.S. 507 (1997)

separation he articulates: that the government cannot participate in the affairs of any religious organizations or groups and vice versa, either openly or secretly.

This final provision helps set the tone for neutrality with regards to government interaction with religion. Here, the Court prohibits any government participation in the affairs of the church and vice versa. This does not prohibit interaction between the entities, but participation in the other's realm. This divorce in participation between the two realms seeks to eliminate personal bias in the government, allowing it to equally serve all peoples of all religions and of no religion.

As evidenced by over a half-century of constitutional tests and standards, however, this non-participation neutrality is conceptual and virtually unattainable practically. The purest and perhaps fairest of neutrality is complete—either a complete ban on all religions or a complete ban on any government intervention. Yet, such extremes result in either the demolition of the very religious liberty the state seeks to preserve or a demolition of the very state that can preserve liberty. Neutrality, then, is an admirable and honorable concept, but it appears only attainable in a society of perfection—one upon which liberal democracy was not predicated. Rather, the state of conflict in which liberal democracy finds itself, along with the comprehensive nature of religion, push towards an understanding of and policy towards religious pluralism that is not state neutrality.

## CHAPTER FIVE

### Religious Conflict and the Reordering of Religion

The reality of religious pluralism in society necessarily creates situations of religious conflict. Liberal democracy, according to its nature, is tasked with mediating such conflict. In working towards this end, while attempting to maintain religious liberty, a natural position of neutrality with respect to religious conflict arises. This government neutrality, however, shifts the conflict from between particular religions within a liberal democracy to between religion itself and the state. With the conflict primarily between religion and liberal democracy, both church and state seek to stake out a position of dominance and authority. Given the framework of liberal democracy, the question then centers on the role that religion may or may not play in society.

With the inability to obtain balanced neutrality towards religion and with state's need for self-preservation, the effective demise of individual religions becomes inevitable. This demise of such religions by liberal democracy, and religion's subsequent efforts of preservation, can be seen in both the proposal to ban religious jargon in public society as well as in the many decisions issued by the United State Supreme Court that effectively accomplish such a proposal.

#### *The Clash of Church and State*

The roles of liberal democracy and religion, and their respective aims, set up an inevitable clash between the two entities. Both claim the same members—any state, regardless of its form of government, has members who are also members of any variety

of religions. Both also function as comprehensive doctrines. Though liberal democracy is not a comprehensive doctrine, in that it only commands a series of actions, it nullifies other comprehensive doctrines by coercing submission and prohibiting certain actions making these doctrines no longer comprehensive. In doing so, liberal democracy takes on the role of a comprehensive doctrine.

As when any two comprehensive doctrines meet, liberal democracy and religion naturally fall into a state of conflict with each other. Thus, both entities seek to dictate how one lives to their members and both entities claim superiority over the other. On the one hand, one enters into liberal democracy through his birth (or immigration), thus having to follow the laws of the state, while on the other hand, the religious adherent does not merely accept the claims discussed earlier, but assents to them, finding them incapable of abandonment, even when contradictory to the state. Inevitably, conflict between the two entities ensues.

Given the conflict between the state and religion, it is easy to see that interaction between the two entities often, if not exclusively, revolves around each one's attempt to work the other into its doctrine. Where the two have common goals, the conflict remains at a minimum. Otherwise, the dialogue between the two is often a struggle of each trying to bring the other to its terms.

### *Liberal Democracy*

With liberal democracy, much attention is given to the question of how ought religion to function in the public square. While a liberal democratic society seeks to maximize individual liberty as well as preserve its own existence, it is utterly impossible to allow the free roam of all religions without some government coercion to maintain law

and order. Towards this end, political philosopher John Rawls articulates his concept of an overlapping consensus in support of his political conception of justice, or justice as fairness. For Rawls, the focus is the stability of the state and, thus, the compromise is thick on structure, to maintain stability, but thin on the issues, to allow for individual freedom. All reasonable comprehensive doctrines, such as religion, must support the overlapping consensus and those that do not are, according to Rawls, not reasonable and, therefore, not permitted in the state. It is not, however, imperative that one believe the overlapping consensus (a matter of issues), so long as one supports it (a matter of structure).<sup>1</sup>

Rawls's overlapping consensus can only be found in a separation of belief from practice in comprehensive doctrines, such as religion. Without such a separation, the survival of liberal democracy is at grave risk. Rawls writes, "Thus, political liberalism looks for a political conception of justice that we hope can gain the support of an overlapping consensus of reasonable religion, philosophical, and moral doctrines in a society regulated by it."<sup>2</sup> Rawls attempts to place comprehensive doctrines within a political confinement, leveling the playing field so that the rules of the game, so to speak, must be political. Rawls continues, "...it is normally desirable that the comprehensive philosophical and moral views we are wont to use in debating fundamental political issues should give way in public life,"<sup>3</sup> again articulating a need to separate "comprehensive philosophical and moral views"<sup>4</sup> from the public practices and actions.

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<sup>1</sup> John Rawls, *Political Liberalism*. (New York: Columbia University Press, 2005), 141.

<sup>2</sup> Ibid. Page 10.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

For Rawls, all doctrines are welcome in society so long as they adopt the language of the state.

Philosopher Robert Audi shares and echoes many of Rawls's sentiments but offers a slightly different account from Rawls's concerning religion's participation within a liberal democratic society. Like Rawls, however, Audi also focuses on the stability of the state as the primary concern. It is Audi's position that while a religious adherent may, and should, participate in a liberal democratic society, his religious language must be couched in secular terms. Audi discusses the need for both "secular rationale"<sup>5</sup> and "secular motivation"<sup>6</sup> before one can make or support a public argument.

Rawls and Audi were not the first to articulate this perspective with regards to religion and government. The Virginia Statute on Religious Freedom, penned by Thomas Jefferson in 1786, made the same distinction between religious beliefs and religious practices: that the actions of man are not dependant upon any particular religious belief. Such dependence would, according to Jefferson, violate the deepest truths of religion: the freedom of conscience. Jefferson writes, "...our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry...."<sup>7</sup> The only time the government may violate religious freedom is when the aforementioned freedom of conscience is violated. Jefferson continues, "...that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into

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<sup>5</sup> Robert Audi, *Religious Commitment and Secular Reason*. (New York: Cambridge University Press, 2000), 86.

<sup>6</sup> Ibid. Page 96.

<sup>7</sup> Thomas Jefferson, "Virginia Statute on Religious Freedom." <http://www.lva.virginia.gov/lib-edu/education/bor/vsrfext.htm>. 1779.



overt acts against peace and good order....”<sup>8</sup> Even here, Jefferson is careful not to prevent the government from trampling the freedom of conscience, limiting the scope of government interference to the actions (he even specifies they be overt) that result from the breaking out of principles.

Jefferson echoes this sentiment in his famed letter to the Danbury Baptist

Association:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.<sup>9</sup>

With a “wall of separation” being erected between church and state, Jefferson is clear that this wall serves the purpose of protecting both the freedom of religion and the stability of the state without sacrificing either. Jefferson continues in the same letter:

Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.<sup>10</sup>

From the moment the intersection of church and state was realized, a separation between the two entities was sought; a separation that would protect religion from being overtaken by the state, while maintaining a strong state to provide stability for society. For Jefferson, the government’s control of actions is necessary for the success of liberal democracy but, in addition, it is what permits religious liberty.

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<sup>8</sup> Thomas Jefferson, “Virginia Statute on Religious Freedom.” <http://www.lva.virginia.gov/lib-edu/education/bor/vsrftext.htm>. 1779.

<sup>9</sup> Thomas Jefferson. “Letter to the Danbury Baptists.” <http://www.loc.gov/loc/lcib/9806/danpre.html>. 1 January 1802.

<sup>10</sup> Ibid.

Thus, it is clear that a liberally democratic state needs to enforce a separation of practice and belief in order to preserve its authority as a state. While the state seeks to maximize individual freedom for all its members, it also seeks to maximize equality; to lose law and order in the process of pursuing either would jeopardize the purpose of the state's existence: justice. By isolating beliefs from practices in all comprehensive doctrines, however, the state assures the sacredness of the beliefs or the conscience and the freedom for individuals to choose whichever beliefs they should desire. At the same time, the state maintains order, and, to some extent, equality, by controlling the practices of all comprehensive doctrines and assuring them to be constitutional.

Political philosophers such as Rawls and Audi, as well as Jefferson, understand that individual freedom includes the freedom of religion. However, they also understand the importance of stability in a liberally democratic state and, for them, the latter is the higher priority. It is, after all, the state that grants its citizens rights, including the right to choose and practice their religion.

### *Religion*

Religious adherents, however, engage the state for different reasons than the preservation of the state. While with liberal democracy the attention focused on the question of how religion and religious adherents ought to act in the state, with religion, the key question is how a liberal democracy ought to act with respect to religion and its adherents. Here, religion primarily takes two approaches, what historian George

Marsden has referred to as the priestly and the prophetic approaches.<sup>11</sup> Both approaches, however, engage society in hopes that society will be changed.

*Priestly approach.* The priestly approach is most commonly employed by groups such as the Moral Majority and the religious right. It is their understanding that a particular set of morals, as taught by their religion, ought to become the law of the land. The primary concern is not the structure of the society (as it is for Rawls and Audi) but the handling of particular issues. For example, in 2005, Alan Sears and Craig Osten, both of the conservative, Christian organization the Alliance Defense Fund, authored a book entitled *The ACLU vs. America*. The subtitle of the book was most telling of their position: “exposing the agenda to redefine moral values.”<sup>12</sup> In the introduction to the book, Sears and Osten label the American Civil Liberties Union (ACLU) “America’s leading religious censor”<sup>13</sup> and accuse them of “waging a largely uncontested war against America’s core values.”<sup>14</sup> Regardless of how one views the ACLU, it is evident that the focus of the book is on moral values and that the authors assume a position that America needs to maintain certain core values. Thus, they engage the public square with hopes that their efforts will preserve those core moral values in society.

*Prophetic approach.* The prophetic approach is nearly polar opposite from the priestly approach, but still has the desire to see religion change society. This approach, as

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<sup>11</sup> George Marsden, *Evangelicalism and Modern America*. Ed. George Marsden, “Introduction: The Evangelical Denomination.” (Grand Rapids, MI: Eerdmans Publishing Co., 1984).

<sup>12</sup> Alan Sears and Craig Osten, *The ACLU vs. American: Exposing the Agenda to Redefine Moral Values*. (Nashville: Broadman and Holman Publishers, 2005).

<sup>13</sup> Ibid. Page 2.

<sup>14</sup> Ibid.

embraced by those theologians such as Stanley Hauerwas, as well as those in radical orthodox movement, such as John Milbank, William Cavanaugh, and James Smith, holds religion (for Hauerwas and the radical orthodox, it would specifically be the Church), as the standard bearer and as an entity that speaks prophetically to the state. Rather than affect society through the state, as the priestly approach calls for, the prophetic approach seeks to change individual persons, bringing them into the church and, as a result, change the society from the bottom up.

Despite reverse approaches, however, the both the priestly and the prophetic approach to interaction between civil society and religion seek a change in civil society, holding religion as the standard bearer. This is a complete turnaround from liberal democracy's position that interaction between the two entities requires religion to, at some level, submit to the state, which is the standard bearer.

### *The Conflict of Liberal Democracy and Religion*

It is evident, then, that religion and liberal democracy exist not merely on opposite sides of a "wall of separation" but, rather, in two separate and distinct spheres.<sup>15</sup> Each entity operates as a comprehensive form of life and each entity maintains its own members. The problem is that the members of one entity also belong to the other.

Both religion and liberal democracy dictate certain policies to their adherents. The two, however, seek different aims. Liberal democracy seeks the defense of the state, to preserve law and order by means of maximizing and defending personal freedom and equality. Religion, on the other hand, seeks the formation, structuring, and development

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<sup>15</sup> In his dissenting opinion to the ruling in *Everson v. Board of Education* (1947), Justice Wiley B. Rutledge refers to church and state as existing in two distinct spheres, citing that Justice Hugo Black's wall of separation between church and state was not built high enough.

of people. Neither entity pursues their aims with any regard for the other, except in how the other may fit in their doctrine and aims. For the liberal democracy, this involves religion to act—to yield on certain issues to the structure (the state). For religion, this involves the emphasis of issues and calling for a loyalty that goes beyond the state. It is from here, that the role religion plays in society begins to threaten liberal democracy.

Should liberal democracy get its way and religion, regardless of variety, submits to the state, then the stability that the state seeks is preserved. However, if this be the case, then any number of individual religions would be severely compromised, if not made completely null and void. Since the comprehensive nature of religion does not allow for separation of the various factors of religion and since the state would need to separate out these factors, the end result is the dissolving of religion and the coercion of all members of society to follow the “religion” that is comprised of their religious beliefs and the state’s mandated actions.

This situation would assure that law and order is preserved in the state and that equality, with regards to religious pluralism, is maintained (given that all religions are subjected to the same treatment). However, the erosion of religion eliminates any hope for individual religious freedom. While state-sponsored coercion is necessary to some extent, in order to keep all citizens within the law, the complete nullification of religious freedom by way of the erosion of religion is not an adequate defense of individual freedoms. Thus, though law and order is preserved, individual freedoms are not and the aim and purpose of liberal democracy is not satisfied.

Should religion get its way, however, and religious adherents remain primarily loyal to their respective religion and not the state, then one of two situations occurs:

either the state becomes anarchist because all religions are given free roam or one religion becomes dominant and the state gravitates towards that particular religion. It is no secret that the former situation is unacceptable in a liberal democracy but the latter scenario holds the same fate.

Given a situation where a particular religion's standard becomes the standard of the state, the religion is no longer in a position where it loses its comprehensiveness. This applies, however, to only that one religion and nothing changes for the other religions. Furthermore, this disrupts the equality that a liberal democracy seeks to preserve by placing one comprehensive doctrine above the others. Again, the aim and purpose of liberal democracy cannot be satisfied.

Whether the state reigns supreme or defers to an individual religion, liberal democracy loses sight of its aims and purpose when religion enters the scene. Considering the aims of both liberal democracy and religion, this appears to be inevitable. Liberal democracy finds itself seeking law and order, understanding that humanity is in conflict (be it a natural or fallen state). Thus, it attempts to form laws and policies that seek preservation, not perfection. Religion, however, seeks the betterment of the person with the end goal one that approaches perfection. Seeing, as Milbank and Cavanaugh do, liberal democracy as coming from the fall of man, religion cannot settle for liberal democracy, as it would develop persons to the point of conflict and do no more. Religion seeks not preservation, but perfection.

Given the aims and purpose of liberal democracy and religion, given the comprehensive role that both entities play, and given the shared membership by both, it is inevitable to avoid the catch-22 that liberal democracy finds itself in when religion enters

the picture. Since religion, being a comprehensive doctrine, cannot merely be removed, it appears that it stands opposite liberal democracy—at best, being liberal democracy’s most persistent challenge and, at worst, being liberal democracy’s greatest threat.

### *The Reordering of Religion*

Due to the all-encompassing and clashing nature of a plurality of comprehensive doctrines, such as religion, to allow any such doctrine be the political philosophy that dictates the governance of society is to inevitably coerce others to practically follow, if not adhere to, one particular doctrine. This clearly infringes upon both the individual freedoms and societal equality that liberal democracy seeks to preserve, as individuals are no longer free to choose what doctrines to follow and the doctrines are not of equal priority to the state.

There is, however, a grave danger in having no coercion in the state; the state would, for all intents and purposes, become an absolute anarchist state. Law brings about order and order is a necessary element to any civil state. Thus, Rawls puts forth his aforementioned concept that individuals are given absolute freedom to believe as they wish, but actions, on some level, must be coerced under the law. For Rawls, comprehensive doctrines, such as religion, are allowable in society so long as their adherents abide only by their beliefs and not their practices. Any and all practices are free only within purview of the state.

As discussed previously, for the state to survive, beliefs and practices of all and any religion must be separated. However, this same separation puts into jeopardy the very individual religious liberty that a liberal democracy seeks to defend and uphold. To

accept this view of divorcing practice from belief signals the demise of particular individual religions and the rise of a reordered religion in their place.

### *Reordering Religion*

Given the conflict between church and state in liberal democracy, one born out of the natural conflict between religions, the state has little choice but to support itself, seeking to preserve its own sovereignty, authority, and even existence. Unwilling to do away with religious liberty altogether, considering the purpose of a liberal democracy, the state seeks to work religion, as well as religious liberty and religious pluralism, into the framework of state sovereignty. This adjustment and reordering does not, however, lead towards religious liberty but, rather, towards the demise of religion. The various Supreme Court decisions on religious liberty since *Everson v. Board of Education* exemplify this very demise and move towards the replacement of religion in society within liberal democracy.

The reordering of religion begins as United States Supreme Court has continued to seek a workable but strictly practical definition for religion and it eventually leads to the replacement of particular religions with other ones that may fill the functional role of religion, but, perhaps, are substantively different. To define religion purely in terms of practice allows for the court to uphold the high wall of separation between church and state and, thus, retain the authority and sovereignty of the state, while recognizing, at least in policy, the right for each religion to believe freely under the purview of the government. These principles are most clearly expressed by Chief Justice Morrison Waite in his decision in *Reynolds v. United States* (1878), often considered the first religious liberty case before the high court, where he writes, “Congress was deprived of



all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>16</sup>

This trend is seen throughout both Establishment and Free Exercise Clause cases and in the various constitutional tests and standards the high court sets.

*Everson v. Board of Education (1947)*. The same debate over religion in the public square appears throughout both the majority and the dissenting opinions; the justices debate how much leeway should be given to religion in the public sphere. None of the justices, however, attempt to define what is meant by religion. This becomes a consistent trend in religious liberty cases and, subsequently, an increasing problem with each additional constitutional test or standard passed down from the high court. Without a clear understanding of what religion is, it is not possible for the courts assess the government’s interaction with religion.

In *Everson v. Board of Education*, under the purview of the wall of separation doctrine, a New Jersey statute allowing for reimbursement for transportation to the families of non-public school children would undoubtedly be ruled as unconstitutional. This decision, however, would equate assuring safe transportation for parochial school students with a government establishment of religion, thereby implying that attending parochial school is an integral religious practice. Attending parochial school, however, is hardly a key practice of the Catholic faith (the religious affiliation cited in *Everson*).

More grave than mistaking parochial school attendance as a key practice to any faith is the Supreme Court’s decision to address religions based upon their practices. This decision stems from the high court’s fear to address religion for what it is and their

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<sup>16</sup> *George Reynolds v. United States* 98 US 145 (1878)

attempt to define it in purely practical terms. It is simply easier and neater for religion to be no more than the practices that are seen in daily life. These practices, however, only paint a partial and incomplete picture of what religion truly is. The lack of clarity in understanding religion is a glaring problem in the *Everson* decision that challenges the existence of religion, as well as religious liberty and pluralism, in liberal democracy.

*State: Establishment Clause cases.* Throughout Burger's decision in *Lemon v. Kurtzman*, there are no clear terms for what constitutes a religion; yet evident in the Lemon Test is that each prong of the test addresses some effect with respect to religion. For example, Burger attempts to differentiate between secular and religious purposes and effects but it is unclear from his decision just how religious a statute must be to be deemed too religious. This lack of clearly defined parameters for what constitutes religion effectively dooms the Lemon Test from the beginning, setting it as an impossible standard to meet. It is these very parameters that Burger seeks when he determines, first, that Catholicism is a legitimate religion under the United States Constitution and, second, that parochial schooling is an integral part of the Catholic religion. He writes:

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."<sup>17</sup>

By arguing that the statute violated the Lemon Test, Burger must assent to Catholicism being a legitimate religion. Burger must also accept some argument that holds parochial schooling to be, at some level, vital to the Catholic religion and, thus, he

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<sup>17</sup> *Alton J. Lemon, et al. v. David H. Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al.* 403 U.S. 602, 609 (1971)

equates religion with parochial schooling for all practical purposes. To do such, however, is to break religion, in particular Catholicism, down into its components and select one such component as representative of the entire religion.

In his ruling in *Lee v. Weisman*, Justice Anthony Kennedy seems to strongly oppose coercion and finds it unconstitutional. It is evident from the rest of the opinion, however, that religion, not coercion, is the primary problem for Kennedy. Kennedy explains that coercion is not limited to physical coercion and that students were coerced to attend the graduation, yet he finds no problem with this. Rather, the problem rests in the inclusion of a prayer, which, despite being admittedly non-sectarian, Kennedy finds as state-sponsored religious activity.<sup>18</sup> Had the prayer not been a part of the graduation ceremony, it is doubtful that Kennedy would hold anything against the school for coercing students to attend their graduation. Kennedy's argument is not that the Constitution forbids coercion, but that it forbids coercion to participate in religion or religious activities.

While Kennedy's assessment is undeniably true, he fails to explain what constitutes a religion or even a religious activity. Instead, Kennedy holds that the prayer delivered is inherently religious for no other reason than that it is a prayer and invokes the divine. Kennedy, as many of his predecessors and colleagues have done before, works with a definition of religion that is not a definition but a distortion, being little more than a component of certain religions. Kennedy finds that a prayer, even a non-sectarian one, is a key practice of religion and, thus, the inclusion of it in a coerced setting, such as a

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<sup>18</sup> A further problem with the prayer being delivered at the middle school graduation in *Lee v. Weisman* is that the prayer was written by school officials, not the rabbi. This becomes a clearer violation of state-sponsored religious activity. It is not clear, however, that if the prayer was not written by school officials, that Justice Kennedy would have decided otherwise.

graduation ceremony, equates having a religious ceremony. While prayer is an integral part of many religions, however, the practice of praying is neither equal to adhering to a particular religion nor exclusive to religion. Furthermore, it is agreed upon, by the Supreme Court, that the prayer offered at the Weisman's graduation was non-sectarian, meaning that it belonged exclusively to no religion (it is further doubtful that any religion would claim the prayer). Allusions to the divine, such as those in the prayer, are not necessarily of any particular religion and certainly do not define religion. To construe them as such is to define religion by the various practices and components that some religions hold.

*Church: Free Exercise cases.* The same trend witnessed throughout the Supreme Court's decisions in establishment cases is against seen in their rulings in free exercise cases: the Court remains mum on what they mean by religion. The various free exercise rulings do indicate an expansion and more complete understanding of religion by the high court. This broadened understanding, however, only further illuminates the seesaw effect between religion and liberal democracy and the downfall of religion that comes with the reaffirmation of the state.

In *Sherbert v. Verner*, the Supreme Court recognizes religious belief along with religious practice in their ruling. They make the argument that the government cannot in anyway restrict or deny an individual's right to religious belief; to believe as one desires. However, the outward display of such belief is religious practice and that not only can, but must be regulated by the government. Thus, the Supreme Court recognizes religious belief and its role in religion; but for legal matters, the court only recognizes religious practice and, thus, defines religious by the same.

In the particular case of *Sherbert v. Verner*, it is the practice of church attendance that the court rules is being violated. Undoubtedly, church attendance is a major part of Seventh Day Adventism, the religion to which Sherbert belonged; and to have forced Sherbert to choose between church attendance and employment would have been a violation of her right to free exercise. This would not, however, have diminished Sherbert's religion. In *Yoder v. Wisconsin*, it is the practice of compulsory high school education that is in contradiction with the practices of the Amish religion. Again, as it is with *Sherbert*, forcing the Amish children to attend high school would have been a violation of their free exercise of religion. It would not, however, have diminished their religion in any way. In both *Lyng v. Northwest Indian CPA* and *Employment Division v. Smith*, the court recognizes the practices of the respective Native American religions, but contends that government interest is more pertinent.

*The replacement of religions.* In the majority opinion in *Lee v. Weisman*, Justice Anthony Kennedy writes that "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."<sup>19</sup> Here, Kennedy makes an important distinction: he recognizes the free exercise of religion as a "principle" permitted to occur (note the use of his word "may") while he sees the Establishment Clause as "fundamental" and taking precedent over free exercise. Kennedy's distinction illustrates the core of the conflict between establishment and free exercise. In many ways, Kennedy's distinction is necessary but, at

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<sup>19</sup> *Robert E. Lee, Individually and as Principal of Nathan Bishop Middle School, et al., Petitioners v. Daniel Weisman etc.*, 505 U.S. 577 (1992)

the same time, it dooms all attempts towards a harmonious balance between church and state.

Whether the court rules with the government or with the religious adherents, the court, as policy, divorces religious belief from religious practice and focuses solely on the latter, allowing it to define religion for all legal purposes. By defining religion solely in terms of practice, the court is able to uphold the Establishment Clause of the First Amendment. However, as Justice Sandra Day O'Connor suggests in her concurring opinion in *Employment Division v. Smith*:

Belief and action cannot be neatly confined in logic-tight compartments. ... Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause.<sup>20</sup>

Thus, when the attention is turned towards the Free Exercise Clause, the conflict between religious liberty and state sovereignty becomes brightly illuminated. This conflict leaves only two options available:

1. Despite Burger's best efforts in *Sherbert v. Verner* to assure that the pertinent questions deal with the sincerity and not the validity of religion, if the Supreme Court ever denies a religion's adherents their right to free exercise, then the court has effectively ruled the religion as invalid. This potentially leads to the very ban on all religions that guarantees government neutrality but, also, that liberal democracy attempts to avoid.
2. If the Supreme Court grants all religious adherents, regardless of religion, the right to free exercise, then the court opens the doors for a religiously

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<sup>20</sup> *Employment Division, Department of Human Resources of the State of Oregon, et al. v. Alfred Smith*, 494 U.S. 872, 893 (1990) (concurring opinion)

pluralistic society with respect to the law. This leads to libertarian state that also guarantees government neutrality but, as O'Connor astutely points out in *Lyng v. Northwest Indian Cemetery Protection Agency*, such can also potentially undermine the state itself.

The denial of a religious practice, such as church attendance, is not equal to the termination of a religion, for a religion is more than merely a set of practices. It does, however, divorce religious practice from the rest of religion. The comprehensive nature of religion, however, does not permit for such separation and to maintain it is the demise of religion. The essence of liberal democracy, however, does not permit for such separation to not exist and to not maintain it is to undermine the state.

Liberal democracy's attempt to maintain government neutrality results in this very conflict, with the two polarizing options seemingly placing liberal democracy in a catch-22. With the state's primary concern its own self-preservation, the resulting product is not religion, but religious belief along with constitutional actions. Such begins the demise of religion in liberal democracy. With religion relegated to little more than its practices, the state functions off what is, at best, an incomplete picture of religion and, at worst, a complete replacement of it. While this allows for the state to be preserved, it leaves a decreasing amount of room for the preservation of the free exercise of religion. With the end of religious liberty then, also comes the end of religious pluralism.

While all the justices in *Everson v. Board of Education* agree to the wall of separation standard, they come out on two opposite sides in applying the standard. This occurrence is not a fluke, but reflective of the inherent failures of the standard. The high wall of separation between church and state laid out by Black prevents even the slightest

action of support for religion from coming to pass. The two separate spheres language that Justice Wiley Rutledge introduces in his concurring opinion articulates this very standard. Here, religion and the state are in separate spheres, completely distinct and apart from each other with no chance of meeting.

This standard accurately reflects the nature of both liberal democracy and religion—that each functions as a comprehensive doctrine and claims the same members. As evidenced by the continuing discussion over religious participation in society that evolves into legal conflict as expressed in the various religious liberty cases at the United States Supreme Court. The standard does, however, also completely disregard the balance between establishment and free exercise that is integral to the Constitution and to the preservation of religious liberty. With nothing to push back against it, the high wall language sets up an absolute and establishment-heavy system that does not lend itself to a balance. This is a grave problem as it forces the relationship between the establishment and free exercise of religion to be separate and opposed instead of complementary. Yet, liberal democracy demands a complementary relationship between church and state. The challenge exists in how this relationship can exist in a liberal democracy.



## CHAPTER SIX

### Liberal Democracy and Civil Religion

The dilemma of liberal democracy with regards to religion is such that the state's efforts to preserve religion and religious liberty are counter to its primary efforts to preserve stability and its own sovereignty and authority. A solution against either side, however, proves, at best, counter to the overall purpose of liberal democracy and, at worst, to undermine the state and liberal democracy altogether. It is from this position that civil religion is born. A religion that rises from the citizens of a state, permeates society, and ends with the state itself, civil religion exists as a religion of the state. It attempts to bridge the gap between the preservation of religion and the preservation of the state by being a religion that seeks to preserve the state. A close examination of civil religion—what it is, the need for it in a liberal democracy, and the rise of it in society—sheds significant light on the debate between church and state itself as well as demonstrates the limits of religious liberty and, subsequently, religious pluralism in a liberal democratic state.

#### *Defining Civil Religion*

In Jean-Jacques Rousseau's *Du contrat social ou Principes du droit politique* (The Social Contract or Principles of Political Right) (1974), he introduces the term "civil religion" as an integral moral foundation to modern society. Civil religion, for Rousseau, serves the purpose of unifying society under the sovereignty of the state by providing it

with a sacred authority.<sup>1</sup> Civil religion would change dramatically from the time Rousseau introduced it to the present and it was sociologist Robert Bellah who first coined the term “American civil religion.”<sup>2</sup> Bellah introduced the concept in a 1967 paper where he wrote:

While some have argued that Christianity is the national faith, and others that church and synagogue celebrate only the generalized religion of “the American Way of Life,” few have realized that there actually exists alongside of and rather clearly differentiated from the churches an elaborate and well-institutionalized civil religion in America.<sup>3</sup>

Civil religion, then, appears to be exactly as its name suggests: it is a religion, just as any other religion, but one that is from the state, of the state, and for state.

### *Civil Religion as Religion*

In being a fully functioning and complete religion, the very nature and essence of religion holds true for civil religion as well. Civil religion must be, then, “A religion is a form of life that seems to those who belong to it to be comprehensive, incapable of abandonment, and of central importance.”<sup>4</sup> Civil religion is, in the fullest sense of the term, a religion of the state.

*Comprehensive.* Civil religion in a liberal democracy may not appear to be comprehensive, especially given Rawls’s account of liberal democracy, that it necessarily

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<sup>1</sup> Jean-Jacques Rousseau, *The Social Contract*. (New York: Penguin Books, 1968), 176.

<sup>2</sup> Perhaps the greatest change from Rousseau to Bellah is that Rousseau’s civil religion is not transcendent. Merely, the will of the public is sovereign and there is no higher law. American Civil Religion, however, sees America as standing in judgment under a higher law.

<sup>3</sup> Robert Bellah, “Civil Religion in America,” *Daedalus: Journal of the American Academy of Arts and Sciences*, 1 (1967).

<sup>4</sup> Griffiths, Paul J. *Problems of Religious Diversity*. Malden, MA: Blackwell Publishing. 2001. Page xiv.

cannot be a comprehensive doctrine. In reality, however, civil religion does not merely play the role of a comprehensive doctrine, as liberal democracy does, but it is a comprehensive doctrine. By not requiring a set of beliefs from its member, liberal democracy is not a comprehensive doctrine. This, however, leaves liberal democracy as primarily a practical structure that is thin, if not obsolete, on sustenance. Civil religion supplies the lacking beliefs while retaining the demand for constitutional practices. Civil religion, serving as the glue of society, connects beliefs and practices, along with the other various components and expressions of liberal democracy, and holds them together as one all-encompassing and inseparable doctrine.

*Incapable of abandonment.* Civil religion, by nature, is incapable of abandonment. While the incapability of abandonment with most religions is an internal matter, that religious adherents find apostasy to be a non-option from within the religion, such is much more complete with a civil religion. A citizen enters the state either by birth or by naturalization and, immediately, is indulged in the civil religion, which serves the purpose of supporting and pointing back to the state. The same citizen leaves the state only by death or by emigration from the state. Only through such is the civil religion abandoned.

Because civil religion rises up from individual citizens, through society, and finally to the state, civil religion can, and is bound to, change as the society and culture changes. These changes do not signify, however, an abandonment of the civil religion. The content of the civil religion may be tweaked, but the citizens remain in society and in the civil religion. As a comprehensive form of life, civil religion is necessarily incapable of abandonment.

*Central importance.* The clash between religion and liberal democracy itself points to the centrality of the state and its civil religion. Just as a religion's central importance is expressed by its adherents through sacred practices, religious education, and other such expressions, a civil religion's central importance is displayed in the same manner. For example, in the United States, public education demonstrates the role of central importance that civil religion plays in a liberal democracy. Public education serves the general purpose of indoctrinating the public to the civil religion. Within the purview of public education occurs various practices of the civil religion, for example, the recitation of the Pledge of Allegiance at the beginning of the day, and even religious ceremonies such as commencement. These various practices and ceremonies themselves are expressions of the civil religion but also components of public education, which points back to the central importance of civil religion.

Civil religion serves as the bond that holds society together, in the same way that a religion binds its members together. The various histories, myths, practices, ceremonies, and so forth that surround and buttress the state are all a part of civil religion indicative of the central role that it plays in society.

A civil religion, just as any other religion, is a form of life. A state's civil religion embraces the identity of the state. It affects every member and provides a holistic influence on society. Just as it is with any particular religion, civil religion expresses itself in civil religious practices, ceremonies, and so forth. To those within the society, everything they do is affected, either consciously or subconsciously, by the civil religion. As a religion of the state, civil religion is a true and complete religion; one that rises from the people and points to the state.

### *Civil Religion as State*

The conflict that leads to the point of separation between religion and liberal democracy is one that centers on the inability for liberal democracy to incorporate religion completely. This is the very gap between religion and liberal democracy that civil religion is able to bridge. As a religion, civil religion has the same aims and purpose of any other religion, and serves as the glue that holds society together. As the state, however, civil religion also has the same aims and purpose as does the state—pointing to and buttressing the state that it might be preserved. Civil religion, then, does not work against religion or liberal democracy but, rather, is the one source that brings to two together to function as one and the same. Civil religion, then, does not work against religion or liberal democracy but, rather, is the one source that brings to two together to function as one and the same.

In the case of a liberal democracy, the aim and purpose of the state is to preserve itself, creating a stability in society, followed by preserving individual liberty and societal equality. Having civil religion does not work against these goals but, instead, helps the state realize these ends. It is, in fact, civil religion that often provides the stability necessary in society. Being a religion that rises up from the people and moves towards the state, civil religion also seems to preserve individual freedoms and was as societal equality.

It is a unique characteristic that civil religion finds itself rooted in the individual members of society yet pointing towards their governing state. As such, civil religion is, indeed, both a complete religion as well as an integral part of a liberal democracy state. It appears, then, that the rise of civil religion in a liberal democracy is not merely

inevitable, but that the civil religion itself is both necessary for and inseparable from the state

### *The Rise of Civil Religion*

#### *The Need for Civil Religion*

When a state meets times of crisis, it is not enough for law and order to be maintained. There must be some aspect that can hold the society together; that can serve as some form of a societal glue. It is here that civil religion is necessary and plays a vital role. It serves as a religion that points back to the state gives the members of the state the identity that they are seeking while giving the state the support it needs to maintain law and order. This need for civil religion is evidenced throughout history. For example, Robert Bellah describes the development of American civil religion through three such crises: the founding of the nation, the American Civil War, and the 1960s era. He writes:

“Once in each of the last three centuries America has faced a time of trial, a time of testing so severe that...the existence of our nation has been called in question...the spiritual glue that had bound the nation together in previous years had simply collapsed.”<sup>5</sup>

It is during these times of crisis that the American identity is challenged. When a people suffer religious persecution, they allow their religion to supply their strength, to hold them together, and to help them overcome. Their religion serves as the glue that holds them together. In much the same way, when a nation faces trials that question its nature, identity, and existence, it is only natural for its people to seek some “glue” to hold them together. While religion certainly can serve as this glue, the religion must be

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<sup>5</sup> Robert Bellah, *The Broken Covenant: American Civil Religion in Time of Trial*. 2<sup>nd</sup> Ed. (Chicago: University of Chicago Press, 1975).

comprehensive and accessible to liberal democracies, being that it is the members of the state, not any religion, that must be united.

It is here that civil religion arises and assumes an important role in liberal democracy. Civil religion serves as the glue that holds society together. It is a fully-functioning and complete religion, from its comprehensiveness to its centrality, and it is accessible to liberal democracy, given that it arises from liberal democracy. Civil religion is not a law passed that trickles down to the members of a society. Rather, it rises up in a grassroots method from its members and permeates through society, eventually making its way to the top, ending with the state. As it does so, it offers a deeper understanding, a strengthening of identity, and a reassurance to the members of that particular society.

### *The Rise of Civil Religion*

Given the circumstances and the crises that face any state and society, it is inevitable that civil religion would give rise in a liberal democracy. As civil religion rises up, however, it is important to remember the aims and purposes of both liberal democracy and religion and the impact of both on society. It is this understanding that guides the rise and formation of a civil religion in a liberal democracy.

Liberal democracy seeks justice in a state of law and order. Towards this end, a liberally democratic society seeks to maximize individual freedom as well as equality for its members. These two factors, however, often find themselves opposite each other on a scale and, thus, a liberal democratic society often finds its job one of a balancing act. The balancing act often seen played out in church-state relations, is merely a sample view of the grand act that is liberal democracy.

Religion seeks an end of worship towards its central figure, be it natural or supernatural, a deity or not. How one reaches this end varies greatly from religion to religion, but in all cases, maximum liberty and equality for others, especially those outside the religion, is not the primary end. As a comprehensive doctrine, one's religion permeates all aspects of one's life, including one's public engagements. Religious plurality then provides a problem to any state attempting to maximize both individual freedom (in this case, the freedom to choose what religion to follow) and equality (in this case, keeping all the religions equal with regards to the law).

To allow this plurality of religions unchecked in the public square to freely influence and help form society and the state would bring absolute chaos in the state. Just as Thomas Hobbes described a state of "*bellum omnium contra omnes*," or "a war of all against all,"<sup>6</sup> where individuals pursue their own interests with complete disregard for others, a similar state would be ushered in where religions and their communities pursued their own interests with little to no regard for others. The state exists to maintain law and order in society and to allow such free roam is not feasible. The inevitable result is an anarchistic, not a liberal democratic, state.

To completely remove religion from the public square, however, creates a different problem. Since religion is a form of life, it is not like a hobby in which one can participate on certain days but not on others. It is not a pair of shoes that one can remove; it is imbedded as a part of a person's identity. To take religion out of play in society would be a major infringement upon the individual freedom that the liberal democracy is tasked with maintaining. To establish an official state religion, the opposite extreme,

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<sup>6</sup> Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil*. (London: Cambridge University Press, 1904), 151.



would violate both individual freedom and societal equality and, thus, would undermine the sovereignty and authority of the state and, subsequently, break apart liberal democracy. In the interest of preserving the state, neither removing religion nor establishing one religion as superior or official are viable options.

Thus, the solution that many liberal democracies, such as the United States, have drifted towards is the separation of belief and practice within religion. On the one hand, individual freedom is defended—there exists the freedom of conscience in that one can believe however he should so choose to believe. On the other hand, equality is maintained—all religious practices are subject to the same law. Thus, both religious liberty and civil law and order are preserved. This maneuver, however, brings with it its own set of troubles. As discussed earlier, the divorce of belief and practice is good for the state, but the religious liberty derived is little more than a façade. The result is the same as removing religion from the public square.

The need for both a stable state as well as religion and religious liberty is ever present, despite the inability to legislate any such policies. It is here that particular state-based religion termed “civil religion” arises out of society. A need to a stable civil state is present while it is every bit a religion—“a form of life that seems to those who belong to it to be comprehensive, incapable of abandonment, and of central importance.”<sup>7</sup> to its adherents. For a liberal democratic state, which is thick on structure and thin on sustenance, civil religion is an absolute necessity, as it delivers the sustenance needed to preserve the sovereignty of the state while not abandoning the purpose of liberal democracy or forsaking the soul of its society.

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<sup>7</sup> Griffiths, Paul J. *Problems of Religious Diversity*. Malden, MA: Blackwell Publishing. 2001. Page xiv.

### *Civil Religion: Church as State*

With the natural rise of civil religion as a solution to the lack of true religion in liberal democracy, the separation between church and state begins to lessen. The solution comes not in a pure church-state integration but, rather, in the church becoming the state through civil religion. This can be seen clearly in the U.S. Supreme Court case *Lynch v. Donnelly* (1984), which gave strong confirmation not towards religious liberty, but towards civil religion and, specifically, the American civil religion.

In his majority opinion in *Lynch v. Donnelly*, Chief Justice Warren Earl Burger finds a crèche within a larger holiday display as not in violation of the Establishment Clause. The crèche, so long as it is within a larger holiday display, represents the origins of Christmas, which is a major part of the Western culture. To Burger, the government's recognition of Christmas and other religiously-based holidays is a long-standing tradition and the display of a crèche among other holiday decorations fits into this tradition. As such, the crèche is no more religious than Santa Claus or Frosty the Snowman in such a display and is, therefore, fully constitutional. Burger explains:

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. . . . Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.<sup>8</sup>

Burger makes clear that while Christmas is a religious holiday, it has an important secular role in today's society. Any advancement of religion that may be caused by the crèche should not be viewed as an advancement of any particular religion but as supporting a

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<sup>8</sup> *Lynch, Mayor of Pawtucket, et al. v. Donnelly, et al.*, 465 U.S. 668, 676 (1984)

long-standing and historical Western tradition. It is not, thus, in violation of the Establishment Clause.

In her concurring opinion, Justice Sandra Day O'Connor approaches the issue of the crèche differently than Burger does, but still moves clearly in the direction of seeing the crèche as a part of the American civil religion. In developing the Establishment Test, O'Connor, like Burger does with the Lemon Test, fails to satisfactorily define religion. This failure leads O'Connor to the opinion that Christmas is a secular and cultural holiday that comes with religious affiliations and overtones. Seeing secular and traditional reasons for the Christian practice of celebrating Christmas, O'Connor proceeds to define Christianity in such non-religious terms.

O'Connor agrees that the Christmas holiday is a celebration held in the Christian religion and that the crèche does represent Christian beliefs. She argues, however, that no reasonable observer would equate the presence of a crèche in a larger Christmas display with the promotion of Christianity. While Christianity is a legitimate religion under the Constitution and the holiday and celebration of Christmas, including the crèche, is a part of the religion, O'Connor holds that Christmas is a cultural holiday and celebration of which the crèche is a traditional symbol. Thus, while Christmas has a religious aspect, the defense of the Christmas display comes in a defense of secular Christianity and Christmas.

O'Connor articulates her position, writing that religion serves “the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”<sup>9</sup> These

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<sup>9</sup> *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (concurring opinion)

“legitimate secular purposes” for religion are, essentially, the nature of civil religion—a fully functioning religion whose purpose is for the state.

What the U.S. Supreme Court attempts in *Lynch v. Donnelly* is to fit religion properly into liberal democracy. While the court acknowledges Christianity and its various expressions, such as the celebration of Christmas, its constitutional approval of these expressions in public come not as a result of true religious liberty but because those very expressions, while being shared by a particular religion, also profess the traditions of the state. The end result of this process of secularizing religion for the public square is the rise of civil religion

The conflict between church and state within a liberal democracy culminates with the rise of civil religion. While the state cannot adopt any religion, yet seemingly cannot escape from religion, civil religion provides the state with a complete and sectarian (towards the state) narrative that can preserve the soul of society while not forsaking the necessary principles of liberal democracy—principles that call for a primary end of preserving the state. In many ways, civil religion is the idea compromise for the state, yet it arises amorphously from the individual citizens within society.

The introduction of civil religion does not, however, end all conflict between church and state in liberal democracy. Questions of religious liberty and state sovereignty remain and the government continues to attempt to balance individual liberty and autonomy with societal equality, all while working toward maintaining an ordered state. The change comes in that such questions are now framed in the context of civil religion. While this provides direction for the state and for religion, it also places

significant limitations on religious liberty—limitations that ironically arise from the people and not from government coercion. As Rousseau articulates:

At first men had no kings but the Gods, and their only government was theocratic. They reasoned like Caligula, and in the circumstances they reasons rightly. A prolonged modification of feelings and ideas was needed before man could make up his mind to accept one of his own kind as master, and to persuade himself that in doing so he had done well.<sup>10</sup>

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<sup>10</sup> Jean-Jacques Rousseau, *The Social Contract*. (New York: Penguin Books, 1968), 176.

## CHAPTER SEVEN

### Conclusion

The centuries-old debate over church and state and the role that each ought to play in a liberal democracy is a reflection of the even older debate over the essence of liberal democracy—the struggle to balance individual liberty and autonomy with state sovereignty and authority. Complicating the matter is the introduction of religion, shifting from an otherwise ordinary matter of individual liberty towards a complex matter of religious liberty. It is upon this religious liberty that the seeming societal norm of religious pluralism is predicated. Understanding religious pluralism in its liberal democratic framework, then, first calls for a proper understand of both liberal democracy, and its internal struggle for balance, as well as religion—what it is and what it is not.

In realizing the absolute necessity for liberal democracy to play the role of a comprehensive doctrine and to seek the preservation of the state, along with its sovereignty and authority, ahead of the individual autonomy and freedoms of its members, the need for restrictions on individual liberties, including religious liberty, becomes abundantly clear. When religion is understood, however, not by its various components or descriptions, but as a comprehensive form of life that is centrally important and incapable of abandonment, such restrictions on religious liberty in society become more than mere limitations, but lead dangerously towards the destruction of religion.

At the center of the struggle, are two or more entities (each religion in a pluralistic society is a separate entity), each which functions in society as a comprehensive doctrine. The entities greatly overlap in their membership, with any religious individual at least being a member of his religion of choice as well as the state. These entities also, however, pull in separate, and at times entirely opposite, directions, threatening to break apart any or all of the entities and, thereby, threatening both the perseverance of the church as well as the state.

It is from this situation that civil religion arises as a complete and fully functioning religion that seeks resolution to the conflicts had with traditional religion by pointing back to the state and, thus, being vested in the same aims and purpose of liberal democracy. As a religion of the state that ultimately points back to the state, the conflict that previously existed between religion and the government becomes moot with civil religion. Yet, as a religion that is of the people, having risen from the individual members of society, the coercive nature of the state with regards to religion and religious liberty also becomes moot. The unique nature of civil religion is such that it rises up from the citizens of the state and, thus, can be changed by the same, leaving the freedom of civil religion in the hands of the people. Civil religion ultimately culminates, however, at the top with the state itself, but having permeated through society first, the coercive nature is directed from the citizens up to the state and not from the state down the citizens.

As a comprehensive doctrine that can transcend both the spheres of liberal democracy as well as religion, it appears that civil religion provides a viable solution to the dilemma of liberal democracy and religion. Upon closer examination, however, civil

religion is not adequate in to accomplish such as it does not eliminate the issue of maintaining religious liberty and, subsequently, religious pluralism in a liberal democracy but, rather, it merely redirects the issue. In the church versus state model, an individual's right to religion is directly pitted against the state's need to preserve itself. While civil religion provides a religion that is no longer pitted against the state, it does not resolve the dilemma. Any religion outside of the civil religion continues to have the same problem, except it is no longer a matter of religion and government being on opposite ends, but religion and civil religion.

Civil religion effectively establishes an official religion of the state. Thus, there still exists no pure religious liberty. The freedom of religion exists for those religions whose beliefs and practices are not contrary to that the civil religion. The same applies for religious pluralism—that a religion can only exist in a liberal democracy if it is not contrary to the civil religion. While it appears that civil religion is a solution to the hindrances of religion in liberal democracy, it only redirects those hindrances from the state to the state's religion.

Religion is often seen as the glue of a society—holding it together during times of crises and change. For a liberal democracy, civil religion plays this very role. The comprehensive and central nature of religion, dictates that all beliefs, actions, and so forth be within the purview of civil religion. It is in this purview that religious liberty and pluralism exists in a liberal democracy. Certainly, with civil religion being a religion from the people, it stands to change as the culture of society changes. It is in these changes that religious pluralism must thrive, having a plethora of religions competing amongst society to influence and decide what the civil religion may be. Outside of the



civil religion, there can exist no pluralism, as the structure of liberal democracy cannot sustain such. As Justice Sandra Day O'Connor articulates in her opinion in *Lyng v.*

*Northwest Indian Cemetery Protection Agency*:

However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities -- from social welfare programs to foreign aid to conservation projects -- will always be considered essential to the spiritual wellbeing of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.<sup>1</sup>

There exists truly, then, only one religion in any liberal democracy—civil religion, the religion from the people and of the state. This returns the church-state debate to the beginning, with the entities sitting in two separate spheres and attempting both dialogue and balance for society—exactly where liberal democracy desires itself. Perhaps it is fitting that out of many religions, only one arises.

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<sup>1</sup> *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 452 (1988)

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