

The J. Byron McCormick Lecture

REFLECTIONS ON THE SEPARATION OF CHURCH AND STATE

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I.

I call my lecture “reflections” on the separation of church and state in part because I have no strong assertions to make about it. Indeed, I will confess to those here present that after two decades of laboring in the salubrious vineyards of constitutional law, about half of that spent as what I suppose one would call a specialist on religion, I continue to find the concept of separation of church and state baffling, utterly baffling. I do not mean by this admission to suggest that I am an opponent of it; quite the contrary, I am fairly sure that I favor it. The problem is that I have only the dimmest idea what the words mean, and therefore have but the haziest notion of what it is that I favor; and I rather suspect that a fair number of those who use the words, including some eminent jurists, share my confusion.

I suppose many people would describe the separation of church and state as a mandate of the First Amendment; others would suggest that it is a fundamental principle of liberal democracy; yet I can find no serious reason to believe that either of these postulates is true; or, rather, if true, neither one is sufficiently unambiguous to admit of serious dialogue. In other words, when we use the phrase “separation of church and state,” I suspect that few of us can really guess what the other is talking about. And this has been true all through the

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nation's history. Roger Williams and Thomas Jefferson, had they been contemporaries, could have had an entirely incoherent conversation on the doctrine, because they understood it so differently. One can stretch back earlier. The Apostle Paul who wrote Romans 13 and Constantine the Great who absorbed the organized Christian church into the Roman state could both have used the phrase, too, but would have intended to convey sharply distinct ideas.

Let us consider the famously paradoxical words of Mr. Justice Black in the *Everson* case, a little more than half a century ago:

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.¹

I should like to offer a respectful dissent, because I am skeptical of the proposition that the separation of church and state is or could ever be a doctrine of constitutional law. I fear that the image of the wall confuses more than it clarifies, which is why Mr. Justice Stanley Reed was exactly right in objecting that it is not proper to construct a rule of law from a figure of speech.² But my discontent goes deeper. The serious historian will readily admit that the metaphorical separation of church and state, whatever precise meaning we might choose to assign to it today, has its origins in Protestant theology, for it was the Protestants who laid before an unenlightened Europe the model of the two great powers, the temporal and the spiritual, and the theological argument for placing the capacities in the hands of separate earthly masters.

It is vital that we in our legalist ahistoricism not forget that the Protestant separatists believed in dividing *church* from state, not *God* from state. The purpose of the separation was not to protect the state from religious believers but to protect the church in its work of salvation from the corruption of the state. Both earthly capacities were understood to fall under the rule of the one God, and, indeed, the traditional Christian teaching on obedience to constituted authority rests on this assumption. Thus, chapter 13 of the epistle of Paul to the Romans begins:

Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.³

The key word, here translated "consequently," is in the original Greek *ὥστε* meaning "so" in the sense of "in consequence." In other words, the *reason* the

1. *Everson v. Board of Education*, 330 U.S. 1 (1947).

2. *See Illinois ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

3. *Romans* 13:1-2 (NIV).

believer must obey the governing authorities—and the *only* reason—is that they were created by God.

The early Protestant theorists of church and state were inspired, as John Noonan has lately reminded us, by the prophets of Israel, for it is in the often lengthy biblical passages rehearsing the arguments between the rulers and the prophets that we find what appear to be the first historical instances of outsiders daring to accuse the sovereign of acting against the will of God.⁴ Prior to that time, as far as we can tell, rulers were themselves thought to be divine or semi-divine. The idea that the king could do something contrary to the will of God denied the monarch's divinity, and that denial carried within it the seeds of the separatist revolution that would in time sweep the globe.

The Puritans certainly understood the problem, which was why they took marriage away from the priests. In Protestant New England, it was actually against the law for a member of the clergy to officiate at a wedding. The justice of the peace, an individual with no clerical function, was required to perform the ceremony. In this way, the Puritans "separated" the church from the state. But let us be clear about their motive. In separating the two great powers, they were seeking to purify the church, not the state. Their beloved church, they feared, was at risk when it exercised authority over matters that the Bible did not command it to run.⁵

These early American separationists—often called "pietistic" by the historians—separated church and state for theological reasons. Yet, even as they insisted that the two great powers remain rigorously demarcated, these pietistic separationists never imagined that either power was to be separated from the authority of the one true God: on the contrary, they saw divine edict as the source of the sovereign's right to rule, and of the state's right to exist.

To be sure, other strands of separationism exist in American thought: there were, for example, the Enlightenment separationists, who thought the state would be better off were it separated from the church. But—without laboring the point here—we probably overplay the differences. The Enlightenment thinkers did not believe religion was dangerous, or that it was a pollutant in the pure waters of politics. Rather, they worried about the danger that the church, if merged with the state, would be tempted to coerce individuals into beliefs that the Bible required them to accept voluntarily or not at all. Recent history had taught them this lesson, although even the Inquisition, in a delightful burst of legalese, took the view that it was wrong to coerce men to act against their consciences but it was not wrong to coerce their consciences.

4. See generally JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (1998).

5. For an excellent history of the desacrilization of marriage, see JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997).

In any event, I wish to talk about the pietists. I am interested, in particular, in how we might enrich our understanding of the separation of church and state by envisioning it as first laid down, as a means to protect the church, not the state. Although the lecture is intended as speculative, I will, I hope, have some points to make about the way we might improve our constitutional law of religion as well.

II.

The separationist metaphor was popularized in the New World by Roger Williams, the Baptist preacher (among other things) who founded Rhode Island, first as a refuge for those seeking religious freedom from Puritan Massachusetts, although it later became the site of religious discriminations of its own. Williams coined the metaphor of the garden and the wilderness to describe the relationship between the church and the society it inhabited. For Williams, the garden was the place of God's people, the community of people of faith, who gathered together to determine what the Lord required of them, nurturing and building their religious understanding in relative tranquility. Outside the garden was the unevangelized world, what Williams called the wilderness. And between the two, separating the wilderness from the garden, was a high hedge wall, constructed to protect the people of the garden in their work of religious nurture. The hedge wall existed to keep the wilderness out, not to keep the people of the garden hemmed in. It was the vital work of the garden, not the less vital work of the wilderness, that the wall was built in order to protect.⁶ In other work, I have offered extended analyses of Williams's metaphor.⁷ For the moment, let it suffice to say that the Supreme Court was wrong, and has been consistently wrong, in attributing American authorship of the idea of a wall of separation to Thomas Jefferson rather than to Williams.

But even if Roger Williams, the seventeenth century Baptist, believed that the wall of separation existed to protect the church from the state rather than the other way around, is it not possible that the Enlightened eighteenth century gentlemen who drafted the Constitution were worried more about the influence the church might gain over the state?

Well, no.

In the first place, the familiar contention that the Framers were dominated by deists or other secularists rather than by traditional religious believers has not stood up well to historical analysis.⁸ And, although it is commonly suggested that

6. For detailed discussion of Williams's metaphor of the wall of separation, see TIMOTHY D. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1998); MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965).

7. See, for example, my discussion in STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* ch. 5 (2000).

8. As a matter of fact, the dominant thinker in the training of those who met in Philadelphia was probably John Calvin. For a persuasive recounting of Calvinist influence on the Framers, see Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the*

the Framers sought to keep religion out of public life because they worried about the sectarian warfare sweeping Europe, that suggestion, too, is on shaky historical footing. The last arguably religious war on the European continent was the Thirty Years War, which ended in the middle of the seventeenth century—well over a hundred years before the drafting of the Constitution.⁹ After the end of the Thirty Years War, Europe saw many others, motivated by nationalism, or commerce, or aggrandizement. The Founders were wise enough to understand that it was people, not religions, that made wars; and so their Constitution made it tougher for people to get together to do mischievous things, whatever their motivations might have been.

The notion that the Founding Generation was particularly afraid of the influence of religion over the state is nonsense—pardonable nonsense, but nonsense all the same. It does not stand up well to the evidence. Look at the sermons by leading preachers who supported the Revolution. Charles Chauncy, one of the most influential clergy in America in the late eighteenth century, argued that separation from the Crown had become imperative precisely because the King and Parliament were not “ruling in the fear of God.” Argued Chauncy, after listing the abuses of the Crown: “[I]t should be a constraining argument with rulers to be just, that they are accountable to that Jesus, whom God hath ordained to be the judge of the world, for the use of that power he has put into their hands.”¹⁰ Indeed, if anyone in the turbulent colonial debate of the era argued against religious influence over affairs of state, it was the supporters of the Crown, who were fond of reminding the revolutionaries, in the words of the famed Tory preacher Jonathan Boucher, that “obedience to government is every man’s duty because it is in every man’s interest; but it is particularly incumbent on Christians, because...it is enjoined by the positive commands of God.”¹¹ The insurrectionists were unpersuaded. In 1783, a pro-revolution pamphleteer put the answer simply: “But all kings are limited, and the connexion may be thus confirmed in short: That power which is not the ordinance of God, may be resisted.”¹²

This is not to say that all or even most colonial clergy supported the break with England. At the moment of revolution, every Southern state had an

Constitutional Convention, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293 (Michael W. McConnell et al. eds., 2001).

9. If anyone should have been influenced by religious warfare in Europe, it was Williams, as indeed he was; his solution was not to keep religious influences out of government but vice versa.

10. Charles Chauncy, *Civil Magistrates Must Be Just, Ruling in the Fear of God*, Sermon preached on May 27, 1747, before the House of Representatives of Massachusetts Bay, reprinted in POLITICAL SERMONS OF THE FOUNDING ERA, 1730–1805, at 139, 165 (Ellis Sandoz ed., 1991).

11. Jonathan Boucher, quoted in BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 315 (enlarged ed. 1992).

12. Anonymous, probably Stephen Case, *Defensive Arms Vindicated and the Lawfulness of the American War Made Manifest* [1783], reprinted in POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805 at 713, 738 (Ellis Sandoz ed., 1991).

established Anglican church, and, as the historian William Lee Miller has pointed out, "an Anglican clergyman took an oath to support the king, the supreme head of the church, as part of his ordination."¹³ As the war neared, most of the clergy evidently did as the oath prescribed.

Yet that is not the point of the story. The point is that the clergy took sides in the war, and that both parties wanted them to. Far from fearing the incursion of the religious voice into politics, even on the most vital issues of the day, the Founding Generation welcomed it. As a matter of fact, they relied on it.

III.

This history is only prologue. I do not mean to suggest that an account of past controversy creates in us a binding obligation to the political science of an earlier generation. I believe, of course, that we owe to traditions prior to our own a healthy degree of respect, and even deference, and, certainly, that we should not view them through the eyes of ahistorical critique. But we may have better ideas. Let us investigate whether that is true.

If the separation of church and state is a rule of constitutional law, then it must emerge, through a process of interpretation, from the Constitution itself, and must then admit of workable definition. The Supreme Court has identified the First Amendment as the source of the metaphor, locating it, in particular, in what nearly everybody calls the Establishment Clause.

I put the point that way because the text of the First Amendment, on its face, does not admit of the two-religion-clause interpretation. Let us simply look at the language, elegant and gracious if perhaps needlessly involute:

Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof;...

The First Amendment is made up of a series of three clauses, separated by semi-colons. We have, thus, the religion clause, the speech and press clause, and the assembly and petition clause.

The religion clause is the first to which we come when we read over the amendment. The religion clause on its face appears to address a single subject. The two-clause reading given it by all courts and most commentators is not the one that emerges most readily from the text. After all, if the clause is meant to be in two segments, each referring substantively to a different area of constitutional law, why on earth does it end with the word "thereof"? The minimum we must grant to the authors is that this final tantalizing word, "thereof," must refer to the word "religion," as in the phrase "establishment of religion," which suggests—one might even say requires—that the word be given the same definition in both parts of the clause. That is, even if we grant the shaky proposition that the religion

13. WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 16 (1986).

clause is actually two clauses, there is no plausible interpretation on which the word "religion," mentioned once and then marked with a pregnant "thereof," can mean two different things.¹⁴

Why does this matter? It matters because the tendency of courts and commentators has been to give a very narrow reading of the word *religion* in what we are bold to label the "Establishment Clause," and a much broader reading in what we insist on calling the "Free Exercise Clause." Contrary to the evident structure of the text, we use the word *religion* to refer to two very different things. For example, the word *religion* in the "Free Exercise Clause" (remember that the real word is *thereof*) is generally conceded to include non-religion: atheism, say, is protected as part of the freedom of religion. In the case of the previous occurrence of the word *religion*, however—its use in the the "Establishment Clause"—we do not include atheism.

Very well. How is all of this semantic inquiry related to the problem of the separation of church and state? At the outset of this lecture, you will recall, I expressed doubt on the proposition that the separation of church and state is, or can be transformed into, a doctrine of substantive constitutional law. But let us assume, contra my skepticism, that it can. What is its source? Where in the document do we find the text to which we will attach it?

Let us look back at the "Establishment Clause," as it is called. There, after all, is the provision in which the separationist metaphor is located by its most ardent constitutional advocates. But what a peculiar place the clause turns out to be! "Congress shall make no law respecting an establishment of religion." Let us be realistic. Surely the clause means what it says, and no more than that. At the moment of the founding, the majority of the states had official, state-supported, established churches, and all but two required religious tests for public office. The states were not giving these powers away. On the contrary, they wanted to protect their own established churches from interference by the new national government, and also wanted to prevent that national government from establishing a church of its own. My Yale colleague Akhil Reed Amar has argued persuasively that we should therefore read the "Establishment Clause" as a states'-rights provision, as an allocation between the national and local sovereignties of the authority to create or to endorse an official church.¹⁵

If Professor Amar is right, then the Supreme Court's subsequent proclamation that the clause is "incorporated" against the states through the agency of the Fourteenth Amendment begins to lose its luster, to say nothing of its coherence. If the purpose of the "Establishment Clause" was to keep the national

14. For a rather jocular attention to the same point, see NOONAN, *supra* note 4, at 357. An important early attempt to set out two separate definitions of the term "religion" in the clause is found in William Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POLITICAL SCI. REV. 865 (1963).

15. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32-45 (1998).

government from interfering in what was properly a local responsibility, the only sensible meaning of incorporation would be that it now prevents the state government from interfering with local communities as they decide whether to establish their own churches. In other words, if the clause is truly to be applied against the states, then the state of Arizona would not be able to prevent Tucson from establishing an official church, and the state of Connecticut would not be able to prevent New Haven from reviving the old established Congregational Church as its formal public faith.

I am not suggesting that this is a desirable result. I mention it only because I think it quite wrong historically, and quite unpersuasive textually, to look to the "Establishment Clause" as the source of a prohibition on creation of these things called "establishments," which leads in turn to the long line of unfathomable federal court cases telling us which government programs amount to forbidden "establishments" and which do not. Without that line of cases, however, we have no wall of separation; or none, at least, located in the first half of the first clause of the First Amendment.

IV.

So if the wall of separation is to be constructed on a foundation of the constitutional text, perhaps we might find its support in the second half of the first clause of the First Amendment, that is, the so-called "Free Exercise Clause." There, at least, the case is more plausible, assuming always what I have already told you I doubt, that metaphors make good rules of law, constitutional or otherwise.

I am hardly the first to suggest that the separation of church and state is better understood as a means for protecting religious liberty than as a way of preventing forbidden religious establishments. As a matter of fact, much of the serious theory of the religion clause in recent years points in that direction.¹⁶ Yet, as I continue along this speculative path of reasoning, I hope to reach the same end—the proper location and thus the proper understanding of the separation of church and state—by a slightly different route than the one scholars have tended to follow.

Let us consider, first, one of the great constitutional rulings of the twentieth century, the Supreme Court's 1943 decision in *West Virginia Board of Education v. Barnette*.¹⁷ There the Justices ruled that objecting children whose parents were Jehovah's Witnesses could not be compelled, contrary to the dictates of their faith, to recite the Pledge of Allegiance. The case is nominally about free speech, and often cited as an early example of the protection of religious liberty,

16. See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000), which is among the best of the recent works proposing to locate the separation of church and state in the words "free exercise thereof."

17. 319 U.S. 624 (1943).

but what is most remarkable is the breadth of Justice Jackson's language for the Court:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁸

According to Justice Jackson, it is the prescription—the compulsory recital of a creed—that leads to the constitutional problem. The difficulty, in other words, is not that the state likes the Pledge of Allegiance and is willing to make its preferences clear; the difficulty is that the dissenters are coerced into acting as though they agree, and punished if they do not.

This, surely, is what the separation of church and state is (or should be) most keenly about. The high hedge wall protects the garden from the wilderness precisely in order to allow the people of the garden to nurture the faith without the interference of the state. And one can imagine few more intrusive state acts than requiring that the people of the garden recite an official creed that is inconsistent with what their religion teaches.

Yet the point is deeper. Recall once more that *Barnette* involved children. A little less than two decades earlier, in *Pierce v. Society of Sisters*,¹⁹ the Court had affirmed what most Americans of the day doubtless took as received wisdom, that decisions about the education of children must be left in the hands of the parents, as part of the parents' liberty. In *Pierce*, the state of Oregon had adopted by referendum a provision outlawing most private schools. The Court ruled the law unconstitutional, as an infringement on the rights of parents, who must be free to choose private education, including religious education, for their children.

What has all this to do with separationism? Just this: *Barnette* is justly celebrated as a judicial recognition of the primacy of individual conscience. What *Pierce* adds to the mix is a celebration of the places where conscience is formed. Indeed, it is a striking weakness of contemporary liberal theory that so much attention is paid to protecting the individual in the exercise of the convictions he may possess, but so little is paid to how he comes to possess them. The separation of church and state, as understood by Williams, would propose that the principal place in which conscience is formed is the delicate space of the garden. The wall of separation must protect that space from state interference.

It has become a commonplace of liberal theory to argue for the importance of educating the young in the faculty of critical rationality, so that, as they grow, they may choose for themselves which convictions to adopt. Some theorists today would prefer a somewhat thicker liberalism, in which basic tenets

18. *Id.* at 642.

19. 268 U.S. 510 (1925).

of liberal thought—tolerance seems to top most lists²⁰—would be taught. There is a surface attractiveness to both these ideas, for it is terribly tempting, once one knows the great truths, to reach out and seize the institutions of the state in order to inculcate those truths in the young, and thus to make the political sphere safe for generations to come. Tempting, yes—but also dangerous, and not different in kind from the idea that we ought to have classroom prayer because the students who pray will be better off for having done so. Organized classroom prayer, too, tends to break down the wall of separation, not because it is an “establishment” of religion (which it isn’t) but because it represents a profound interference with the freedom of the family to create for its children the garden it prefers.²¹ Teaching tolerance, teaching prayer: Each argument begins with the same error; each ends with the same mischief.

The mischief is coercion. But let us be clear where the coercion problem lies. The parents are always free to coerce their children: *You must go to school. You must do your homework. You must go to the party.* The school, moreover, is always free to coerce the children in the parents’ name: *You must serve your detention.* The coercion that brings the problem, then, is not of the student qua student; it is of the student as a representative of the family. It is the religious liberty of the family that matters, the liberty to decide for itself on the particular moral world—the garden—that it wants the children to inherit. If the garden is the sphere in which conscience is nurtured, parents are the nurturers who stand watch on the high hedge wall. And it may be that the particular wilderness against which they wish to build walls is the very wilderness the state wants the children to inhabit.

Thus the separation of church and state, as guardian of religious liberty, means that the school should not be permitted to force the children to adhere to a creed contrary to the moral or religious teaching of the family. If the state uses its schools as a tool to wean the children away from the parents’ religion—as many states tried actively to do at the height of anti-Catholic nativism in the nineteenth century²²—the state is breaching the wall. So far, courts have for the most part overlooked their duty to protect the garden that the parents try to build. But it is time for a change. If we protect the nurturing in the garden of values and ideas

20. My critical faculties tell me that the concept of tolerance is empty, but perhaps they have been poorly trained. For an explanation of my view on this point, see STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 213–23 (1998).

21. The original classroom prayer cases are *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963).

22. For accounts of the nativist efforts to use the public schools to wean Roman Catholic children in particular from the faith of their parents, see JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT* (1985); WARREN A. NORD, *RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* (1995). For my own discussion of some of this history, see STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* lec. 1 (2000).

very different from the mainstream, we will create a steady supply of challenges to the status quo, of radical dissenters who might lead us in new directions, of fools and knaves, certainly, but of martyrs in just causes, too. The civil rights movement and the abolition movement were church-led revolutions, and they were accomplished because the garden was largely left alone: raised to ideas radically different from the wisdom of the moment, the leaders of those movements, as well as the rank-and-file, put their faith into practice and changed the nation.

Religions have always been characterized by the attempt to project themselves into the future. Indeed, some have argued that a religion should not qualify for the name until it has managed to survive over several generations. Anyone can have a belief about God; but it takes the nurturing of the belief over time to transform it into a religion. Many religions take the view that it is a requirement of the faith that the children be trained in it. Christianity, my own tradition, carries a strong norm, and perhaps a duty, of teaching the young. Indeed, there is every reason to think that the religious training of the young was of first importance in Christian families from earliest times. The norm is reflected, for example, in Paul's second letter to Timothy.²³ It is also part of the Hebrew Scriptures, the Christian Old Testament, which served as a principal source of instruction for first-century Christians.²⁴ In first-century Rome, the obligation of Christian parents to raise their children in the faith grew increasingly explicit and absolute.²⁵

To believe in true religious liberty, one must accept a broad ability of the people of the garden to pass on their faith to their children. The fact that the state might think it has a better idea than the people of the garden do (today, critical rationality and tolerance; a century and a half ago, Americanism) is actually a rather meager justification for breaching the wall. And, as to the claim, commonly pressed, that the school curriculum will not interfere with religion as properly understood—well, the dissenters in the garden, struggling to raise their children, are entitled to their improper understanding. If the state is free to breach the wall simply because it has better ideas, then one supposes that the people of the garden must try to protect themselves by getting their hands on those same levers; after all, they, too, believe that they possess better ideas.

23. Cf. 2 *Timothy* 1:5 (NIV): "I have been reminded of your sincere faith, which first lived in your grandmother Lois and in your mother Eunice and, I am persuaded, now lives in you also."

24. See, e.g., *Deuteronomy* 4:9; *Deuteronomy* 6:7; *Psalms* 78:5; *Proverbs* 22:6.

25. See James S. Jeffers, *Jewish and Christian Families in First-Century Rome*, in *JUDAISM AND CHRISTIANITY IN FIRST-CENTURY ROME* 128 (Karl P. Donfried & Peter Richardson, eds., 1998). According to Jeffers, the principal source of moral teaching in the early Christian family, following the Roman model, was probably the mother. (For a refutation of the common argument that first-century Christianity was not really a religion but merely a philosophy of life, see WAYNE A. MEEKS, *THE FIRST URBAN CHRISTIANS: THE SOCIAL WORLD OF THE APOSTLE PAUL* ch. 5 (1983).)

The wall of separation of church and state was developed to prevent this competition. If the garden is protected by the hedge wall, then the mere fact that a powerful group of outsiders believes its own ideas to be more important to the education of children than the ideas of the parents and their religious communities is not a sufficient reason to supersede the family's authority to build its moral world. Otherwise, *Barnette* is simply wrong. If the high hedge wall does not prevent state interference as children are raised in the garden, then there is no reason for the courts to get involved if the state chooses to coerce adherence to the nationalist creed contained in the Pledge of Allegiance. That the case happens to involve the Pledge rather than a critical thinking curriculum—or the theory of evolution²⁶—should be considered an accident of history, not the basis for the decision.

V.

But now the reflection has brought us face-to-face with an interesting problem. It is easy, as we have seen, to understand how an enriched appreciation of religious liberty would handle the classroom prayer cases. The question is whether it should matter that the prayers in question are noticeably religious. The Pledge of Allegiance, by way of distinction, is not. Lest one point to the language "under God" as evidence of religiosity, it is useful to bear in mind that in 1943, when *Barnette* was decided, those words were not yet part of the text. They were added later, in the early years of the Cold War, to distinguish the United States from what used to be called "Godless communism."²⁷ Consequently, if we consider the *Barnette* case (as I am speculating that we should) as an exemplar of judicial protection of the sphere in which conscience is nurtured, we cannot make the contours of that sphere depend upon whether the recitation that is coerced happens to be religious. It is the coercion, not its religiousness, that the separation of church and state forbids.

Consider once more the experience of the early Christians. Pliny, who persecuted Christians early in the second century, may have been the first Roman official to come up with the idea of requiring suspects to disprove their Christianity by indulging in ritual acts honoring the emperor or the Roman gods. Anyone who refused to perform the rituals was summarily executed.²⁸

26. As far as I am aware, this analogy, now a commonplace of argument in this arena, was first presented by the attorney Wendell Bird in his student law review note. See Wendell Bird, Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515 (1978).

27. See GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 81 (1990).

28. See ROBERT L. WILKEN, THE CHRISTIANS AS THE ROMANS SAW THEM 8-30 (1984). Pliny, interestingly, believed that Christians were atheists, as did many Roman observers, perhaps because they were monotheistic, or perhaps because they believed that God had become incarnate as a human being, and therefore, in pagan eyes, were worshipping a man.

Why would the Christian refuse to perform the rituals? Plainly, because he believed that God had so commanded. Pliny, then, was executing Christians for following what they believed to be divine will. But nothing in this account turns on the undeniable fact that the rituals Pliny chose were religious. The problem for the believing Christian was not that Pliny demanded worship of the Roman gods, but that he demanded what God forbade them to do. Thus, had Pliny stumbled upon one of the many early Christian sects pledged to celibacy and required them, on pain of execution, to engage in sexual activity, the problem for the believer would have been identical.

The Christian position on such matters has changed little in the ensuing centuries. The Christian tradition, even though it counsels obedience to properly constituted state authorities, nevertheless places obedience to God above obedience to the will of the state. Yet the tradition teaches that the authority of the state to rule is given by God. The two propositions do not erupt in paradox because they are mediated by a corollary: if the state consistently commands what God forbids, or forbids what God commands, then perhaps it is not, after all, constituted by God, and therefore is not the state and need not be obeyed.

This corollary was crucial during the middle of the nineteenth century in the argument over slavery. Southern pastors argued that slavery, right or wrong, was the law of the land, and that Christians therefore were required to make their peace with it. It was left to the abolitionist preachers to raise the objection that a state that would countenance the enslavement of human beings risked sacrificing its God-given authority to rule.²⁹ Indeed, a principal theme of abolitionist preaching, from radicals and moderates alike, was that the Christian's first duty was to serve God—to follow what the pastors called the "Higher Law"—even when the laws of the state were different. Thus, for example, active disobedience to the Fugitive Slave Law of 1850 was held justified because the requirement to return escapees conflicted with God's law. Typical of the anti-slavery position was one articulated by Ichabod Spencer, a Presbyterian pastor, who argued that although Christians have a religious duty to obey the government, that duty ceases when the state becomes "so unjust, oppressive, tyrannical, and cruel, as not to answer the designed, and righteous, and beneficial purposes of government for a whole people." When the state falls to that level, said Spencer, it "deserves no respect as an ordinance of God, for it is then acting contrary to the will of God and the necessity of society."³⁰

Abolitionist preaching was full of similar argumentation, all of it resting on the same simple truth as the separation of church and state itself: that the state can be wrong, and the believer may consult the will of God to understand when this is so. Were church and state not separated, the contention that the state is

29. I discuss this history in greater detail in STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* ch. 6 (2000).

30. ICHABOD S. SPENCER, *THE RELIGIOUS DUTY OF OBEDIENCE TO LAW: SERMON PREACHED IN THE SECOND PRESBYTERIAN CHURCH* 14 (1850).

wrong for God's reasons would be difficult if not impossible to articulate, as the state might therefore claim to speak for God. Even Kant understood this point, and addressed it at some length in his essay "Religion within the Bounds of Mere Reason." According to Kant, the idea of divinely inspired Scripture implies that the text holds a message, and that implication in turn suggests the need for a trained interpreter to work out what the message is. The interpreter must be guided by his reason, applied in a way that is consistent with the teaching of the faith. Thus, Kant argued, from the point of view of religious faith, the state cannot be allowed to enact dogma and creeds, because the state is the voice of the people, the laity; and official enactment of a creed would amount to the laity telling the clergy what the Scriptures meant—exactly the reverse of what revealed religion requires.³¹

But the space in which the clergy will explain Scripture to the laity must therefore be protected absolutely from interference by the state. And it is the same sphere—the same garden—which we have already been pondering. The people of the garden (or, rather, the many gardens) must be free to teach the young that obedience to God is a higher value than obedience to the state; and that the state is wrong when it enacts laws requiring what God forbids. If the state is allowed to use its schools, or other tools, to shape the young contrary to the designs of the garden, this freedom is infringed, and radical argumentation of the sort featured in abolitionist preaching becomes impossible.³²

The Justices briefly recognized the need for protection so broad in the controversial 1972 decision in *Wisconsin v. Yoder*,³³ which allowed the Old Order Amish to keep their children home from school after eighth grade. To require the children to attend further, the Court implied, would devastate the Amish religion.

31. IMMANUEL KANT, *Religion within the Boundaries of Mere Reason*, in RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS 118–122 (Allen Wood & George di Giovanni trans., 1998). Kant did not leave to the experts the entire field. He thought their interpretations of Scripture should be freely criticized by the laity, as a way of encouraging dialogue, and that the clergy should listen to the arguments of the unschooled. But he opposed the notion of laws telling the churches, or their clergy, which interpretations were correct, or which were to be taught.

32. This proposition might reasonably raise in the reader's mind the question of vouchers and other forms of public support for religious education. After all, if the state must avoid interference with the garden, has the state an obligation to pay for it? The answer, I think, is no: the state has no obligation of support. But the state is not prohibited from supporting either, and, to the extent that the cases suggest otherwise, the cases would seem to be permitting, even requiring, what looks like a patent violation of the separation of church and state. If the state can support private education at all, it surely must include religious education; otherwise, it is, in effect, taxing the parents whose visions of the garden are furthest from the mainstream. I hasten to add that I am not at all sure about the wisdom of accepting state money for religious education, should it become available, because state influence will likely follow state dollars. But the question of whether the benefits outweigh the risks is for each religious group prayerfully to resolve in its own way. It is not a question of constitutional moment.

33. 406 U.S. 205 (1972).

Scores of commentators, led by Justice Douglas in a stinging dissent, have excoriated the *Yoder* result. But if, as I have speculated so far, the separation of church and state exists to protect religious liberty, it is difficult to see how the case could have been decided the other way.

VI.

In my rush to speculate about matters not often associated with religious liberty, I have so far neglected a variety of questions that plainly belong in the conversation. The Supreme Court, after all, has supplied us with a voluminous jurisprudence on a way of approaching religious liberty, and if much of the law is quite bad, it is at least possessed of the virtue of consistency. And what is most interesting about our bad constitutional law of religious liberty is where the Court has made its error. For the stumbling block, in nearly every case, is at the same precise point: the fruitless effort to pour content into the “free exercise clause” without violating the “establishment clause.” Because the Justices seem to see the two parts of the religion clause as being at war with each other, it is inevitable that the law the Court produces will be in key respects mistaken.³⁴

The mistaken idea that the First Amendment protects some important value other than states rights through its ban on establishments had led the Court, and not a few of the commentators, to worry about giving too much to believers who seek to invoke the clause’s protection for their free exercise of religion. The problem is this: if a group of believers, as will surely occur, seeks exemption from generally applicable laws on the ground that the group’s religion will not allow them to comply, a grant of a special privilege to ignore the law—what the courts call an accommodation—would seem, on its face, a special favor. Because the Court has decided that the First Amendment prohibits, through the “establishment clause,” special favors for religious groups, the protection sought is, unfortunately, not the Court’s to grant. This line of reasoning has led to a long line of rather shaky decisions, in which, to put the matter simply, the Justices have pointed religious dissenters to politics to seek protection from generally applicable laws³⁵—even though if a political solution were likely, judicial sanctuary would not have been sought in the first place; and, besides, one who is concerned about “establishments” might worry that, however bad judicial creation of accommodations might be, legislative creation is still worse.³⁶

34. I owe this proposition to Michael McConnell, who has articulated it often, perhaps most usefully in Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). Another very thoughtful discussion of the problem may be found in Robert F. Nagel, *Judicial Power and the Restoration of Federalism*, 574 ANNALS 52 (2001).

35. See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

36. A particularly effective exponent of this view has been Professor Ira C. Lupu. See, e.g., Ira C. Lupu, *The Case Against Legislative Codification of Religious*

If the wall of separation is conceptualized in the way I have suggested, as a metaphor for keeping the state's nose out of the affairs of the church rather than the other way around, it is plain that some level of accommodation will be necessary. In no other way can we truly nurture the diverse gardens our democracy needs and the First Amendment demands. So, for example, when a woman hired by the attorney general of Georgia had her job offer yanked away because she had married another woman in a religious ceremony, contrary to the public policy of the state, one need have no particular view of same-sex marriage, or even on gay rights, to see that the state has crossed the wall of separation: for what goes on within the four walls of the house of worship is, absent some sort of life-threatening emergency, simply not the state's business.³⁷ Similarly, when a preacher decides, for better or worse, that the time has come to endorse a political candidate from the pulpit, the Internal Revenue Service should launch no investigation into the tax-deductible status of the church in question, because, again, the state that believes in the wall of separation must take no account whatever of words spoken by the clergy within the performance of their duties.³⁸

Does all this speculation seem to give an awful lot of special rights to religionists? Of course it does. But if we do not want to grant those rights, we surely should stop talking about the separation of church and state. If we treat religion like everything else, we are not separating church and state, we are combining them, by reducing the sphere of religion to one far smaller than the authors of the metaphor imagined. Indeed, if we do not want to honor religious liberty by providing the litigative tools for religionists to use to protect the moral worlds they wish to build, we should cease any pretense that we believe in separating church and state; for in that case, what we really want is for the state to knock down the wall and win the day.

VII.

In our enthusiasm for the anti-establishment side of the separation of church and state—the side that neither has nor can have any coherent doctrine behind it—we tend to neglect the pro-religious liberty side, the real concern of the pioneers of the metaphor. I think that is probably why we guard free exercise so poorly. We choose to place the energy of radical judicial intervention on the side of limiting government speech; whereas the greatest threats to liberty lie not in the government's speech but in its action. The posting of the Ten Commandments on the wall of a courtroom might be, for many Americans, offensive; but not allowing

Liberty, 21 CARDOZO L. REV. 565 (1999); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

37. See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

38. I discuss in more detail the proposition that the tax status of churches should not be affected by their political activities in CARTER, GOD'S NAME IN VAIN, *supra* note 29, at ch. 5.

a grade school student in New Jersey to read his favorite story to the class, merely because the story comes from the Bible, is an offense to religious liberty.³⁹ The cross that the Ku Klux Klan erected in Capitol Square in Columbus, Ohio, might, for many of the citizens, be a reminder of what they hated or feared;⁴⁰ but, if a school can coerce students into reciting as true what the faith of their fathers believes to be false, the state becomes, for those parents, a hated and feared source of religious oppression.

How, then, to resolve our establishment dilemmas? We might be far better off if we tried to find answers in politics. The Supreme Court, to its credit, did much of the spadework forty years ago when it banned organized classroom prayer led by a teacher. The Justices created a conversational climate in which it is possible—if we are interested—to discuss exactly what is wrong with the observances that had been part of the school day for a century and a half before *Engel* and *Abington*, and perhaps to find a rule of reason, based somewhere in the need to compromise that lies at the heart of democracy at its best.⁴¹ Surely finding compromises would be a better solution than the endless partisan posturing by ideologues of the left and right, which leads to the endless stream of litigation, and the endless supply of ever-more-confusing court decisions that purport to tell us what counts, and what does not, as an establishment of religion.

On the free exercise side of the ledger, on the other hand, we would do well to find greater judicial scrutiny, not less. We cannot protect religious liberty—the only concern of the authors of the religion clause—if we do not protect the places where religious belief is nurtured. And that should be the primary work of the courts under the religion clause. Alas, as we have seen, it is work at which the courts have failed badly.

Instead, the law tries to reduce religion in scope, making it just like everything else. If religion is just a form of speech or belief, then it is unjust to reserve for religious speakers or believers privileges not granted to other speakers or believers. But the fact that the religion clause is included in the First Amendment suggests that, at least to the Founders, religion was not a species of the other important aspects of conscience that the Amendment was written to protect. Religion is not like everything else, and is damaged in the attempt to draw

39. See *C. H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000).

40. See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

41. I am not suggesting that the absolutism of *Abington* and *Engel* well serves the cause of separationism—at least as they have been read by later interpreters. I quite see how organized classroom prayer infringes on the constitutionally protected ability of the family to create a moral world for children. Whether the infringement is greater than in the case of, say, the Pledge of Allegiance—or the theory of evolution—is not so easy to resolve. Yet, on the argument I have presented, the violation would have to be so much worse as to constitute a difference in kind not merely degree. Otherwise, one cannot support the conclusion that the classroom prayer violation is resolved by a ban on the practice, whereas the evolution or Allegiance violations are resolved by excusing the student from performing the ritual invocation of a creed.

comparisons. The judge who seeks a definition, even for the purpose of enforcing the First Amendment's protections, has already proposed to reduce religion to a merely human scale. Kierkegaard was surely right: when we make of our faith a thing to be defended, we also shrink it to a defensible size, and thus remove a part of its power.

Ninety years ago, a Philadelphia pastor put the point this way in a sermon on what one might call the priority of righteousness:

The time has come for a protest. Religion is the fountain-head of the ideal. It is the impulse that leads men to do good, 'hoping for nothing.' It finds its compensation in the absorbing power of a disciple's love. The moment we try to make it a figurable quantity, we lose it. Can faith and penitence be put in parallel columns? Can a price be fixed to mercy, or a cost-mark be tied to the truth? Of all the things in life that come to us on their own recommendation, the values of religion are the first. They are lost by the man, or the age, that has 'no vision.' Reason cannot estimate them. They must be received without thought of the cost of entertainment, or they depart. While we are scrutinizing them from an upper window, or trying to unfasten some rusty lock of calculation, they are gone.

Religion must refuse to surrender to the pragmatic and commercial spirit of our age. She must assert her kingship. She must not march behind the chariot of a conquering materialism....⁴²

Which leads us back, in the end, to the paradox. The world points religion in a particular direction, and sometimes, in craven surrender, religion marches according to the world's command. When, instead, religion chooses the path of righteousness, marching according to God's command, the world rises up in consternation, and condemnation. At the same time, religion is, often, consternated by the world, and condemns it right back.

Properly understood, the separation of church and state prohibits the state from favoring one condemnation over the other. But, as we have seen, separationism so understood carries internal contradictions incapable of logical resolution. So we resort instead to power. The winner in the contest over meaning, a contest not yet ended, is not the side that is possessed of the answer that is "best" but the side that is possessed of better control over the institutions that set the rules. The courts are one battleground, but, as we have seen, the schools are another. And there are more.

The war to define the meaning of separationism continues apace, with both sides sharpening their rhetoric, and neither showing any sign of backing down, or, indeed, of a serious interest in compromise. So we battle on, two

42. George Hooper Ferris, D.D., *Compensation: Sermon at the First Baptist Church Philadelphia, 7* (Feb. 25, 1912) (on file with Author).

nations, mutually unintelligible, each deeply suspicious of the other, and each one rightly certain that the other is trying to manipulate the rules of the game. I see no solution, and, indeed, no end; perhaps we democrats (small d) must learn to live with the tension. But let us remember what Camus wrote of Sisyphus: The struggle itself toward the heights is enough to fill a man's heart.

The Supreme Court, just a few days before this talk was delivered, heard oral argument in another case involving the Jehovah's Witnesses. This time, the town of Stratton, Ohio, has adopted an ordinance requiring a permit for all door-to-door soliciting, in the interest of the safety of the residents, most of whom are evidently elderly.⁴³ By the time this lecture is published, the case will have been decided. I cannot predict what the result will be. I can tell you what I think the result should be, if we truly believe in separation of church and state, and, depending on the actual outcome, what I have to say will read either as an explanation for the Court's decision or a dissent from it.

Simply put, I think the town of Stratton should lose. The power of the state should not be used to shut down religious solicitation. We can all stipulate that the risk to personal safety, even in the home, is a grim reality in this broken and sinful world. In the terms in which we have been talking this morning, however, the crucial question is not whether the fears for safety are rational, but whether they justify regulation of the people of one particular garden as they filter out into the wilderness. Here we speak not of the effort to seize the levers of power, but simply of the desire to witness, to share with others the story that has moved them. In the image painted for us by Roger Williams, the people of the garden enjoy not merely the right but the solemn duty to cross the high hedge wall and spread the word to others.

I began these remarks as a reflection. I explained at the beginning that I bring to the task of interpreting the metaphor of separation of church and state far less certainty than I would prefer, especially after studying the subject for so many years. Yet it does seem to me that our constitutional law of religion is dead wrong on three counts:

- 1) Despite what courts and commentators say, the First Amendment contains only one religion clause, not two, and the text will not admit of an interpretation that tries to assign two different meanings to the word *religion*, which appears only once.
- 2) The separation of church and state, if it is to be a rule of constitutional law at all, should be understood as a tool for furthering religious liberty, not hampering it, for the wall protects the garden, not the wilderness.

43. See *Watchtower Bible and Tract Society of New York v. Village of Stratton*, No. 00-1737 (U.S. Nov. 29, 2001). The Court heard oral argument on February 26, 2002.

3) The liberty that must be protected is not simply the liberty of conscience, but the liberty of those fragile spaces in which conscience is nurtured. If the wall turns out not to guard the people of the garden in their work, then the wall does no service to the cause in which the metaphor was invented.

And what else might all of this mean in practice? Again, consider the case before the Supreme Court that I mentioned a moment ago, a case that will surely have been resolved by the time these remarks (delivered in February 2002) are published, and permit me to offer a small comment. If we allow the people of the wilderness to construct of the hedge wall an escarpment to keep the faithful pent up in the garden, we are violating the only coherent vision of the separation of church and state. We treat the wall as an effort to limit religion, whereas its authors understood the metaphor as a way of liberating religion. Perhaps the people of Stratton, Ohio, do not want to hear the message of the Jehovah's Witnesses. Perhaps I do not want to hear it, either. But we cannot wall them out. We must either listen to what they have to tell us or say a quiet "No, thank you," and close the door. If we are to honor the wall of separation, however, the decision to close the door must be made by individuals, not by the collective coercion of law. This mature choice is a small price for the rest of us to pay in order to preserve the liberty of the faithful—the only subject of the religion clause of the First Amendment.