1997

The Separation of Church and State: An American-Catholic Perspective

Daniel J. Morrissey

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol47/iss1/3

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
ARTICLES

THE SEPARATION OF CHURCH AND STATE: AN AMERICAN-CATHOLIC PERSPECTIVE

Daniel J. Morrissey*

I believe in an America where the separation of church and state is absolute.

John F. Kennedy

Those who say that religion has nothing to do with politics do not know what religion means.

Mohandas K. Gandhi

I. INTRODUCTION: GROUNDING A CONSTITUTIONAL JURISPRUDENCE ABOUT RELIGION

Much is said today of the need for a theory about religion and government that is true to the unique vision of our Constitution. Many find

* Dean and Professor of Law, St. Thomas University School of Law, Miami, Florida. A.B., 1971, Georgetown University, J.D., 1974, Georgetown University. The author would like to thank Monsignor Franklyn Casale, Father Andrew Anderson, Jay Silver, Siegfried Wiessner, Ray Rufo, Frank Sicius, Gilbert Gaynor, Jack McNeill, and student Nancy Campiglia for their helpful comments.

This article is dedicated to Mary Beth Minor Morrissey, a dear friend and loving wife.


2. MOHANDAS K. GANDHI, THE WORDS OF GANDHI 76 (Richard Attenborough ed., 1982). As a contemporary jurist has put it:

We cannot divide the central ideas of a religion into two columns: a set of propositions about what reality ultimately is and a series of doctrines about how people ought to live. The point is that the call to live in a certain way is felt to be the direct implication of the world's being a certain way. . . . [I]deas about, say, the relationship of human will to divine grace, represent, simultaneously and inseparably, visions of reality and imperatives of life.


3. As one distinguished commentator in this area has explained: “almost everyone, including most of the present membership of the Supreme Court, is dissatisfied with the current state of constitutional law regarding church and state.” Steven G. Gey, Why is
the Supreme Court's opinions in this area unclear and unconvincing. Others question whether such a project is even possible. Great divisions
Separation of Church and State

exist in our society on matters of politics and faith. It may be even harder to reach any consensus on the more sweeping issue of how those two spheres of human concern should interrelate.

But our jurisprudence on religion and government—what Jefferson aptly called "the separation of Church and State"—has not been created out of whole cloth during the relatively short history of our republic. It has evolved from an intellectual heritage stretching back several millennia and turns on pivotal insights from such historical figures as Gelasius, an early medieval pope, who may have been the first to formally place religious and political power in two separate realms. And like all constitutional jurisprudence in our common law tradition, it depends as well on the continuing efforts of human reason to discover some meaningful measures to advance the common good.

From such a perspective of history and reason this Article will explore the twin religion clauses of the First Amendment to offer a workable, contemporary theory on the separation of church and state. In particular, these comments will build on the historical experience of American Catholics and the thought of the American Jesuit social philosopher John Courtney Murray.

Murray was perhaps the most prominent American Catholic theologian of the twentieth century and he was instrumental in reviving an ap-

---


Jefferson's remarks echoed those of the Puritan dissident, Roger Williams, who wrote in 1644 of the "hedge or wall of separation between the garden of the church and the wilderness of the world." MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 54 (1996) (quoting ROGER WILLIAMS, MR. COTTON'S LETTER LATELY PRINTED, EXAMINED AND ANSWERED (1644), reprinted in PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 98 (1953)).

8. See infra notes 249-53 and accompanying text (discussing Pope Gelasius's theory separating religion and government).

9. See Mary C. Segers, Murray, American Pluralism, and the Abortion Controversy,
preciation of the common origins of liberalism and the natural law tradi-
tion.\textsuperscript{10} Most importantly, his insights led to a sea-change in world-wide Catholic thought, a full acknowledgement of the importance of religious liberty as it had been developed in the American political tradition.\textsuperscript{11}

II. THE AMERICAN CATHOLIC EXPERIENCE

The dominant moral thought in our country seems historically to have been drawn from two classic sources: the Enlightenment model of "reason-as-argument," and the Puritan heritage with its explicitly religious notions of "truth-as-disclosure."\textsuperscript{12} But in post-modern, pluralistic America, other traditions, with their philosophical and cultural legacies, can now offer fitting comment on issues like church/state relations.\textsuperscript{13} With worldwide Catholicism, thanks to Murray, having embraced the distinctly American theory separating church and state, it may now be time in reciprocal fashion for contemporary Catholic thought to make its own nuanced contributions to our country’s civic discourse on this important issue.

As America is becoming ever more diverse in its religious practices,\textsuperscript{14} the Catholic experience may even present the most appropriate frame-

\textsuperscript{10} See Robert F. Cuervo, John Courtney Murray and the Public Philosophy, in JOHN COURTNEY MURRAY, supra note 9, at 67.

\textsuperscript{11} See infra notes 281-84 and accompanying text (discussing the Second Vatican Council’s affirmation of religious freedom).

\textsuperscript{12} David Tracy, Catholic Classics in American Liberal Culture, in CATHOLICISM AND LIBERALISM 210-11 (R. Bruce Douglass & David Hollenbach eds., 1994).

\textsuperscript{13} See id. at 210.

\textsuperscript{14} There are now 1600 denominations in the United States, half of which have originated since 1960. See Jon D. Hull, The State of the Union: As Clinton Reports to the Congress, Citizens are Busy Remaking America, TIME, Jan. 30, 1995, at 53, 72 (citing J. GORDON MELTON, ENCYCLOPEDIA OF AMERICAN RELIGIONS). Of these denominations, forty-four percent are non-Christian. See id. This is a greater diversity than in any country in recorded history. See id. As a recent newspaper report described this phenomenon:

The United States, where belief in God remains vastly popular and religious freedom is guaranteed, is becoming what academic specialists call "a spiritual marketplace," a great, competitive field where the various Christian denominations, together with all the world's major faiths and countless minor ones, meet and jostle for followers and influence.


The phenomenon of religious pluralism is, of course, worldwide. An international Catholic leader, Cardinal Francis Arinze, president of the Pontifical Council for Interreligious Relations, recently observed:

[We] must accept the fact of religious plurality. In our world people are on the
work to address this issue. Religious freedom has always been a symbolic element in the American mystique, yet for much of our nation's history religious minorities were not afforded full acceptance. Even after the formal abolition of government-sponsored religions in the late eighteenth and early nineteenth centuries, a non-sectarian Protestantism was the defining culture of our country. Catholics were the first sizeable minority to confront this Protestant establishment and all the discrimination that it entailed.

In the first part of the nineteenth century, for instance, the right of Catholics to hold public office continued to be restricted in some states, and violence against Catholic churches and convents occurred with frequency. As late as the mid-nineteenth century, Catholic children in the public schools were lawfully beaten for refusing to read aloud from the King James Bible. Such was the generalized hostility there that Catho-

move. Many Muslim Turks live in Germany and Holland. Many Christian Filipinos live in Saudi Arabia and the emirates. Hindus work in England. Buddhists have monasteries in Switzerland. ... We can accept and respect the rights of others, especially the right to religious freedom, both for individuals and for groups.


15. See generally CHURCH AND STATE, supra note 1, at 32-89 (discussing the movement for religious freedom in America during the colonial and revolutionary period); ARIENS & DESTRO, supra note 7, at 45-73; NOONAN, supra note 7, at 93-126.


For a number of reasons, Protestantism did not find it easy to adjust to the new realities of America in the twentieth century. See WINTHROP HUDSON, AMERICAN PROTESTANTISM 130-34 (1961), reprinted in CHURCH AND STATE, supra note 1, at 148-50. For one thing, the power-centers of this country shifted from country towns to large cities where the new Catholic and Jewish immigrants gained the ascendancy. See id. Perhaps even more importantly, the dominance of Protestantism in the nineteenth century depended on periodic bursts of evangelical fervor which were difficult to renew on a mass scale as America moved into a more sophisticated age. See id.

One of America's finest contemporary novelists makes this point well in his recent work about an urban Presbyterian minister who loses his faith amid the many changes occurring in the early part of this century. See JOHN UPDIKE, IN THE BEAUTY OF THE LILIES (1996).


18. See id. at 201-02; see also CHARLES R. MORRIS, AMERICAN CATHOLIC 60-63 (1997).

lacks set up and paid for their own educational system that went from grade school to the graduate and professional level.\textsuperscript{20} And so integral were such schools to Catholic religious identity\textsuperscript{21} (or so threatening to the Protestant majority), that their right to exist had to be settled by a Supreme Court decision.\textsuperscript{22}

In addition, many nativist groups, from the ante-bellum Know-Nothings to the Ku Klux Klan and the American Protective Association of the late nineteenth and early twentieth centuries, fostered overt anti-Catholicism.\textsuperscript{23} Examples of such prejudice were perhaps more subtle but no less pervasive in other aspects of American society. For example, in this century, the qualifications of two major party nominees for president were openly challenged because of their Catholic faith.\textsuperscript{24} The election of

\textsuperscript{20} See DOLAN, supra note 17, at 262-93. Education was not the only area where American Catholics chose to create their own distinctive community. A recent history contains this description of American Catholicism in the first half of the twentieth century: It was a Church that insisted on its own uniqueness and rightness and on the necessity of religion's being utterly pervasive in daily public and private life . . . [T]he Catholic Church attempted nothing less than creating a completely enveloping state-within-a-state for its own Catholic community. The goal was to make it possible for an American Catholic to carry out almost every activity of life—education, health care, marriage and social life, union membership, retirement and old age care—within a distinctly Catholic environment.

\textsuperscript{21} As Justice Robert Jackson saw it in his dissent in \textit{Everson v. Board of Education}:

\begin{quote}
Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. . . . I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.
\end{quote}

\texttt{330 U.S. 1, 23-24 (1947) (Jackson, J., dissenting).}

\textsuperscript{22} See PIERCE \textit{v. Society of Sisters}, 268 U.S. 510, 534-35 (1925) (holding that an Oregon statute that required children to attend public primary schools was an unconstitutional infringement upon the rights of parents to determine how to raise and educate their children).

\textsuperscript{23} See DOLAN, supra note 17, at 202-03.

\textsuperscript{24} In 1928, Al Smith, a Catholic, was the Democratic nominee for president. The race generated much anti-Catholic hostility. See \textit{id.} at 351. Smith lost the election to Herbert Hoover. For Smith’s reply to questions about his patriotism, see ALFRED E. SMITH, \textit{Governor Smith replies}, ATLANTIC MONTHLY, May 1927, at 721-28, reprinted in \textit{CHURCH AND STATE}, supra note 1, at 182-84.

In the fall of 1960, John Courtney Murray remarked that candidate John Kennedy “was facing an anti-Catholicism as bitter as that encountered by Smith a generation before.”
John F. Kennedy in 1960 as the country's first non-Protestant president was widely heralded as signaling an end to the most virulent anti-Catholic bias.25

Despite such animosity, Catholics thrived here, in a land where they were allowed to worship without governmental interference,26 and political leaders were correspondingly prohibited from meddling in their ecclesiastical affairs.27 During the same time, this beneficial freedom was often denied to Catholics in other countries even ironically where they constituted historic majorities.28 Such actions by anticlerical or totalitarian regimes led American Catholics to appreciate their religious liberty as one of the chief benefits of limited government.

And the economic prosperity that American Catholics have generally enjoyed contributed to this freedom.29 As Murray pointed out, the faith of their European ancestors depended on the state for financial support30 but widespread material abundance, particularly during the post-war period, made it possible for American Catholics to sustain their many educational and charitable institutions through voluntary contributions.31 Yet during the nineteenth and early twentieth centuries, when Catholics in America were enjoying religious freedom, statements from their international leaders often appeared hostile to that basic human right and to

Paul J. Weithman, John Courtney Murray—Do His Ideas Still Matter?, AMERICA, Oct. 29, 1994, at 17; see also infra note 286 and accompanying text (discussing Protestant leaders' reaction to Kennedy's candidacy for president).

After Kennedy's victory, political observers believed his religion may have helped his candidacy as much as it hurt it. See DOLAN, supra note 17, at 421. The rise of Catholic political power may have had as much to do with the concentration of Catholics in large cities, the "power centers" of mid-twentieth century America, as with the increasingly larger numbers of Catholics in the population. See HUDSON, supra note 16, at 148.


26. See generally DOLAN, supra note 17, at 349-83 (discussing how practice of the Catholic religion flourished in early to mid-twentieth century America).

27. See JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 71 (1960) (recounting the papal nuncio's consultation with Benjamin Franklin in Paris in 1783). The nuncio told Franklin that the Vatican would seek the new American government's approval of a bishop for its territory. He was surprised when Franklin told him Congress had no power over such matters.


29. Cf. DOLAN, supra note 17, at 427.

30. See MURRAY, supra note 27, at 181

31. See id. at 180-81; but see Joseph Claude Harris, Pennies for Heaven: Catholic Underachievers, COMMONWEAL, Apr. 9, 1993, at 8-9 (reporting that American Catholic social giving is currently lower than that by members of almost all of the Protestant denominations).
closely related ones such as the freedom of conscience. Such papal pro-
nouncements came from a communal tradition that had become rigid
and highly authoritarian. But insights by Murray and other progressives
in the church paved the way for a new understanding of how human
freedom was essential to true community. In response, Catholic doc-
trine underwent a significant shift when Church leaders, gathered world-
wide at the Second Vatican Council in 1965, declared that “the right to
religious freedom has its foundation in the very dignity of the human
person.”

Yet this Catholic turn for personal freedom did not find its roots in the
individualistic premises of liberal prophets like Locke and Mill but
remained grounded in the communal moral theory of Aristotle and

32. Pope Gregory XVI made the notorious comment in 1823 that the “right to free-
dom of conscience is an ‘insanity.’” David Hollenbach, A Communitarian Reconstruction
of Human Rights: Contributions from Catholic Tradition, in CATHOLICISM AND
LIBERALISM, supra note 12, at 127 (quoting Pope Gregory XVI); see also Steinfels, supra
note 28 (noting the Catholic Church’s rejection of the values of liberalist thought, such as
freedom of conscience and religion).

A number of American Catholic leaders in the nineteenth century, however, were
strong proponents of a unique identity for the Church in this country, which included a
respect for religious liberty and a commitment to the separation of church and state. See
DOLAN, supra note 17, at 305. Chief among them were Archbishop John England of
Charleston, Archbishop John Ireland of St. Paul, Issac Hecker, founder of the Paulist fa-
thers, and Orestes Brownson, a noted New England intellectual who converted to Catholi-
cism. See id. at 305-08; see also MORRIS, supra note 18, at 63. Archbishop Ireland wrote
at the turn of the century:

The partition of jurisdiction into the spiritual and the temporal is a principle of
Catholicism; no less is it a principle of Americanism. Catholicism and Ameri-
canism are in complete agreement. . . . [The Establishment and Free Exercise
Clauses of the First Amendment were] a great forward leap on the part of the
new nation towards personal liberty and the consecration of the rights of con-
science.

Millar eds., 1924), reprinted in CHURCH AND STATE, supra note 1, at 142-43.

33. See KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY 1092-95
(1953); see also Joseph A. Komonchatk, Vatican II and the Encounter Between Catholicism
and Liberalism, in CATHOLICISM AND LIBERALISM, supra note 12, at 76-78.

34. See infra notes 276-83 and accompanying text.

35. Declaration on Religious Freedom, reprinted in THE DOCUMENTS OF VATICAN II

36. See generally JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Mac-

37. See generally JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett

38. See ARISTOTLE, POLITICS (T.A. Sinclair & T.J. Saunders trans., Penguin Classics
Aquinas. Accordingly, this new Catholic liberalism differed in its ultimate purpose from the classical school of that name and its modern progeny such as the philosophy of John Rawls. Its raison d'être was not so that each individual could be left free to find his or her own ends alone in some splendid isolation, but rather to enable all to develop their unique selves so that they could share them with others.

This emphasis on the intersubjective and communicative aspects of human fulfillment resonates strongly with the contemporary school of social thought that goes by such names as communitarianism or civic republicanism. It is also in line with the insights about the human personality of such post-modern thinkers as Habermas and Gadamer who

---

39. See THOMAS AQUINAS, TREATISE ON LAW (SUMMA THEOLOGICA, QUESTIONS 90-97) 5-7 (1963).
40. See Hollenbach, supra note 32, at 137.
41. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).
42. George Kateb may be the best contemporary exponent of this outlook. As he succinctly stated in a work that traced the origins of individualism from the seventeenth century English Puritans to modern times: “One's end is found alone.” GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE 266 (1992). For a jurist of high academic credentials who finds Kateb's views appealing, see RICHARD A. POSNER, OVERCOMING LAW 27-28 (1995).
43. See Hollenbach, supra note 32, at 138-39 (quoting the Second Vatican Council's document Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)). As a renowned contemporary jurist stated:

...Personal love and transformative work enable people to escape selfishness and isolation without denying the weight of subjectivity. In love, they find a connection to another person that simultaneously confirms them in their sense of self-possession.

UNGER, supra note 2, at 34.
44. See ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 216-21 (2d ed. 1984). See generally MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Harold Berman, Individualistic and Communitarian Theories of Justice: An Historical Approach, 21 U.C. DAVIS L. REV. 549 (1988). The essential human need for community has been aptly described in this fashion:

...Every developed vision of redeemed human society—the visionary imagination of human association—contains, in one form or another, at least two elements. Call one of them community and the other objectivity. By community in this setting I mean human association viewed as a set of relations desired for their own sake as well as for the independently defined wants that these relations may satisfy. One of the chief reasons for valuing association for its own sake is its occasional ability to provide people with a zone of heightened mutual vulnerability in which they can free themselves, partly, from the experience of a flat and insoluble conflict between self-assertion and attachment to other people.

UNGER, supra note 2, at 43-44.
emphasize, for instance, that we all come to one another as "conversation partners." 46

Because of this communal tradition, Catholic thought continues to be wary of a type of liberal individualism that would not give primacy to the loving loyalties felt toward those with whom we are connected by kinship or other human association. And it continues to stress the obligations which compassion for the less fortunate press upon us. 47

Murray also remained true to a strong ethical component in the Catholic intellectual tradition—the natural law school of morality. 48 He moved it, however, from a static objectivism to a much more supple form of rationalism—one that was historically conscious, open to searching inquiry, and sensitive to the importance of continuing dialogue with those from other cultures and traditions. 49 Murray saw this natural law approach as a dynamic, constructive outlook that would allow for what he called a "future of rational progress" 50 in human affairs and yet at the same time would ultimately have its origins and sanctions in a higher order.

Because of this ethical component, Catholic thought is skeptical of anti-humanistic practices, even if they are justified by religious beliefs. The notion of the law's primary role as promoting justice 51 and the com-

46. See Tracy, supra note 12, at 207; see also JOSEPH DUNNE, BACK TO THE ROUGH GROUND: 'PHRONESIS' AND 'TECHNE' IN MODERN PHILOSOPHY AND IN ARISTOTLE (1993) (exploring the connection between classical Aristotelian theory and the ideas of Gadamer and Habermas).

47. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: A PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (3d draft 1986). As one recent historian has put it:

The New Deal, pro-union, pro-underdog American Catholic tradition dies hard and is buttressed by a long line of papal encyclicals and other official statements stressing human rights, decent wages, equal education, and worker living standards.

MORRIS, supra note 18, at 305.

48. The natural law tradition holds that law must be grounded in justice, a vision of good, which humans can comprehend through the use of reason. See MARCUS TULLIUS CICERO, DE RE PUBLICA DE LEGIBUS 211 (Clinton Walker Keyes trans., 1928); AQUINAS, supra note 39, at 14-16.

In the modern era, until recently, natural law theory has been principally the province of Catholic thinkers. Among contemporary authors, however, natural law theory is experiencing a revival. See generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987); Daniel J. Morrissey, MORAL TRUTH AND THE LAW: A NEW LOOK AT AN OLD LINK, 47 SMU L. REV. 61 (1993) (discussing other contemporary philosophers whose work is in this tradition).

49. See MURRAY, supra note 27, at 331.

50. Id. at 336.

51. See supra note 48.
mon good is therefore deeply rooted in Catholic philosophy in a way that makes legitimate secular and public concerns controlling even over sincerely held religious practices that thwart those ends.

And yet Catholic thought also reacts against those who would banish all talk of morality or religiously inspired values from our public discourse. The need for an openness to such ideas may be especially acute today in an era where a rapacious materialism may be filling a spiritual vacuum in society and eroding long-held ethical standards.

There is a question, however, whether such a distinct social and moral outlook strikes a responsive chord with most American Catholics today. With their successful adaptation and acceptance into the mainstream of American society, the actions and attitudes of Catholics may now differ little from those of their Protestant neighbors.

The effects of widespread prosperity among a large segment of American Catholics are unclear as well. This affluence may have tempered some of the excessively other-worldly aspects of the faith inherited from Europe, and it may have correspondingly created a beneficent new commitment among American Catholics to foster good in the here and now. On the other hand, it may be that a pervasive interest in material

52. See supra notes 38-39 and accompanying text.
53. See Robert J. Araujo, Contemporary Interpretation of the Religion Clauses: The Church and Caesar Engaged in Conversation, 10 J.L. & RELIGION 493, 493 (1993) (advocating the constitutionality of allowing religious considerations to enter into the public political and social discourse); Chopko, supra note 3, at 1181-82 (arguing that society would benefit from the participation of religious institutions in legal and public policy dialogue); Tracy, supra note 12, at 211 (hoping that the American Catholic social tradition may contribute to the “public realm”).
55. See Andrew Greeley, Polarized Catholics? Don’t Believe Your Mail!, AMERICA, Feb. 22, 1997, at 11 (discussing polls which show American Catholics becoming progressively more alienated from their leadership during the past two decades, particularly on issues concerning sexual ethics and the role of women).
56. See DOLAN, supra note 17, at 233-40 (discussing how the devotions and rituals of the nineteenth and early twentieth century Catholic immigrants brought their world into a “sacred cosmos”). The same author also describes how the next generation of better-educated Catholics became involved in the social concerns of the 1960s and 1970s. See id. at 442-53.

Discussing the views on the afterlife of Reverend Richard McBrien, a leading contemporary Catholic theologian, a recent article states: “What some describe as today’s apathy or scanting of heaven, he calls health. It allows Catholics ‘to focus on our life in this world and our responsibility to one another now, and let God take care of the rest.”’

success has displaced concern for the faith itself and its teachings, including perhaps the mandate long felt by most American Catholics to show concern for the needy. Generalizations are difficult here but over centuries of troubles and missteps the faith has demonstrated substantial staying power and a unique consciousness undoubtedly remains with the overwhelming majority of American Catholics. “Once a Catholic, always a Catholic”

57. See generally Michael Schwartz, The Restorationist Perspective: Catholic Challenge to Modern Secular America, in American and Catholic: The New Debate 71 (Joe Holland & Anne Barsanti eds., 1988). A recent controversy at Notre Dame University has again brought to light this criticism of contemporary American Catholicism. A priest in the Theology Department, Father Michael Baxter, was denied tenure allegedly for his views that Catholicism has been robbed of its inherent power by being assimilated into the dominant American culture. See Pamela Schaeffer, Notre Dame Dispute May Signal a Shift: Countercultural Catholic Voice Stirs a Storm, Nat’l Cath. Rep., Jan. 31, 1997, at 3. Baxter is also critical of John Courtney Murray’s position that Catholicism and the American Constitution are compatible because in his view the ultimate beliefs of Catholics should set them apart from secular political institutions. See id. As Father Baxter himself has written in language reminiscent of St. Augustine:

However, if “politics” is redescribed in traditional theological terms—as the art of achieving the common good through participation in the divine life of God—then substantive religious convictions are central to legitimate political authority, and interest group “politics” is not truly “politics” at all, but a cacophonous conflict of wills.


Father Baxter is allied with the Catholic Worker Movement founded in the 1930s by a charismatic, left-wing journalist Dorothy Day. See Schaeffer, supra, at 3. As one author has described their program:

The Catholic Worker put no hope in the modern state; it put faith in the community of the sacred; ... the ideal of Christian perfection far surpassed the minimalism of the natural-law tradition; ... [u]nlike Catholic liberals, the Catholic Worker recoiled from politics and argued for a spiritual solution to society’s problems.

Dolan, supra note 17, at 411.

58. See Harris, supra note 31, at 9 (indicating that the amount of charitable contributions by Catholics is lower than the average for all American households).

59. The ambivalent state of contemporary American Catholicism is perhaps best summed up by this excerpt from a statement issued by the National Pastoral Life Center, Called to Be Catholic: Church in a Time of Peril:

It is widely admitted that the Catholic Church in the United States has entered a time of peril. Many of its leaders, both clerical and lay, feel under siege and increasingly polarized. Many of its faithful, particularly its young people, feel disenfranchised, confused about their beliefs, and increasingly adrift. Many of its institutions feel uncertain of their identity and increasingly fearful about their future.

Those are hard words to pronounce to a church that, despite many obstacles, continues to grow in numbers, continues to welcome and assist the poor and the stranger, and continues to foster extraordinary examples of Christian faith and witness to the Gospel. The landscape of American Catholicism is dotted with vi-
is an enduring adage in popular theology that continues to bear out that insight. Catholics moreover are a critical mass of the country's general population (twenty-five percent) and more so and of its voting electorate (thirty percent). And if membership on the Supreme Court is any indication of the influence of a religious group, Catholic leverage is at an all time high with three of the nine justices professing that faith.

Reconciling religious freedom with the important secular and public goals of our commonweal is a crucial part of our continuing constitutional agenda. Such felt needs, as Holmes astutely observed, give life to the law. And by force of both the sizeable numbers of its adherents and, more importantly, the cogency of its social thought, the Catholic tradition may now hold the best chance of producing such a workable theory.

This Article will first summarize the Supreme Court's existing jurisprudence in this area along with the significant critical comment on those


60. Andrew M. Greeley, Why do Catholics Stay in the Church?, U.S. CATH., Mar. 1995, at 31 (indicating that Catholics are not leaving the church in any greater proportion than they have for the last 40 years). The article reported that approximately 85% of those born Catholic maintain some connection with the church for their entire lives. See id. Furthermore, the article found that the sacraments of the church and the maternal love of God embodied in the image of the Virgin Mary provided powerful ties which kept even skeptical Catholics linked to the Church. See id. at 33-34. As Father Greeley stated:

The sometimes inaccurate dictum "once a Catholic, always a Catholic" is based on the fact that the religious images of Catholicism are acquired early in life and are tenacious. You may break with the institution, you may reject the propositions, but you cannot escape the images.

Id. at 33.

61. See Andrew M. Greeley, The Catholics in the World and in America, in WORLD RELIGIONS IN AMERICA: AN INTRODUCTION 94 (Jacob Neusner ed., 1994). This percentage should continue to grow because approximately "a third of America's eighteen- to twenty-nine-year-olds call themselves Catholic." MORRIS, supra note 18, at 301.


63. See Richard Carelli, Court's Religious Makeup May Play Role in 2 Cases, AUSTIN-AMERICAN STATESMAN, Jan. 25, 1997, at A14. In 1996, Justice Clarence Thomas left the charismatic Episcopal church, announcing that he was again, after a 25-year absence, an active Roman Catholic. See id. Justices Scalia and Kennedy are also Catholics. See id.

decisions. It will then bring history and philosophy from the Catholic tradition to bear on the subject drawing especially from the thought of Father Murray. Murray, however, did his influential work in the two decades immediately following the Second World War. It was a time when American Catholics had come of age. And Murray's project was in large part given over to demonstrating the compatibility between Catholic principles and the American experience as embodied specifically in the type of pre-Vietnam liberalism to which he subscribed.

Over thirty years have passed bringing great changes. Many see American society as having become progressively less religious during that time, at least in its dominant themes. Certain aspects of Murray's work, which emphasize the need for American politics to be specifically conscious of its religious heritage may no longer be fitting, if they ever were. And yet his countervailing insights from the Catholic tradition about the right and appropriateness of the government to exist independent from any formal religious connection offer continuing wisdom to people of many faiths. It may be that we are presently at a moment where the insights of a creed whose adherents numbered only a tiny fraction of the American population at the time of our nation's beginning can offer a widely appealing outlook on that critical issue.

III. FOUNDATIONAL JURISPRUDENCE

Although it has been invoked from time to time by the Supreme Court, the metaphorical language of "a wall separating church and

---

65. See Segers, supra note 9, at 228. As a recent historian succinctly noted: "except for the newest waves of Hispanic immigrants, American Catholics have long since made it in America. As much as any other religious body, they are middle-class, suburban, educated, affluent." MORRIS, supra note 18, at 431.

66. See generally Richard John Neuhaus, Democracy, Desperately Dry, in JOHN COURTNEY MURRAY, supra note 9, at 13-18. A recent historian has described Murray's prominence with these comments:

One of the few Catholic priests ever to teach at Yale up to that time, [Murray] was a fixture on national commissions like the Rockefeller Commission on National Goals and on study groups like those organized by the Fund for the Republic, Robert Hutchins's liberal California think tank.

MORRIS, supra note 18, at 273.


68. See infra notes 290-95 and accompanying text.

69. See ARIENS & DESTRO, supra note 7, at 71-72 (citing JOHN TRACY ELLIS, CATHOLICS IN COLONIAL AMERICA 395-96 (1965)). In 1776, the U.S. population consisted of 2.5 million people, 20,000 of which were Roman Catholic. See id. By 1790, there were about 35,000 Roman Catholics in the United States. See id.
Separation of Church and State is not found in the Constitution but comes from a letter written by President Thomas Jefferson in 1802 to a Baptist Association in Connecticut. The relevant text in the First Amendment itself reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." These two clauses are designed, it is often said, to promote the single goal of religious freedom. Yet commentators and the Supreme Court itself have often pointed to a tension between the thrusts of the two provisions. Any governmental concession to religious expression can be seen as support and therefore establishment of religion. Conversely, in the eyes of a believer, legal restrictions on the practices of a particular faith or even governmental neutrality between religion and nonreligion might be seen as a hinderance to free religious expression. The Court has thus stated its goal as walking a "tight rope," preserving the auton-
omy and freedom of religious actors while refusing to condone any sponsorship of religion itself by political entities.

The only branch of government explicitly banned by the First Amendment from dealing with religious issues is the federal legislature. This has led one recent commentator, Professor Steven Smith, to argue that the framers had no intent to restrict the ability of state governments to act in those situations. The clauses were merely a statement that the federal government should lack jurisdiction in religious matters—a controversial area that members of the first Congress were happy to leave to the states as purely local concerns. It is therefore inaccurate, cautions Smith, to attribute any greater intent to the drafters of the Amendment other than that the federal government should keep its hands off the issue.

Smith's position appears to have some historical logic. Through the early part of the nineteenth century, various states continued to maintain established religions and to support them from general revenue. A number also had religious tests for public officeholders, a practice directly forbidden in the main part of the federal Constitution.

Some practices of our republic's early leaders also appear ambivalent about the proper nature of the relationship between religion and government. For example, James Madison, who had been a leader for religious liberty in his home state of Virginia, was also a principal proponent of the First Amendment as Speaker of the House in the First Congress. Yet at the same time as the Amendment passed, Congress approved payment for a congressional chaplain. Madison also endorsed

79. See infra notes 128-34 and accompanying text.
80. See infra notes 111-27, 135-83 and accompanying text.
81. See supra note 72 and accompanying text.
82. See SMITH, supra note 5, at 47.
83. See id. at 42.
84. See id. at 45-54.
85. See generally ARIENS & DESTRO, supra note 7, at 45-73 (discussing the historical practice of public support of religion in the various states before the revolution and in the early republic). Massachusetts was the last state to abolish the establishment and tax support of churches in 1833-34. See id. at 51, 73.
86. See generally id. at 100-01, 108.
87. See U.S. CONST. art. VI, cl. 3.
88. See infra note 107 and accompanying text.
Virginia legislation punishing Sabbath-breakers and later, as president, proclaimed national days of thanksgiving.

Through the nineteenth century, only one significant matter reached the Supreme Court in this area and it involved federal law. The Mormons claimed that their religiously inspired practice of polygamy, proscribed by national legislation, was entitled to constitutional protection. The Court quickly dismissed that assertion with a broad statement that Congress was free to prohibit any religiously inspired practice so long as it did not formally outlaw a belief.

In a series of cases in the 1940s, however, the Supreme Court used the Fourteenth Amendment's due process constraints to extend the First Amendment's restrictions on religious interference to all political entities. The first cases involved two practices by Jehovah's Witnesses which violated state law: soliciting contributions without a license and refusing to salute the flag at school. Although the opinions also had free speech groundings, the Court ruled that both situations involved activity protected by the defendants' rights to freely exercise their religion.

The flag salute case, *West Virginia State Board of Education v. Barnette*, is memorable for Justice Jackson's famous statement generalizing the American commitment to liberty: "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

91. See SMITH, supra note 5, at 38.
92. See Wallace, 472 U.S. at 103 (Rehnquist, J., dissenting).
94. See id. at 161-62.
95. See id. at 166.
96. See generally NOWAK & ROTUNDA, supra note 74, § 10.2, at 339-42 (explaining general theories of how certain provisions of the Bill of Rights are made applicable to the states by incorporation through the Fourteenth Amendment).
99. See Cantwell, 310 U.S. at 303; Barnette, 319 U.S. at 642.
100. 319 U.S. 624 (1943).
matters of opinion or force citizens to confess by word or act their faith therein."

However, these comments made by Justice Frankfurter in dissent may more accurately state how such freedom must be ordered by law:

Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience.

The most influential of those early decisions, however, was the 1947 case of *Everson v. Board of Education*. There Justice Black stated that the "establishment clause," as he called it, prohibits both the federal and state governments from not only setting up an official church, but also from passing any law or supplying any funding which aids any one religion or aids all religions indiscriminately. In other words, the Constitution demands that all entities of government (including public schools) must be completely impartial on matters of religion. This neutrality must not just be between religions, but also between religion and non-religion.

Justice Black supported his theory by a rather sweeping claim that the Establishment Clause had its underpinnings in the American colonists' revulsion against government assistance to any religion. For that proposition, he cited arguments made in 1785 by James Madison in his *Memorial and Remonstrance* against continued tax levies to support the Episcopal Church in Virginia.

Justice Black followed Madison's remarks with citations from the Jefferson authored Bill for Religious Liberty which the Virginia Assembly passed when it rejected the ecclesiastical assessment the following year. Black presented the religion clauses of the First Amendment as the natural outgrowth of those events and imputed Madison's and Jefferson's arguments to its framers.

101. *Id.* at 642.
102. *Id.* at 654 (Frankfurter, J., dissenting).
104. See *id.* at 15.
105. See *id.* at 15-16.
106. See *id.* at 10-11.
107. See *id.* at 11-12; see also *infra* notes 270-71 and accompanying text.
108. See *Everson*, 330 U.S. at 12.
The American people, as Black saw it, "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions. . . ." He summed up by invoking Jefferson again, citing his metaphor of a wall separating church and state as the ultimate statement of what was intended by the Constitution's prohibition against the establishment of religion.

Using this theory as its foundational jurisprudence, the Court then trod its way through a variety of religion issues in the post-war era. In the Everson case itself, Justice Black held for a divided Court that public funding to bus children to parochial schools did not constitute an unconstitutional establishment of religion. In the next year, however, the Court in Illinois ex rel. McCollum v. Board of Education relied heavily on his theory to strike down a practice where children were afforded "release time" to attend religious instruction in the public schools.

Several years later in Zorach v. Clauson, however, the Court distinguished the situation in McCollum from a constitutionally permissible one where children were released from secular classes for religious instruction outside the public school premises. Writing for the Court, Justice Douglas, who had voted with the majority to strike down the McCollum arrangement, now condoned a very similar practice noting "[w]e are a religious people whose institutions presuppose a Supreme Being."

In the early 1960s, the Court reinforced its "separationist" stance by striking down prayer and devotional Bible reading in the public schools. It reaffirmed the thrust of those decisions in the mid-1980s when it refused to sanction a religiously motivated moment of silence at the beginning of classes. And although the Court permitted a state to loan textbooks free-of-charge to students in religiously affiliated

109. Id. at 11.
110. See id. at 16.
111. See id. at 18.
113. See id. at 210.
115. See id. at 308-09.
116. Id. at 313.
It struck down a scheme of public financing to directly provide them in such schools, even if the books dealt only with secular subjects.\(^{121}\)

The key decision in that area was *Lemon v. Kurtzman*.\(^ {122}\) There the Court announced a three-part test that any government funding to religious institutions must pass if it is to be held constitutional.\(^ {123}\) The state aid must have a secular purpose, its principal effect must be one that neither advances nor inhibits religion, and it must not foster ""an excessive government entanglement with religion.""\(^ {124}\)

As dissident justices have pointed out, that standard seemed to effectively foreclose all public funding because any governmental monitoring necessary to safeguard against a misuse of such financing could be deemed ""excessive entanglement.""\(^ {125}\) Later, in 1985, the Court invoked just that logic to strike down federal grants to parochial schools for non-religious, remedial programs,\(^ {126}\) a practice that one justice conceded had ""done so much good and little, if any, detectable harm.""\(^ {127}\)

At about the same time as it was staking out such a strong ""separationist"" position on establishment issues, the Court nonetheless issued an opinion that many see as the high-water mark in its deference to the practices of religious minorities. In *Wisconsin v. Yoder*,\(^ {128}\) Amish parents were prosecuted for violating a state law that required that they send their children to school until age sixteen.\(^ {129}\) The parents' action was motivated by a sincere theological belief that to allow their children to at-

---

122. 403 U.S. 602 (1971).
123. See id. at 612-13.
124. Id. (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
125. See id. at 668 (White, J., concurring and dissenting). Justice White wrote of the ""insoluble paradox"" of policing a policy that forbade the teaching of religion in the classroom, thus, becoming impermissibly ""entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence."" Id.

More recently, Justice Scalia compared the *Lemon* test to a monster that is disliked by a majority of the justices, but survives because the Court as a whole finds it selectively useful. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring).

127. *Aguilar*, 473 U.S. at 415 (Powell, J., concurring) (quoting Felton v. United States Dep't. of Educ., 739 F.2d 48, 72 (2d Cir. 1984)).
129. See id. at 207-08.
tend school beyond eighth grade would expose them to worldly influences that contravened the tenets of their religion.\textsuperscript{130}

Before resolving the issue, the Court first stated its admiration for the Amish’s centuries-old faith and their peaceful, productive way of life.\textsuperscript{131} It then held for the parents, deeming their religious freedom a “fundamental right” that could only be overridden by a “compelling state interest.”\textsuperscript{132} In this case, even the state’s valid concern for universal public education did not rise to that level.\textsuperscript{133} Only once earlier, in a matter dealing with observation of the Sabbath, had the Court required that the state satisfy such a rigorous test before it could compel legal compliance from a religious objector.\textsuperscript{134}

IV. CRITICISM AND REVISION

As time passed and Court personnel changed, new perspectives emerged that would challenge both Everson’s strict “separationist” approach to the establishment clause and Yoder’s understanding of the free exercise guarantee as a fundamental right. In a 1981 decision, the Court held that a state university could not refuse a student religious group access to its facilities despite the objection that such use would constitute governmental promotion of worship.\textsuperscript{135} And in 1983, the Court upheld legislative prayer by a state paid chaplain.\textsuperscript{136} Side-stepping the Everson\textsuperscript{137} and Lemon\textsuperscript{138} standards, the Court found ample warrant for the practice in long-established historical actions, including the appointment of

\begin{flushleft}
\textsuperscript{130} See id. at 209.
\textsuperscript{131} See id. at 222-24.
\textsuperscript{132} Id. at 214.
\textsuperscript{133} See id. at 234-36.
\textsuperscript{135} See Widmar v. Vincent, 454 U.S. 263, 277 (1981). Following that decision, Congress passed the Equal Access Act, which mandates that high schools give religious groups the same use of its facilities as it affords other non-curricular activities. See 20 U.S.C. §§ 4071-74 (1994). In Board of Education v. Mergens, the Supreme Court upheld the Act’s constitutionality in the face of a challenge that it violated the Establishment Clause. See 496 U.S. 226, 253 (1990).

Shortly thereafter, the Court again visited this issue, holding that a public school violated the Free Speech Clause when it denied the use of its facilities to a group that wanted to discuss “family values” in a religious context. See Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 388, 394-95 (1993).
\textsuperscript{136} See Marsh v. Chambers, 463 U.S. 783, 792-95 (1983).
\textsuperscript{137} See supra notes 103-10 and accompanying text.
\textsuperscript{138} See supra notes 122-24 and accompanying text.
\end{flushleft}
chaplains by the first Congress in the very week that it also approved the First Amendment for submission to the states.\textsuperscript{139}

Two years later, however, Justice Rehnquist went further and directly challenged \textit{Everson}'s holding that the Establishment Clause required strict governmental neutrality in matters of religion.\textsuperscript{140} Examining at length various draft proposals of the First Amendment's religion clauses, he found that they were designed merely to forestall the establishment of a national religion and any governmental preference among various sects.\textsuperscript{141} Therefore, unlike the Virginia documents cited in \textit{Everson}, the Congressional proposals were not, according to Justice Rehnquist, intended to require complete governmental neutrality between religion and nonreligion.\textsuperscript{142} To further support his "non-preferentialist"\textsuperscript{143} position, Justice Rehnquist also pointed to various actions by early Congresses and presidents that favored religion in a general way, such as encouraging it in the territories and declaring national days of prayer.\textsuperscript{144}

In 1983, the same year that it upheld legislative prayer, the Court also ruled that a state could allow parents a tax deduction for private school tuition even if that money went to a religiously affiliated institution.\textsuperscript{145}

\begin{footnotes}
\item 139. \textit{See Marsh}, 463 U.S. at 788; \textit{see also supra} note 90 and accompanying text.
\item 140. Justice Rehnquist made these remarks in a dissenting opinion in \textit{Wallace v. Jaffree}, 472 U.S. 38, 91-114 (1985), where the Court struck down a state law providing for a religiously motivated moment of silence at the beginning of public school classes. \textit{See supra} note 119 and accompanying text.
\item 141. \textit{See Wallace}, 472 U.S. at 92-99 (Rehnquist, J., dissenting).
\item 142. \textit{See id.} at 98.
\item 143. \textit{See Religious Liberty, supra} note 16, at 335 (making the non-preferentialist characterization of the establishment prohibition).
\item 144. \textit{See Wallace}, 472 U.S. at 100-04 (Rehnquist, J., dissenting); \textit{see also supra} note 92 and accompanying text.
\item 145. \textit{See Mueller v. Allen}, 463 U.S. 388, 400 (1983). In 1973, the Court invalidated state programs that reimbursed parents whose children attended non-public schools for part of their tuition. \textit{See Sloan v. Lemon}, 413 U.S. 825, 835 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 794 (1973). The Court at that time was unconvinced that such assistance would not advance religion. The majority in \textit{Mueller} distinguished its case from the programs in these earlier cases because the tax deductions for education expenses in \textit{Mueller} were available to parents who sent their children to either public or private schools. \textit{See} 463 U.S. at 398-99. Four dissenters, however, found the distinction meaningless. \textit{See id.} at 404-08 (Marshall, J., dissenting).

Other recent decisions in this area that may be construed as supporting state aid to religious schools include \textit{Zobrest v. Catalina Foothills Sch. Dist.}, 509 U.S. 1, 13-14 (1993), permitting government payments to a sign-language interpreter for a deaf student attending a religiously affiliated school; \textit{Witters v. Washington Dep't. of Servs. for Blind}, 474 U.S. 481, 489-90 (1986), allowing a state to issue a vocational tuition grant to a blind person to finance his study for the ministry at a Christian college; and \textit{Committee for Pub. Educ. & Religious Liberty v. Regan}, 444 U.S. 646, 648 (1980), permitting reimbursement to religious and secular nonpublic schools for certain administrative expenses. \textit{See also infra}
\end{footnotes}
And the following year a sharply divided Court ruled that a crèche displayed by a city at Christmas did not violate the Establishment Clause as long as it was exhibited alongside other seasonal symbols such as Santa Claus and reindeer. The display could then be said primarily to serve the "secular purpose" of celebrating the winter holidays. Justice O'Connor concurred, stating that such public acknowledgement of religion did not violate the Establishment Clause so long as there was no endorsement of a belief.

In dissent, Justice Brennan rejected the Court's justification of the Nativity scene as the trivialization of a deeply religious event: "The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah." Five years later, governmental celebration of winter religious holidays again came before the Court in County of Allegheny v. ACLU. There, an even more fractionalized Court invalidated the display of a Nativity scene which stood alone at a courthouse. It upheld, however, the placement of a menorah in front of another government building where it was accompanied by a Christmas tree which created an "overall holiday setting."

Justice O'Connor again cited her "non-endorsement" test as the touchstone of constitutionality, and Justice Kennedy spoke of an even milder standard which would sustain such governmental action where there was no coercion involved. No justices made reference to Jefferson's metaphor of the separating wall.

The same issue came before the Court once more in the 1995 case, Capital Square Review & Advisory Board v. Pinette. There, in response to a menorah placed on a public square, the Ku Klux Klan sought per-
mission to display a privately owned cross in a public park.\footnote{156} Citing free speech grounds, the Court found the action constitutional.\footnote{157} Justice Stevens, however, in dissent resurrected the \textit{Everson} test stating: "the sequence of sectarian displays disclosed by the record in this case illustrates the importance of rebuilding the 'wall of separation betweenchurch and State' that Jefferson envisioned."\footnote{158}

Justice Rehnquist's rejection of such "separationist" views remained unconvincing to other justices as well. In the 1992 case, \textit{Lee v. Weisman},\footnote{159} the Court by a five to four vote invalidated a nonsectarian prayer offered by a rabbi at a public middle school graduation.\footnote{160} In a concurring opinion, Justice Souter again reviewed the process by which the religion clauses were drafted and found it significant that in the final version no article qualified the noun "religion."\footnote{161} The drafts which Justice Rehnquist had construed as forbidding only discriminatory support for a single religion, Justice Souter pointed out, were rejected by the framers.\footnote{162} They instead ultimately opted for language banning not "the establishment of a religion," but "the establishment of religion," plausibly meaning all religion.\footnote{163}

Justice Souter acknowledged that some activity by the nation's early leaders indicated they may not have all favored a strict separationist approach.\footnote{164} As he saw it, however, that did not rule out that a "respectable body of opinion" at the time of the Amendment's ratification wanted something stricter than a non-preferentialist approach.\footnote{165}

Two years later the Court also struck down a separate school district that was created so that handicapped children of Hasidic Jews could avail themselves of government-funded services without leaving their home village.\footnote{166} The Court found the arrangement to be an allocation of pol-
Separation of Church and State

However in *Rosenberger v. Rector*, decided in 1995, the Court veered back to a more accommodationist approach. There a state-sponsored university levied mandatory assessments on its students and allocated them to pay the debts of various student organizations. One such group, Wide Awake Productions, was denied funding for the publication of a magazine that, in the words of its sponsors, would "‘facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,’" and "‘provide a unifying focus for Christians of multicultural backgrounds.’"

In reality, however the publication's message was often stronger, actively proselytizing for evangelical Christianity. It routinely made editorial comments like this: "‘When you get to the final gate, the Lord will be handing out boarding passes. . . . If, in your lifetime, you did not request a seat on His Friendly Skies Flyer by trusting Him . . . [y]ou will be met by your chosen pilot and flown straight to Hell on an express jet . . . .’" A majority of the Court nevertheless held that the university's refusal to pay for the group's printing expenses constituted impermissible viewpoint discrimination and thus violated the Free Speech Clause.

Justice Souter, however, writing for four dissenting justices, found the practice to be direct public funding of core sectarian activities, thus striking at the heart of the non-establishment principle. Even though such support was distributed among many publications in an even-handed fashion it violated, Justice Souter said, the cardinal Madisonian principle forbidding direct government aid to religion.

Justice Thomas, however, in an opinion concurring with the majority, took sharp exception with Justice Souter's renewed reliance on Madison's *Remonstrance*. In passing, he commented, "[o]ur Establishment Clause jurisprudence is in hopeless disarray."

167. See id.
169. See *Rosenberger*, 515 U.S. at 824 (quoting petitioners' appellate brief).
170. Id. at 825-26.
171. Id. at 865-66 (Souter, J., dissenting).
172. See id. at 845-46.
173. See id. at 898-99 (Souter, J., dissenting).
174. See id. at 868-73.
175. Id. at 861. (Thomas, J., concurring).
In the most recent ruling on the relationship of government and religion, \textit{Agostini v. Felton,}\textsuperscript{176} the Court, in a five to four decision, overturned the twelve-year-old \textit{Aguilar} case.\textsuperscript{177} It will now allow public school teachers to provide remedial education in parochial schools. The Court based its about-face on cases decided after \textit{Aguilar} that it said had changed Establishment Clause jurisprudence, specifically the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect."\textsuperscript{178}

Based on those precedents, the Court said that it no longer presumed that the placement of public employees at a parochial school would inevitably result in state-sponsored religious indoctrination or constitute a symbolic link between government and religion.\textsuperscript{179} And it also said it had ceased to believe that all government aid to religious schools was invalid, since it had condoned the use of government grants at religious schools that were available on a non-sectarian basis.\textsuperscript{180}

The Court concluded by adding that it no longer worried that the excessive entanglement prong of the \textit{Lemon} test would be breached in this situation.\textsuperscript{181} The \textit{Aguilar} Court had thought the entanglement prong would be violated because of the pervasive monitoring that it believed necessary to ensure public employees would not engage in religious activity on private school grounds.\textsuperscript{182} The \textit{Agostini} Court, however, found such extensive supervision unwarranted since it now believed that the publicly paid teachers would act as instructed and not engage in religious indoctrination just because they were in a parochial school setting.\textsuperscript{183}

In recent years, the Court's "free exercise" theory has exhibited substantial change of a similar magnitude as the justices have backed away
from Yoder's sweeping precedent. In a series of cases in the 1980s, the Court refused to countenance religious exemptions to laws and government practices that prohibited racial discrimination and mandated military attire and a uniform prison diet. It also declined to give special protection to Native American burial grounds when their preservation conflicted with road building and timber harvesting by government agencies.

In a 1990 case, Employment Division v. Smith, the Court upheld the denial of unemployment benefits to individuals who were fired for the use of peyote at a Native American religious ceremony. Justice Scalia, writing for the Court, cited the strong national policy against the use of hallucinogenic drugs and virtually confined the "compelling state interest" test of Yoder to its facts as a case involving the "hybrid" interests of parental rights. The government's ability to enforce a neutral law of general applicability that proscribes socially harmful conduct cannot, Justice Scalia explained, "depend on measuring the effects of a governmental action on a religious objector's spiritual development.

In 1993, however, the Court itself clarified Smith to make it plain that a law could not selectively target the practices of a particular religion. In Church of the Lukumi Babalu Aye, Inc. v. Hialeah, the Court found that ordinances banning religiously motivated animal sacrifice were not neutral in purpose (since kosher slaughter was exempt), but were passed to outlaw the practices of a specific church. In the Court's opinion, Justice Kennedy, however, spoke of the Constitution's "religious tolerance." Those words troubled some commentators who feared that the Court might view religious rights as only an indulgence of government, not as a higher duty owed to God. And Justice Blackmun noted in his concurring opinion that had the ordinance been motivated by a desire to

189. See id. at 890
190. See id. at 882, 885.
191. Id. at 885.
193. See id. at 540.
194. Id. at 547.
195. See ARIENS & DESTRO, supra note 7, at 257-58.
prevent cruelty to animals, it might have overridden the religious rights claimed by the practitioners.\textsuperscript{196}

The Smith decision was widely criticized as failing to give due deference to the genuinely religious practices of an historically oppressed minority.\textsuperscript{197} It also caused alarm among many religious organizations who feared that certain practices might not be granted constitutional protection.\textsuperscript{198} Responding to such concern, in 1993, Congress, with virtual unanimity, passed what it called The Religious Freedom Restoration Act (RFRA).\textsuperscript{199} RFRA purported to overturn Smith\textsuperscript{200} and reinstate the more liberal Yoder standard.\textsuperscript{201} Under RFRA, any law burdening religious expression would be inoperative unless it was shown to serve a compelling state interest and be the least restrictive means of furthering it.\textsuperscript{202}

Decisions under RFRA, however, did not change Smith's essential thrust. For instance, in the face of religious challenges, courts upheld various prison regulations as necessary to protect a "compelling state interest."\textsuperscript{203} And in one of its most recent decisions, Boerne v. Flores,\textsuperscript{204} the Court struck down RFRA itself as an improper exercise of congressional power.\textsuperscript{205}

In Boerne, religious authorities invoked RFRA to challenge a local zoning ordinance that prohibited them from expanding a church because it had been designated an historic landmark.\textsuperscript{206} In reviewing the constitutional basis for RFRA, the Court conceded that Congress has power under the Fourteenth Amendment to legislatively enforce the Bill of

\begin{footnotes}
\footnotetext[196]{See Church of the Lukumi Babalu Aye, 508 U.S. at 580 (Blackmun, J., concurring in judgment).}
\footnotetext[197]{Fifty articles were written on the Court's ruling in Smith and most condemned its decision. See ARIENS & DESTRO, supra note 7, at 253. For the comments of two of the more prominent scholars that criticize Smith, see Douglas Laycock, The Remnants of Free Exercise, 1990 S. CT. REV. 1; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109 (1990).}
\footnotetext[198]{See ARIENS & DESTRO, supra note 7, at 254.}
\footnotetext[200]{See id. § 2000bb(a)(4).}
\footnotetext[201]{See id. § 2000bb(b)(1).}
\footnotetext[202]{See id. §§ 2000bb(b)(1), 2000bb-1.}
\footnotetext[203]{The courts upheld the prison regulations despite the Senate's rejection of an amendment that would have specifically exempted prison regulations from RFRA. See 139 CONG. REC. S14,468 (daily ed. Oct. 27, 1993); Daniel J. Solove, Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons, 106 YALE L.J. 459 (1996) (studying many prison cases brought under RFRA).}
\footnotetext[204]{117 S. Ct. 2157 (1997).}
\footnotetext[205]{See id. at 2172.}
\footnotetext[206]{See id. at 2160.}
\end{footnotes}
Rights. But what Congress does not have, said the Court, is the power to substantively change those provisions. And it found RFRA's attempted overruling of *Smith* to be just such an unconstitutional activity.

In addition to asserting its prerogative over Congress to declare what the Constitution means, the *Boerne* Court was also critical of the standards that Congress set for the states in RFRA:

Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law . . . . This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

V. IS A JURISPRUDENCE OF RELIGION POSSIBLE?

This diversity of judicial opinion on the appropriate relationship of religion and government reflects fundamental differences. Should the two interests be separated as much as possible or be accommodated in some way? As Justice Souter and others have perceptively pointed out, this was a hot question even among the Amendment's framers, and of course it continues to be so today.

Several distinguished commentators have therefore argued that any attempt to formulate a coherent theory delineating the proper domains of church and state is doomed to failure. Such boundaries, they say, inevitably end up privileging one of the interests, either the sacred or the

207. *See id.* at 2163.
208. *See id.* at 2168.
209. *See id.* at 2171-72.
210. *Id.* at 2171.
211. *See supra* notes 161-65 and accompanying text.
212. For a good summary of various opinions on the relevancy of "original intent," that is, what role, if any, historical interpretation should play in the Supreme Court's decisions on religion, see ARIENS & DESTRO, *supra* note 7, at 96-98.

A noted historian in a well-received recent book has made this apt description of the perils of ascribing any particular intent to the Constitution's framers:

I think that originalism is vulnerable to two powerful criticisms. First, it is always in some fundamental sense anti-democratic, in that it seeks to subordinate the judgment of present generations to the wisdom of their distant (political) ancestors. Second, the real problems of reconstructing coherent intentions and understandings from the evidence of history raise serious questions about the capacity of originalist forays to yield the definitive conclusions that the advocates of this theory claim to find.

213. *See supra* note 5 and accompanying text.
secular, at the expense of the other.214 This attitude would be skeptical of all purportedly principled positions and would see them as ultimately driven by the religious dispositions of their proponents. It also might expose the consequentialist logic used to defend those stances with the following analysis.

Those who find little validity or use for religion, particularly in its organized varieties, would most likely want to see it marginalized by a highly “separationist” approach to the Establishment Clause.215 That approach would privatize all religiously based values and activity, effectively banishing them from the public forum. Such an outlook would also seem consistent with a distinctly unfriendly attitude to any legal exemptions claimed under the Free Exercise Clause.216 An exception to that sentiment might exist, however, if those critical of religion were sympathetic to the practices of religious minorities217 or wanted them respected out of a general deference for conscientiously held beliefs.218

On the other hand, those who consider religion a force for good in human affairs would, it seems, be likely to favor a more accommodationist approach to the Establishment Clause.219 That approach would leave

214. See generally SMITH, supra note 5, at 99-117.
215. See Kaminer, supra note 6, at 24. As an example of this attitude, Richard Duncan claims an “eloquent declaration of atheism” by Professor Bruce Ackerman grounds his opinion that the government ought to make sure that children are assimilated into “a strictly secular educational culture.” Richard F. Duncan, Public Schools and the Inevitability of Religious Inequality, 1996 BYU L. REV. 569, 582-83.
216. See West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 654 (1943) (Frankfurter, J., dissenting) (expressing fear of a broad free exercise exemption which would subordinate the state to individual religious consciences); NOONAN, supra note 7, at 238-39 (discussing religious beliefs of Supreme Court Justices in the 1940s and noting that Frankfurter was Jewish but belonged to no congregation).
218. See David E. Steinberg, Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment, 75 B.U. L. REV. 241 (1995). For a piece that makes an attractive case for the close relationship between freedom of religious expression and the right to follow one’s conscience, see Rodney K. Smith, Converting the Religious Equality Amendment into a Statute with a Little “Conscience,” 1996 BYU L. REV. 645. Smith notes that the philosophy of the Protestant theologian Paul Tillich equates God with one’s central or ultimate concern. See id. at 660; see also United States v. Seeger, 380 U.S. 163, 173-76 (1965) (equating a statutory exemption to conscription based on a religious objection to all war with one based on similar beliefs that were the functional equivalent of a theistic faith).
219. One of the more candid statements of this preference for religion is: “[T]he point of the First Amendment is to promote the good of religion, and we should use whatever rule—neutrality or freedom—best serves that purpose.” John H. Garvey, All Things Being Equal... . . ., 1996 BYU L. REV. 587, 609.
Another forceful exponent of the good of religion in society is STEPHEN L. CARTER,
much room for religious expression and religiously motivated activity in public affairs. Correspondingly, they would also seem to support a broad reading of the Free Exercise Clause, allowing generous exemptions to laws which conflicted with creedal practices. Here again, however, a converse exception to that outlook might exist among those who favor religion generally, but would be reluctant to extend such freedoms to the practices of non-mainstream sects with which they feel little affinity.

There would thus, according to the skeptics, seem to be no method that can be truly neutral in this area and give full force to the claims of both religious and political authority. Are they two masters which cannot equally be served because one, either the sacred or the worldly, must have the final say thus limiting the other's authority? If so, then the ultimate question of which realm is supreme would appear to be controlled by nothing beyond the beliefs of the legal decision maker. Or is it possible to fashion a theory that gives due deference to the claims of both the secular and the sacred with each being equally compelling? Of course there may be conflicts between the two interests as presented in the demands of various regimes, but Catholic thought has long maintained that the claims of religion and politics are not hostile, but compli-

---

THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993). Professor Carter writes: "There is nothing wrong with the metaphor of a wall of separation [between church and state]. The trouble is that in order to make the Founders' vision compatible with the structure and needs of modern society, the wall has to have a few doors in it." Id. at 109.

220. This is the view that some commentators attribute to the framers of both the First and the Fourteenth Amendments. See generally Bradley, supra note 3, at 827; Destro, supra note 3; Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409 (1990). Chief Justice Rehnquist shares that opinion. See supra notes 140-44 and accompanying text.


222. Compare the friendly reception given to the practices of the Amish whose peaceful, productive way of life the Supreme Court admired, see supra text accompanying notes 128-32, to the Court's rejection of the Native Americans' long-standing use of peyote, see supra text accompanying notes 188-91.

223. See supra note 5 and accompanying text.

224. Of course, Legal Realists and The Critical Legal Studies Movement have been saying this for some time about all judicial rulings. For my discussion of their views and a defense of rational legal decision-making, see Morrissey, supra note 48; see also SMITH, supra note 5, at 119-27 (arguing that political compromise is the only way to resolve these issues, making pragmatism, not principle, the determining factor). Mark Tushnet similarly
As Murray wrote: "[T]he creation of a temporal order of justice and civic fraternity has been a humanistic aspiration connatural to the Christian heart."

If such is the case, the task is then to fashion such an appropriate theory of church-state relations and to present it for discussion to our pluralistic, possibly fragmented, society. As Murray pointed out, this is a problem of ontology and epistemology evoking profound issues concerning the structure of reality and our ability to know it and discuss it with others. And as a good, natural lawyer, Murray always held that those questions were accessible to human reason. He thus wrote: "This underlying social structure is a matter of theory, that is, it is to be conceived in terms of a theorem with regard to the relation between the sacredness inherent in man and the manifold secularities amid which human life is lived."

So any theory on the separation of church and state would have to find its warrant in the persuasiveness of its arguments, that is, whether others of open mind find them convincing and presenting a truly workable framework for human aspirations. It could also find support in history and tradition, including perhaps even in the complex motives of those who drafted and approved the original text of the religion clauses.

Although such general principles, as Holmes astutely observed, "do not decide concrete cases," they may at least present a background for continued civic discourse on this crucial topic. The American-Catholic tradition offers a dialogue with an intellectual legacy that stretches from the scriptures and classical antiquity through the medieval, modern, and advocates a regime of mutual forbearance where religious actors would not press to have their practices adopted into policy, and their opponents would correspondingly tolerate such activity if conducted only in private. See Tushnet, supra note 3, at 736-38. But with such a resolution the "separationist" interests would seem to be privileged without any principled justification.

For instance, consider these remarks by Pope Pius XII in 1951:

The profession of Christian truth and fidelity to the fundamental tenets of the Catholic faith are indissolubly bound up with the sincere and constant assertion of human nature's most authentic and exalted values . . . . True religion and profound humaneness are not rivals. They are sisters. They have nothing to fear from one another, but everything to gain.

MURRAY, supra note 27, at 176.

Id. at 192.

Id. at 198-99.

Id. at 199.

See infra notes 298-304 and 350-61 and accompanying text.

post-modern world. It is in closing that “hermeneutic circle,”231 I believe, that such a perspective can best be found.

VI. A THREE THOUSAND YEAR HERITAGE

The union of government and religion was the norm in antiquity, often with the king or emperor being held up as a divine or priestly figure with his rule embodying transcendent truth.232 Two traditions laid claim to by Catholicism, however, offered a different arrangement. The Hebrew Scriptures present a God who is quite direct in His demand that people not give allegiance to the established order.233

Contemporary scripture scholarship has come to see what we know as the Hebrew conquest of Palestine as something akin to a peasant revolt.234 It seems the indigenous underclass joined with refugee slaves from Egypt to overthrow the Canaanite kings and the sacred hegemony of their gods.235 And when those rebels were successful, their political units continued to have an anti-establishment thrust. At first, under God’s guidance, the Israelites resisted kingship altogether,236 but ultimately at His direction they chose for their ruler David, an outlaw,237 who would become their most renowned leader. Religion was in control here, but it was anti-formalistic in spirit, stressing ethical behavior and works of justice and mercy.238

231. See infra note 350 and accompanying text.
232. Cf. MURRAY, supra note 27, at 202. As Murray put it: “Augustus was both Summus Imperator and Pontifex Maximus; the ius divinum was simply part of the ius civile.” Id.
233. Various Biblical commands, like the following order to the Israelites preparing to enter the land of Canaan, represent this uncompromising Divine mandate: “Take care not to make a covenant with the inhabitants of the land to which you are going, or it will become a snare among you. You shall tear down their altars, break their pillars, and cut down their sacred poles.” Exodus 34:12-13 (Catholic ed., Catholic Bible Press 1993). For a fine treatment of this issue by a Catholic scholar who brings together the best recent studies of the Hebrew Scriptures, see J.P.M. WALSH, THE MIGHTY FROM THEIR THRONES (1987).
234. See WALSH, supra note 233, at 36-51; see also KAREN ARMSTRONG, A HISTORY OF GOD: THE 4000-YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM 19 (1993).
235. See WALSH, supra note 233, at 36-37.
236. See 1 Samuel 8:1-22; WALSH, supra note 233, at 67-93.
237. See 1 Samuel 27:1-12.
238. This tradition continued through the prophets and may be best summarized by this famous injunction: “With what shall I come before the LORD, and bow myself before God on high? . . . He has told you, O mortal, what is good; and what does the LORD require of you but to do justice, and to love kindness, and to walk humbly with your God?” Micah 6:6-8 (Catholic ed., Catholic Bible Press 1993).
In classical Greece, on the other hand, a rationalistic perspective developed that seemed to sidestep religion altogether, giving primacy to philosophy.239 Starting the century before Socrates, certain thinkers began to look to nature for ethical principles.240 And one of them, Heraclitus, held that humans are capable of apprehending such knowledge.241

Socrates himself built on that critical tradition, finding standards of political and moral order not in the prevalent polytheism of his day, but in a quasi-divine inner voice.242 Perhaps most typical of this attitude was his famous assertion in dialogue with Euthypro that something is not good because it pleases the gods, but it pleases the gods because it is good.243

Plato244 and Aristotle245 made their contributions to classical republicanism, but it was the Stoic philosophers, both in the Hellenistic world and then in Rome, who carried this rationalist tradition forward.246 Through their influence on the jurists, this rationalism became imbedded in Roman law, first as the *ius gentium*, a kind of ubiquitous commercial law, and then ultimately as the *ius naturale*, the natural law.247 As explained by Cicero, this was a set of moral and juridical standards, universal in scope, which were rooted in an ultimate rational principle, the Logos.248

With the rise of Christianity and the subsequent decline and fall of the Roman Empire in the West, an early medieval pope, Gelasius, was the first to espouse a theory separating religious and political authority into

239. See generally, IGNATIUS BRADY, A HISTORY OF ANCIENT PHILOSOPHY 28 (1959).
241. Even though Heraclitus was famous for his beliefs about the flux of the material universe ("one cannot step in the same river twice"), he also believed in the existence of a unifying principle to the cosmos which he called the *logos*. Id. at 33. Through reason, this principle was accessible to at least some humans. See id.; see also David T. Mason, Ani-madversions on John Courtney Murray's Political Ontology, in JOHN COURTNEY MURRAY, supra note 9, at 150.
242. Socrates called this inner-voice his "'daemon.'" SOLOMON & HIGGINS, supra note 240, at 47. It was paradoxically reminding him at all times of both his basic ignorance and that knowledge alone would save him. See id.
244. See generally The Republic, in 1 THE DIALOGUES OF PLATO, supra note 243, at 591-879.
245. See generally ARISTOTLE, supra note 38, at 507.
246. See Mason, supra note 241, at 150-51; see also WEINREB, supra note 48, at 35-42.
247. See WEINREB, supra note 48, at 44-46; Mason, supra note 241, at 151.
248. See generally CICERO, supra note 48.
two distinct spheres. In 494 C.E., he wrote the eastern Emperor Anastasia: "'Two [swords] there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power.'"\(^{249}\)

Yet in this "dyarchy," as Murray called it,\(^{250}\) later Church leaders argued that Gelasius had given religious authorities the upper hand.\(^{251}\) Following the teachings of St. Augustine, who stressed the inherent sinfulness of human institutions,\(^{252}\) later popes claimed that Gelasius must have afforded ecclesiastical officers the ultimate authority to determine the jurisdiction of each force. That was necessary, they said, to check the power of the state lest it infringe on the spiritual prerogatives of the Church.\(^{253}\)


\(^{250}\) Murray, supra note 27, at 205. Murray prefers the term dyarchy to "dualism." See id.

\(^{251}\) The crucial passage from Gelasius to the Emperor is "'although you take precedence over all mankind in dignity you piously bow the neck to those who who [sic] have charge of divine affairs.'" William R. Luckey, The Contribution of John Courtney Murray, S.J.: A Catholic Perspective, in John Courtney Murray, supra note 9, at 28-29.

\(^{252}\) See generally Saint Augustine, The City of God (Marcus Dods trans., 1950) (c. 354-430 C.E.). The best twentieth century American Augustinian voice was the famed Protestant social theorist, Reinhold Niebuhr, a contemporary of Murray. An apt summation of Niebuhr's views on the church-state issue is as follows:

I have argued that with respect to religious participation in politics, the Niebuhrian stance welcomes religion as a full participant, but calls on religious activists to express humility by presenting their arguments in terms others can understand. With respect to other church-state questions, the Niebuhrian stance is deeply concerned with the problem of secularization driven by an active secular government. Nevertheless, Niebuhrian insights suggest that government-sponsored religion is an inappropriate means to address the problem. Instead, government should, through various means, accommodate the independent religious activity of individuals and groups.

Thomas C. Berg, Church-State Relations and the Social Ethics of Reinhold Niebuhr, 73 N.C. L. Rev. 1567, 1637-38 (1995). Professor Berg ends his article with this quote from Niebuhr, indicative of his deep, Augustinian pessimism about the human condition: "'Nothing that is worth doing can be achieved in our lifetime; therefore we must be saved by hope.'" Id. at 1639 (quoting REINHOLD NIEBUHR, THE IRONY OF AMERICAN HISTORY 63 (1952)).

As a natural lawyer and disciple of Aquinas, Murray did not share such a negative attitude about human possibilities. See supra notes 225-26 and accompanying text. However, he and Niebuhr were often associated together and they both were the subject of cover stories in Time magazine. See Richard John Neuhaus, Democracy, Desperately Dry, in John Courtney Murray, supra note 9, at 5.

\(^{253}\) The classic medieval statement is Pope Boniface VIII's bull Unam Sanctam in 1302 which states:

[C]ertainly anyone who denies that the temporal sword is in the power of Peter has not paid heed to the words of the Lord when he said, "Put up thy sword into
Gelasius's dictum thus set the stage for frequent clashes between papal and civil powers during the Christian Middle Ages. But in the thirteenth century, the scholastic philosopher Thomas Aquinas made two pivotal moves that would free political authority from ecclesiastical control and lay the groundwork for religious liberty. As Murray pointed out, Aquinas seized on Europe's rediscovery of Aristotelian thought to present political authority and law as grounded solely in the natural order of human activities. Aquinas's deep faith saw these earthly matters as ultimately under God's providential ordering of all existence which he called the Eternal Law. Yet his Aristotelian ontology gave temporal power a mandate that was independent of the Church's authority. Through human reason alone, a ruler could draw on baseline moral principles to establish law for the common good.

Aquinas also led another significant turn away from ecclesiastical absolutism. Although he condoned the burning of heretics and apostates as just punishment for those who had broken faith with the community, he defended the imperatives of conscience, arguing that one is bound to follow a sincerely held belief, even if it is erroneous. It may be a bit much to see Aquinas as a progenitor of modern liberalism yet he was an important link in the transmission of Socratic-Aristotelian humanism to ensuing generations.

With the Reformation, the spiritual independence that Gelasius and his medieval successors had defended as the freedom of the Church became transformed into principles of religious and conscientious liberty.
Separation of Church and State

for the individual. Then with the antipathy to organized religion ushered in by the Enlightenment, European Catholicism was put further on the defensive. This culminated in what Murray called Jacobin secular absolutism—Robespierre enthroning the goddess of Reason in Notre Dame Cathedral.

The French Revolution's anticlericalism was perhaps the dominating spirit of continental politics through the nineteenth and early twentieth centuries. European Catholicism countered not only with blanket condemnations of liberal propositions such as Pius IX's notorious Syllabus of Errors but also with renewed assertions of its own absolutism such as the First Vatican Council's Declaration of Papal Infallibility.

But as Murray saw it, American Catholicism was spared this European baggage of outright governmental hostility through a happy coincidence of circumstances. Our revolution was considerably less ideologically radical than the French, and established churches in America were hardly seen as privileged handmaidens of a despised ancient regime. Our land, even from its early European settlement, had a healthy diversity of denominations. And when states such as Virginia moved to dis-

261. See Murray, supra note 27, at 201-06.
263. See Murray, supra note 27, at 208-15.
264. See Latourette, supra note 33, at 1093; see also Murray, supra note 27, at 68 (discussing the French government's legal regulation of the Church under the theory of the "principle of the primacy of the political").
265. See Murray, supra note 27, at 68; see also Joseph A. Komonchak, Vatican II and the Encounter Between Catholicism and Liberalism, in Catholicism and Liberalism, supra note 12, at 77-78.
266. See Latourette, supra note 33, at 1093-95.
267. See Murray, supra note 27, at 56-60.
268. Cf. id. at 56-57.
269. See id. at 58-59. The classic commentary on this religious diversity and its connection with the democratic tendencies of our early republic is Alexis de Tocqueville, Democracy in America (Richard D. Heffner ed., Penguin Books 1956) (1840). There, de Tocqueville, the aristocratic French visitor to America in the 1830s, wrote:
I have seen no country in which Christianity is clothed with fewer forms, figures, and observances than in the United States; or where it presents more distinct, simple, and general notions to the mind. Although the Christians of America are divided into a multitude of sects, they all look upon their religion in the same light. This applies to Roman Catholicism as well as to the other forms of belief.
establish a particular church, they did so to further, in Madison’s words, “the generous policy” of “offering an Asylum to the persecuted and oppressed of every Nation and Religion.” In the incipient democratic spirit of the new nation, Madison rejected establishment because it “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”

Most importantly, even Americans in our republic’s early years who professed no faith themselves tended for the most part to view religion with indifference, not animosity. As de Tocqueville astutely pointed out, the new Americans were usually too busy with economic pursuits to fight the Old World’s ideological battles over religion.

Murray noted that with such a provenance our Constitution’s religion clauses did not share the Jacobin tradition of imperious secularism, but were merely what he called “articles of peace” for a pluralistic society.

Id. at 154.

270. James Madison, To the Honorable the [sic] General Assembly of the Commonwealth of Virginia A Memorial and Remonstrance, reprinted in NOONAN, supra note 7, at 109-10; see supra note 107 and accompanying text.

271. Madison, supra note 270, at 110. In the legislature of the new state of Maryland, a colony founded by Catholics, a similar bill failed in 1785 which also would have supported all religious denominations through tax revenue. See DOLAN, supra note 17, at 109. Most of the Catholic delegates opposed it, fearing that it would be the beginning of the establishment of the Protestant Episcopal Church. See id.; infra notes 359-60 and accompanying text.

272. See MURRAY, supra note 27, at 58.

273. See DE TOCQUEVILLE, supra note 269, at 154-55 (describing the clergy’s lack of interference in the American people’s pursuit of prosperity). As Murray put it: “The merchants of New Jersey, New York, Virginia, and the more southern colonies were as emphatically on the side of religious freedom as on the side of commercial profits. Persecution and discrimination were as bad for business affairs as they were for the affairs of the soul.” MURRAY, supra note 27, at 59.

De Tocqueville also noted the general acceptance of Christianity but was quick to point out that religious influence had its limits. Reflecting on the separation of church and state in the new republic he wrote, “[r]eligious institutions have remained wholly distinct from political institutions, so that former laws have remained easily changed while former belief has remained unshaken.” DE TOCQUEVILLE, supra note 269, at 6. He also made this comment about the favorable climate that existed in the new American republic for the Catholic faith:

America is the most democratic country in the world, and it is at the same time (according to reports worthy of belief) the country in which the Roman Catholic religion makes most progress.... Many of the doctrines and practices of the Romish Church astonish them [American Protestants]; but they feel a secret admiration for its discipline, and its great unity attracts them.

Id. at 29.

274. See MURRAY, supra note 27, at 56-59. As Murray also noted, “[i]f history makes one thing clear it is that these clauses were the twin children of social necessity, the necessity of creating a social environment, protected by law, in which men of differing religious faiths might live together in peace.” Id. at 57.
And correspondingly, our laws would carry only the modest, but meaningful legitimacy of being grounded in the shared values of the community, not the dogmatic stamp of either ecclesiastical or secular absolutism.275

Thanks in part to thinkers like Murray, but most importantly to a remarkable man who became Pope John XXIII, the worldwide Catholic Church itself finally became willing to drop its claims to special status in legal and political matters.276 From the time of Constantine, of course, the Church had asserted such prerogatives.277 But Pope John opened the Second Vatican Council in 1962 with remarks that were highly critical of those who argued that the old arrangements were best.278 He called the traditionalists "prophets of doom" who denounced the modern world and spoke as if the Church's privileged connections of the past had been

275. See id. at 68-69, 74-75.

276. See generally Komonchak, supra note 265, at 76 (examining the effect of Vatican II on church-state relations). This privileged relationship was often referred to as the "altar-and-throne arrangements of the confessional state." Weigel, supra note 67, at 277; see also Peter Hebblethwaite, John XXIII, in MODERN CATHOLICISM: VATICAN II AND AFTER 27 (Adrian Hastings ed., 1991) (addressing the effects of Pope John XXIII's contribution to Vatican II).

277. See supra note 253 and accompanying text. Constantine converted to Christianity after his famous vision on October 28, 312 C.E. predicting victory over his rival Maxentius. See JOHN DOMINIC CROSSAN, JESUS: A REVOLUTIONARY BIOGRAPHY 201 (1994). He later summoned a council of the Christian bishops at Nicea to settle various theological disagreements that might imperil imperial unity. See id. The historian Eusebius offers this interesting description of the banquet that celebrated the conclusion of that meeting:

Detachments of the bodyguard and troops surrounded the entrance of the palace with drawn swords, and through the midst of them the men of God proceeded without fear into the innermost of the Imperial apartments, in which some were the Emperor's companions at table, while others reclined on couches arranged on either side.

Id.

Professor Crossan, a noted Catholic scripture scholar, writes forcefully that this close relationship with imperial power was a betrayal of the essential message of Jesus, which he describes as follows: "His [Jesus'] strategy, implicitly for himself and explicitly for his followers, was the combination of free healing and common eating, a religious and economic egalitarianism that negated alike and at once the hierarchical and patronal normalcies of Jewish religion and Roman power." Id. at 198 (emphasis omitted).

Another leading Catholic scripture scholar made a similar point in his recently published description of Jesus' life:

He [Jesus] encountered people of every kind, in word and deed, in a bold, prophetic, at times even spectacular ministry of confrontation as well as compassion; in doing so, he was willing to set aside accepted forms of socio-religious discrimination. He assured known sinners of God's forgiveness and mercy, and did not avoid table fellowship with them as well as many others.


278. See Komonchak, supra note 265, at 78.
to its advantage.\textsuperscript{779} They ignored, he said, the degree to which such status had been "purchased at the loss of the church's freedom" to pursue its true mission.\textsuperscript{780}

Following Pope John's lead, the Council went on to affirm two key principles that strongly resonated with the American experience. In its \textit{Pastoral Constitution on the Church in the Modern World}, the Council gave full force to the autonomy of political authority.\textsuperscript{281} And in a follow-up document, the \textit{Declaration on Religious Liberty}, of which Murray was a principal draftsman,\textsuperscript{282} the Council made this ringing endorsement of religious freedom:

\begin{quote}
[A person] . . . is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious. The reason is that the exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God.\textsuperscript{283}
\end{quote}

The Church, to paraphrase Pope John's aspirations, had made its long overdue rendezvous with the modern world.\textsuperscript{284}

\begin{footnotes}
\footnotetext[779]{Id.}
\footnotetext[780]{Id.; see also Morris, supra note 18, at 327-30.}
\footnotetext[281]{See \textit{Pastoral Const. on the Church in the Modern World}, reprinted in \textit{The Sixteen Documents of Vatican II and the Instruction on the Liturgy} 596 [hereinafter \textit{Sixteen Documents}]. The document made that point directly with this statement: "The Church and the political community in their own fields are autonomous and independent from each other." \textit{Id.; see also Komonchak, supra note 265, at 80-83 (analyzing the statements of the Council, which draw a distinction between the Church and politics).}
\footnotetext[282]{See Dolan, supra note 17, at 425. Murray's status as an expert at the Council is indicative of the rapid change that was occurring in Catholic thought. As late as 1963, he had not been allowed to speak at The Catholic University of America in Washington, D.C. See id. at 443.}
\footnotetext[283]{Vatican Council II, Declaration on Religious Freedom, reprinted in Sixteen Documents, supra note 281, at 400. The document also made these comments that are relevant to issues involving restraints on religious practice: "The right to religious freedom is exercised in human society: hence its exercise is subject to certain regulatory norms. In the use of all freedoms the moral principle of personal and social responsibility is to be observed." \textit{Id. at} 403.}
\footnotetext[284]{See Dolan, supra note 17, at 424. Pope John used the Italian word "aggiornamento" to describe the purpose of the Council. See id. Its purpose was "to bring the Church up to date." \textit{Id.} Several years earlier, Pope John had written, "we are not on earth as museum-keepers, but to cultivate a flourishing garden of life and to prepare a glorious future." Hebblethwaite, supra note 276, at 28.
\end{footnotes}
VII. PUTTING MURRAY IN PERSPECTIVE

Murray's principal work was done in the 1950s, a time when American Catholics still had to contend with the implication that they were somewhat less than fully patriotic Americans.285 For example, as late as 1960, a group of ministers headed by Norman Vincent Peale, one the nation's most respected Protestant leaders, issued a statement urging that "no Catholic be trusted with the Presidency."286 Understandably then, the thrust of Murray's work was polemic in nature.287 His major thesis was that Catholic social thought was fully compatible with the American experience.288 Interestingly, presidential candidate John Kennedy was not quite so sure that such would always be the case. Addressing a convention of Baptist ministers in Houston during the 1960 campaign, Kennedy promised to resign the presidency should a conflict arise between his faith and his duties under the Constitution.289

But much of Murray's writings were given over to demonstrating that one could be both a true Catholic and a loyal American. Not only did he present the separation of church and state as an idea that had originated to the 19th century. The council legitimized religious liberty, collegiality, ecumenism, liturgical reform, a concern for social justice and a greater role for the laity. This was an extraordinary achievement that cannot be rolled back. These reforms are deeply rooted at the parish level and are now part of our Catholic identity.


285. See generally PAUL BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER (1949) (warning that the Catholic hierarchy might take control of education and family relationships if Catholics ever constituted a democratic majority in America); JAMES M. O'NEILL, CATHOLICISM AND AMERICAN FREEDOM (1952) (presenting a Catholic author's vigorous counterattack).

In addition, several highly publicized controversies in the late 1940s and early 1950s also brought out hard feelings between some Catholic and Protestant leaders. See ARIENS & DESTRO, supra note 7, at 279-80. Eleanor Roosevelt and Cardinal Spellman of New York engaged in nasty exchanges on the propriety of federal aid to Catholic schools, and President Truman's decision to appoint a personal representative to the Vatican also engendered inter-religious acrimony. See id.

286. See Catholicism and the Campaign, COMMONWEAL, Sept. 23, 1960, at 507. Another prominent Protestant leader was more open-minded on the issue. For him, the acceptability of a Catholic president would depend on whether he would seek to impose his religious beliefs on others. See James A. Pike, A Roman Catholic in the White House?, in CHURCH AND STATE, supra note 1, 193.

287. See Weigel, supra note 67, at 277.

288. See MURRAY, supra note 27, at 45-78. One commentator notes that a reversal of that proposition would be a more accurate statement of Murray's intent: "Murray always understood that the key issue was whether America was compatible with Catholic understandings of the human person and human community." Weigel, supra note 67, at 276.

289. See Kennedy, supra note 1.
with Catholic thinkers like Aquinas, but according to Murray, the guiding principles of our government actually depended on the Judeo-Christian legacy. And Catholicism, with its natural law groundings, was the leading standard-bearer of that tradition. For instance, Murray often cited the Declaration of Independence to prove that human equality and dignity were of divine origin, and he was fond of quoting Justice Douglas's famous dictum in Zorach: "We are a religious people whose institutions presuppose a Supreme Being." Accordingly, Murray feared that if our country lost sight of its religious heritage, its democratic, egalitarian ethos would be substantially eroded.

Contemporary conservative interpreters of Murray thus say he was at root a "non-preferentialist" and would have agreed with Chief Justice Rehnquist's view that the Establishment Clause only mandates equal treatment of all religious groups, not absolute neutrality between religion and non-religion. But Murray did not have it right about our country's philosophical origins. Founders like Jefferson and Madison, with their Enlightenment rationalism, probably had more in common with the Jacobins than Murray would have liked to admit. And the Declaration of

290. See supra notes 255-57 and accompanying text.
291. See generally MURRAY, supra note 27, at 97-123.
292. See id. at 37.
293. See supra notes 114-16 and accompanying text.
294. MURRAY, supra note 27, at 30.
295. See id. at 41-43; Kenneth L. Grasso, We Held These Truths: The Transformation of American Pluralism and the Future of American Democracy, in JOHN COURTNEY MURRAY, supra note 9, at 89-115 (extrapolating Murray's thinking on this point to the current day).
296. See supra notes 140-44 and accompanying text.
297. See Keith J. Pavlischek, John Courtney Murray and the American Civil Conversation, 10 J.L. & RELIGION 589 (1993-94) (book review essay); see also Gerard V. Bradley, Beyond Murray's Articles of Peace and Faith, in JOHN COURTNEY MURRAY, supra note 9, at 181 (arguing that Murray was an "accomodationist" on church and state issues but that his description of the Religion Clauses as "Articles of Peace" undermined his larger theme that the American government is underwritten by Judeo-Christian principles).
298. See Mason, supra note 241, at 149.
299. Jefferson believed that America's wartime alliance with France created a special bond between the two countries which was deepened when the French overthrew the monarchy and moved to a constitution. See THE FOUNDING FATHERS, THOMAS JEFFERSON: A BIOGRAPHY IN HIS OWN WORDS 242 (Newsweek Books eds., 1974). In 1793, he wrote a letter defending the anticlerical Jacobins despite their turn toward a more radical form of republicanism. See id. While deploring some of their excesses, he nonetheless hailed the Jacobins as the true representatives of French popular sentiment and said this of his affinity for them: "My own affections have been deeply wounded by some of the martyrs to this cause, but rather than it should have failed, I would have seen half the earth desolated." Id. at 243; see also Michael Lienesch, Thomas Jefferson and the Democratic Experience, in JEFFERSONIAN LEGACIES 331 (Peter S. Onuf ed., 1993).
Independence, which Jefferson authored, is substantially copied from the Second Treatise on Government by John Locke, a thinker who Murray called a "decadent nominalist." Even the language "Nature's God" and "endowed by the Creator" in the Declaration is highly ambiguous in its theological groundings. Many see it as more the generalized product of political compromise than the statement of a faith community. The Constitution, of course, does not mention God at all, but derives its authority from "We the People."

Some have noted the uncharacteristic nature of Justice Douglas's statement in Zorach about our religious legacy. The opinion was written in 1952, a presidential election year when Justice Douglas may well have been harboring ambitions for higher office. Americans, then as well as now, are indeed a "religious people," if church membership and professions of faith to public opinion pollsters can prove piety. Yet, for the historical reasons just stated, it is hard to sustain a claim that our institutions presuppose a Supreme Being.

The natural law tradition, although baptized by Aquinas, had its actual beginnings, as this paper has pointed out, in the pre-Socratic philosophers of ancient Athens and their Stoic descendants. We owe democratic thought, of course, to the Greeks, along with the important Aristotelian notion of government as a rational enterprise for the common good. Catholics like Aquinas and the sixteenth century Jesuit Robert Bellarmine can take some credit for transmitting those foundational

---

300. Murray, supra note 27, at 309.
301. The Declaration of Independence (U.S. 1776); see also Peter Augustine Lawler, Murray's Natural-Law Articulation of the American Proposition, in John Courtney Murray, supra note 9, at 127.
303. See id. at 127.
304. U.S. Const. preamble.
305. See Frankel, supra note 19, at 636; Glendon & Yanes, supra note 3, at 535 & n.282.
306. See Glendon & Yanes, supra note 3, at 535.
307. See supra note 14 and accompanying text.
308. See supra notes 298-304 and accompanying text.
309. See supra notes 239-41, 246-48 and accompanying text.
310. The most eloquent statement of this heritage was Pericles's funeral oration reported by Thucydides which extolled the democratic constitution of Athens. See Kathleen Freeman, God, Man and the State: Greek Concepts 222 (1952).
311. See supra note 245 and accompanying text.
312. See Philip Gleason, How Catholic is the Declaration of Independence? You'd Be Surprised, Commonweal, Mar. 8, 1996, at 13 (stating that Aquinas's and Bellarmine's theories influenced English Whigs, who in turn influenced the founders of the American republic).
principles down to us through the Middle Ages, but they were hardly ideas that at their origins sprung directly from religious beliefs.

Murray's more substantial legacy to contemporary Catholics, and by extension to all Americans, is his central notion of the legitimacy of civil government in its own right and his concomitant dedication to the separation of church and state as articles of peace for a pluralistic society. This is very compatible with Everson's outlook that the Establishment Clause mandates neutrality, not just among religions, but between religion and non-religion. From that perspective, and the general richness of Murray's thought, we can draw these insights for application to contemporary issues.

VIII. THE FREE EXERCISE OF RELIGION

As important as religious freedom was to Murray, he held that like all liberty, in Cardozo's famous dictum, it must be ordered. And he followed Aquinas in the Aristotelian tradition that emphasized reason as the shared faculty that allows all members of a community to establish basic moral principles for the common good. When should the right to freely exercise one's religion override laws that are presumably based on that consensus?

Murray's theory of the Constitution as "Articles of Peace" showed a generous acceptance of our increasingly pluralistic nation and its varied religious practices. And he was quite critical of naked majoritarianism, a type of positivism that would find the ultimate warrant for law in the will of most of the citizenry. Murray at root was both a liberal and a natural

313. See supra notes 255-57 and accompanying text (discussing Murray's use of the theories of Aquinas and Aristotle to support his belief in the independent legitimacy of civil government).
314. See supra notes 267-75 and accompanying text.
315. See supra notes 103-10 and accompanying text.
316. See Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (referring to the protection afforded by specific amendments in the Bill of Rights as "implicit in the concept of ordered liberty").
317. Representative are these remarks by Murray about what he called the paradox of social freedom:

First, in society constraint must be for the sake of freedom . . . . The whole texture of civilization is a web of restraints, which deliver man from a host of slaveries—to darkness, cold, and hunger; to ignorance and illness and wearisome labors. Delivered from these base slaveries man is free to be man, to live the inner life of reason and love, the classic life of wisdom, the Christian life of faith.

MURRAY, supra note 27, at 160.
318. See id. at 114-15.
319. See id. at 208.
lawyer, supporting a democracy whose laws would not contradict certain fundamental ethical precepts. As such, his theory, while quite open to varied religious expression, would be reluctant I believe to condone certain practices that are obviously inimical to the common good or threaten legitimate public concerns.

For instance, in Yoder the Supreme Court held that Amish parents had a "fundamental right" to limit the formal education of their children to less than the state’s age of compulsory schooling. For Murray, however, the self-evident value of education was so important that he called it "the great ‘affair’ of the commonwealth." Since the religiously based anti-intellectualism of the Amish thus ran counter to one of the most important goods that rational beings can pursue, it is doubtful that Murray would have supported the exemption that the Court created. It can be surmised that he would have brought similar skepticism to Congress’s attempt in RFRA to demand that any law limiting religiously inspired practices be justified by a "compelling state interest." The Act had support from civil libertarians, but its principal sponsor was a wide coalition of organized religions that feared a generalized hostility or indifference to their goals and practices.

320. See supra notes 255-57 and accompanying text (discussing the theories of Aquinas and Aristotle on which Murray relied).

321. One constitutional scholar expressed a viewpoint not far from this standard, stating "[t]he correct baseline . . . is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order." Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195, 198 (1992); see also supra note 283 (explaining how the Second Vatican Council cautioned against religious freedom that was not placed in the context of moral and social responsibilities).

One does not have to point to the extreme examples of the Branch Davidians or Heaven’s Gate to find shocking practices that were apparently condoned by sincerely held religious principles. See Lundman v. McKown, 530 N.W.2d 807, 832 (Minn. Ct. App. 1995) (upholding an award of compensatory damages in a wrongful death action against a mother of the Christian Science faith who refused conventional medical treatment for her 11-year-old daughter), cert. denied, 116 S. Ct. 828 (1996); see also William Dowell, Her Dying Prayers, TIME, May 5, 1997, at 66 (describing the recent criminal conviction of parents who refused conventional medical treatment on religious grounds for their 16-year-old daughter who died of a diabetic coma). But see In re Dubreuil, 629 So. 2d 819, 820 (Fla. 1993) (upholding the right of a woman of the Jehovah’s Witnesses faith to refuse a blood transfusion to save her life despite the fact that she was the mother of three children ages twelve, six, and four).

322. See supra notes 128-33 and accompanying text.

323. MURRAY, supra note 27, at 9.

324. See supra notes 199-203 and accompanying text.


Any concern that certain religious activities may not be rationally defensible would be outside Murray's Catholic tradition which always upheld the affinity of humanism and Christian faith. Religion is rightly afforded a special status in the Constitution. But as the Court stated in Boerne when it struck down RFRA, if believers were given broad power to exempt themselves from neutral, generally applicable laws that further the common good, government would have a difficult time achieving its legitimate goals.

IX. RELIGIOUSLY INSPIRED LAWS AND POLITICAL ACTIVITY

But what of the right of individuals and religious organizations to participate in the political process by advocating views that are grounded by their faith? Two leading constitutional commentators, Michael Perry and Kent Greenawalt, have argued that the rights of those citizens should not be circumscribed by the source of their convictions. This argument would seem to be in keeping with other First Amendment guarantees concerning freedom of expression. It would also be unrealistic to force individuals to dichotomize their personalities in a way that would closet their religious inspiration.

In addition, religious views and religiously inspired language can contribute vital support to endeavors that are amply justified by humanistic concern. Particularly a propos here are certain scripturally rooted beliefs that are prominent in Catholic thought, such as the notion that all humans are made in God's image. Many advances in human dignity and civil rights have been animated by that belief because it rings so true, I believe, with an aspiration that is universal in the human heart.

In their political advocacy, however, it would be prudent for church leaders to also support such religiously motivated messages with sound policy arguments. Such an approach should be no problem for Catholics


327. See supra notes 225-26 and accompanying text.
328. See supra notes 204-10 and accompanying text.
331. See supra note 53 and accompanying text.
332. See Tracy, supra note 12, at 197.
who hold to Aquinas’s bedrock belief that grace builds on nature. Similarly, the much maligned Lemon test, which requires that every law have a valid secular purpose, is important here to guarantee the autonomy of political authority.

X. STATE AID TO RELIGIOUS SCHOOLS

For some time, many Catholics, particularly most of those who send their children to church-run schools, have felt aggrieved by decisions that make it very difficult for the government to grant direct financial aid to those institutions. Murray himself sounded this theme, arguing that denial of state aid to religious schools was unjust because it did not recognize the diverse educational needs of a pluralistic society. To support his position, he cited comments by Justice Douglas in Zorach that the government should “respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs.”

Reflecting on the American Jewish experience, Stephen Feldman has recently made a similar point from a post-modern perspective. According to Feldman, the Supreme Court’s failure to condone the creation of a separate school district so that federal funds could be allocated to the needs of handicapped Hasidic children was nothing more than the dominant culture’s refusal to give equal validity to the Jewish religion. Catholic leaders felt similarly put upon when the Court ruled in the

334. See THOMAS AQUINAS, SUMMA THEOLOGIAE 307-24 (Timothy McDermott ed., 1989). It is interesting that in the Summa, Aquinas’s great work, his section on grace follows the section on law. For Aquinas, both are divine influences on human action, “God stimulating us to do good, teaching us by law and aiding us by grace.” Id. at 276. And it follows that grace builds on nature because moral principles, Aquinas’s natural law, come from human reason. See supra note 257 and accompanying text.

335. See supra notes 122-24 and accompanying text.

336. See supra notes 255-57 and accompanying text. Michael Perry, a leading Catholic jurist, has recently stated that: “[G]overnment [may] not make [certain] political choices... unless a plausible secular rationale supports the choice without help from a parallel religious argument.” MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 34 (1997).

337. See supra notes 117-27 and accompanying text (discussing the Supreme Court’s Establishment Clause jurisprudence with respect to public schools).

338. See MURRAY, supra note 27, at 143-54.


341. See supra notes 166-67 and accompanying text.

342. See Feldman, supra note 340, at 873.
Aguilar case that federally funded programs for disadvantaged children could not be operated in parochial schools.

Yet Catholic education is today enjoying substantial indirect governmental aid through decisions like Mueller which condone the tax deductibility of contributions to religious organizations that maintain schools. And the Court's recent reversal of Aguilar in Agostini seems to solidify a trend where the Court is willing to condone governmental grants to individuals for use in either public or religiously affiliated schools if they are administered on a non-sectarian basis.

With such judicial willingness to condone some government support to those attending religiously affiliated schools, a good approach might now be to admit that direct state aid is undesirable. Despite Murray's explicit opinion to the contrary, other aspects of his outlook point that way. He saw the Establishment Clause as having an important role in safeguarding religious freedom and described it approvingly as a self-denying ordinance where the government bluntly prohibited itself from acting in furtherance of religion.

Decisions which do not allow direct state support of institutions promoting religion thus preserve the important principle of governmental neutrality toward belief. In the long run, this guarantees that Catholics, as well as others, may enjoy the liberty to practice their faith as they see fit.

343. See supra notes 126-27.
344. See Chopko, supra note 3, at 1149-51 (discussing the Aguilar case in detail).
345. See supra note 145 and accompanying text.
346. See supra notes 176-83.
347. The Agostini decision has raised renewed speculation about the constitutionality of certain "voucher" plans where students choose to enroll in either a public or private school and the government pays part of the tuition to the school. The Wisconsin Supreme Court upheld this type of program in Davis v. Grover, 480 N.W.2d 460, 477 (Wis. 1992), when it excluded religiously affiliated schools from a state school choice program. Likewise, a federal district court ruled that this same school choice program could not include religiously affiliated schools. See Miller v. Benson, 878 F. Supp. 1209, 1216 (E.D. Wis.), vacated as moot 68 F.3d 163 (7th Cir. 1995).

A similar program in Ohio that provided parents with checks that could be endorsed to religiously affiliated schools was also declared unconstitutional. See Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583, at *15 (Ohio App. May 1, 1997). The court ruled that this program provided direct and substantial government aid to sectarian schools. See id. at *10.
348. See Murray, supra note 27, at 69.
349. From that perspective, the reasoning of Everson is still fundamentally sound. See supra notes 103-10 and accompanying text.
XI. CLOSING THE HERMENEUTIC CIRCLE

The contemporary German philosopher Hans Gadamer has insightfully described the process of textual interpretation as "the interplay of the movement of tradition and the movement of the interpreter." In that spirit may I close by offering an explanation of the religion clauses drawn from the intent of one of their framers who precedes me in the Catholic tradition.

Legislative history of congressional deliberations on the religion clauses is sparse, but here is a summary of the comments made at that time by Congressman Daniel Carroll of Maryland, one of only two Catholics to sign the Constitution, and one of only two non-Protestants in the First Congress:

Mr. CARROLL.—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present Constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed. He would not contend with the gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

As is clear from his comments, Congressman Carroll was not interested in quibbling over the First Amendment's language. His broader, practical concern was to make sure that the government of the new nation was going to keep its hands off religious matters. He came from a state that had been founded as a Catholic colony in the 1630s and whose early laws proclaimed religious tolerance, at least for Christians. By the late seventeenth century, however, Maryland had become dominated

350. HANS-GEORG GADAMER, TRUTH AND METHOD 293 (2d ed. 1989); cf. RAKOVE, supra note 212, at xv n.*. Rakove, tongue in cheek, may have the true insight here. After his discussion of the perils of divining and applying the intent of the Constitution's framers to contemporary issues, he adds: "On the other hand, I happen to like originalist arguments when the weight of the evidence seems to support the constitutional outcomes I favor—and that may be as good a clue to the appeal of originalism as any other." Id.

351. See THE STORY OF CATHOLICS IN AMERICA 16 (Don Brophy & Edythe Westenhaver eds., 1978).

352. See McConnell, supra note 77, at 136.

353. ARIENS & DESTRO, supra note 7, at 80 (citing 1 Annals of Congress 729-31).

354. See DOLAN, supra note 17, at 76-77.
by Puritans who placed severe restrictions on the practice of the Catholic faith. 355

Maryland Catholics had regained political power after the revolution and many were elected to the new state’s assembly in 1784-85. 356 At that time, legislation similar to that proposed in Virginia, which would have provided tax-funded support of all religions, was also offered in Maryland. 357 Madison and Jefferson successfully opposed that initiative in Virginia. 358 And the Catholic delegates in Maryland did the same, fearing that such public funding would be the beginning of the establishment of the Protestant Episcopal Church in their state. 359 Their opposition was instrumental in the legislation’s defeat. 360

With that background, it is hard to see how Congressman Carroll could have supported an Amendment that only guaranteed neutrality among denominations while allowing the government to act preferentially for religion in general. The national faith that would arise from such an arrangement would be Protestant and from their early history of persecution Congressman Carroll must have known that his Catholic constituents could only really thrive in an America where the functions of government and religion were strictly separated.

As this article has shown, Carroll’s support of the Amendment was prescient in that regard. It constituted the consent of a proto-minority—one that with some struggle would lead the way in demonstrating that America could offer the opportunity for human fulfillment to people of all beliefs. The Catholic experience would thus confirm Madison’s remarkable insight—that full freedom of religion is essential to the promise of equal citizenship. 361

355. Among other things, Catholics were forbidden to worship in public and, in 1718, they were stripped of their right to vote and hold public office. See id. at 84-85.
356. See id. at 109.
357. See id.
358. See supra note 271 and accompanying text.
359. See DOLAN, supra note 17, at 109; see also supra note 271 and accompanying text.
360. See DOLAN, supra note 17, at 109.
361. See supra notes 270-71 and accompanying text; see also supra notes 232-48, 332-33 and accompanying text (discussing the religious and philosophical roots of that humanistic egalitarianism).