

RELIGIOUS FREEDOM AND NATIONAL IDENTITY: NOTES ON THE AMERICAN EXPERIENCE

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America was born in Europe. But the Atlantic crossing and the encounter with the new continent rewove the strands of European heritage in the course of building a new nation. In this paper, I have been asked to reflect on the significance of one aspect of this “sea change”: the role of religious freedom in the emergence of American national identity. This is in fact a vast and tangled topic that literally fills libraries in the United States. All I can hope to do here is provide a few notes on the American experience, tracing the emergence of religious freedom as a fundamental human right, and more than that, tracing the way that religious freedom instead of religion itself emerged as a source of national identity.

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I. The Religious Founding

The narratives of the American founding are almost all religious. There is some truth in a cynical cartoon I often include in the materials for my church-state course. Two pilgrims are standing at the rail of a ship, and one says to the other, "Religious freedom is my immediate goal, but my long-range plan is to go into real estate." That is, there was often an economic undergirding to the ostensibly religious motivations for emigration and settlement. At the same time, there is something essentially false about recent public school textbooks conceived in excessive respect for separating church and state in the classroom that sanitize the story of the founding so that the role that religion played is ignored or understated. The story of the pilgrim founders and the communities they built were pervasively religious. They were not merely "wanderers in a foreign land," as the sanitized textbooks would lead the next generation to believe. Leo Pfeffer's summary is surely far closer to the mark: "in the minds of the fathers of our Constitution [and the First Amendment], independence of religion and government was the alpha and omega of democracy and freedom."²

It is important not to make the mistake of thinking that the British colonies that grew up along the American seaboard were all alike. They were roughly equivalent in size to European countries, and each developed a culture and an identity all its own. It is true that the austere brand of Protestantism known as Puritanism played a key role in the settlement of virtually all of the British colonies, and a particularly crucial role in the northern New England states.³ By the time of the Revolution, as many as 75 percent of Americans had been raised in families espousing some form

² LEO PFEFFER, *CHURCH, STATE AND FREEDOM* 127 (Boston: Beacon Press, rev. ed. 1967).

³ A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 55 (Washington, D.C.: The Brookings Institution, 1985).

of Puritanism.⁴ The majority of the rest had roots in related traditions of European Calvinism.⁵ Nonetheless, the nature of the religious groups in each of the colonies gave each of the incipient states distinctive cultures.⁶

Massachusetts Bay, which was settled in 1630, was from the beginning a Puritan colony which envisaged itself in terms of the Biblical image of a "City on a Hill."⁷ This group did not yet view itself as "separate" from the Church of England. Francis Higginson, one of the founders of this group, is said to have exclaimed when the ship bearing his party passed Land's End, that "We do not go to New England as separatists from the Church of England, though we cannot but separate from the corruptions in it: but we go to practice the positive part of Church reformation, and propagate the gospel in America."⁸ The Bay Colony was governed by a religious elite that was clearly not known for toleration, and indeed, had little good to say for it. "Toleration," wrote John Cotton, one of the leading ministers, "made the world anti-Christian."⁹ Anne Hutchinson was expelled from Massachusetts for espousing an antinomian heresy, and was later murdered by Indians in 1643 after wandering for several years along the New England frontier.¹⁰ Baptists, Quakers, and Mennonites also experienced various types of persecution.¹¹ Taxpayers in Massachusetts were required to support "an able, orthodox, and learned minister,"¹² which created no small consternation for non-Congregationalist believers who had

⁴ 1 SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 169 (Doubleday, 1975).

⁵ REICHLEY, *supra* note 3, at 53.

⁶ See generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (New York and Oxford: Oxford University Press, 1986).

⁷ REICHLEY, *supra* note 3, at 55-62.

⁸ Quoted in THOMAS G. SANDERS, *PROTESTANT CONCEPTS OF CHURCH AND STATE* 243 (Holt, Rinehart and Winston, 1964).

⁹ Quoted in REICHLEY, *supra* note 3, at 56.

¹⁰ *Id.* at 58-59.

¹¹ *Id.* at 57-59.

¹² *Id.* at 60.

their own brand of orthodoxy. Not surprisingly, Massachusetts was the last state to abandon its established church, and did not do so for over forty years after the ratification of the Constitution and the formation of the United States.¹³

The Massachusetts colony was broad-minded enough to assimilate the original pilgrim founders who settled Plymouth in 1620. This was a separatist group reflecting a more pietist strand of the Reformation.¹⁴ However, Roger Williams, one of the patron saints of religious freedom in America, found himself compelled to leave Massachusetts in 1636 due to doctrinal disagreements with the leaders of the colony.¹⁵ He took a small group of his followers and founded what is now Rhode Island.¹⁶ From its inception, Rhode Island was a haven for religious dissenters. Some of the seminal writings on religious freedom emerged from this colony, and full religious liberty was guaranteed to all persons from the time of its first colonial charter in 1663.¹⁷ In part because of its small size and because its government constituted such a radical departure from Puritan political theory, historian Perry Miller concluded that Williams and his colony “exerted little or no direct influence on theorists of the Revolution and the Constitution, who drew upon quite different intellectual sources.”¹⁸ Yet Williams stands as the patron saint of a tradition of religious liberty that has grown up for independent reasons and is focused on protection of the purity and autonomy the church from the corruptions and temptations of state power.

In the Southern states, where slave-holding agrarianism took hold, Anglican establishments prevailed. Virginia had perhaps the most illiberal establishment, which contributed to migration to the inland areas of North

¹³ ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 14 (New York: Lambeth Press, 1982).

¹⁴ REICHLEY, *supra* note 3, at 62.

¹⁵ CURRY, *supra* note 6, at 14-19.

¹⁶ *Id.* at 14.

¹⁷ GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 27 (New York: Greenwood Press, 1987)

¹⁸ Quoted in BRADLEY, *supra* note 17, at 30.

and South Carolina.¹⁹ The struggle to disestablish Anglicanism was connected with the anti-British sentiments of the revolution, and provided the historical opportunity for Jefferson and Madison to press their claims as apostles of religious freedom in America.²⁰ This struggle culminated in Jefferson's Bill for Religious Liberty, adopted in 1785.²¹

Maryland was originally settled under a charter granted to Lord Baltimore, which was construed in a manner to provide a refuge for his Roman Catholic co-religionists.²² By the time of the Revolution, however, Maryland evolved into a state that was "unsurpassed in its hostility to Romanists."²³ In 1704, the legislative assembly prohibited public celebration of the Mass, and throughout the 18th century, taxes were imposed on "papists".²⁴ And as bad as things became for Catholics, they were even worse for Maryland's non-Christians.²⁵

Like Rhode Island, Pennsylvania was settled by a persecuted minority group, the Quakers. William Penn, after whom the state was named, consistently affirmed the importance of protecting religious freedom. "We must give the liberty we ask," Penn wrote. "We cannot be false to our principles. We would have none to suffer for dissent on any hand."²⁶ Pennsylvania accordingly extended basic civil liberty to Jews and Roman Catholics. It also proscribed compulsory financial support of religion, vie-

¹⁹ Paul Conklin, *The Church Establishment in North Carolina*, 42 N.C. HIST. REV. 11, 22 (1955).

²⁰ Accounts of the thought of Jefferson and Madison on religious liberty are legion. An important work helping to identify differences in their thought on this issue is Robert S. Alley (ed.), *JAMES MADISON ON RELIGIOUS LIBERTY* (Buffalo, New York: Prometheus Books, 1985).

²¹ For a copy of the text of this famous document, see BRADLEY, *supra* note 17, Appendix A, at 149-50.

²² SANFORD H. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 364-65* (New York: Cooper Square Publishers, Inc., 1902).

²³ BRADLEY, *supra* note 17, at 45.

²⁴ *Id.*

²⁵ *Id.*

²⁶ COBB, *supra* note 22, at 441.

wing this as part of freedom of conscience.²⁷ Pennsylvania did not countenance “swearing, drinking, card playing, stage plays, and cockfights” since these tended to “excite the people to rudeness, cruelty . . . and irreligion” and such “wildness and looseness of the people provoke the indignation of a God.”²⁸ In Pennsylvania, as elsewhere, religious liberty was never understood as authorizing libertinism. Delaware was essentially an offshoot of Pennsylvania, and followed essentially the same approach.²⁹

New Jersey never had an establishment of any kind, and was a haven for refugees from New England’s narrow orthodoxy.³⁰ New Jersey had a very pluralistic, albeit predominantly Protestant population throughout the colonial era. The original proprietors, Lord John Berkeley and Sir George Carteret, established a scheme of government in 1664 that they called “Concessions,” among which was a guarantee of religious freedom to all “who do not actually disturb the civil peace of the province.”³¹

New York was like the other middle states in that its prime location for purposes of commerce and access to the hinterlands led to the early emergence of a heterogeneous population.³² It had substantial Dutch and German populations in addition to the British.³³ Anglicans counted for no more than 10 percent of the population.³⁴ New York was further pluralized in that for part of its history, it was controlled by the Dutch. The state constitution of 1777 already announced principles of religious freedom, and disestablished the Anglican Church.³⁵

In short, each of the colonies had its own distinctive history of church-state relations, depending in large part on the religious background (or

²⁷ BRADLEY, *supra* note 17, at 47.

²⁸ CURRY, *supra* note 6, at 75.

²⁹ BRADLEY, *supra* note 17, at 49-50.

³⁰ *Id.* at 51-52.

³¹ *Id.* at 51, *citing* COBB, *supra* note 22, at 400.

³² *Id.* at 52.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

plural backgrounds) or its settlers. Patterns of migration both from Europe and within the colonies contributed to an increasingly pluralistic religious situation everywhere, though Protestant domination was obvious. The tradition of separation of church and state, established first in Rhode Island, gradually spread to other colonies, but this process was not complete until well into the 19th Century. The federal constitutional prohibition of laws “respecting an establishment of religion” was originally understood as a ban on federal meddling with residual established churches in the states, and as a prohibition of the establishment of a national church; it obviously did not ban establishments at the state level.³⁶ Part of what made life distinctive in each of the colonies was precisely the unique and varying approaches each took to church-state issues.

II. The Emergence of Religious Freedom as a Core of National Identity

During much of human history, it has been assumed that religious unity was vital to the unity of a nation. Religious dissent has accordingly been viewed as a threat to the minimal unity necessary for a nation to survive. The experience of religious warfare in the aftermath of the Reformation (both within and among countries) further intensified fears that religion could be a dangerous source of political instability. The traditional established church was viewed as a critical support for the morality of the citizenry, as a stabilizer of social order, as a source of the legitimacy of the regime, and as a bearer of the common culture of a nation. In this world view, religious differences are seen as profound threats to the existing order, and it makes perfect sense to mobilize the machinery of the state in the effort to eliminate the threat. Religious dissent is seen as a sign at least of disloyalty, and possibly of treason.

This way of looking at the world is evident in the life of Massachusetts Bay, where the persecuted believers who left Europe for enhanced freedom to worship rapidly went on the attack against divergent believers such as Anne Hutchinson and Roger Williams. But as colonial history

³⁶ CORD, *supra* note 13, at 14.

unfolded, and the range of religious believers who had come to the United States to escape even greater persecution in Europe proliferated, it became more and more difficult to maintain regimes of intolerance as a matter of practical politics. The frontier was too vast, and it was simply too easy for those who believed differently to go elsewhere. Moreover, the hypocrisy of claiming religious freedom for one's own beliefs, but not allowing it for others became too evident.

Political theory was gradually changing to adapt to these new realities. By the late 17th Century, the philosopher John Locke, who among his many other accomplishments, helped draft a constitution for the Carolinas,³⁷ pointed to another way of thinking about the dynamics of religion and politics. In a passage near the end of his famous Letter Concerning Toleration, Locke advanced the following thesis:

Now if that church, which agrees in religion with the prince, be esteemed the chief support of any civil government, and that for not other reason, as has already been shown, than because the prince is kind and the laws are favorable to it; *how much greater will be the security of government, where all good subjects, of whatsoever church they be, without any distinction upon account of religion, enjoying the same favor of the prince, and the same benefit of the laws, shall become the common support and guard of it; and where none will have any occasion to fear the severity of the laws, but those that do injuries to their neighbors, and offend against the civil peace!*³⁸

Locke's contention in this passage was that far from destabilizing a regime, toleration and respect could have exactly the opposite effect. In the context of a pluralistic society, a regime that respects divergent beliefs will win support from those it respects, resulting in much greater stability than can be achieved by favoring the dominant group. The idea is that minority groups will be so grateful for this respect that instead of becoming centers of dissension and potential social disintegration, they will feel profoundly indebted and thus loyal to the regime, thereby providing

³⁷ COBB, *supra* note 22, at 119.

³⁸ JOHN LOCKE, A LETTER CONCERNING TOLERATION 68-69 (First published in 1689; cited edition: Buffalo, NY, 1990)(emphasis added).

much greater social stability than can be derived from merely reinforcing the hegemony of the more powerful elements in society. This insight has laid the foundation in contemporary societies for religious liberty in particular, and for pluralism in general.³⁹

The American colonial experience provided sufficient corroboration for the validity of this insight for it to evolve into one of the axioms of American political life. Rhode Island, while sometimes looked down upon by social elites because of the strong Baptist representation in its population and the generally lower level of education of Baptist lay preachers as compared with ministers in other traditions, and because of other economic problems in the colony,⁴⁰ one could not claim that religious liberty had imperiled Rhode Island society. More to the point, the experience in the powerful middle colonies, from Virginia to New York, confirmed that a stable polity could flourish without an established church, and that indeed, refugees from more oppressive regimes abroad or in other colonies became some of a state's most loyal citizens.

Not all of the states had absorbed the Lockean insight by the time of the revolution and the framing of the Constitution. As noted above, Massachusetts did not disestablish its church until 1833.⁴¹ While many states continued to assume the appropriateness of maintaining public support for religion both prior to and after the revolution,⁴² the sentiment that freedom of conscience should be protected was widespread and had already taken root. During the ratification debates on the Constitution, the absence of explicit protection of freedom of conscience emerged as an

³⁹ For a more extensive discussion of the significance of this Lockean insight, see Durham, *Perspectives on Religious Liberty: A Comparative Framework*, in *Religious Human Rights in Global Perspective: Legal Perspectives* 1, 7-12 (Johan D.vander Vyver and John Witte, Jr., eds.) (The Hague: Martinus Nijhoff Publishers, 1996). A version of this article has been published in Spanish as *Bass para un Estudio Comparativo sobre Libertad Religiosa*, 10 ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 465 (1994).

⁴⁰ BRADLEY, *supra* note 17, at 30.

⁴¹ CORD, *supra* note 13, at 14.

⁴² See generally BRADLEY, *supra* note 17.

often criticized defect of the Constitution itself,⁴³ and it was accordingly no surprise that the Bill of Rights listed religious freedom as its first freedom.⁴⁴ Thus, it is not surprising that “[i]nstead of establishing religion, the Founders established religious *freedom*.”⁴⁵

It is fair to say that in the two centuries since the adoption of the U.S. Constitution, religious freedom itself has emerged as a core element in American national identity. By the 1940's, the U.S. Supreme Court could hold that both free exercise of religion and non-establishment of religion were an inherent part of the ordered liberty assumed by the 14th Amendment to the U.S. Constitution, and that accordingly, these principles were binding on the states.⁴⁶ The Supreme Court's reasoning concerning whether the original founders intended the establishment clause to apply to the states was dubious, but as a matter of national experience, it was consistent with dominant assumptions about the importance of separation of church and state as a bulwark of religious liberty. American national life is replete with recognition of the importance of religious freedom. The U.S. national anthem speaks of the “land of the free,” and a primary constituent of that freedom is religious freedom. It is hard to mention an Independence Day (July 4) speech that does not list religious fre-

⁴³ CURRY, *supra* note 6, at 194-98.

⁴⁴ PFEFFER, *supra* note 2, at 127. Cord notes that one cannot in fact infer too much about the mind-set of the framers as to the symbolic preeminence of the first amendment from the placement of the religion clauses ahead of the other amendments, since in fact Madison had proposed a different placement and what ultimately became the first amendment was actually the third of the proposed amendments submitted to the states for ratification. (The first two proposed amendments were not ratified.) CORD, *supra*, at 56-57. But there can be no doubt that religious freedom and freedom of speech have come to be thought of in the United States constitutional pantheon as the first freedom in the United States.

⁴⁵ WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 15 (New York: Basic Books, Inc., 1970)(emphasis in original).

⁴⁶ *Cantwell v. Connecticut*, U.S. (1940); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

edom as a key feature of American society.⁴⁷ Religious freedom has always had a high priority for Americans as they have worked for protection of international human rights.

A more recent demonstration of the significance of religious freedom in national consciousness relates to recent experience with the Religious Freedom Restoration Act (“RFRA”).⁴⁸ When the U.S. Supreme Court narrowed its interpretation of the scope of free exercise protections in 1990 by holding that any neutral and general law could override religious freedom,⁴⁹ an extremely broad coalition, representing virtually all spheres

⁴⁷ See Robert N. Bellah, *Civil Religion in America*, DAEDALUS 96 (Winter 1967), reprinted in ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* (New York: Harper & Row, 1970).

⁴⁸ Pub. L. No. 103-141 (Nov. 16, 1993), 107 Stat. 1489, codified at 42 U.S.C.A. §§ 2000bb, 1988(b) and 5 U.S.C.A § 504(b)(1)(C)(Supp. 1995). The literature on RFRA is vast. Leading articles include: Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994); Jay S. Bybee, *Taking Liberties with the First Amendment Congress, Section 5 and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 NYU L. REV. 437 (1994); Eugene Gressman & Angela Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65 (1996); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under the Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994); Douglas Laycock, *The Religious Freedom Restoration Act*, 1996 BYU L. REV. 221 (1995); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONTANA L. REV. 145 (1995); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and the Free Speech Concerns*, 56 MONT. L. REV. 227 (1995); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996).

⁴⁹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

of American society, assembled to call for and secure virtually unanimous passage of the Religious Freedom Restoration Act in 1993. This Act was struck down last summer on grounds of lack of Congressional power to enact it,⁵⁰ and the RFRA Coalition is now seeking alternative approaches for providing enhanced protection of religious freedom.

The point of the foregoing, in addition to tracing some of the major twists and turns in church-state theory in the United States, is to emphasize what has been learned over time about the Lockean insight. Not only was Locke correct in thinking religious liberty could provide the foundation for a stable society, and a foundation even more stable than that provided by an established church, but in addition, his insight suggests a new possibility for nation building in the modern era. Where in the past national religions served as a vehicle for defining national identity, in the contemporary world, *religious freedom itself* together with more general respect for human rights can provide a locus around which national identity can be built. Thus, the strength of the Basic Rights under the 1949 German Basic Law is a locus of national identity that supplants a problematic past. The new Spanish Constitution, with its simultaneous recognition of Spanish history, and its commitment to religious freedom for all,⁵¹ has moved Spain in a similar direction. The European Convention for the Protection of Human Rights and Fundamental Freedoms⁵² provides a similar rallying point for what it means to be a European in the contemporary world. As free movement of labor and general mobility of society further contribute to the mixing of societies and peoples, religious liberty itself not only can but should serve as a key element in the sense of identity of any just society.

⁵⁰ *Flores v. City of Boerne*, 117 S.Ct. 2157 (1997).

⁵¹ La Constitución, art. 16 (Spain); see Gloria M. Moran, *The Spanish System of Church and State*, 1995 BYU L. REV. 535, 537-38.

⁵² European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 321 U.N.T.S. 221.

III. Benign Separation

One concluding point needs to be made about the American experience with religious freedom. In Europe, the American experience is often seen as being anomalous, both because of the degree of pluralization in American society, and because of the rigorousness with which the principle of separation of church and state is implemented in the United States. I want to make two points with respect to this perception.

First, if pluralization was an argument against the relevance of U.S. models in the past, the increasing pluralization of society in Europe, particularly in major urban areas, suggests that U.S. models may be increasingly relevant. Tides of immigration, free movement of labor, and a variety of other factors are making urban centers everywhere similarly diverse. My point here is not so much that we need total harmonization of church-state regimes everywhere. Rather, it is that there is value in shared discourse about the common problems of safeguarding religious rights in an increasingly complex and interdependent world, and that automatic rejection of thoughtful discourse on these issues, merely because it is foreign, no longer makes sense. This point runs in both directions. I am a strong exponent of the belief that we need increased two-way traffic in discourse on difficult religious freedom issues between Europe and the United States. Among other things, I believe that the Organization for Security and Cooperation in Europe (the Helsinki Process) may provide an important context for raising and globalizing discourse on religious freedom issues.⁵³

Second, and perhaps more importantly, it is vital to understand a key difference between the separation principle as it has been experienced in Europe and in America. It is fair to say that for the most part, the political impetus for separation of church and state in Europe has come from anti-

⁵³ In this regard, the Preliminary Report of the Panel of Experts convened in 1997 by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe and submitted in connection with the Human Dimension Implementation Meeting held in Warsaw in November of 1997 provides a useful starting point. (Copy in the possession of the author, or available from ODIHR, Krucza 36/Wspolna 6, 00-522 Warsaw, Poland.)

clerical sources. As a result, pressures for separation of church and state have almost always been experienced in Europe as being hostile toward religion, especially organized religion. In the United States, the picture is much more mixed. There is no doubt that at least some of the advocates for separation of church and state have shared worries with anti-clerical Europeans that religion should not be allowed to become too powerful. Jefferson, for one, was concerned about this risk in calling for a wall of separation between church and state,⁵⁴ and there is a significant contingent of establishment clause thinkers who believe that every inroad into the separation principle must be avoided because of the risk that erosion of the wall of separation will end in intolerant domination by a majority religion.⁵⁵

What is significant about the American experience, however, is that the “anti-clerical” wing of the separationists is not nearly as significant as another wing, associated in American consciousness with Roger Williams, the founder of Rhode Island. The primary aim of Williams’ policy of separation was protection of the church against the corruptions and subtle seductions of the world. In Williams view, when men “opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness . . .”⁵⁶ As James Reichley has described it, “[f]or Williams the wall of separation was to insulate the garden of the church against the wilderness of worldly affairs—a substantially different intention than that which Thomas Jefferson later conveyed through the same metaphor.”⁵⁷ Stated differently, the point of non-establishment in the United States has more to do with

⁵⁴ See Joel F. Hansen, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 BYU L. REV. 645.

⁵⁵ Strict separationism of this type is often advocated by the American Civil Liberties Union and other separationist groups in church-state litigation in the United States.

⁵⁶ Roger Williams, cited in REICHLAY, *supra* note 3.

⁵⁷ REICHLAY, *supra* note 3, at 67. See generally MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (Chicago: Chicago University Press, 1965).

what Europeans analyze as the right of churches to autonomy in their internal affairs.⁵⁸ The worry about excessive religious power is thus balanced in American national consciousness by a concern to assure full autonomy of religious institutions.⁵⁹ As a result, one can speak of “benign” separation in America. That is, the primary aim of separation is not to hobble religion, but to liberate it: to liberate it both from direct state interventions and excessive regulatory burdens, and from the more subtle distortions of religious policy which are always a risk when religion becomes too dependent on state largesse. These concerns are not only American concerns: they are the kinds of concerns that have recently led Sweden to elect to disestablish its church after many centuries,⁶⁰ and the concerns that have led to a broader recognition in established democracies that church autonomy and independence in internal affairs is a vital dimension of religious freedom.⁶¹

⁵⁸ See, e.g., AXEL FREIHERR VON CAMPENHAUSEN, *STAATSKIRCHENRECHT: EIN STUDIENBUCH* 198-220 (Munich: C.H. Beck'sche Verlagsbuchhandlung, 2d rev. ed. 1983); Law on Freedom of Conscience and Religious Associations, art. 15, Russian Federal Law No. 125-FZ (September 26, 1997), available in LEXIS, Intlaw Library, Rfarch File [“1997 Freedom of Conscience Law”], and at On Freedom of Conscience and on Religious Associations (visited Feb. 7, 1998) <<http://www.stetson.edu/~psteves/reinews/freedomofconscienceeng.html>>.

⁵⁹ See Carl H. Esbeck, *Establishment Claims Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984); Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373-1417 (1981).

⁶⁰ See Lori Lessner, *Perseverance Carried Swedes 150 Years Ago; Archbishop to Join Lutheran Church of Chicago's North Side in Celebrating the Sesquicentennial of Immigrants' Arrival Here*, CHICAGO TRIBUNE 9 (May 10, 1996)(referring to lecture of Archbishop Gunnar Weman on “The Church of Sweden After Disestablishment” and noting that the process of disestablishment is moving forward).

⁶¹ See, e.g., Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-Operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-Up to the Conference, Principle 16(d) Jan. 17, 1989, 28 I.L.M. 527, 534 (1989).

IV. Conclusion

My concluding point is to emphasize the need to resist what might be called the “nationalist temptation.” The temptation is that in the quest to affirm distinctiveness, one runs the risk of becoming parochial, and subject to the petty and not-so-petty tyrannies that flow from parochialism. Too often, succumbing to this temptation leads governmental entities, whether it be in colonies or in countries, to lay so much emphasis on asserting their own distinctive religious identity that they give in to pressures to oppress or discriminate against those that do not fit the national norm. One of the virtues of the emergence of religious freedom as a universal human right is that this temptation is increasingly recognized as illegitimate, and the value of Lockean pluralism’s respect for difference as a foundation for just societies is affirmed.