UNIVERSITY HONORS PROGRAM

SENIOR PROJECT - APPROVAL

Name: Cory S. Stott

College: Arts and Sciences Department: Religious Studies

Faculty Mentor: Dr. Rosalind I.J. Hackett

PROJECT TITLE: Religion and Law: Separate *or* Equal?

I have reviewed this completed senior honors thesis with this student and certify that it is a project commensurate with honors level undergraduate research in this field.

Signed: R I J Hackett, Faculty Mentor

Date: 4/29/03

Comments (Optional):

Send me more like Cory!

Religion and Law:
Separate *or* Equal?

Cory S. Stott

Spring, 2003

> Law helps to give society the structure, the gestalt, it needs to maintain inner cohesion; law fights against anarchy. Religion helps to give society the faith it needs to face the future; religion fights against decadence. These are two dimensions of social relations—as well as of human nature—which are in tension with each other: law through its stability limits the future; religion through its sense of the holy challenges all existing social structures. Yet each is a dimension of the other...[1]

> There are times when one is tempted to wonder whether the Establishment Clause's rule against favoring particular religions has so permeated the legal scholars' mind-set that we have lost the ability to draw the connections between the great theologians and our scheme of government...Whatever the cause, it is a striking omission.[2]

Introduction

The idea that religion and law are and should be entirely separate in nature and function pervades Western society and ideology. As the Western model of separation begins to spread to India, Turkey, and other non-Western nations, there is increasing pressure to examine the Christian theological and philosophical roots of the separationist mystique, especially with reference to the dangers of cultural imperialism. Scholars speak of the problems inherent in the imposition of one culture's paradigms on another. Abdullahi An-Na'im comments that "the majority of Muslims believe in an Islamic state."[3] He further contends that "for Muslims, freedom to practice their faith includes the right to seize control of the state in order to 'enforce the will of God.'"[4] Even in the United States, cases dealing with religion demonstrate a wide variety of positions, and are a mainstay of the judicial system. For example, the current debate about whether the phrase "under God" should remain in the pledge of allegiance is a reminder of the pervasiveness and potential divisiveness of the issue.

---

[1] Marty, Martin E. "The Widening Gyres of Religion and Law." *Law and Religion: A Critical Anthology*. Ed. Stephen Feldman. p. 28. Quoting Harold Berman from a 1983 lecture.

[2] Hamilton, Marci A. "The Reverend John Witherspoon and the Constitutional Convention." *Law and Religion: A Critical Anthology*. p. 54.

[3] An-Na'im, Abdullahi Ahmed. "Religious Persecution in the Middle East and Sudan." *Religious Persecution as a U.S. Policy Issue: Proceedings of a Consultation held at Trinity College, Hartford, September 26-27, 1999*. p. 26.

[4] Ibid, p. 26. An-Na'im is speaking about the difficulty of universal application with regard to IRFA, but the point is equally valid in this context.

Conversations about legal issues affecting religion are frequently framed in religious rhetoric. Winnifred Sullivan speaks of "Anti-Catholicism" by the Supreme Court. She contends that the Court has hesitated to support Catholic schools, while allowing Amish students to be exempt from mandatory high school attendance in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).[5] Similarly, Stephen Feldman argues that the Supreme Court interprets the First Amendment according to Christianity. The Court, he writes, "emphasizes that the first amendment protects the individual's freedom of conscience, which is grounded firmly on Protestant and New Testament theology."[6] The issue, he later states, reflects an emphasis on belief rather than works based on Protestantism's stress on orthodoxy rather than orthopraxy.[7]

With the American penchant for Protestantism in mind, I will consider the Lutheran, Calvinist, and Constitutional influence on what Winnifred Sullivan has termed the "Accomodationist" and Jeffersonian "Separationist" perspectives.[8] Finally, with special attention to the views of Harold J. Berman, who has published extensively on religion and law, I will consider the possible pitfalls of ensuring the unbroken continuity of Jefferson's veritable Hadrian's Wall of Separation.[9]

While there are undoubtedly advantages to distinguishing between the realms of church and state, one must investigate the provenance of the belief in the sanctity of separation. Furthermore, scholars aware of the mutual imbrications of law and religion should question the pervasive idea that the wall of separation is beneficial in every cultural context. One must be wary of cultural imperialism, in this case through the imposition of a legal separation of religion

---

[5] Sullivan, Winnifred F. *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States.* p. 63.
[6] Feldman, Stephen. *Please Don't Wish Me a Merry Christmas.* p. 261.
[7] ibid, pp. 263-266.
[8] Sullivan, Winnifred F. *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States.* pp. 77-78.
[9] ibid, p. xxii. Sullivan references the Jeffersonian idea of a "wall" of separation.

and state, as it may pave the way for oppression and exploitation. Though written in an African context, the work of Ngugi wa Thiong'o gives universal insight into the dangers of cultural imperialism through the imposition of systems of law. In a section entitled "Kimathi on Law as a Tool of Oppression," he quotes:

> JUDGE: Kimathi, I may remind you that we are in a court of law.
>
> KIMATHI: An imperialist court of law...
>
> JUDGE: ...We are here to deal fairly with you, to see that justice is done. Even handed justice.
>
> KIMATHI: I will not plead to a law in which we had no part in the making.
>
> JUDGE: Law is law. The rule of law is the basis of every civilized community. Justice is justice.
>
> KAMATHI: Whose law? Whose justice?
>
> JUDGE: There is only one law, one justice...No society can be without laws to protect property...I mean protect our lives...Civilization...Investment...Christianity...Order...There's no liberty without law and order.
>
> KAMATHI: There is no order and law without liberty. Chain my legs, Chain my hands, Chain my soul, and you cry, law and justice? And the law of the people bids me: Unchain my hands, Unchain my legs, Unchain my soul![10]

Idealistic historians will argue that America's founding was rooted in a desire for religious liberty. They will recount the travails of the Pilgrims bravely traversing the Atlantic in search of freedom from the Anglican union of church and state in what those transoceanic voyagers might have termed an unholy marriage. However, they will conveniently disregard the assertion that "the overriding goal for eighteenth-century colonial Americans strikingly resembled that of the early Puritans: to create and maintain 'a Christian civilization.'"[11] To fully

---

[10] Thiong'o, Ngugi wa. *Barrel of a Pen: Resistance to Repression in Neo-Colonial Kenya*. pp. 5-6. He references one of his earlier works, *The Trial of Dedan Kimathi*, written with Micere Mugo.

[11] Feldman, Stephen. *Please Don't Wish Me a Merry Christmas*. p. 142 with endnote 117 referencing Handy.

comprehend the innate Western character of the separationist paradigm, one must realize and understand its continuous historical lineage.

Romulus and Remus

It will be argued in this essay that theological ideas directly, if surreptitiously, inform the American conception of church and state. While a great deal of attention has been given to individual thinkers' contributions, comparatively little has focused on a shared repertoire of ideas that cut across denominational lines, but share an historical and philosophical lineage. The Reformed theology of Martin Luther and his views on the proper roles of church and state have had a demonstrable effect on the American legal system and culture. However, to fully understand Luther's theology of separation, one must follow the thread of continuity further back in church history to Augustine and the Roman Empire. At the same time as Christianity struggled to gain legitimacy and then authority within the Roman Empire, Augustine was formulating an early theology of separation.

It is not clear whether or not Augustine had determined to articulate this doctrine. It certainly would not have been out of place at the time, given the recent excommunication of Emperor Theodosius I by Ambrose, the bishop of Milan, for his role in ordering a massacre. The Emperor was forced to travel to Milan to regain his ability to receive the sacraments and thus salvation in the afterlife. As Feldman notes, "regardless of [his] specific intentions when writing *The City of God*, his symbolic division of the heavenly and earthly cities has grounded the subsequent development of the doctrine of the separation of church and state."[12]

Feldman further recounts the evolution of Christianity's integration into the government of the Roman Empire and the effects of the ultimate official endorsement of Christianity by the Roman Emperors when "Christianity sealed its political triumph" in the *Edict of Emperors*

Gratian, Valentinian II, and Theodosius I, issued on February 27, 380 C.E.[13] The relationship between the Christian Church and the Roman Empire moved from persecution to public policy in the span of about a century.[14] Feldman notes that the rapid absorption of Christianity into the Roman government had three significant consequences, the first of which is directly relevant to this analysis. The initial repercussion of Christian establishment was a focus on and dialogue about matters of church and state, with advocates of two very different opinions in opposition to one another.

The position of the popes, and consequently the Church, was a hierocratic one. This perspective acknowledged the emperor as one "empowered to rule in the temporal and material world," but fundamentally subordinate to the papacy. Furthermore, the emperor governed a kingdom "irrelevant to eternal salvation."[15] One can certainly see this view of the hierarchy of authority evidenced in the conflict between the Bishop of Milan and the Emperor Theodosius I discussed earlier. The antithetical position, termed Caesaropapism, was championed by the emperors. It stated that the emperor possessed "divine authority to rule over religious as well as imperial affairs," and was demonstrated by Constantine, who convened the Council of Nicaea in 325 C.E., thereby directly influencing and determining the course of Church policy.[16]

To be reminded of the longevity of the tension between these two positions, one need only consider the humbling of Henry IV at the hands of Pope Gregory VII in 1077 C.E., and Henry's later retaliation. Henry prompted excommunication for siding with nobles in opposition to Gregory's reforms with regard to lay investiture. Much like Theodosius I, he repented to the

---

[12] ibid, p. 27.
[13] ibid, p. 21.
[14] ibid, p. 21. Feldman acknowledges that Christianity was persecuted intermittently until around the fourth century C.E. It became the official religion with the Edict mentioned above in 380 C.E.
[15] ibid, p. 21.
[16] ibid, p. 22. Feldman references Ehler and Ullmann.

church authority—in this case Gregory. He is said to have stood in the snow for three days at Canossa before, as legend has it, he was forgiven by the piqued pontiff. However, Henry later asserted his authority in a Caesaropapist fashion by supporting the installation of an antipope, Clement III in 1080 C.E.

Luther's Two-Kingdoms

The theological and cultural influence of Christianity on American society and thus the American legal system cannot be fully considered to begin with Martin Luther. One must delve even further into the history of the Christian Church to realize the influences. Luther's theology draws upon the Augustinian separation of the City of God from the realm of humanity, and lies within a context of an unbroken struggle for power between the Church and various governments beginning with the Roman Empire. However, the thought promulgated by his writings and spread as a result of the Reformation serves to create an even starker divide between the realms of Religion and State in the Western context.

John Witte explains Martin Luther's Two-Kingdoms framework, noting that "God has ordained two kingdoms—earthly and heavenly. The earthly is the realm of creation...where a person operates primarily by reason and law. The heavenly kingdom is that of redemption, of spiritual and eternal life, where a person operates primarily by faith and love."[17] Luther emphasizes the inner nature of the spiritual or heavenly kingdom. For Luther, the divide was not so much between church and state, as between an inner, inviolable realm, and an outer, earthly one. As stated earlier in the Roman context,[18] an earthly king would therefore be ruling over a world steeped in irrelevance.

[17] Witte, John, Jr. *Law and Protestantism.* p. 5.
[18] See Footnote 8

Two central components of Lutheran theology, justification by faith and the innate sinfulness of humanity, further divide the Two Kingdoms. Hearkening back to Augustine's *City of God*, Luther divided humanity into two classes: those under the authority of the realm of Heaven and those in the domain of the world. To administer these two separate jurisdictions, "God ordained two governments: the spiritual, 'by which the Holy Spirit produces Christians and righteous people under Christ,' and the temporal or secular, 'which restrains the un-Christian and wicked.'"[19] Therefore, there are two divisions made by Luther: a division between types of people, and a division between governments or authorities.

To further elaborate the differences between the Two Kingdoms, John Witte asserts that "the earthly kingdom is distorted by sin, and governed by the Law," while "the heavenly kingdom is renewed by grace and guided by the Gospel."[20] Just as God reigns over both kingdoms, so do Christians belong to both. Luther therefore acknowledges the necessity of both kingdoms. Even if the earthly kingdom is tarnished by sin, both kingdoms must endure, "the one to produce righteousness, the other to bring about external peace and prevent evil deeds."[21]

The distinction between internal and external kingdoms is important for two reasons. First, it allows secular and ecclesiastical authorities complete autonomy within their realm. For this reason, according to Feldman, "Luther rejected both the Caesaropapist and hierocratic positions," contending that "religious and secular authorities should complement and not compete with each other."[22] One might assume that the relegation of secular power to the exterior would result in a greater measure of religious freedom for the individual. This was not the case, as Luther operated under the assumption that "the secular law of the state would, in

[19] Feldman, Stephen M. *Please Don't Wish Me a Merry Christmas*. p. 59.
[20] Witte, John, Jr. *Law and Protestantism*. p. 105.
[21] Feldman, Stephen M. *Please Don't Wish Me a Merry Christmas*. p. 60.
[22] ibid, p. 62. Referencing Skinner and Forrester in endnote 69.

Luther's view, always be the law of a Christian ruler."[23] The second consequence of Luther's distinction is therefore a reduction or at least maintenance of the sixteenth century status quo with regard to religious freedom.

Luther argued the supremacy of the text and the accessibility of Christianity to the laity, asserting his own right to religious freedom from the Catholic hegemony, yet, "in Lutheran lands, not every biblical truth could set one free; only evangelical Lutheran truths might do so."[24] One might contend that this insistence on his own interpretation did not affect overall religious freedom, only flexibility and originality within the Lutheran denomination. Luther wrote:

> Temporal authority has laws, which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul.[25]

However, he "in no way advocated toleration of or liberty for religious outgroups,"[26] and "saw no inconsistency in his argument when it was *his* prince, the elector of Saxony, who mandated his (Luther's) teaching and suppressed the views of rival Protestants" like Zwingli, with whom he had no small disagreement on the matter of the Eucharist.[27]

The extent of Luther's accomodationist sense of the role of the external, earthly kingdom is seen in his portrayal of the magistrate as a figure with a responsibility to "elaborate and enforce [the natural word of God] through their positive laws and public policies."[28] In addition to "combining faith, reason, and tradition," the magistrate, "who represents God in this earthly kingdom," must "pray to God earnestly for wisdom and instruction" in administering the law,

---

[23] ibid, p. 62. Referencing Berman and Mitchell in endnote 73.
[24] Ozment, Steven. "Martin Luther on Religious Liberty." *Religious Liberty in Western Thought*. Ed. Reynolds and Durham. p. 77.
[25] ibid, 81. Excerpted from Martin Luther's *On Temporal Authority* in *Luther's Works*. Ed. W.I. Brandt.
[26] Feldman, Stephen M. *Please Don't Wish Me a Merry Christmas*. p. 62.
[27] Ozment, Steven. "Martin Luther on Religious Liberty." *Religious Liberty in Western Thought*. Ed. Reynolds and Durham. p. 81.
[28] Witte, John, Jr. *Law and Protestantism*. p. 114.

which Luther considered "a form of 'heathen wisdom.'"[29] In every aspect, the magistrate is to reflect upon his inner, heavenly kingdom in the dispensation of his duties in the earthly kingdom. The proposition that the magistrate might subscribe to another religious mindset would certainly be a cause of considerable confusion and vexation.

One may conceive of Lutheran theology as a link in the philosophical chain of the separationist chain beginning with Augustine. However, the de facto practice of Luther would be much more appropriately labeled an early form of the accomodationist perspective. Regardless, Luther had a tremendous influence on Western cultural conceptions of religion and law as disparate spheres. While John Calvin and Luther would disagree in a number of areas, Calvin would follow closely in his footsteps with regard to affecting ideologies of church and state.

A Calvinist Lineage

Calvin's conception of the relationship between church and state bears marked similarity to that of Luther in that both see that the sacred and secular spheres are separate and different to the extent that they cannot be directly comparable. Calvin maintained that "[secular] government is distinct from that spiritual and inward Kingdom of Christ, so we must know that they are not at variance."[30] With regard to liberty and freedom of religion, Calvin concurs with Luther. Witte captures the nature of his argument, writing that, with Calvin, "liberty of conscience is 'in all its parts, a spiritual thing'...a liberty to obey the commandments of God with a free conscience. God defines the duties of man, the commandments; man has the liberty to choose to obey them."[31]

---

[29] ibid, p. 115. Witte references several of Luther's works.
[30] Feldman, Stephen. *Please Don't Wish Me a Merry Christmas*. p. 69. He quotes Calvin's Institutes in endnote 111.
[31] Witte, John, Jr. "Moderate Religious Liberty in the Theology of John Calvin." *Religious Liberty in Western Thought*. Ed. Noel B. Reynolds and W. Cole Durham, Jr. p. 91. Witte references the Institutes in footnote 46.

Feldman contends that Calvin became part of the lineage of Thomas Aquinas, Machiavelli, and Luther "by enhancing the status of the secular state."[32] While one may acknowledge Calvin's verbal homage to the separate nature of secular government, his actions and policies, like those of Luther, place him squarely at odds with Aquinas and Machiavelli. Machiavelli would have argued that a ruler should avoid subordinating himself to the authority of the church, while Aquinas would have objected to the lack of reason allowed a secular authority in his or her process of religious discernment.[33] There may be demonstrable continuity between Luther and Calvin, but Machiavelli and Aquinas valued individual reason too highly to be considered part of their ancestry. One may more accurately continue the lineage already discussed with roots in the writings of Augustine. The Calvinist progeny in the American context reveal their exposure to this extraction through their activities during the formation of the United States and its government.

Presbyterians in Politics

> Calvinist theory has never limited itself solely to organization of the church structure. It is the mark of Calvinist, and especially Presbyterian, theory that it has political application.[34]
>
> Cousin America has run off with a Presbyterian parson and that was the end of it.[35]

The role of John Witherspoon and other Presbyterians in the politics of early U.S. history should not be overlooked. John Witherspoon traveled in a number of circles as a Presbyterian minister, head of the College of New Jersey, which would later become Princeton University, member of the Continental Congress, signatory of the Declaration of Independence, and member of the New Jersey ratifying body for the Constitution. During the American Revolution, a

---

[32] Feldman, Stephen M. *Please Don't Wish Me a Merry Christmas*. p. 69.
[33] Witte, John, Jr. "Moderate Religious Liberty in the Theology of John Calvin." *Religious Liberty in Western Thought*. Ed. Noel B. Reynolds and W. Cole Durham, Jr. p. 91.
[34] Hamilton, Marci A. "The Reverend John Witherspoon and the Constitutional Convention." *Law and Religion: A Critical Anthology*. p. 60.
[35] ibid, p. 54. Hamilton quotes Horace Walpole.

British military officer called him a "political firebrand, who perhaps had not a less share in the Revolution than Washington himself," particularly through his teachings to students.[36]

Marci Hamilton contends that Witherspoon's influence over the Founders and Constitutional development manifested itself in two ways. First, Witherspoon mentored a number of the Framers, most notably James Madison, who acknowledged "that Witherspoon had prescribed to him 'a strong dose of Calvinism.'"[37] Second, and perhaps more demonstrably, the Presbyterian Church was in Philadelphia creating its revised constitution at the same time as the Constitutional Convention was being held there. Witherspoon chaired the committee in charge of revising the old Presbyterian constitution.

In several sermons beginning roughly in 1776, Witherspoon compared the Reformation and the creation of America, both of which he believed stood against injustice and tyranny. He compared the rebellious colonies to the Biblical David, striving against a Philistine Goliath. "Like the Reformation," preached Witherspoon, "'the cause in which America is now in arms is the cause of justice, of liberty, and of human nature.'" For him, the Revolution could be "framed...as a holy war, one the faithful could not forgo without imperiling their salvation."[38] Although one may argue that this merely represents the ardent political outcry of a clergyman, Witherspoon's influence in overseeing the education of a number of early American leaders, as well as his direct role in government makes it impossible to dismiss the significance of such religious rhetoric in political and legal debate.

Witherspoon rejected the notion of a monarchical hierarchy within the revised Presbyterian constitution, and would do the same with regard to the U.S. Constitution. In offering a formula for successful government, Witherspoon emphasized that "it should be

[36] ibid, p.55. Hamilton references Collins' biography of Witherspoon.
[37] ibid, p.55. Hamilton quotes from writings of Witherspoon edited by Miller.

assumed that all rulers, including the people if they were rulers, would be tempted to abuse their powers."[39] Witherspoon drew upon the Calvinist doctrine of the depravity of humanity and the inexorable draw of temptation. As Hamilton quotes, "man's depraved apostate Condition renders Government needful. Needful both in the State and the Church."[40] In a single statement, one may extract the doctrines asserting depravity and rejecting infallibility, even in the Church.

The Presbyterian system of organization relies heavily upon a representative government. Direct democracy like that of the Congregationalists was utterly rejected as a format because, like John Calvin, the Presbyterians at the time found anarchy as distasteful as they found despotism. To give an idea of the prevailing Presbyterian scorn for this form of government, one need only consider a "Presbyterian minister," who "'poured pages of inky contempt on Congregational democracy,'" deriding its "'localism'" among other flaws.[41] The other end of the spectrum, a bishopric, or hierarchical system similar to that of the Catholics, seemed unthinkable given both historical and then contemporary considerations. Representative government provided the most plausible and prudent assurance against corruption due to the innate sinfulness of even the most saintly of church leaders.[42]

Having in their collective mind resolved the dilemma of governmental organization, as it was no doubt predestined to be, the Presbyterians moved to share their opinions on government with those in the political realm. The Presbyterian imprimatur is clearly seen in the rejection of direct democracy and monarchy by the Framers in favor of none other than a representative democracy. One may have difficulty conceiving that Witherspoon had such sway as to be the architect of this form of government. However, he was not alone in his Presbyterianism. Of the

[38] ibid, p. 56.
[39] ibid, p. 57.
[40] ibid, p. 59.
[41] ibid, p. 59.

Framers, six belonged to the Presbyterian denomination. Besides Witherspoon, there was one minister, and ten of the framers received their education at the College of New Jersey. Five of the ten had been students of John Witherspoon. One of the five students was James Madison.[43]

The Constitution: Is Religion Truly Separate?

> But the greatest thing by far is to be a master of metaphor.[44]

The lineage of Martin Luther and John Calvin in asserting freedom of religion while maintaining that this freedom exists only within the confines of Christianity was continued by some of the Framers. Dr. Benjamin Rush corresponded with a number of the prime architects of the Declaration of Independence and Constitution, including Jefferson and Franklin, and, along with these individuals, signed the Declaration of Independence. He supported "the proposition that liberty cannot be established without morality nor morality and a virtuous citizenry without religion," writing:

> The only foundation for a useful education in a republic is to be laid in RELIGION. Without this, there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments...The religion I mean to recommend in this place is the religion of JESUS CHRIST.[45]

While Thomas Jefferson would have objected to Rush's thoughts on government establishment of religion through public schools, he may have been open to Rush's "proposition" concerning the importance of religion to virtue, morality, and liberty. Harold Berman suggests that Jefferson, though "an ardent advocate of freedom of every kind of opinion...believed that, despite all diversity, there was a common core of religious belief that was essential to preserve peace and order in society." In his first presidential message, in 1801, Jefferson stated "that the

---

[42] ibid, pp. 56-62.
[43] ibid, p. 61.
[44] Dreisbach, Daniel. *Thomas Jefferson and the Wall of Separation between Church and State*. p. 107. Dreisbach quotes Aristotle's *Poetics*.

liberties of a nation [cannot] be thought secure when we remove their only firm basis, a conviction in the minds of the people that their liberties are the gift of God."[46] These statements may seem a stark contrast to the picture of Jefferson as the master mason erecting his Wall of Separation through the craftsmanship of words, but upon closer inspection, one realizes that Jefferson's position with regard to government is very much one of separation.

Jefferson states his belief that religion is important for morality, and thus for the preservation of liberty. As Berman elucidates, "the authors of the Constitution, including those who were personally skeptical of the truth of traditional theistic religion, did not doubt that the vitality of the legal system itself depended on the vitality of religious faith," especially "the Protestant Christian faith that predominated in the new American Republic."[47] Neither Jefferson nor Madison failed to notice this predominance, and their "rhetoric seems to be directed at a polity that they, at least, believed did not question the existence of God."[48]

Regardless of the theology inherent in his language and that of Madison, Jefferson in no way endorses the government sanctioning of religion as called for by Benjamin Rush. According to the Jeffersonian perspective, "the disestablishment of religion was a great 'experiment,'...intended to test whether that common core of shared religious belief...could flourish without governmental sanctions."[49] Jefferson believed in the need for religion for pragmatic reasons, but also saw the need for government separation from it. His "experiment"

---

[45] Sandoz, Ellis. "Religious Liberty and Religion in the American Founding Revisited." *Religious Liberty in Western Thought.* Ed. Noel B. Reynolds and W. Cole Durham, Jr. p.263. Use of capitals is in the Sandoz quote of Rush from Rush's writings. See Sandoz Footnote 30.

[46] Berman, Harold J. *Faith and Order: The Reconciliation of Law and Religion.* p. 210. References to Padover and Cornelison in footnotes 2 and 1, respectively.

[47] Ibid, pp. 210-211.

[48] Failinger, Marie A. "Wondering after Babel: Power, Freedom and Ideology in US Supreme Court Interpretations of the Religion Clauses." *Law and Religion.* Ed. Rex J. Ahdar. p. 93.

[49] Berman, Harold J. *Faith and Order: The Reconciliation of Law and Religion.* p. 210. Berman references Mead in footnotes 3 and 4.

was whether or not religion could survive without assistance from an alliance with the state, such as that enjoyed by the Christian Church throughout the Middle Ages.

The Great Schism: Accommodationists and Separationists

One can observe the evolution of the separation of church and state from the fourth century C.E. through the eighteenth century C.E. The lineage of Augustine, Calvin, and Luther split at the time of Jefferson into the categories appropriately labeled by Winnifred Sullivan. The accomodationist position is represented by Benjamin Rush and the separationist by Jefferson himself. However steadfastly Jefferson strove to refine and maintain his Wall of Separation, he faced a difficult battle against those of Rush's ilk.

Berman raises significant questions with regard to how successfully separationists managed to eliminate Christianity and Christian theology from the government and courts. The difficulties began early with conflict over whether the first amendment applied to both federal and state governments, or solely to the federal. According to Berman, "the first amendment was well understood to be applicable to the federal government alone." The justification of this opinion relies on the amendment's use of the word "Congress" when stating which body should refrain from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[50]

To exemplify the consequences of this interpretation, in 1811, the highest New York state court refused to overturn a conviction "for blasphemous utterances against Christ." Chief Justice Kent opined that "we are a christian people, and the morality of the country is deeply ingrafted [sic] upon christianity..."[51] Perhaps even more telling with regard to the mood of state courts and the unabashed zeal with which they established Christianity in a Pennsylvanian context. In

[50] Ibid, p. 211. Berman quotes the religion clauses of the First Amendment to the U.S. Constitution.
[51] Ibid, p. 211.

1822, a Pennsylvania man was found guilty of "blasphemy for saying that 'the Holy Scriptures were a mere fable' and that 'they contained a great many lies.'" The Pennsylvania Supreme Court's take on the matter was as follows:

> Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania,...not Christianity founded on any particular religious tents; not Christianity with an established church, and tithes and spiritual courts; but Christianity with liberty of conscience to all men.[52]

The Pennsylvania Supreme Court opinion bears a remarkable resemblance to that of Calvin discussed earlier, in which "God defines the duties of man, the commandments; man has the liberty to choose to obey them."[53] Certainly, this interpretation of liberty was not that intended by Thomas Jefferson.

Jefferson, in his 1802 letter to the Danbury Baptist Association, considered "with sovereign reverence" the inclusion of the religion clauses in the plan of the "American people" with regard to the actions of the legislature, "thus building a wall of separation between Church & State." Jefferson was always keenly aware of the power and subtlety of language. It is therefore interesting to note that in his preliminary draft of the letter,[54] He writes, "thus building a wall of *eternal* separation between church and state."[55] If Jefferson, a master wordsmith, contemplated using the word "eternal," he must have felt very strongly on the subject. "Eternal" not only denotes infinite longevity, but also connotes a fortitude of Herculean proportions.

The description of Jefferson's "Wall" as a Hadrian's Wall is appropriate in that it captures the symbolism of Jefferson's words. Just as Hadrian's Wall stretched seemingly in perpetuity to ensure protection for Roman Britain, so does Jefferson's Wall stand to provide

---

[52] Ibid, p. 212.

[53] Witte, John, Jr. "Moderate Religious Liberty in the Theology of John Calvin." *Religious Liberty in Western Thought*. Ed. Noel B. Reynolds and W. Cole Durham, Jr. p. 91. Witte references the Institutes in footnote 46.

[54] The draft and final version may be found in Appendix 6 of Daniel Dreisbach's *Thomas Jefferson and the Wall of Separation between Church and State* on pages 144 and 148 respectively.

safety from marauding tyrants in the sheep's clothing of established religion. Jefferson's powerful language served as an attempt to calm the voices of clergy who had been brutally attacking his separationist policies. None other than a Presbyterian minister, John Mitchell Mason, declared that "it would be 'a crime never to be forgiven' for the American people to confer the office of chief magistrate 'upon an open enemy to their religion, their Redeemer, and their hope,'" further, it would be "'mischief to themselves and sin against God."[56] Perhaps the key difference between the two perspectives lay in their visions of the nation's future. The accomodationists, rooted in Calvinist and Lutheran ideals of religious liberty, envisioned government acting in the name and according to the will of a Christian God. Jeffersonian separationists found experiences of minority religious groups, such as the case of the Danbury Baptists, instructive and imagined a pluralistic society in which alternate viewpoints would be tolerated and treated equally under the law, despite majority opinions to the contrary.

Conclusion

By way of summation, we may consider the words of Harold Berman, who warns of the hazards of the most recent link in the evolutionary chain of the separation of church and state. He cautions that "the radical separation of law and religion in twentieth century American thought...creates a serious danger that law will not be respected." The efficiency of law, he continues, is based on trust in the law eliminating the need for "coercive sanctions."[57] Berman is reinforcing the idea found throughout Calvinist and Lutheran thought that considers religion as an integral part of a successful government and legal system. Like Jefferson, however, he does not advocate an establishment of religion.

---

[55] Italics denote the text omitted in the final version. See previous footnote (47) for citation information.
[56] Dreisbach, Daniel. *Thomas Jefferson and the Wall of Separation between Church and State*. p. 19.
[57] Berman, Harold J. *Faith and Order: The Reconciliation of Law and Religion*. p. 215.

With regard to religion, Berman continues, "the radical separation of law and religion...creates a serious danger...namely the danger that it will be viewed as a wholly private, personal, psychological matter without any social or historical or legal dimension." In Berman's opinion, respect must be garnered for Jefferson's "experiment," because it "may be in the process of failing."[58] Viewed in general terms, the privatization of religion due to increasing compartmentalization and a culture of separation threatens the social relevance of religious practice as well as the viability of the legal system. However, on the positive side, separation does provide a measure of freedom and security from "caesaropapism, on the one hand, and theocracy on the other."[59]

The difficult task within the American context is monitoring and regulating the ebb and flow in the balance of power between church and state to ensure freedom for and from religion. In carrying out this task, Supreme Court Justices and Constitutional scholars must continually reinterpret the dynamic and constantly renegotiable Jeffersonian wall, while remaining cognizant of its inherently and unavoidably porous nature with regard to the exchange of ideas and beliefs. Successful reinterpretation and renegotiation of religion and law is contingent upon the ability to recognize the historical dimension and lineage of the balance of power between them. Without this realization, it is impossible to fully understand the way in which separationist thought is embedded in our culture, and therefore equally difficult to comprehend the consequences of imposing a Western paradigm on other cultures.

[58] Ibid, p. 216.
[59] Ibid, p. 216.

Works Consulted

An-Na'im, Abdullahi Ahmed. "Religious Persecution in the Middle East and Sudan." *Religious Persecution as a U.S. Policy Issue: Proceedings of a Consultation held at Trinity College, Hartford, September 26-27, 1999*. Ed. Rosalind I.J. Hackett, Mark Silk, and Dennis Hoover. Hartford: Center for the Study of Religion in Public Life, 2000

Berman, Harold J. *Faith and Order: The Reconciliation of Law and Religion*. Grand Rapids: William B. Eerdmans Publishing Co., 1993.

Dreisbach, Daniel L. *Thomas Jefferson and the Wall of Separation between Church and State*. New York: New York University Press, 2002.

Failinger, Marie A. "Wondering after Babel: Power, Freedom and Ideology in US Supreme Court Interpretations of the Religion Clauses." *Law and Religion*. Ed. Rex J. Ahdar. Aldershot: Ashgate Publishing, Ltd., 2000.

Feldman, Stephen M. "A Christian America and the Separation of Church and State." *Law and Religion: A Critical Anthology*. New York: New York University Press, 2000.

---. *Please Don't Wish Me a Merry Christmas*. New York: New York University Press, 1997.

Gutmann, Amy. "Religion and State in the United States: A Defense of Two-Way Protection." *Obligations of Citizenship and Demands of Faith*. Ed. Nancy L. Rosenblum. Princeton: Princeton University Press, 2000.

Hamilton, Marci A. "The Reverend John Witherspoon and the Constitutional Convention." *Law and Religion: A Critical Anthology*. New York: New York University Press, 2000.

Marty, Martin E. "The Widening Gyres of Religion and Law." *Law and Religion: A Critical Anthology*. New York: New York University Press, 2000.

McConnell, Michael W. "Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine." *Law and Religion*. Ed. Rex J. Ahdar. Aldershot: Ashgate Publishing, Ltd., 2000.

Ozment, Steven. "Martin Luther on Religious Liberty." *Religious Liberty in Western Thought*. Ed. Noel B. Reynolds and W. Cole Durham, Jr. Atlanta: Scholars Press, 1996.

Richardson, James T. "Discretion and Discrimination in Legal Cases involving Controversial Religious Groups and Allegations of Ritual Abuse." *Law and Religion*. Ed. Rex J. Ahdar. Aldershot: Ashgate Publishing, Ltd., 2000.

Sandoz, Ellis. "Religious Liberty and Religion in the American Founding Revisited." *Religious Liberty in Western Thought*. Ed. Noel B. Reynolds and W. Cole Durham, Jr. Atlanta: Scholars Press, 1996.

Sullivan, Winnifred F. *Paying the Words Extra*. Cambridge: Harvard University Press, 1994.

Thiong'o, Ngugi wa. *Barrel of a Pen: Resistance to Repression in Neo-Colonial Kenya*. Trenton: Africa World Press, 1983.

Witte, John, Jr. *Law and Protestantism*. Cambridge: Cambridge University Press, 2002.

---. "Moderate Religious Liberty in the Theology of John Calvin." *Religious Liberty in Western Thought*. Ed. Noel B. Reynolds and W. Cole Durham, Jr. Atlanta: Scholars Press, 1996.