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# The Iceberg of Religious Freedom: Subsurface Levels of Nonestablishment Discourse

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THE ICEBERG OF RELIGIOUS FREEDOM:  
SUB-SURFACE LEVELS OF NONESTABLISHMENT DISCOURSE

Steven D. Smith<sup>1</sup>

I hope I correctly understood Professor Dallan's invitation to participate in this conference as a proposal to reflect broadly on scholarly work in an area in which I've been teaching and writing for about two decades now, and in any case I want to try do that by describing what I perceive to be three levels of disagreement in establishment clause discourse. For short, we can call these the "lawyerly," the "constitutive," and the "philosophical" (or perhaps the "theological") levels. Disagreement at the first of these levels is readily and everywhere apparent in the way lawyers and justices and scholars write and argue; disagreement at the second level is somewhat less obtrusive but still easily discernible; disagreement at the third level is almost wholly beneath the surface. Nonetheless, my own view is that much of what is said and decided at the first, most visible level is largely dictated by commitments at the second level, and that (contrary to liberal wisdom which suggests that public or constitutional reasoning should be detached from people's various "comprehensive doctrines"<sup>2</sup>) commitments at the second level are in turn influenced to a significant extent by what is believed or at least presupposed at the third level. Hence the comparison of our establishment clause discourse to an iceberg: what we see is the most insubstantial part, and the real mass and force are partly or largely out of sight.

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<sup>1</sup> Warren Distinguished Professor of Law, University of San Diego. The paper was presented at a conference at Creighton Law School on October 9, 2004, though the present draft has not been altered in response to questions raised at the conference. I thank Larry Alexander and participants in a convocation at Westminster Seminary for comments on an earlier draft.

<sup>2</sup> See generally John Rawls, *Political Liberalism* (paperback ed. 1996) .

## LAWYERLY DISPUTES

So let me start by simply alluding to the sorts of lawyerly arguments that we all observe and often participate in. Are school voucher programs that include religious schools constitutional?<sup>3</sup> May a judge— or a city— place a monument inscribed with the Ten Commandments on public property?<sup>4</sup> Are the words “under God” in the Pledge of Allegiance unconstitutional?<sup>5</sup> What about so-called “faith-based initiatives”? Or prayer in public school classrooms, or graduation exercises, or sports contests?<sup>6</sup> May a city allow a youth organization with a marginal religious component to use property in a public park?<sup>7</sup> May a state require the teaching of creationism in the public schools if evolution is taught?<sup>8</sup> And so forth.

These are the kinds of questions that we encounter in the newspapers almost everyday, and that law professors teach about and write about; and we typically do so using familiar lawyerly techniques and materials. So we argue about what “the framers intended,” or about what the chaotic mass of modern precedents really means, or about what the doctrines announced by the modern Supreme Court require or entail or imply.

It is plain enough that these sorts of lawyerly arguments have not led to any general consensus

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<sup>3</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>4</sup> See, e.g., *ACLU v. Ashbrook*, 375 F.3d 484 (6<sup>th</sup> Cir. 2004).

<sup>5</sup> See *Elk Grove School District v. Newdow*, 124 S. Ct. 2301 (2004).

<sup>6</sup> See, e.g., *Santa Fe School District v. Doe*, 530 U.S. 290 (2000).

<sup>7</sup> See *Barnes-Wallace v. Boy Scouts*, 275 F. Supp. 1259 (S. D. Cal. 2003).

<sup>8</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987).

regarding the various legal controversies that arise, nor does consensus seem likely to emerge any time soon. And the lack of consensus is hardly surprising. After all, we know from experience that on large constitutional questions in which people have a stake, the lawyerly materials are rarely determinate enough to demonstrate decisively that one answer is right and the other answers are wrong. Usually there will be reasonable disagreements over how to characterize the “original meaning” of a constitutional provision, and how to adapt that meaning to modern circumstances, and the extent to which original meaning should govern modern interpretations anyway; and these disagreements make it impossible for one side in a controversy to triumph conclusively.

In this particular area (that is, establishment clause controversies), I think there is a special problem, which is that we can be reasonably confident that the prevailing official account of the constitutional provision’s original meaning— the separationist story as told in *Everson v. Board of Education*<sup>9</sup> and reiterated by people like Justice Souter<sup>10</sup>— is, at least as a mundane historical proposition, false in important respects. The original purpose of the establishment clause was simply to leave the matter of religion where it had been all along and where most everyone in the founding period believed it should stay— namely, within the jurisdiction of the states.<sup>11</sup> But hardly anyone favors that position today: *I* certainly don’t. And more generally, people (and especially Justices) are not about to

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<sup>9</sup> 330 U.S. 1 (1947).

<sup>10</sup> See *Rosenberger v. Rector, University of Virginia*, 515 U.S. 819, 863, 868-72 (1995) (Souter, J., dissenting).

<sup>11</sup> See *Elk Grove School District v. Newdow*, 124 S. Ct. at \_\_\_\_ (Thomas, J., concurring). I have argued at length for this jurisdictional interpretation in Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 17-50 (1995).

give up on an attractive story for as trivial a reason as that the story happens to be false. The result, however, is that the official story assumes more the character of a revered myth.

One of the virtues of a myth is that it can be retold and revised and shaded to suit current needs and values. But that virtue also means that insofar as there is disagreement about what those current needs and values are, a malleable myth will not be able to settle those disagreements, because everybody will be able to reshape the myth to their own purposes.

If the familiar lawyerly materials are incapable of demonstrating that one view in a controversy is correct and the other views are wrong, then a suspicion naturally arises: maybe the lawyers and scholars and judges are not so much deriving their conclusions from the arguments they publicly offer, but rather are (consciously or unconsciously) selecting from a rich batch of rhetorical resources whatever materials and arguments operate to support outcomes that they are already predisposed to favor on other grounds. Maybe premises are being derived from conclusions, not the other way around. But then what are the real determinants of those conclusions, and hence of the premises? What prompts Justice Thomas, say, to prefer the premises that will lead to one set of conclusions and Justice Souter to prefer a different set of premises?

#### THE CULTURAL DIVIDE: WHAT “AMERICA” IS

The answer, I suspect (or at least a large part of the answer) is that our lawyerly arguments are driven to a significant extent by our more general understandings and commitments about what sort of political community the nation we call “America” is. And here we notice a somewhat different and deeper kind of disagreement— one that is only occasionally debated forthrightly in lawyerly arguments

about school prayer or school vouchers, but that is sometimes at least alluded to and that in any case is familiar enough from other work and in other contexts. Sometimes this disagreement is discussed under the heading of “culture wars,” which of course was the title of a much noticed book published just over a decade ago by the University of Virginia sociologist James Davison Hunter.<sup>12</sup>

Hunter found that across a wide variety of seemingly independent political and social issues, Americans tend to coalesce into two broad camps, which he called “progressive” and “orthodox.” These camps diverge over the essential character of the nation. “This is a conflict over how we are to order our lives together,” Hunter observed. “[T]he contemporary culture war is ultimately a struggle over national identity—*over the meaning of America*, who we have been in the past, who we are now, and perhaps most important, who we, as a nation, will aspire to become in the new millennium.” Consequently, the struggle expresses itself, among other ways, in competing constitutional claims in more than the lawyerly sense— competing claims, that is, about what “constitutes” us as a nation. Orthodox interpreters “link[] the nation’s birth to divine will . . . . To them, America is, in a word, the embodiment of Providential wisdom.” By contrast, “[t]hose on the progressive side of the cultural divide rarely, if ever, attribute America’s origins to the actions of a Supreme Being.” Instead, they tend to suppose that “the American mind has been from the outset pragmatic, optimistic, and secular. . . .”<sup>13</sup>

If you want convenient labels for these two understandings of America, you can easily find them simply by pulling out and examining the back of a dollar bill. On the left side, just under the pyramid capped by the spooky radiant eye, you see the phrase “*Novo Ordo Seclorum*.” The Latin words are

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<sup>12</sup> James Davison Hunter, *Culture Wars* (1991).

<sup>13</sup> *Id.* at 50 (emphasis in original), 109, 113.

best translated as “New Order for the Ages,” or so I am told; but if like me you never studied Latin, you might naturally translate this phrase as “New Secular Order.” Balancing this description, though, in slightly more legible letters and in the middle of the bill, are the words we now know as the national motto of the United States: “In God We Trust.”

“*New Secular Order*” vs. “*In God We Trust*”: these are mere slogans. Slogans can be important, but philosophers and social scientists tell us that our more developed understandings often adopt narrative terms: we grasp our worlds, and our most basic beliefs and commitments, in the terms of stories.<sup>14</sup> And in fact the “progressive” camp and the “orthodox” camp each has its own story of America— a story that explains how America came into being, and how it developed, and what it stands for.

The Secular Order story narrates how freedom-loving colonists fled the oppressive religious establishments of early modern Europe and, after some floundering and backsliding, eventually concluded that the best way to avoid the conflict and persecution associated with such establishments was to embrace a “separation of church and state” – a principle that at first mainly seemed to mean that government should be religious in a vague, generically Protestant way but gradually came to mean that government must be “secular.” Hence *novo ordo seclorum* – the “new secular order.”

It is crucial to note that the “Secular Order” story is not presented as being antagonistic to religion. On the contrary. “Secularism” has various meanings,<sup>15</sup> of course, and in some of its senses it

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<sup>14</sup> See Christian Smith, *Moral, Believing Animals* (2002).

<sup>15</sup> See generally Steven D. Smith, “The Religious,” “the Secular,” and “the Moral”: What Are We Talking About?, 36 *Wake Forest Law Rev.* 487 (2001).

*does* denote an overt hostility to religion: we have seen that sort of secularism in, for instance, Soviet Russia or late-eighteenth century France (and perhaps in twenty-first century France as well, as the continuing controversy over Muslim head scarves may suggest). And no doubt some of the partisans of the Secular Order story in this country *are* instinctively or even self-consciously hostile to religion. Self-styled children of the Enlightenment, they may be a bit fuzzy about just what “religion” is, but they know that it is a repository of ignorance and superstition, and they are chagrined that religion has not just disappeared in the way Mill and Marx and Durkheim and Weber and Freud and Comte and nearly every other significant thinker of the nineteenth and early twentieth centuries solemnly assured us it would.<sup>16</sup> Working in universities, I have hobnobbed and argued and joked with such people for years.

Still, the Secular Order story itself is not inherently hostile to religion. I will qualify this statement in a moment, but for now let me say that many of the story’s most faithful proponents are genuinely devout people who believe, not without reason, that religion flourishes best when it does not get mixed up with government. According to a common view, the American “separation of church and state” is precisely why religion seemingly enjoys more vitality in this country than in most of the nations of Europe, where governments continued to support religion for a much longer period (and in some cases still do), and where many of the grand or charming old churches of centuries past now appear to be forlorn relics.

The adoption of a commitment to a separation which evolved into public secularism was viewed by those who undertook it as a daring departure— a “lively experiment.”<sup>17</sup> But the experiment

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<sup>16</sup> See Jose Casanova, *Public Religions in the Modern World* 17 (1994).

<sup>17</sup> See generally Sidney Mead, *the Lively Experiment* (1960).



has turned out to be more successful than its authors could reasonably have hoped for: subsequent history has shown that orderly government can survive and even prosper without the support of religion. By allowing religion to flourish in the private realm, moreover, the community is able to respect two crucial commitments articulated in the Declaration of Independence and celebrated over the course of our constitutional tradition: *liberty* and *equality*. Citizens have the liberty to follow the religion of their choice or, if they prefer, to remain independent of any religion or faith. And all citizens are regarded as equals before the law, regardless of their religious faith or lack thereof: Methodists have no greater or lesser political status than Baptists, or Jews, or Hindus, or agnostics.

In sum, this story tells how America developed secular government as a response to modern religious pluralism— and thereby set an example to the nations of the world. It is a cheerful, invigorating story. So we cannot be surprised that the Secular Order story is told and retold— in high school civics classes, and by eminent political philosophers like John Rawls and, occasionally, in judicial opinions by Supreme Court Justices.<sup>18</sup>

Even so, the Secular Order narrative it is not the only story of America that enjoys widespread support in this country. A leading alternative, which we might call the Providential story, agrees with the Secular Order story in many respects. It also begins with Old World decadence, and with the observation that conditions in early modern Europe had become uncondusive both to a peaceful, happy human existence and to the healthy practice of religion. And it agrees that the story of America is centrally one about the realization of liberty and equality. But it does not see “secularism” as the central

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<sup>18</sup> Indeed, I have taken the broad outlines of the story directly from *Everson*.

theme or strategy in the development of these commitments.

According to the Providential story, rather, America reflects a more mature understanding (and a providentially-inspired one, most likely) of what genuine faith consists of. The older, medieval view had assumed that if a religious doctrine was true and important, it followed that government should not merely embrace and endorse that doctrine but should do what it could to induce conformity and acceptance. This view had its logic. If baptism is essential to a person's eternal salvation, then a benevolent Christian prince who cares about his subjects' welfare should try to ensure that they receive that saving rite. It stands to reason, doesn't it? And if religious heresies endanger the hapless souls who might be beguiled by them, then government should endeavor to stamp out the noxious doctrines. Heresies were akin to deadly plagues or epidemics (which government might try to prevent by, for instance, imposing quarantines), or to counterfeit currency (which government might try to suppress by punishing the counterfeiters).<sup>19</sup>

By contrast, the crucial insight that more perceptive and progressive thinkers in both Europe and America came to understand was that religious faith is worthless— to God or man— unless it is sincere and voluntary. This was itself an essentially religious insight, and it was elaborated in essentially (though differing) religious terms by Roger Williams and John Locke, by Jefferson and Madison, by Baptist agitators in colonial America such as John Leland and Isaac Backus.

Often the point was conveyed in terms of a commitment— a *religious* commitment— to “freedom of conscience.” So “freedom of conscience” has been the central theme in the American

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<sup>19</sup> See generally Brian Tierney, *Religious Rights: An Historical Perspective*, in *Religious Human Rights in Global Perspective: Religious Perspectives* 17 (John Witte, Jr. et al. eds., 1996).

understanding of religious freedom. Or at least it *was* the central theme until recently<sup>20</sup>— when notions like “secularism” came to displace and distort that theme.

“Freedom of conscience” was entirely consistent with the accompanying notion that, as Benjamin Franklin put the point at the Constitutional Convention, “God Governs in the affairs of men”<sup>21</sup>-- including in the formation of this nation. Indeed, the themes have historically been mutually reinforcing. According to the Providential story, the founding of America was a chapter in a providentially-guided course of history, and America’s purpose was at least in part to provide a haven for those committed to conscience and an example of a community founded on the value of conscience.

In this story, the commitments to liberty and equality are perfectly compatible with— even dependent on-- a communal trust in Providence. As the Declaration of Independence explains, our rights to liberty and equality are themselves the gifts of Providence: they are rights with which we are “endowed by [our] Creator.” So proponents of the providential story worry that a departure from the nation’s providential foundations will leave the commitments to liberty and equality undefended and vulnerable. “And can the liberties of a nation be thought secure,” Thomas Jefferson asked in this spirit, “when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God. . . ?”<sup>22</sup>

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<sup>20</sup> For an excellent discussion of the development and centrality of conscience in the modern understanding of religious freedom, see Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 NYU L. Rev. 346 (2002).

<sup>21</sup> Notes of Debates in the Federal Convention of 1787 Reported by James Madison 209 (Adrienne Koch ed. 1966).

<sup>22</sup> Thomas Jefferson, Notes on Virginia, Qu. XVIII, in *The Portable Thomas Jefferson* 215 (Merrill D. Peterson ed.1975).

So the Providential story is charged with a moral (though one that secularists find paradoxical): in order to preserve the American way of life, including its commitment to religious freedom, it is essential that the community continually recall and reaffirm its trust in and gratitude to the Source of our liberties and prosperity.

In one or another version, both the Secular Order and Providential stories are familiar in American society.<sup>23</sup> But for their proponents, these stories are not merely idle or entertaining tales; they

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<sup>23</sup> The Providential story, like the Secular Order story, comes in countless variations; but because the Providential story is less familiar in educated circles, it is worth noting three variations that may sometimes be conflated, thereby promoting misunderstanding.

One variation might be called the “triumphalist” version. In this jingoistic and smug account, the United States of America is God’s favored nation, and its people are God’s chosen people. A second variation can be called the “Christian Nation” version. This account tracks the story as told above except that it consistently conceives Providence in narrowly Christian terms. So the Nation was founded by *Christians*, for *Christians*. Non-Christians are tolerated. Ideally, they should be the beneficiaries of Christian love. But Christianity is the religion of the nation. We are, as the Supreme Court used to say, “a Christian nation.” See, e.g., *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

A third variation, perhaps most powerfully articulated by Lincoln, see generally Elton Trueblood, *Abraham Lincoln: Theologian of American Anguish* (1973), might be called the “prophetic” version. In this rendition, the Almighty did indeed have a hand in the bringing forth of the American Republic— a historic development that was to serve some lofty purpose not fully apparent to us, but one that most likely included the establishment of a place where liberty and equality and freedom of conscience might flourish. This providential purpose, however, is cause for concern as much as for gloating. That is because providential sponsorship does not merely provide support for the American experiment; it also establishes a high standard against which our efforts may be judged— and may often be found to fall woefully short. In attempting to build and preserve a republic committed to liberty and equality, America might be “the last, best hope of earth,” as Lincoln put it, but whether that hope would be realized or dashed remained a (probably perpetually) open question, and thus a source of self-criticism and humility as well as of encouragement and inspiration.

In American history and culture, these versions of the Providential story are typically intermingled. But a standard canon of interpretation counsels us to use charity— to adopt the interpretation that makes its object “the best it can be.” My own view is that whether we consider the question from a historical or moral or theological perspective, this canon favors the “prophetic” version of the Providential story over the other two.

are intended to be authoritative. The stories are *constitutive*; they make us the sort of people we are. Consequently, proponents of each story naturally try to embody their account in fundamental law. And they read their stories into— or, as they would have it, they find them already in— “the Constitution.”

My suggestion is that our lawyerly arguments are to a large extent driven by these often tacit constitutive stories about what America essentially is. And yet like the lawyerly arguments, the stories are not capable of producing consensus at either the lawyerly or more constitutive levels. Part of the problem, obviously, is that we have a rich, multifaceted history which lends itself to competing interpretations. But to be honest, I doubt that historical indeterminacy is the main cause of dissensus here. For example, modern secularists may like to read their views back onto figures like Madison and Jefferson. But I think we can say with confidence that Americans of the founding generation— even Jefferson— were not secularists in the central modern sense (though they may well have been “secular” in other senses).<sup>24</sup> The historian James Turner explains that for the founding generation, “disbelief in God remained scarcely more plausible than disbelief in gravity.”<sup>25</sup> And one of the most perceptive

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<sup>24</sup> See generally Daniel Boorstin, *The Lost World of Thomas Jefferson* (1993) (first published 1948). For a similar argument, see Sidney E. Mead, *The Nation with the Soul of a Church* 18-20 (1975). Mead argues that “most of the men who had a hand in framing the Declaration and the Constitution in launching the new government” acted on the basis of a sort of “theology of the Republic.” This theology was not “distinctively Protestant or even Christian.” At the same time, “those who try to make secularists—in the classical sense—out of [the framers] are just as wrong” as those who argue for a Protestant or Christian founding. I discuss the contrast between eighteenth-century and modern notions of Enlightenment in *Recovering (from) Enlightenment?*, 41 *U. San Diego L. Rev.* 1263 (2004).

<sup>25</sup> James Turner, *Without God, Without Creed: The Origins of Unbelief in America* 44 (1985). Turner adds that

[w]hat the orthodox called “atheism” usually amounted to nothing but a Deistic denial of revealed religion . . . . If one disregards the expatriate Barlow just before 1800, America does not seem to have harbored a single individual before the

historians of the period, Henry May, explains that “neglect of religion or of theology is one common error among historians of the Enlightenment,” and he offers a hypothesis about how “a homogenized version of the Enlightenment” that downplayed its religious dimension came to prevail:

In America [this depiction] comes mostly . . . from the . . . moderate and liberal left to which most of us academics usually give our allegiance. This version, I think, reached its greatest strength in America in the late nineteenth and early twentieth century among pragmatic social scientists, among them James Harvey Robinson and, in far less naive form, John Dewey. These men, like many others in all periods and especially in the eighteenth century, tended to think that all history inevitably led to themselves. Thus, as they saw it, the “mind of the eighteenth century” moved gradually from orthodoxy to natural religion to deism and finally to pragmatism.<sup>26</sup>

In short, I think the historical facts from the founding period more plausibly fit the Providential than the Secular Order interpretation of what America is. So then does the persistence of disagreement on this level merely reflect a stubborn refusal by secularists to acknowledge the plain truth? I don’t think so. For one thing, facts about the founding period are only part of the evidence: the founding generation did not determine the character of America once and for all. Even more importantly, the question of national character is ultimately not a merely historical question; it is also a question of ideals and aspirations and fundamental commitments. Proponents of the competing stories differ not only—and not ultimately—about what American *has been*, but rather about what it *should be*.

Thus, proponents of either story have a ready defense against those strands or elements in our history that seem more consistent with the competing story. Proponents of the “Secular Order” story can, if they are candid, acknowledge the pervasively religious character of the founding generation but

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nineteenth century who disbelieved in God . . . .

<sup>26</sup> Henry F. May, *Ideas, Faiths, and Feelings* 131, 135 (1983).

contend that even if the founders conceived of and expressed their fundamental political commitments in religious vocabulary, this vocabulary was not essential: from our vantage point we might perceive our history as moving in progressive or perhaps Hegelian fashion toward the ideal of a neutral, liberal, *secular* state. Conversely, disciples of the Providential story will sometimes acknowledge or lament a movement toward a more pervasively secular culture but embrace what we can call a “cut flower” or “accumulated capital” view: secularism is insufficient to justify or maintain our constitutive commitments, but at least for a period we may manage to live off of the achievements of the past— achievements secured on sounder, providential assumptions.<sup>27</sup>

### THE COSMIC DIVIDE

Earlier, I suggested that the materials used in lawyerly arguments are insufficient to resolve disagreements at the familiar, lawyerly level. The same turns out to be true at the level of disagreements about America’s essential character: mere historical evidence does not decisively resolve this dispute, in part because each side has devices for preserving its ideal and deflecting the evidence that seems to support the competing story.

So then, what determines which side— which story— you or I embrace as the best interpretation of what America essentially is? There is no simple or neat answer to this question, I think, but I would venture that our stances at this level are at least heavily influenced by our deeper religious or philosophical commitments. Blandly formulated, this suggestion seems innocuous enough— a true (and

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<sup>27</sup> See, e.g., Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in *Equality: Selected Readings* Louis (Pojman and Robert Westmoreland eds, 1997).

truistic) yawner– but in a more concrete version I imagine it will strike many people as implausible or at least unacceptable– as simplistically and even offensively reductionist.

Let me explain. What I have in mind is suggested in Chesterton’s comment that “the most practical and important thing about a man is still his view of the universe. . . . [T]he question is not whether the theory of the cosmos affects matters, but whether, in the long run, anything else affects them.”<sup>28</sup> In the spirit of this observation, I think it follows that culture wars (including their dimension of struggle over the meaning of America) grow out of religious and philosophical divisions. And indeed, James Davison Hunter suggested as much. As we have seen, Hunter argued that Americans are divided into what he called “progressive” and “orthodox” camps who disagree about America’s essential character. But they disagree about more than that. Thus, Hunter explained that the progressive camp is composed of “secularists” and also of persons who, though counting themselves religious, place their trust in “personal experience or scientific rationality” over “the traditional sources of moral authority, whether scripture, papal pronouncements, or Jewish law.” By contrast, the “orthodox” camp, reflecting a “biblical theism” that includes many Catholics, Protestants, and Jews, is defined by

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<sup>28</sup> Quoted in Joseph Vining, *The Cosmological Question*, 94 *Mich. L. Rev.* 2024, 2025 (1996). See also David F. Swenson, *The Dignity of Life*, in *The Meaning of Life*, 21, 22 (E. D. Klemke ed., 2d ed. 2000) [“A view of life is . . . a personal expression of what a man essentially is in his own inmost self . . . “]. Richard Weaver quotes Thomas Carlyle to similar effect:

But the thing a man does practically believe (and this is often enough *without* asserting it even to himself, much less to others); the thing a man does practically lay to heart, and know for certain, concerning his vital relations to this mysterious Universe, and his duty and destiny there, that is in all cases the primary thing for him, and creatively determines all the rest.

Richard M. Weaver, *Ideas Have Consequences* 18 (1948). See also *id.* at 3 (asserting that “world view is the most important thing about a man”).



“the commitment on the part of adherents to an external, definable, and transcendent authority.”<sup>29</sup>

With misgivings (and with qualifications to follow), I might tentatively suggest that the disagreement reflects a basic and perennial divergence presented centuries ago by Plato in terms that with minor adjustments remain surprisingly apt. In Plato’s *Laws*, the central character (the Athenian) describes a fundamental divide in people’s suppositions about the ultimate nature of the world: we might describe the first view as “naturalistic” and the second, for lack of a better term, as “religious.” The first view, Plato’s character explains, holds that “fire and water, earth and air, are the most primitive origins of all things” and that “the soul is a later derivative from them.” So the things we encounter in the world— including ourselves— are produced “not . . . by the agency of mind, or any god, or art, but . . . by nature and chance.” This is the dominant view, the Athenian explains, “widely broadcast, as we may fairly say, throughout all mankind.” Skillfully advocated by “men who impress the young as wise,” this view has led to “youthful epidemics of irreligion.”

Despite its prevalence, however, the Athenian opposes this view in favor of a contrary position which holds that “soul came first— . . . it was not fire, nor air, but soul which was there to begin with. . . .” So what people call “nature” is actually “secondary and derivative from art and mind.”<sup>30</sup>

For our purposes, we might frame the divide with a question: Is Providence (or at least the notion of “Providence”) the product of nature?— of Darwinian evolution, leading to a species with a proclivity for Freudian or Durkheimian projection, and so forth: you can easily fill in the details. Or, conversely, is the natural world with its components and their products (including ourselves, and our

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<sup>29</sup> Hunter, *supra* note at 71, 44.

<sup>30</sup> Plato, *The Laws* 889c-892c.

Republic) the creation and subject of Providence? If you believe that natural processes created us and we in turn imagined up God, then I suspect that even if you are devoutly liberal and thus happy to allow people to believe in and worship the deities they have concocted, you will also regard this phenomenon as vaguely humiliating— as something that like other unavoidable but embarrassing human functions should be confined as much as possible to the private domain. We ought to aspire to be rational, and secular, or at least to make our collective public deliberations as secular as possible.

Conversely, if you believe that God created us and blesses us and guides our affairs, then you may be resolutely liberal and thus happy to allow people to worship deity (or not) as they choose; but you will not be eager to banish God from our public affairs, or to maintain the pretense that those affairs can be conducted without any reference or deference to God, or to explain away the vestigial references that exist as expressions that “have lost through rote repetition any religious content.”<sup>31</sup> To refuse to acknowledge God’s authority over our collective as well as individual affairs should seem to you both ungrateful and risky; perhaps most importantly, it would amount to professing a position that is (in your estimation) fundamentally false.

You will understand, of course, that not everyone accepts these providentialist beliefs, and that some people find them offensive. But in the nature of things, such dissatisfaction is neither here nor there: that is because the same dissatisfaction will be exist for *any* premises that government may act upon. So the pious objection that “Not all citizens believe that!” will have approximately the same force, and will prompt basically the same rejoinder, as the equivalent objection regarding an executive

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<sup>31</sup> See *id.* at 716 (Brennan, J., dissenting). See also *Elk Grove School Dist. v. Newdow*, 124 S. Ct. at (O’Connor, J., concurring).

or legislative or even constitutional decision<sup>32</sup> (“Not all citizens favor that!”). Though the providentialist assumptions are surely controversial, and though citizens have an undoubted right to disagree with and oppose them, these assumptions also have the not insignificant virtues of being both important and (again, in your estimation) true.

In sum, my suggestion is that, at bottom, our lawyerly disputes about voucher programs and faith-based initiatives and school prayers are manifestations of different visions of what America essentially is, and these different visions are in turn muted expressions of fundamental theological and philosophical commitments. In my own experience, lay people are often more discerning about these deeper connections than academics and judges are. This is not surprising: in recent decades, academics and judges have invested heavily in the effort to separate political and constitutional principles from anyone’s “comprehensive doctrines,”<sup>33</sup> or to maintain the fiction that government can be— and constitutionally *must* be— benignly “neutral” in matters of religion. So academics and judges have a powerful incentive *not* to see (or at least not to acknowledge) the philosophical and theological presuppositions of the positions they take and the decisions they make at the more visible levels of discourse. Lay persons, by contrast, are untutored and unpracticed in this cultivated myopia, or this coyness, and hence they often readily perceive how various legal decisions and doctrines *do* in fact amount to tacit acceptance or rejection of one or another article of their faith.

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<sup>32</sup> Including, I suppose I should add, a decision regarding “constitutional essentials” or “matters of basic justice.”

<sup>33</sup> See Rawls, *supra* note ; Stephen Macedo, *In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases?*, in *Natural Law and Public Reason* 11, 13, 25-26 (Robert P. George & Christopher Wolfe eds. 2000).

## BEYOND INCONSISTENCY?

Still, the picture I have been drawing seems too crude. Surely the reality is not as clean and simple as this description implies. The description suggests, for example, that religious people will support the Providential account along with the lawyerly arguments and conclusions it sponsors, and that nonreligious people will support the Secular Order account with its legal attachments. But didn't I say just a moment ago that devoutly religious people are often among the leading supporters of the "Secular Order" story of America, and hence of the lawyerly arguments and positions that grow out of that story?

There are indeed complications here. As a partial response, let me start by conceding— or rather insisting— that religious believers *can* whole-heartedly endorse notions like religious freedom, freedom of conscience, religious pluralism, and separation of church and state (though I also happen to think that these endorsements present more difficulties than we typically acknowledge<sup>34</sup>). So religious believers can, in complete good faith, support many aspects of the Secular Order story (though the parts they can support are probably part of the Providential story as well).

In addition, I don't want to imply that there is any iron, deterministic law by which particular beliefs on one level lead inexorably to particular views or conclusions on the next level. There is, I acknowledge, a good deal of indeterminacy both within and between levels: hence people who agree on some matters can still disagree in good faith on others.

What I doubt is that people can genuinely believe that (as Franklin put it) "God governs in the

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<sup>34</sup> See, e.g., Steven D. Smith, *The Tenuous Case for Conscience* (forthcoming).

affairs of men,<sup>35</sup> including in their political affairs, and at the same time can *consistently*— the qualifier is essential— embrace the sort of public secularism that *in principle* is called for by influential views such as Rawls’s political liberalism or Justice O’Connor’s “no endorsement” test.<sup>36</sup> On the contrary, people who believe in Providence in this sense are likely to see the incorporation of the Secular Order story into our constitutive law as a repudiation of not only of their legal views or of their understanding of what America is, but of their most fundamental religious convictions. And in this perception, they will be correct.

To be more concrete, it is hard for me to see how someone who genuinely believes that

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<sup>35</sup> Franklin’s more complete remarks, as recorded by Madison, were as follows:

In this situation of this Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the divine protection.— Our prayers, Sir, were heard, & they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we now forgotten that powerful friend? or do we imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth— *that God Governs in the affairs of men*. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings, that “except the Lord build the House they labour in vain that build it.” I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better, than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded; and we ourselves shall become a reproach and by word down to future ages.

Notes, supra note at 209-10 (emphasis in original).

<sup>36</sup> The qualifier “in principle” is essential as well, because people like Rawls and O’Connor in fact make various, arguably unprincipled concessions and qualifications that dilute the sort of secularism that their assumptions would seem to entail.

Providence operates in history in the ways proclaimed by, say, Isaiah, or Abraham Lincoln, could *consistently* write the sort of opinion that Justice O'Connor wrote in the *Newdow* case.<sup>37</sup> A person typically does not protest that when she said things that appeared to acknowledge and thank her major benefactor, she didn't really mean it – or that even if she meant it at the time she doesn't mean it now. A genuine believer, it seems, would be reluctant and embarrassed– even ashamed– to say such impudent and imprudent things (imprudent because of course the benefactor might learn of her disclaimers and might be less inclined to benevolence in the future).

But I hasten to add that I have never met Justice O'Connor; much less can I pretend to know what is in her mind and heart. For all I know, she and many others who share her views might be genuine religious believers. If so, then I can only say that their stance looks internally contradictory to me; but even if I am right about this, they might nonetheless be sincere in their (inconsistent) views. Perhaps they are simply confused: after all, it was Justice O'Connor who at about the same time she was promoting the “no endorsement” test also stirred up a small, short-lived ruckus by appearing to

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<sup>37</sup> See, e.g., 124 S. Ct. at 2322-23 (O'Connor, J., concurring):

Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-religion.

See also *id.* at 2325:

Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to "one Nation under God" in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.

endorse a “Christian nation” interpretation of the country.<sup>38</sup> Or maybe they are not confused: maybe they have clearheadedly chosen to embrace inconsistencies-- to appease important constituencies, maybe, or for well-intended diplomatic purposes.

So I don't mean to judge or condemn on a personal level here. No doubt we are all inconsistent at times, and probably it is fortunate that we are. A gift for inconsistency may be what saves us from the potentially disastrous conclusions and consequences that might follow if we consistently worked out and acted upon much of what we think we believe. And I occasionally wonder whether a blessed, strategic muddleheadedness is necessary for people in a pluralistic society to live together in comparative peace.

But even if inconsistency is excusable or even necessary, this observation does not elevate inconsistency into an intellectual or scholarly virtue. It sounds quaint, and I blush to say it: but as scholars, we are supposed to be committed to truth and reason, and hence to working out the connections between our commitments on the various levels of discourse and to perceiving and overcoming the internal contradictions.

In sum, I think it is futile to suppose that our disagreements on the lawyerly and constitutive levels can be resolved using the resources of those levels. Rather, reflecting seriously on those disagreements will inevitably push us to examine the deeper theological and philosophical assumptions that animate (often without our awareness) our commitments and rhetoric. And in my view, the

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<sup>38</sup> For a brief account of the incident, see Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 *Syracuse L. Rev.* 892, 937-38 (1991).

valuable work in the area of religious freedom– the work that has a chance to be illuminating and not merely polemical– will be work that probes those deeper connections and presuppositions.<sup>39</sup>

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<sup>39</sup> For current examples of such work, see Michael J. Perry, *A Human Right to Religious Freedom* (forthcoming); Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 *UCLA L. Rev.* 1645 (2004).

OF RELIGIOUS DOCTRINE