
AMERICA AND THE SOFT ESTABLISHMENT OF CHRISTIANITY[†]

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Abstract

The First Amendment to the Constitution of the United States forbids only the federal establishment of Christianity, not its establishment at the state level. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” It was only in the mid-20th century that the First Amendment was applied to the individual states. This paper explores the establishment of Christianity de facto and de jure in the United States as originally intended by the First Amendment, in particular as this establishment was realized in the first half of the 20th century. It is argued that this approach to the place of religion in the public space and even in the public forum is to be preferred by evangelical Protestants, Orthodox Jews, and traditional Moslems to the current hard laicist establishment of secularism. All major religions, Buddhist, Confucian, Hindu, Jewish, and Moslem, should find the soft establishment of Christianity to be preferable to the current hard establishment of secularism. This approach also allows for local diversity (i.e., at the state level). If engaged as a paradigm for Europe, this original American approach would at the local level allow a laicist France, a Roman Catholic and Protestant Germany, and an Orthodox Greece and Russia. This paper begins with a brief overview of these background issues. It then explores the notion of a religious federalism. It concludes with an argument that the federalist approach in the American union should be that of the early 20th-century United States and should be supported generally by contemporary Christians in the United States and in Europe.

Keywords: relations, public policy, religion, bioethics, religious pluralism

1. A brief history

Much ink has been spilled in an attempt to rewrite the history of the United States. One side portrays the founding fathers as ideal symbols of Christian faith and piety, in order to defend a more traditional understanding of morality and society. Opposing this revision - and more its aim and conclusions

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- others attempt to point out that many of America's founding fathers were deists or lacking in genuine faith and Christian commitment. They then often conclude that all faith and religious respect given at the time of the founding of the United States was for immediate, efficient political gain and not consistent with the grand scheme established in the Constitution and Bill of Rights. Surely, the truth likely lies between these extremes. The full history and consideration of religion in the founding of the United States is beyond this paper. A brief overview of the de jure establishment and disestablishment of religion will be reviewed.

2. The de jure establishment of religion

The First Amendment of the US Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Arguably, the intent of the first amendment was to prohibit the funding of clergy by the federal government or the exclusive establishment of one Church, such as many founders and settlers had experienced in England. Even with a more expansive view of the intent, it is plain that the first amendment did not 'originally' prohibit the establishment of religion on the state level. Several states had established religions after the ratification of the Constitution and Bill of Rights, these include: Congregationalism in Massachusetts, Connecticut, and New Hampshire until 1833, 1818, and 1790 respectively; Anglicanism in Georgia, Maryland, North Carolina, South Carolina, Florida, and Virginia until 1789, 1776, 1776, 1790, 1783, and 1786 respectively [1].

The disestablishment in these states did not endorse a dramatic turn to secularism. The Georgia Constitution summarizes the overall intent (and arguably the intent of the First Amendment of the US Constitution) as it said in Article IV, Section 10: "No person within this state shall, upon any pretense, be deprived of the inestimable privilege of worshipping God in any manner agreeable to his own conscience, nor be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do. No one religious society shall ever be established in this state, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles."

2.1. The disestablishment of religion in the United States

Despite what seemed to be the disestablishment of religion in the local states within the United States, a de jure establishment persisted by modern standards. Religious basis and language were allowed in the public square and were deemed worthy foundations for law and policy. Supreme Court rulings prior to the mid-20th century commonly called upon the Christian society or its

influential history and scriptures [*United States v. Macintosh*, 283 U.S. 605 (1931)].

States enforced laws against non-Christians or atheists from holding public office. At the time, an atheist holding office was likely unthinkable and it was codified in law. These laws largely persisted until the United States Supreme Court ruling in the 1961 case of *Torcaso v. Watkins* [367 U.S. 1 (1961)]. This case claimed that laws prohibiting public office on the basis of religious affiliation or non-affiliation were contrary to the First and Fourteenth Amendment of the Constitution. This was a clear challenge to the establishment of religion but it was not the first. The first and most notable Supreme Court ruling to challenge the establishment of Christianity at the state level was the 1947 decision in *Everson v. Board of Education*. In the majority decision, Justice Hugo Black wrote: “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion to another ... in the words of Jefferson, the [First Amendment] clause against establishment of religion by law was intended to erect’ a wall of separation between Church and State’ ... That wall must be kept high and impregnable. We could not approve the slightest breach.” [*Everson v. Board of Education*, 330 U.S. (1947)]

The 1960s brought numerous related challenges to the establishment of religion at the state level. The turn to an established secular government or laicism occurred gradually and on many fronts but is clearly articulated in the ‘Lemon Test’ in the 1971 ruling of *Lemon v. Kurtzman*. The ‘Lemon test’ details the requirements for legislation concerning religion. Its trinity are:

1. the government’s action must have a secular legislative purpose;
2. the government’s action must not have the primary effect of either advancing or inhibiting religion;
3. the government’s action must not result in an “excessive government entanglement” with religion [*Lemon v. Kurtzman*, 403 U.S. 602 (1971)].

If any of the trinity listed above are transgressed then, according to the ruling, the First Amendment has been transgressed. This ruling effectively completed the de jure disestablishment of religion in the United States.

2.2. Voice of the founders

With the exception of the isolated quote of Thomas Jefferson invoked by Hugo Black in the *Everson v. Board of Education* the founding fathers of the United States and their observers clearly differ with the hard establishment of laicism realized increasingly after *Lemon v. Kurtzman*. Consider the following declarations:

- “The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality

and it will not be necessary to change a single letter of the Constitution in order to vary the whole form of their government.” (Francis Grund) [2]

- “We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government for any other.” (John Adams) [2, p. 139]
- “Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not violated but with his wrath?” (Thomas Jefferson) [2, p. 139]
- “No nation has ever yet existed or been governed without religion. Nor can be. The Christian religion is the best religion that has ever been given to man and I as Chief Magistrate of this nation am bound to give it the sanction of my example.” (Thomas Jefferson) [2, p. 129]

The collector of these quotes, Charles Murray, summarizes the legal reality at the founding of the United States: “Americans were subject to criminal law, which forbade the usual crimes against person and property, and to tort law, which regulated civil disputes. But otherwise, Americans faced few legal restrictions on their freedom of action and no legal obligations to their neighbors except to refrain from harming them. The guides to their behavior at any more subtle level had to come from within.” [2]

Quoting philosopher Michael Novak, Murray concludes in seeming agreement with the founding fathers: “Liberty is the object of the Republic. Liberty needs virtue. Virtue among the people is impossible without religion.” [2, p. 202-208]

2.3. The de facto establishment of religion

The de facto establishment of religion may yet persist but has greatly weakened, if it has not altogether been lost. Until the 20th Century the United States had a de facto established basic Protestant Christianity. The multitude of specific Protestant communities that sought refuge in America brought specific theologies and liturgical rites. In part, due to an increase in Roman Catholic immigration, these various communities coalesced to form a de facto establishment of Protestant Christianity. This was largely expressed as a civic religion of virtue and shared morality and not of specific theology or ecclesial rites (though civic rites were often shared). After World War II, immigration of non-Christians, the radical secularization of Christianity (Protestant and Roman Catholic), and the secularization of the public square has brought a coalescing of conservative Christians and some other traditional religious as allies in a culture war against the secular axis.

The recognition of the rising secular and laicist tide in the United States has brought the question of the establishment of religion in the United States back into conversation. Conservative states are increasingly challenging what they believe to be overreaching secular and laicist national laws with threat of nullification. The state of North Carolina in April of 2013 was even considering a bill to establish Christianity as the state religion. The bill explicitly stated that the First Amendment of the Constitution of the United States intended to disallow the establishment and funding of a national religion but allowed the establishment of religion on the state level. Further, the bill explicitly rejected all US Supreme Court rulings that held contrary to this original intent of the Constitution on the grounds that the court overstepped juridical authority. The bill received much media attention with those on the other side of the cultural divide reacting with shock that such could be considered in 2013. The secularist assumes that all the educated in society have progressed beyond such ideas. However, some polls suggest that approximately thirty percent of the population were in favour of the bill. Thirty percent, according to some polls, is also the percentage of Americans who make religion an active part of their life (another thirty to fifty percent are Christians of some sort and most polls suggest that well over eighty percent are theists) and many of these are indeed 'educated' [2, p. 127-128]. Despite attention and some support the bill was not brought to a vote and effectively failed. This test case brings a challenge to the project recommended in this paper. American society may lack the critical mass of persons holding to traditional religion to return to a soft establishment of religion. Further, there may be something rotten at the root of Western Christianity that predictably necessitates its demise. Such considerations are beyond this paper. This paper merely argues why the religious should prefer the soft establishment of Christianity. How realistic and how to politically accomplish it is beyond the present paper and potentially beyond the abilities of the author.

2.4. The hard establishment of secularism

Following the forsaking of God and of religion in the public square the United States, following Western Europe, has witnessed the attempt to establish a secular, morally neutral society. If a neutral state is possible, which one does not and arguably has not existed; it would need to resemble the minimal state described by Engelhardt: "Limited democracies are morally neutral by default. They cannot acquire the authorization to establish a particular moral vision, religion, or ideology. After all, given the failure of reason to discover the rational, canonical, content-full moral vision, establishing a morality or ideology as a government's concrete morality or moral vision has no more secular moral plausibility or authority than would the establishment of a particular religion. Limited democracies are therefore morally committed to not being committed to a particular vision of the good; they are committed rather to being the social structure through which, and with whose protection, individuals and

communities can pursue their own and divergent visions of the good. As far as possible, limited democracies should enable individuals and communities to pursue their own visions of the good, while not compromising the moral commitments of other individuals and communities.” [3]

However, this vision of a neutral state is not the vision sought by the present secularized United States or Western Europe. Instead the state more follows the vision of a philosopher such as John Rawls. Rawls (along with others) gives an attempt to give canonical philosophical authority to the secular, laicist movement spreading in the West.

Rejecting the tenants of Christianity during World War II, Rawls, like many others, diagnosed religion as a disease that prevents healthy, peaceful, and just governance. He sought to articulate a rational and practical account of the good and just without God. He proposed a secular moral vision with “religious temperament” [4]. Rawls’ moral account includes:

- 1) a reasoned faith that a just constitutional democracy is possible and desirable [5];
- 2) the higher valuing of interpersonal relationships over seeking God or any other object or higher good;
- 3) the primacy of considering individuals over communities, cultures, or peoples [4, p. 7];
- 4) the expansion of toleration by employing a reasoned system [6].

With concentration on the fourth observation, Rawls endorses only toleration of those with ‘reasonable’ positions. He recognizes the destructiveness of atheism but calls for its toleration and he asserts nontheism as a goal [4, p. 268-269]. The religious that use secular reasoning that meets his standard for reasonable can be tolerated. But those that take religious authority, doctrine, and dogma seriously are marginalized and excluded. Rawls demands: “[That] reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support” [7].

Rawls’ central concern is clearly expressed in his revised introduction to *Political Liberalism*: “How is it possible for those affirming a religious doctrine that is based on religious authority, for example, the Church or the Bible, also to hold a reasonable political conception that supports a just democratic regime?” [5, p. xxxix] Rawls’ essential answer is to exclude the religious that call upon religious authority.

A broad and oversimplified (yet honest) refutation of Rawls’ task can be brought by considering his weakest link in his argument — the ‘original position’. The original position of Rawls is necessary to come to a reasoned understanding of the good. This original position forces the participant to cognitively forget who they are, their culture, their abilities, their plans, desires, aspirations, religion, ethnicity, values, and socio-economic status. Rawls asserts that only from this position can the good be declared. Though the original

position is often recognized as impossibility, it remains a pervasive applied theory at least on an aspirational level. With the before mentioned concerns and assumptions of Rawls it is reasonable to consider another motive behind the original position and his overall task - the exclusion of fundamentalist religious groups from the public square [4]. In simplified form, for Rawls a fundamentalist is anyone that holds to exclusive truth claims (without the ability to assume the original position or translate into secular language) [7]. Rawls asserts that all fundamentalists should be excluded from the secular public square in order for the reasonable truth to be known [5]. Yet, this is an exclusive truth claim. Thus, Rawls meets his own definition of a fundamentalist. The only distinction is that he is a secular fundamentalist and not religious. The secularly politically reasonable becomes the ultimate test of faith for the secular fundamentalist [3, p. 392-393; 8].

In healthcare the Rawlsian dystopia is being realized. The prevailing bioethics dogma is becoming: if legal then ethical, if ethical then a right to be demanded. Under this rubric Roman Catholics are asked to perform abortions and fund contraceptives. Evangelical Protestants are coerced to fund and participate in reproductive assistance for homosexuals [*Benitz v North Coast Women's Medical Group*, 44 Cal. 4th 1145 (2008)]. And top theorists demand that any physician that invokes a right of conscience must be punished [9]. Moslems, Orthodox Jews, Confucians, Buddhists, Charismatic and Evangelical Protestants, and traditional Roman Catholics are being forced to adhere to a secular bioethics in mechanized healthcare systems with a secular humanist definition of health, suffering, and the 'good' death. The hard establishment of secularism divorces the religious public from the *polis*.

Rawlsian neutrality is a charade. His, like all, laicism is anti-religion. A Rawlsian system, at worst, wages war against the religious. At best, it does not bring neutrality but the desire for the reasoned, ecumenical lowest common denominator. Society built on the foundation of such common ground quickly finds that it is shifting sand – as the common ground is devoid of the rocks of faith that separate us. These same rocks can stabilize communities on sure foundations. (I do not suggest that all rocks are equally valid or sure. I reject such relativism.) To change metaphor, the desired univocity in a secular, laicist, pluralistic state sounds not like a chorus but a cacophony of 'private' moral intuitions and sentiments that only have in common the exclusion of God and the content and culturally rich aspects of religion.

3. Conclusions

By giving historical precedence and consideration of the danger of the hard establishment of secularism this paper is commending a soft establishment of religion as opposed to a hard establishment of laicism and a hard establishment of religion. Regarding the former hard establishment of laicism, we have already reviewed some of the societal destruction that can follow with the marginalization and coercion of those that hold to traditional religious beliefs

(whether traditional Christian, Orthodox Jewish, traditional Moslem, or others) emphasized in this consideration. The argument against the establishment of laicism is at least in part made by consideration of its consequences. As for why the soft establishment of religion over the hard establishment of religion - What is the difference? By 'soft' establishment I am referring to the use of religion by the state to set a general moral compass, a way of recognizing and defining the good that is known by the people or polis. Under a soft establishment of religion exceptions, exemptions, and conscientious refusals may be granted to various degrees. This may be to a degree that allows the construction of a quasi-millet system, which would allow communities with different ordering of values to have limited self-rule. Such would be the model if a more minimalist or limited state were enacted. Whether the state is minimalist or exercises more direct authority under a soft establishment, differences are allowed to remain differences without necessitating assimilation or marginalization. Clearly this construction of the state protects against the drag down to the lowest common denominator or an insistence of seeking the most broadly accepted ecumenical principle. But how does it protect against the hard establishment of religion? This paper cannot make a claim that it does such, nor can it clearly condone that such is desirable. However, the soft establishment as opposed to the hard establishment of religion is recommended as a pragmatic respect for the pluralism that obviously exists. The hard establishment of religion is simply not feasible and potentially not desirable in a society with significant pluralism. Thus, liberty for dissenting groups is preferred in the effort to maintain peace and encourage a thriving society. The hard establishment of religion would in most states, especially those in the West, be a failure to respect the pluralism that exists. Contrastingly, a soft establishment of religion is merely recognizing the way things are. A state consisting of a public that have largely a shared vision of the good and the way of truth can allow that vision to guide them, while allowing liberty for those that have differences. This liberty for dissenters would not be a claim right, or a positive right, that would coerce others to agree with the dissenting view, ushering in a tyranny of the minority. The liberty granted would be a forbearance right, or the right to generally be left alone. For instance, homosexual relationships and contraceptives may be allowed as exceptions to the overall moral vision but others would not be coerced to endorse or fund such deviations. The establishment of religion in the West need be soft simply because this is all Western society could potentially tolerate.

It can be argued that this recognition of what the people can endure may account for some of the differences in the establishment of traditional Christianity under the reign of Saint Constantine the Great and Saint Justinian. Saint Constantine allowed greater liberty and full engagement of non-Christians while clearly making Christianity the moral norm. Saint Justinian ruled a more mature Christian society and recognizing this was able to have a thriving 'hard' establishment. In his consideration of the Ecumenical Councils Father John Romanides explains how such a shift to a hard establishment could come about:

“We can see why the government of the Byzantine State sought to make Orthodoxy its official religion and why it frequently took such pains in order to ensure the purity of Orthodox doctrine. Why did the State take these steps? Did it take such steps merely in order to safeguard dogma for dogma’s sake? Or instead, did it take these measures because the particular Orthodox dogma in question was necessary for the curative treatment of its subjects and thus for the social reform brought about by healing the personality of each individual citizen? More likely than not, the second scenario is correct....Since the government could foresee how implementing Orthodox therapeutic teaching and methods could be beneficial and contribute to society, the government passed legislation sanctioning and promoting the Orthodox faith as the official state religion, so that the empire would be filled with parishes in which priests would provide this therapeutic treatment. So in time, the number of healthy citizens in the parishes would increase, and by extension the number of healthy citizens throughout the nation itself. This is the reason why the Church naturally did not say ‘no’ to the State, but collaborated with it...the Church continued her mission, which then included the related task of protecting the State from quack doctors and heretics.” [10]

This Orthodox consideration seems to better echo the voice of the founding fathers of the USA than the current secular, laicist claims.

3.1. Toward a soft establishment of religion

The soft establishment of religion recognizes the culture and historical rootedness of persons and peoples. It recognizes that the laws and moral vision of nations do not come from nowhere. Nor does it pretend that all morality is an agreed upon, universal, rational construct (something that seems inconsistent with our present post-modern culture). Instead of oppressing and marginalizing, the soft establishment of religion could allow the needed moral vision and direction to encourage a virtuous and prosperous society and protect the liberty of the people including those that hold to a diversity of religious faiths. Thus, the soft establishment of Christianity in the US and some Western European countries should be supported and preferred by all that take seriously religion, moral differences, and potentially other foundational and content-rich understandings of truth and morality. A federalist approach to the place of religion in the public space and even in the public forum similar to that of the United States prior to the mid-20th century is to be preferred by evangelical Protestants, Orthodox Jews, and traditional Moslems to the current hard laicist establishment of secularism. All major religions, Buddhist, Confucian, Hindu, Jewish, and Moslem, should find the soft establishment of Christianity to be preferable to the current hard establishment of secularism. This approach also allows for local diversity (i.e., at the state level). If engaged as a paradigm for Europe, this original American approach would at the local level allow a laicist France, a Roman Catholic and Protestant Germany, and an Orthodox Greece and Russia.

References

- [1] M.W. McConnell, *William and Mary Law Review*, **44** (2003) 2105.
- [2] C. Murray, *Coming Apart*, Crown Forum, New York, 2012, 138.
- [3] H.T. Engelhardt, *Foundations of Bioethics*, 2nd edn., Oxford University Press, Oxford, 1996, 120.
- [4] J.A. Rawls, *Brief Inquiry Into the Meaning of Sin and Faith*, T. Nagel (ed.), Harvard University Press, Cambridge (MA), 2009, 5.
- [5] J.A. Rawls, *Political Liberalism*, Columbia University Press, New York, 1993, 172.
- [6] J.A. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge (MA), 1999, 514.
- [7] J.A. Rawls, *U. Chicago Law Rev.*, **64** (1997) 783-784.
- [8] H.T. Engelhardt, *Foundations of Christian Bioethics*, Swets & Zeitlinger, Lisse, 2000, 370-374.
- [9] J. Salvulescu, *Brit. Med. J.*, **332** (2006) 294-297.
- [10] J. Romanides, *Patristic Theology*, Uncut Mountain Press, Dalles (OR), 2008, 212-214.