THE INTEGRATION OF RELIGIOUS LIBERTY

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A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES. By *Arlin M. Adams* and *Charles J. Emmerich.* Philadelphia: University of Pennsylvania Press. 1990. Pp. xv, 172. Paper, $9.95.

The U.S. Supreme Court has ensnared the First Amendment religion clauses in a network of antinomies.[1] Noninterpretivists on the Court have sought to broaden the scope of the religion clauses and root out all violations of establishment and free exercise values.[2] Interpretivists on the Court have sought to narrow the scope of the religion clauses and defer to divergent state resolutions of religious issues.[3] Separationists on the Court have insisted that the Establishment Clause and its principle of strict separation of church and state proscribe most forms of government support for religion.[4] Accommodationists have insisted that the Free Exercise Clause and its principle of accommodation of religion prescribe various forms of nonpreferential support for religion.[5] Some members of the Court

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1. *See, e.g.,* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict,* 41 U. PITT. L. REV. 673 (1980); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise,* 90 MICH. L. REV. 477 (1991); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,* 24 VILL. L. REV. 3 (1978); Mark Tushnet, *The Constitution of Religion,* 18 CONN. L. REV. 701 (1986).

2. *See, e.g.,* Aguilar v. Felton, 473 U.S. 402 (1985) (expansive reading of the Establishment Clause used to invalidate 19-year practice of state support for parochial school education of deprived children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (expansive reading of the Free Exercise Clause used to exempt the Amish from full compliance with state compulsory education laws).

3. *See, e.g.,* Employment Div. v. Smith, 494 U.S. 872 (1990) (upholding state denial of unemployment compensation to a Native American discharged for criminal use of peyote); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (upholding state imposition of sale and use taxes on religious crusader and publisher); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding state prison's denial of Muslim prisoners' request for special accommodation of Friday worship).

4. *See, e.g.,* Texas Monthly v. Bullock, Inc., 489 U.S. 1 (1989) (strict separation argument used to invalidate sale and use tax exemptions for religious publishers); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (strict separation argument used to invalidate zoning law that empowered a church to challenge liquor licenses in its neighborhood).

5. *See, e.g.,* Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that Free Exercise Clause mandates accommodation of Jehovah Witnesses' conscientious objection to production of armaments).

have used history to illustrate the long American tradition of mutual support and cooperation between religion and government.[6] Others have used history to demonstrate the long American tradition of privileging certain religious traditions and vilifying others.[7] The Supreme Court has sought to paper over these antinomies with mechanical tests like the *Lemon* test of establishment[8] and the compelling state interest test of free exercise,[9] but these have proved unpersuasive in theory and unworkable in practice. Justices have readily departed from them in individual cases, or criticized them in angry separate opinions.[10]

Arlin Adams and Charles Emmerich's *A Nation Dedicated to Religious Liberty*[11] charts a bold course between these antinomies in pursuit of a more integrated understanding of religious liberty. In ninety-

6. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988) (using historical examples of government and religious collaboration in dispensing charity); Walz v. Tax Commn., 397 U.S. 664 (1970) (using historical examples of tax exemption laws to support constitutionality of church property tax exemptions).

7. *See, e.g.*, Abington Township Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (using historical data to demonstrate the need for an expansive interpretation of the Establishment Clause).

8. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (requiring that government policies must meet three criteria to pass Establishment Clause scrutiny: (1) have a secular purpose; (2) be primarily secular in effect; and (3) not further an excessive entanglement between church and state).

9. Sherbert v. Verner, 374 U.S. 398 (1963) (requiring that government policies that burden religious exercise promote a compelling state interest and be narrowly tailored to achieve that interest).

10. On the plight of the *Lemon* establishment test, see Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POLY. 513 (1990). On the plight of the compelling state interest test, see Glendon & Yanes, *supra* note 1, at 518-39.

Chief Justice Rehnquist's stinging indictment of the Court's byzantine law on religion and parochial education illustrates the frustration:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.

Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes and citations omitted).

11. Arlin M. Adams is a former distinguished judge on the U.S. Court of Appeals for the Third Circuit. Charles J. Emmerich is former director of the Center of Church-State Studies at

six pages of tightly written text, they present a provocative new reading of the history of the religion clauses that integrates the diversity of perspectives among the Founders and later interpreters. They offer an arresting new First Amendment paradigm in which the values of interpretivism and noninterpretivism, separationism and accommodationism, disestablishment and free exercise all find a place.

The book is not entirely new and does not purport to be. It echoes the themes of several of Judge Adams' judicial opinions[12] and scholarly articles[13] of the past decade. It draws heavily on a long tradition of careful historiography begun by Chester Antieau, Mark Howe, and Paul Kauper in the 1960s and carried forward today by scores of able writers.[14] Specialists will search the book in vain for new archival discoveries or new deconstructions of Supreme Court opinions. Neophytes will look in frustration for any respite from the brisk pace of the prose and the analysis. Liberals will look askance on the unabashed conservativism of some of the passages. But no one who reads the book will come away empty.

In this essay, I offer an analytical summary of the volume and then

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DePaul Law School. Both authors are now working at the University of Pennsylvania Law School.

12. Among Adams' opinions on religious liberty issues, see particularly Protos v. Volkswagen of Am., Inc., 797 F.2d 129 (3d Cir. 1986) (holding, inter alia, that Title VII's requirement that employers accommodate their employees' religious scruples does not violate the Establishment Clause); Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) (holding that, where prison regulations prevented Muslim prisoners from weekly worship, state was required to prove that security was being served, and no form of accommodation was available), *revd. sub nom.* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Presbyterian & Reformed Publishing Co. v. Commissioner, 743 F.2d 148 (3d Cir. 1984) (holding that a small religious publisher does not lose its tax-exempt status merely because of unanticipated accumulations of capital); Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d Cir. 1984) (discussed *infra* note 36 and accompanying text), *vacated on other grounds,* 475 U.S. 534 (1986); Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981) (holding that a revolutionary organization is not a religion for First Amendment purposes, and thus one of its imprisoned adherents has no free exercise claim to a special religious diet); St. Claire v. Cuyler, 643 F.2d 103 (3d Cir. 1980) (Adams, J., dissenting) (arguing that the principle of accommodation requires a balancing between a Muslim prisoner's right to wear a skullcap and legitimate penological objectives); Americans United for Separation of Church & State v. United States Dept. of Health, Educ. & Welfare, 619 F.2d 252 (3d Cir. 1980) (offering an expansive interpretation of standing to claim violations of the Establishment Clause).

13. See particularly Arlin M. Adams & Sarah B. Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses,* 37 DEPAUL L. REV. 317 (1988) (arguing for "accommodationism" as a principle that transcends and links the Establishment and Free Exercise Clauses); Arlin M. Adams & William R. Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment,* 128 U. PA. L. REV. 1291, 1297 (1980) (arguing that "at least in the area of church disputes over property, the two religion clauses each work to the same end," and thus endorsing the neutral principles test); *see also* Arlin M. Adams & Charles J. Emmerich, *William Penn and the American Heritage of Religious Liberty,* 8 J.L. & RELIGION 57 (1990).

14. For bibliographies of this new historiography, see CHURCH AND STATE IN AMERICA: A BIBLIOGRAPHICAL GUIDE (John F. Wilson ed., 1986); Lucy S. Payne, *Uncovering the First Amendment: A Research Guide to the Religion Clauses,* 4 NOTRE DAME J.L. ETHICS & PUB. POLY. 825 (1990).

an evaluation of it, both on its own terms and in light of other recent interpretations of the religion clauses.

I

Adams and Emmerich delicately balance interpretivism and noninterpretivism in their investigation of the First Amendment religion clauses.[15] Neither form of constitutional interpretation, they believe, does justice to the historical sources or current controversies, and neither deals adequately with the doctrines of precedent and tradition (pp. 19-20, 32-36, 74-75, 94-95). Their approach is decidedly more eclectic and synthetic:

> While the Constitution is a living document, a broadly framed plan to guide future generations, it must be interpreted in the context of its history and the traditions and values of the American people. Thus, although history does not supply a detailed blueprint, it does provide an essential framework for resolving modern religious liberty questions. In interpreting the Constitution, one must look to its underlying philosophy and identify the Founders' broad purposes. [p. 36]

The authors trace the "underlying philosophy" of the religion clauses to sundry European and colonial sources. Continental Protestant theology, English Lockean philosophy, and colonial Free Church experiences all helped to forge the American tradition of religious liberty. Calvinists and Lutherans advocated both the institutional separation of church and state and the cultivation of a strong public morality and discipline through legal measures. Such ideas came to robust expression in Puritan New England.[16] English Lockean and radical writers taught liberty of conscience and the toleration of a plurality of religions. Such ideas found ready acceptance among the enlightened intelligentsia of the Carolinas and the Middle colonies (pp. 3-4, 8, 44). Baptist and Quaker leaders advocated the free exercise of all religions and the maintenance of what Rhode Island founder Roger Williams called a "wall of separation between the garden of the Church and the wilderness of the world."[17] Such ideas were among the founding principles of colonial Maryland, Rhode Island, and

15. See the discussion of this terminology in JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-41 (1980). *But cf.* Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution,"* 139 U. PA. L. REV. 1319 (1991) (summarizing, without criticism, Brennan's philosophy of noninterpretivism and its application to the religion clauses).

16. Pp. 3-6, 54-55. The authors' discussion of Puritanism is a bit dated. For more recent discussions, see, for example, T.H. BREEN, THE CHARACTER OF THE GOOD RULER: A STUDY OF PURITAN POLITICAL IDEAS IN NEW ENGLAND, 1630-1730 (1970); ANDREW DELBANCO, THE PURITAN ORDEAL (1989); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism,* 39 EMORY L.J. 41 (1990), and sources cited therein.

17. P. 6 (quoting 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (1963) (letter from Williams to John Cotton, written in 1643)). For discussion of the use of the "wall of separation" metaphor among Free Church groups, and its transmutation by Jefferson and his interpreters, see

Pennsylvania.[18] All three of these colonial traditions on religion and government enjoyed wide adherence and authority on the eve of the American Revolution.

The Founders took these and other views into account in their formation of constitutional provisions and legislative policies on religion and the church. A wide "spectrum of ideas" concerning religion and government prevailed during the founding era (p. 31). Adams and Emmerich warn that "[a]ny attempt to reduce the Founders' views to one position" or to restrict the inquiry to Virginian and congressional records, as some cases and commentaries have done, "is apt to produce indefensible and culturally unacceptable results" (pp. 22-31). The authors divide the spectrum of Founders' views on religion and government into three positions — *pietistic separationism, Enlightenment separationism,* and *political centrism*. These positions are not hardened paradigms or Weberian ideal types but simply "heuristic" categories that help to describe the spectrum of ideas among the Founders (pp. 19, 31, 33-36).

Pietistic separationists like Isaac Backus and John Witherspoon embraced and extended the colonial Free Church tradition. They believed in separation of church and state and thus inveighed against state restrictions on religious speech and worship, state regulations of church properties and polities, and state interference in church government and discipline. They believed in religious voluntarism and thus advocated liberty of conscience, free access to ecclesiastical bodies, and the removal of religious test oaths. They believed in confessional pluralism and thus urged the government to accommodate all religious groups without conditions or controls, and to foster a social climate conducive to the cultivation of religious plurality.[19]

Enlightenment separationists like Thomas Paine and Thomas Jefferson embraced and extended the Lockean and radical traditions. They believed in individualism and rationalism and thus viewed religion as a matter more of private conscience and rational opinion than of corporate confession and liturgical worship. Religious liberty was for them primarily an individual right to hold religious and moral views and only secondarily a corporate right to hold ecclesiastical

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MARK D. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965).

18. Pp. 5-8. See also three excellent recent studies, published after this volume: J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA (1990); EDWARD S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA (1991); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty,* 71 B.U. L. REV. 455 (1991).

19. Pp. 28-30, 55-59, 70-71, 102-04. For further discussion of this theological understanding of religious liberty, see HOWE, *supra* note 17; WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 203-16 (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1410, 1437-43 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse,* 140 U. PA. L. REV. 149, 154-66 (1991).

property and impose clerical discipline. Enlightenment separationists also believed in a limited, neutral government that would give no special protection or privilege to religion and would predicate none of its laws or policies directly on religious arguments (pp. 22-26).

Political centrists like George Washington and John Adams stood between these two separationist positions. Like the other two groups, the political centrists advocated liberty of conscience for all, and they opposed both religious intrusions on politics that rose to the level of political theocracy and political intrusions on religion that rose to the level of religious establishment. Unlike the other groups, however, they "believed that religion was an essential cornerstone for morality, civic virtue, and democratic government" (p. 26), without which society would succumb to man's inherently sinful tendencies. "[W]e have no government," wrote John Adams, "armed with power capable of contending with human passions unbridled by morality and religion."[20] The political centrists thus supported governmental proclamations of Thanksgiving Day prayers and appointment of chaplains, governmental sponsorship of general religious education and organization, and governmental enforcement of a stern religiously based morality through positive law (pp. 26-28, 51-52, 113-14).

Adams and Emmerich are largely content to juxtapose these three sets of Founders' views and pay little attention to their relative priority or relative constitutional influence. Later in the volume, they allow that the political centrists "predominated among the Founders" (p. 51) and that "[t]he religion clauses owe as much, if not more, to the pietistic and political centrist positions as to the Enlightenment" (p. 95). They also seem to prefer the pietists over the others, if frequency of citation is any indication. But the authors' main — and novel — point is that the Founders' "broad purposes" respecting government and religion cannot be sought in any one of these philosophies, but only in the dialectic among all three of them. Such a dialectic produced a consensus among the Founders on the "core value" of religious liberty and a range of "animating principles" designed for its integration and implementation.

The Founders all agreed that religious liberty was a "core value" and "first liberty" — "the most inalienable and sacred of all human rights," as Jefferson put it.[21] They understood religious liberty to include, in William Penn's words, "not only a mere liberty of the mind, in believing or disbelieving . . . but [also] the exercise of ourselves in a

20. P. 27 (quoting 9 THE WORKS OF JOHN ADAMS 229 (Charles F. Adams ed., 1854) (letter from Adams to a unit of the Massachusetts militia, written in 1798)).

21. Thomas Jefferson, Freedom of Religion at the University of Virginia (Oct. 7, 1822), *in* THE COMPLETE JEFFERSON 958 (Saul K. Padover ed., 1943). See similar quotes by other Founders on pp. 37-39. For similar interpretations of the importance of religious liberty to the Founders, see Glendon & Yanes, *supra* note 1, at 540-47, and sources cited therein.

visible way of worship."[22] Both religious beliefs and religious actions and omissions predicated on those beliefs came within its protection.

This core value of religious liberty imbued both state and federal constitutional provisions on religion. All eleven of the state constitutions ratified between 1776 and 1784 included general guarantees of religious liberty, often accompanied by elaborate panegyrics about its importance and elaborate principles for its implementation (pp. 38-39, 115-20). Likewise, the drafters of the First Amendment embraced religious liberty as their common goal, and "intended the establishment and free exercise clauses to be [its] complementary co-guarantors" (p. 37). The drafters did not prefer one religion clause over the other or perceive any tension between them. Their goal was simply to prevent Congress from intruding on religious liberty, by either prescribing ("respecting an establishment") or proscribing ("prohibiting") any one form of religious belief, action, or organization.[23] "[H]istory supports the view," the authors insist, "that the nonestablishment and free exercise guarantees, play different although mutually supportive, roles in protecting religious liberty" (p. 43).

The religion clauses of the First Amendment were neither self-contained nor self-implementing. Four "animating principles" — federalism, separationism, accommodationism, and neutrality — served to integrate and implement these twin guarantees (pp. 72-73). These historical principles, the authors argue, are embedded in the Constitution, and can be discerned in the "colonial and early national antecedents on religious freedom, the legislative history of the [religion] clauses, and the Founders' beliefs and practices" (p. 94). Though each group of Founders clearly favored certain animating principles over others, they recognized that all four of these principles were indispensable to the protection of religious liberty.

The principle of federalism bolstered the guarantees of both religion clauses (pp. 43-51, 72). It prevented the federal government ("Congress") from establishing a single national church, as prevailed in England and France; it also perpetuated diversity of religious confession and control within the states. The Founders believed "that au-

22. William Penn, *The Great Case of Liberty of Conscience* (1670), *reprinted in* 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 443, 447 (1726).

23. Pp. 37-39, 40, 43, 71-73. This cardinal insight into the complementarity of the religion clauses, already articulated by the authors in earlier articles, *see* sources cited *supra* note 13, now enjoys considerable scholarly support. *See, e.g.*, JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 119-26 (1987); Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 784-93 (1986); Glendon & Yanes, *supra* note 1, at 540-41; Richard John Neuhaus, *A New Order of Religious Freedom*, FIRST THINGS, Feb, 1992, at 13. Justice Stewart and Chief Justice Rehnquist have made similar observations. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); Thomas v. Review Bd., 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissenting); Sherbert v. Verner, 374 U.S. 398, 413-417 (1963) (Stewart, J., concurring); Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting).

thority over religion, to the extent it could be exercised, was a state matter; and that, unless prevented, Congress would pose a dangerous threat to religious liberty" (p. 44; footnote omitted). The principle of federalism reflected both of these beliefs. The authors rather loosely subsume within federalism the principle of social or structural pluralism.[24] "In addition to dividing state and federal authority," they argue, "the Founders sought to ensure a free society by affording constitutional protection, at both levels, to 'mediating' institutions such as the family, churches, the press, business, and voluntary associations" (p. 47). Such institutions not only provided "buffers between the individual and the government" (p. 47), but represented different interests and articulated alternative perspectives in the public square.

The principle of institutional separation of church and state also animated both religion clauses (pp. 51-58). It precluded alliances that resulted in state coercion of religious beliefs and state intrusions on religious organizations, as was common in establishment regimes. It also ensured that free exercise rights attached to both individual believers and religious institutions. In its original formulation, the principle of separation of church and state mandated neither the separation of religion and politics nor the secularization of civil society. The Founders did not intend to preclude religious officials from participating in political and public affairs or religious beliefs from leavening public discourse and opinion. "[T]he founders conceived of separation in institutional rather than cultural terms. . . . that religion and society should be separated was a notion that would have met with uniform disapproval" (p. 51).

The principle of accommodation rendered the protections of the Free Exercise Clause accessible to all religious believers (pp. 58-65). The Founders understood that religion assumed a plurality of forms and that, in a democratic society, religious minorities would sometimes stand conscientiously opposed to the policies of religious and political majorities. The principle of accommodation required officials to balance "government's duty to promote the cohesiveness necessary for an ordered society and its responsibility to honor the religious practices of citizens by refraining from unnecessary or burdensome regulation."[25] The Founders memorialized this principle not only in

24. I say "rather loosely" because the authors' discussion of structural pluralism in this section is, in contrast to most of the book, devoid of close citations to the historical sources. The only sources adduced are Madison's *The Federalist No. 10* and *The Federalist No. 51* (p. 47), but here Madison speaks of political factions and constituencies, not voluntary mediating structures. In *The Federalist No. 14,* Madison does refer to "the people of America, knit together as they are by so many cords of affection," but this is rather oblique. THE FEDERALIST PAPERS 103 (Clinton Rossiter ed., 1961). This is not to say that the Founders rejected pluralism, but rather that pluralism was not a species of federalism. For further discussion, see *infra* notes 62-70 and accompanying text.

25. Pp. 58-59. *See* Adams & Gordon, *supra* note 13.

the Free Exercise Clause but also in their prohibition of religious test oaths in Article VI of the Constitution and in their accommodation of pacifists (pp. 61-64).

The principle of benevolent neutrality required government to treat all religious groups equally and avoid favoritism of some and discrimination against others (pp. 65-72). Such equality of treatment would ensure that individuals could choose their religion voluntarily. In its original formulation, the principle of benevolent neutrality did not prohibit government from offering general nonpreferential aid to religion, nor did it require government to treat religious beliefs and actions on a par with those that were nonreligious. According to the Founders, "[t]he religion clauses do not compel a neutrality that is blind to the spiritual needs of citizens. Instead, they promote religious liberty through a benevolent neutrality that permits government to foster a society committed to voluntary religious belief and practice" (p. 73).

The Founders designed these four animating principles to be mutually supportive and mutually subservient to the higher goal of religious liberty.[26] No single principle could by itself guarantee religious liberty. Pure federalism could readily perpetuate repressive religious establishments, as it had done in the colonies and in early modern Europe.[27] Pure separationism could deprive the church of all meaningful forms and functions, as it would do in the Soviet Union.[28] Pure accommodationism could deprive society of all common values and beliefs and the state of any neutral role (pp. 58-59). Pure neutrality could render government blindly indifferent to the special place of religion in the community and in the Constitution (p. 71). As a consequence, the Founders integrated these four principles, and made each of them "a servant of an even greater goal," a "means . . . to achieve the ideal of religious liberty in a free society" (p. 37).

In the past half century, the authors argue, these four principles have become alienated both from each other and from themselves. Courts and commentators have sought to achieve religious liberty on the basis of a single principle and so have variously equated religious

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26. Pp. 36-37, 72-73; *see also* Adams & Gordon, *supra* note 13; Adams & Hanlon, *supra* note 13. The following paragraphs present themes scattered throughout this volume and the two articles cited.

27. The principle of federalism and local control was the basis for the religion clauses of the Religious Peace of Augsburg (1555) and the Peace of Westphalia (1648), *reprinted in* CHURCH AND STATE THROUGH THE CENTURIES 164-73, 189-93 (Sidney Z. Ehler & John B. Morrall eds. & trans., 1954). Under the famous doctrine of *cuius regio eius religio,* the prince or local magistrate was empowered to establish his religion in the community and govern the territorial church but had to permit dissenting religious subjects to emigrate freely. *Id.* at 169-70.

28. P. 37. For discussion of the abuse of the doctrine of separation of church and state in the Stalinist Soviet Union, see Harold J. Berman, *Atheism and Christianity in the Soviet Union, in* FREEDOM AND FAITH: THE IMPACT OF LAW ON RELIGIOUS LIBERTY 127 (Lynn R. Buzzard ed., 1982).

liberty with local regulation of religion,[29] separation of church and state,[30] governmental accommodation of religion,[31] or governmental neutrality towards religion.[32] Such narrow formulations, the authors believe, have rendered true religious liberty both elusive and illusory (pp. 74-75), and have pitted the Establishment Clause and the Free Exercise Clause against each other. Those who equate religious liberty with separationism have subordinated the Free Exercise Clause to the Establishment Clause; those who have equated religious liberty with accommodationism have subordinated the Establishment Clause to the Free Exercise Clause (pp. 40-42). To the authors, this schism is myopic and unnecessary. The common core value of religious liberty merges the principles of separationism and accommodationism, thereby permitting the integration of the Establishment and Free Exercise Clauses (pp. 37-42, 74-75, 94-95).

Moreover, courts and commentators have alienated these principles from their original meaning and core values. Federalism, with its core values of local control and social pluralism, has been eclipsed by the nationalization of religious liberty issues and the "advent of a regulatory state of leviathan proportions."[33] Separationism, with its core value of dividing church and state, has become an instrument for the belligerent privatization of religion and the judicial purging of the public square and school of all religious beliefs, values, and symbols (pp. 48, 55-56). Accommodationism, with its core value of protecting religious minorities, has often been subordinated to the principles of ma-

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29. *See* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES (1964). Among cases, see, for example, Employment Div. v. Smith, 494 U.S. 872 (1990); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

30. *See* DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH-STATE RELATIONS (1991); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); Leo Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980); John Witte, Jr., Book Review, 109 THE CHRISTIAN CENTURY, Mar. 4, 1992, at 48 (reviewing DAVIS, *supra*). Among cases, see, for example, Aguilar v. Felton, 473 U.S. 402 (1985); McCollum v. Board of Educ., 333 U.S. 203 (1948).

31. *See* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. Among cases, see, for example, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Zorach v. Clauson, 343 U.S. 306 (1952).

32. *See, e.g.*, PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 18 (1962); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

33. P. 50; *see also* pp. 47-54 (discussing privatization of religion and government provision of formerly religious services, along with separationism); Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L.J. 149, 159-64 (1990); John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice*, 64 S. CAL. L. REV. 363, 366-67, 408-10 (1991).

joritarianism and judicial deference.[34] Neutrality, with its core values of equality and noncoercion of religion, has become a means to reduce religion to the level of nonreligion and to exclude it from all manner of direct governmental aid and accommodation (pp. 66-71). Originally designed as a shield to protect religion, the Establishment and Free Exercise Clauses have become twin swords to attack it.

In response to this crisis, the authors call courts and commentators back to the core value of religious liberty and its animating principles. This is not simply a call to a romantic past, or an invitation to transpose 200-year-old theories and laws into our culture. The authors are aware that the historical sources on religious liberty are more than a little Delphic and that current religious liberty issues require adaptation and extension even of those historical prescriptions that can be discerned (p. 75). They also know that the doctrine of precedent mandates that any transformation of First Amendment law be gradual and deliberate. Thus their agenda is modest and realistic. "[C]ourts should look to the basic value of religious liberty and its implementing principles," they argue, not "as a test or formula to be applied woodenly to current issues," but as a guide to "the revision of existing tests or the formulation of new ones" (p. 74). Such an agenda will ultimately yield a more integrative law of religious liberty.[35]

The authors use, among other issues, the controversy over the "equal access" of religious students to public school fora to demonstrate the utility of the their integrative approach.[36] Traditionally, religious students have claimed a free exercise right to use public school facilities after school hours to hold their voluntary meetings alongside those of other nonreligious groups. Courts have held that the Establishment Clause denies them access to these facilities, since religion is a private matter whose inclusion in the public school forum would suggest an official endorsement of religion. This, to the authors, is a false dilemma: "Properly framed, the issue becomes whether equal access for student religious groups advances religious liberty . . . [and] whether the selective exclusion of such groups violates this value" (p. 79). Consideration of the four animating principles compels their conclusion that "religious liberty not only would seem to permit but would require equal access for student religious groups" (p. 79). Federalism encourages government to hear a plurality of voices, particularly religious voices, in mediating structures like the school.

34. Pp. 58-61. See further discussion in Adams & Gordon, *supra* note 13; Glendon & Yanes, *supra* note 1, at 518-34.

35. See a similar call to "an integrative jurisprudence" in Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, and History,* 76 CAL. L. REV. 779 (1988) and Jerome Hall, *From Legal Theory to Integrative Jurisprudence,* 33 U. CINN. L. REV. 153 (1964).

36. Pp. 75-82. The authors adduce Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds,* 475 U.S. 534 (1986), a case in which Judge Adams wrote a strong dissent.

Separationism and accommodationism teach that state facilitation of voluntary, noncoerced religious activity is not only countenanced by the Establishment Clause but commanded by the Free Exercise Clause. Neutrality prohibits the state from singling out religious groups for special prohibition. Religious student groups that voluntarily convene must, therefore, receive equal access to the public school forum.[37]

II

A Nation Dedicated to Religious Liberty is lucid and learned in argument, lean and laconic in style. It is well documented and indexed and largely up to date with the burgeoning literature on this vast subject. Graced with a foreword by Warren Burger and a handsome selection of historical documents, it serves as a provocative primer for the uninitiated reader and a pristine restatement for the specialist. A few lapses and lacunae in the presentation merit comment, however, particularly since the book is advertised as a prospectus of the authors' major two-volume work, *The American Constitutional Heritage of Religious Liberty,* now in progress.

First, the discussion of European and colonial history breaks down at the edges. The authors assert, for example, that John Calvin embraced Martin Luther's theory of the two kingdoms, "a heavenly one where the church exercised spiritual authority and an earthly one where the civil magistrates exercised temporal authority."[38] This statement doubly misleads. Luther's two-kingdoms theory describes the redeemed and fallen dimensions of human existence, not the two institutions of church and state. The church, according to Luther, is a member of both kingdoms and exercises spiritual authority in each.[39] Calvin's two-kingdoms theory describes the two realms of political

37. Both Congress and the U.S. Supreme Court have agreed. *See* Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), which was upheld against an Establishment Clause challenge in Board of Educ. v. Mergens, 496 U.S. 226 (1990).

38. P. 3. The authors also seem to ascribe this two-kingdoms theory to the eighteenth-century pietists, particularly Isaac Backus. *See* pp. 56-57 (citing ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1773), *reprinted in* ISAAC BACKUS ON CHURCH, STATE AND CALVINISM; PAMPHLETS, 1754-1789, at 317, 334 (William G. McLoughlin ed., 1968)). Backus, however, does not embrace this two-kingdoms theory, either in the passage cited or in other writings. He does accept the biblical distinction between the perfect Kingdom of God that is to come and the present fallen Kingdom of Satan. *See id.* at 79, 263, 281, 315. But this "eschatological" two-kingdoms theory is quite different from both Calvin's and Luther's views, and from the distinction that Backus later draws between "civil and ecclesiastical government" in the present world. *Id.* at 313-25. For discussion of the original distinction between Lutheran and pietist two-kingdoms theories, see ROBERT FRIEDMANN, THE THEOLOGY OF ANABAPTISM 38-47 (1973) and sources cited therein.

39. Luther's 1523 discussion of the two-kingdoms doctrine, which the authors cite, *see* p. 126 n.1, must be read against his earlier and later statements of the doctrine. For discussion of these sources see Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany,* 62 S. CAL. L. REV. 1573, 1585-96 (1989); Siegfried Grundmann, *Kirche und Staat nach der Zwei-Reiche-Lehre Luthers [Church and State Under the Two-King-*

and ecclesiastical power in this world. The church, according to Calvin, wields not only spiritual authority over doctrine and liturgy, but also temporal authority over ecclesiastical polity and property and over the discipline and pedagogy of its members.[40] This theological distinction had profound political consequences: Lutheran churches in Germany and Scandinavia remained subject to close magisterial authority over their temporalities until well into the nineteenth century; Calvinist churches, by contrast, developed elaborate ecclesiastical polities, whose spiritual and temporal authority they jealously protected against civil intrusion.[41]

In the same vein, the authors assert that the Puritans of colonial New England conflated the institutions of church and state and "rejected the concept of ecclesiastical courts."[42] In fact, the New England Puritans, like their European Calvinist brethren, separated the institutions of church and state, and the churches developed ecclesiastical courts to discharge their spiritual and temporal authority.[43] The authors assert that the religion clauses of the First Amendment are "one of America's great contributions to Western civilization" (p. 1). By 1789, however, several European polities had already promulgated disestablishment and free exercise provisions, which were equally, if

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doms Theory], in LUTHER UND DIE OBRIGKEIT [LUTHER AND THE STATE] 341 (Gunther Wolf ed., 1972).

40. *See* JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION Bk. III, 19.14-16, Bk. IV, chs. 11, 12, 20 (John T. McNeill ed. & Ford Lewis Battles trans., 1960). The discussion in Book IV, chapter 20 of the Institutes, which the authors cite at p. 127 n.1, does not speak of "two kingdoms" and needs to be read in the context of Calvin's numerous other discussions of ecclesiology and church-state relations in the Institutes and elsewhere. *See generally* JOSEF BOHATEC, CALVINS LEHRE VON STAAT UND KIRCHE [CALVIN'S THEORY OF CHURCH AND STATE] (1937); WILLIAM A. MUELLER, CHURCH AND STATE IN LUTHER AND CALVIN (1954).

41. *See generally* ROLAND H. BAINTON, THE REFORMATION OF THE SIXTEENTH CENTURY 141-59 (1952); HANS BARON, CALVINS STAATSANSCHAUUNG UND DAS KONFESSIONELLE ZEITALTER [CALVIN'S VIEW OF THE STATE AND THE CONFESSIONAL ERA] (1924); KARL HOLL, LUTHER UND DES LANDESHERRLICHE KIRCHENREGIMENT [LUTHER AND THE TERRITORIAL RULE OF THE CHURCH] (1911); JOHN T. MCNEILL, THE HISTORY AND CHARACTER OF CALVINISM 237 (1954).

42. P. 54. *But cf.* p. 5 ("[T]he Puritans made enduring contributions to America's heritage of religious liberty by repudiating ecclesiastical courts and by distinguishing civil and religious authority."). The Puritans did reject the "commissary courts" of the Anglican Church, but principally because they had been appointed by the English Crown. Puritan church leaders heartily advocated and adopted their own ecclesiastical courts. For a contemporaneous overview of the English ecclesiastical courts and their law, which was often scornfully cited by the Puritans, see JOHN GODOLPHIN, REPERTORIUM CANONICUM, OR, AN ABRIDGMENT OF THE ECCLESIASTICAL LAWS OF THIS REALM, CONSISTENT WITH THE TEMPORAL (3d ed. 1687).

43. *See* EMIL OBERHOLZER, DELINQUENT SAINTS: DISCIPLINARY ACTION IN THE EARLY CONGREGATIONAL CHURCHES OF MASSACHUSETTS (1956); Witte, *supra* note 16, at 55-62. For some classic early Puritan statements, see THOMAS HOOKER, A SURVEY OF THE SUMME OF CHURCH-DISCIPLINE (Arno Press 1972) (1648); RICHARD MATHER, CHURCH-GOVERNMENT AND CHURCH-COVENANT DISCUSSED (Arno Press 1972) (1643). Much of the Cambridge Synod and Platform of 1648, which the authors cite in support of their argument, p. 146 n.51, was, in fact, devoted to defining the consistorial and synodical courts of the congregational churches and the office and authority of court officials.

not more, influential in the West.[44] The authors cite the 1649 Maryland Act Concerning Religion as "the first law in America to afford a measure of religious freedom" (p. 5). More than a decade before, however, the Providence Plantation had promulgated strong religious liberty provisions, which proved more effective than the ill-fated Maryland Act.[45] The authors refer rather casually to the Lockean character of American revolutionary and republican thought (pp. 3-4, 8, 44, 127). But recent historical writing has exposed a welter of other ideological and institutional sources of early American thought besides Locke's writings.[46]

Second, the classification of the Founders' views on religion and government, though far more candid with and faithful to the archives than traditional descriptions, is still a bit rough-hewn. The authors do describe the pietistic, enlightenment, and political centrist positions of the Founders as merely "heuristic" (p. 31). They also recognize the diversity of views within each class and warn against too close an adherence to their terminology (pp. 22, 31). But, even taking these caveats into account, some peculiarities in the presentation remain.

A few of the Founders seem misclassified. Roger Sherman, for example, is classified as a pietist (pp. 30-31). Though Sherman clearly sympathized with the New Lights of Connecticut, his stern Puritan bearing, his habitual stress on the legal enforcement of Christian morals, and his strong ties with the congregationalist establishment render him more centrist than pietist.[47] The same is true of John

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44. Among the first such provisions were those produced during the later sixteenth-century Revolt of the Netherlands, particularly The Pacification of Ghent (1576), the Religious Peace of Antwerp (1578), The Ordinance and Edict Upon the Fact of the Execution of Both the Religions (1578), and the Union of Utrecht (1579), and the numerous pamphlets that accompanied them. Each of these documents is reprinted in TEXTS CONCERNING THE REVOLT OF THE NETHERLANDS (Ernst H. Kossman & Albert F. Mellink eds., 1974) and discussed in O.J. DeJong, *Union and Religion, in* THE LOW COUNTRIES HISTORY YEARBOOK 29 (1981). *See also* Karl Schwarz, *Exercitium religionis privatum,* 105 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (KAN. AD.) 495 (1988).

45. *See, e.g.,* The Providence Compact (1636), *in* 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 14 (1856) (authorizing town action "only in civil things"); Plantation Agreement at Providence (1640) *in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3206 (Francis N. Thorpe ed., 1909) (provision stating "Wee agree, as formerly hath bin the liberties of the town, so still, to hould forth liberty of Conscience"); Government of Rhode Island, Mar. 16-19, 1641, art. 4, *in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS, *supra,* at 3208 (holding that "none bee accounted a Delinquent for Doctrine: Provided it be not directly repugnant to ye Government or Lawes established") (emphasis in original). The 1649 Maryland Act Concerning Religion led a precarious and ineffective existence after the Restoration of 1660. *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 38-53 (1986).

46. *See, e.g.,* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1988); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985).

47. *See, e.g.,* CHRISTOPHER COLLIER, ROGER SHERMAN'S CONNECTICUT: YANKEE POLITICS AND THE AMERICAN REVOLUTION 37, 93, 196, 323-29 (1971).

Witherspoon, whose sharp statements on the importance of religion and morality for social coherence and strong confidence in state paternalism were rather disquieting to the ardent pietists.[48] John Marshall is included among the centrists (pp. 27-28), but his principal attitudes toward religion and government are more compatible with Enlightenment separationism than political centrism.[49] James Madison is included among the Enlightenment separationists (pp. 24-26); while he clearly embraced Enlightenment views late in life,[50] the young Madison of 1776 to 1791 was more of a pietist than a philosophe, and he fits most safely among the centrists.[51]

Roger Williams and William Penn appear too often in the book as spokesmen for the pietistic Founders of the late eighteenth century.[52] Williams wrote in the middle third of the seventeenth century, Penn in the last third, and their writings enjoyed only limited circulation and authority in the late eighteenth century.[53] Moreover, their views on religious liberty, while remarkably progressive for their day, appear rather commonplace and compromised when compared with views articulated a century later. The pietists found more ready spokesmen in Isaac Backus, Eli Clay, Samuel Davies, Reuben Ford, John Leland, John Waller, Charles Wesley, John Wesley, John Williams, and a host of other Baptist, Methodist, and Presbyterian pamphleteers and

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48. *See generally* MARTHA LOU LEMMON STOHLMAN, JOHN WITHERSPOON: PARSON, POLITICIAN, PATRIOT (1976).

49. *See, e.g.*, 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 220-22 (1916); 2 *id.* at 2-11; 4 *id.* at 69-71.

50. See particularly his Detached Memoranda of c. 1817, *reprinted in* Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. (3d Ser.) 534, 554 (1946).

51. See the further discussion in MILLER, *supra* note 19, at 87-106.

52. While the section on pietistic separationism in the "Founders of Religious Liberty" chapter, pp. 28-31, discusses Isaac Backus, John Witherspoon, and Roger Sherman, the references to pietistic separationism throughout the rest of the volume cite and quote mostly from the writings of Roger Williams and William Penn. Pp. 39-40, 53-58, 61, 70-72. Backus is periodically discussed. Sherman is mentioned only once, espousing a position on conscientious objection quite contrary to the pietistic position. Pp. 63-64. John Witherspoon is mentioned only in passing as a "politically active minister." P. 52. Of the ten documents in the Appendix on "Historical Documents of Religious Liberty," three are from Williams, one from Penn, one from Backus, and the rest from nonpietists. Pp. 97-114.

53. The writings of Roger Williams, particularly those on religious liberty, were rare in the early republic and appear on only a few book lists. With the exception of Isaac Backus, late eighteenth-century writers who referred to Williams' views on religious liberty were not flattering. See, for example, the excerpts in WALLACE COYLE, ROGER WILLIAMS: A REFERENCE GUIDE 1-7 (1977) and the discussion in GAUSTAD, *supra* note 18, at 199-207, 220-21 and in the editorial introductions to the selections in THE COMPLETE WRITINGS OF ROGER WILLIAMS (1963). The writings of William Penn, though more readily available in the later eighteenth century, also attracted relatively few adherents — in part, perhaps, because William Penn was both a Quaker and an Englishman (having spent only five years in the colonies). *See, e.g.*, JAMES WILSON, *Of The Study of the Law in the United States, in* 1 THE WORKS OF JAMES WILSON 67, 71-72 (Robert Green McCloskey ed., 1967) [hereinafter WORKS] (bemoaning the habitual disregard for Penn's contributions to the development of religious liberty); *see also* FROST, *supra* note 18, at 10-13.

preachers of the later eighteenth century.[54] A full understanding of pietistic separationism requires a more nuanced treatment of these later writings and a closer delineation of their views.

The class of "political centrists" is too generic in definition and eclectic in participation. The authors assign the centrists to a point along the spectrum from pietistic to Enlightenment separationism. But several Founders did not fit anywhere on this ideological spectrum. The authors reduce the core teaching of the centrists to Washington's maxim that religion and morality are essential to good government, a view that hardly distinguishes the centrists from either the Enlightenment or the pietistic separationists. The authors focus on the "political" formulations of the centrists, but the philosophical and popular expressions of "centrism" were probably more illustrative and influential. The authors label as centrists spokesmen as diverse as the Catholic Carrolls of Maryland and the Puritan Adamses of Massachusetts, who had rather different ideas about religion and government.

The Founders outside the pietist and Enlightenment camps who spoke to the issue of religious liberty fell into at least three additional classes, besides that of "political centrism." One group consisted of New England Puritans, who the authors say "provided the moral and religious background of fully 75 percent of the people who declared their independence in 1776."[55] Their distinctive theology of the covenant community, social pluralism, natural freedom, and church-state relations was not suddenly subsumed within political centrism after the revolution. It was forcefully argued by Charles Chauncy, Jonathan Edwards, Jonathan Mayhew, and a host of sermonizers and pamphleteers inspired by their views.[56] Their writings had a powerful influence on the early constitutional tradition of the New England states and on the thought of such politicians as John Adams, Fisher Ames, and Oliver Ellsworth. A second group — the so-called "civic republicans" — sought the reformation of social morals, the cultivation of public spiritedness, and the articulation of a common set of beliefs for the new nation. Represented by Samuel Adams, James Wil-

54. For further discussion of eighteenth century pietist writings, see, for example, THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 (1977); JOSEPH MARTIN DAWSON, BAPTISTS AND THE AMERICAN REPUBLIC (1956); WILLIAM R. ESTEP, REVOLUTION WITHIN THE REVOLUTION: THE FIRST AMENDMENT IN HISTORICAL CONTEXT 1612-1789 (1990); WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE (1971).

55. P. 5 (quoting SIDNEY AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 124 (1972)); *see also* A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 53 (1985) ("At the time of the Revolution, at least 75 percent of American citizens had grown up in families espousing some form of Puritanism.").

56. For samples of their writings, see THE PURITANS (Perry Miller & Thomas H. Johnson eds., 1938); PURITAN POLITICAL IDEAS 1558-1794 (Edmund S. Morgan ed., 1965). For discussion, see HARRY S. STOUT, THE NEW ENGLAND SOUL: PREACHING AND RELIGIOUS CULTURE IN COLONIAL NEW ENGLAND (1986).

son, Richard Price, and others, this group was neither as ecclesiastically insistent as the Puritans nor as religiously indifferent as the Enlightenment skeptics. Yet because the "civic republicans" regarded religion as essential to their social agenda, they strongly supported the cause of religious liberty.[57] A third group was comprised of isolated Catholics, Quakers, Jews, and other discrete minorities, who strongly supported the free exercise and disestablishment of religion, but were clearly not Pietists, Puritans, or political centrists.

The authors' integrative theory of religious liberty is both their most original and most controversial contribution. Such a theory is particularly propitious given the widespread new interest in the history of religious liberty and the widespread frustration with current First Amendment doctrine. Neither the historical cogency nor the current utility of this theory, however, are entirely proven in this brief book — though such proof may well be forthcoming in their two-volume work-in-progress.

Certain parts of the theory stand on solid and high ground: the identification of religious liberty as a universally accepted core value in the founding era, the basic descriptions of the principles of institutional separation of church and state and of noncoercion and equal treatment of religion, the argument that the First Amendment religion clauses were binding on the federal government ("Congress") alone and that state governments were free to govern religion and the church in accordance with their own state constitutions, and the application of this integrated theory to the modern controversies over equal access and religious symbolism are all unassailable and wholly convincing. Other parts of this integrative theory, however, are less cogently argued.

The discussions of accommodationism and benevolent neutrality are modernist in tone and only modestly supported by the sources. These two terms and concepts are of recent vintage. Accommodationism is usually associated with a pro-religious reading of the Free Exercise Clause, benevolent neutrality with a pro-religious reading of the Establishment Clause.[58] Neither term appears in the writings of the Founders whom the authors quote, and neither concept (as currently formulated) appears directly in the historical sources that the authors adduce (pp. 58-71). The Founders' stated concerns were to protect religious voluntarism and to prohibit coercion of religion by the state.[59] Accommodation of and benevolent neutrality toward religion

57. *See, e.g.*, NATHAN O. HATCH, THE SACRED CAUSE OF LIBERTY: REPUBLICAN THOUGHT AND THE MILLENNIUM IN REVOLUTIONARY NEW ENGLAND (1977); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 53-70, 107-24 (1969).

58. *See* Adams & Gordon, *supra* note 13; Richard H. Jones, *Accommodationist and Separationist Ideals in Supreme Court Establishment Clause Opinions*, 28 J. CHURCH & STATE 193 (1986); McConnell, *supra* note 31.

59. *See, e.g.*, Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Ap-*

were means to achieving the ends of voluntarism and noncoercion of religion; they were not ends in themselves.[60]

The discussion of federalism has two curiosities. On the one hand, the authors exalt the principle of federalism, yet pay only scant attention to the state constitutional laws of church and state. They describe the familiar activity of state constitutional and ratification conventions (pp. 8-13, 20) and include the earliest state constitutional provisions on religion in an appendix (pp. 115-19). They also write that "state constitutions . . . are an important, although often overlooked, source" of religious liberty in America (p. 75) and that the Supreme Court's "nationalization" of "issues of church and state that had been resolved by democratic processes or under state constitutional provisions and laws for over 150 years" was "fundamentally antidemocratic" (p. 49). Yet the authors curiously forgo analysis of that 150-year state history which, by their own premises, is a vital part of what their subtitle calls the "constitutional heritage of the religion clauses." The authors, of course, can only do so much in a short book. Nineteenth-century state precedents, so well described by others,[61] seem readily dispensable. But, given the importance attached to the principle of federalism, this state material deserves at least a synthetic summary.

On the other hand, the authors subsume within the principle of federalism the principle of social or structural pluralism. The principle of federalism, they argue, mandated not only the division between federal and state governments, but also the differentiation of churches, families, schools, clubs, and other voluntary associations that mediate between the individual and the state.[62] The sources do not support such a conclusion. To be sure, earlier writers in Europe and America had used the term *federalism* to describe a variety of social institutions. The sixteenth-century Dutch political theorist Johannes Althusius, for example, had devised a famous "federalist" theory of natural and political associations.[63] Massachusetts governor John

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praisal of Recent Developments, 27 WM. & MARY L. REV. 943, 949 (1986); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

60. Moreover, the principle of "benevolent neutrality," as currently understood, seems well captured in the Founders' understanding of "institutional separation," which allowed for all manner of indirect general support for religion and religious organizations.

61. *See, e.g.*, CHESTER JAMES ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS (1965); NOONAN, *supra* note 23; ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES (1954); CARL ZOLLMANN, AMERICAN CIVIL CHURCH LAW (1969).

62. Pp. 47, 50-51. This theory of social pluralism has gained widespread support in the current academic community. *See, e.g.*, ROBERT N. BELLAH ET AL., THE GOOD SOCIETY (1991); HERMAN DOOYEWEERD, A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS (John Witte, Jr. ed. & Magnus Verbrugge trans., 1986); POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY (James W. Skillen & Rockne M. McCarthy eds., 1991); MICHAEL WALZER, SPHERES OF JUSTICE (1983); Glendon & Yanes, *supra* note 1, at 536-39.

63. *See* FREDERICK S. CARNEY, THE POLITICS OF JOHANNES ALTHUSIUS (1964); OTTO VON GIERKE, JOHANNES ALTHUSIUS UND DIE ENTWICKLUNG DER NATURRECHTLICHEN STAATSTHEORIEN [JOHANNES ALTHUSIUS AND THE DEVELOPMENT OF NATURAL LAW THEO-

Winthrop's robust "covenantal" or "federal" (from the Latin term *foedus*) theory of family, church, and civic community remained a vital part of American Puritan thought.[64] By the late eighteenth century, however, the leading American constitutional Framers used *federalism* in a much narrower political sense to describe the relationship between the extant state governments and the new national government. This was a "novel, unprecedented concept of federalism"[65] that moved the Founders beyond traditional Western concepts of both confederation and consociation.[66] Although a few late eighteenth-century discussions of federalism dithered on this point, it is hard to squeeze a theory of social pluralism out of them.

Pluralism was not a species of federalism, but an independent and indispensable "animating principle" of religious liberty in the founding era. The Founders recognized two distinct types of pluralism: (1) social pluralism, or the division of society into associations like families, churches, schools, corporations, and clubs; and (2) confessional pluralism, or the development of various patterns of individual and institutional expressions of religion.

The principle of social pluralism found its strongest supporters among the "political centrists" and Puritans. Such diverse social institutions, the Puritans and centrists argued, had several redeeming qualities. They provided multiple fora for religious expressions and actions, important sources of morality, charity, and discipline in the community, and important bulwarks against state encroachment on natural liberties, particularly religious liberty.[67] As John Adams put it:

> My Opinion of the Duties of Religion and Morality comprehends a very extensive connection with society at large, and the great Interest of the public. Does not natural Morality, and much more Christian Benevolence, make it our indispensable Duty to lay ourselves out, to serve our fellow Creatures to the Utmost of our Power, in promoting and support-

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RIES OF THE STATE] (1958). On subsequent developments of this federalist theory, see DANIEL J. ELAZAR, EXPLORING FEDERALISM 115-53 (1987); CARL JOACHIM FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE 11-25 (1968).

64. *See* John Witte, Jr., *Blest Be the Ties that Bind: Covenant and Community in Puritan Thought*, 36 EMORY L.J. 579, 590-95 (1987), and sources cited therein.

65. FRIEDRICH, *supra* note 63, at 17.

66. *Id.*; *see also* S. RUFUS DAVIS, THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING 74-120 (1978); ELAZAR, *supra* note 63, at 87-91, 143-44; VINCENT OSTROM, THE MEANING OF AMERICAN FEDERALISM: CONSTITUTING A SELF-GOVERNING SOCIETY 63-97 (1991).

67. The fullest discussion of social pluralism among the Founders appears in JAMES WILSON, *Of Man, As an Individual, in* WORKS, *supra* note 53, at 197; JAMES WILSON, *Of Man, As a Member of Society, in* WORKS, *supra*, at 227; JAMES WILSON, *Of Man, As a Member of a Confederation, in* WORKS, *supra*, at 247. For more general discussion of the theory of social pluralism in the republic, see WILSON C. MCWILLIAMS, THE IDEA OF FRATERNITY IN AMERICA 112-23 (1973); CLINTON ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 204-13 (1963); Berman, *supra* note 33, at 153-59.

> ing those great Political systems, and general Regulations upon which the Happiness of Multitudes depends. The Benevolence, Charity, Capacity and Industry which exerted in private Life, would make a family, a Parish or a Town Happy, employed upon a larger Scale, in Support of the great Principles of Virtue and Freedom of political Regulations might secure whole Nations and Generations from Misery, Want and Contempt.[68]

The principle of confessional pluralism found its greatest supporters among the Enlightenment and pietist separationists. Both groups insisted that a plurality of religions should coexist in the community and that no religions should be favored or disfavored at law. The pietists predicated their pluralism on the belief that it was for God to determine which of these religions should flourish and which should fade. "God always claimed it as his sole prerogative to determine by his own laws what his worship shall be, who shall minister in it, and how they shall be supported," Backus wrote.[69] Confessional pluralism assured that God could exercise this prerogative unhindered. The Enlightenment separationists predicated their pluralism on the belief that reason would invariably yield multiple expressions of faith, whose cogency should be tested by inquiry and debate. "Difference of opinion is advantageous in religion," Jefferson wrote. "The several sects perform the office of a Censor morum over each other. Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. . . . Reason and persuasion are the only practicable instruments."[70] Pluralism is, to my mind, a fifth animating principle that has both historical support and contemporary utility.

Finally, the chapter on the contemporary application of this integrative approach to religious liberty cases is not sufficiently developed to dispel Holmes' famous maxim: "General propositions do not decide concrete cases."[71] The authors have selected three religion cases that they know intimately from Judge Adams' experience on the bench, and whose relatively simple facts lend themselves neatly to their approach. It is not clear how these principles will apply to the numerous more complex issues that face the courts, particularly in

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68. Letter from John Adams to Abigail Adams (Oct. 29, 1775), *quoted in* JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 156-57 (1966). For similar quotes from Adams, see *id.* at 19-22, 157-192 and MCDONALD, *supra* note 46, at 71-72.

69. BACKUS, *supra* note 38, at 317.

70. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY 17 (1784), *quoted in* 5 THE FOUNDERS' CONSTITUTION 79, 80 (Philip B. Kurland & Ralph Lerner eds., 1987). Both the pietist and Enlightenment conceptions of confessional pluralism are skillfully synthesized in JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298 (Robert A. Rutland et al. eds., 1973).

71. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

cases involving conflicts between the religious liberties of the two parties, between the religious liberties of an individual believer and a religious institution, and between the religious liberties of one group and the civil liberties of another.

These criticisms cast only a small shadow on this shining volume. The authors have delivered a profound and provocative work. They have done much to transcend the false history and sterile dialectics of the religion clauses and to foreshadow an arresting new paradigm for the resolution of religious disputes.