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# Comparing Religions, Legally

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*This lecture was dedicated to the Very Rev. Standrod Tucker Carmichael—Washington & Lee class of 1945, great, great grandson of John Randolph Tucker, and an old and dear friend.*

## *I. Introduction*

Religion and law, in some form, seem to exist in every society. Each, broadly understood, offers explanations for life on earth and how it ought properly to be lived. Sometimes religion and law compete for power but more often they share and influence each other's notions about what it means to be a human being and what it means to live with other human beings in the world. For example, although religion looks very independent in modern societies—free, as we say—the choices of religious individuals and religious communities with respect to their religious practices are profoundly limited by secular laws governing zoning, crime, tax, labor, families, etc., as well as the overarching ethos and ideology of the modern "rule of law." In many cases today it is law, rather than religion, that tells us who we are and what we may do. But . . . while modern law itself looks deeply self-contained, all-powerful and secular, we know that it was profoundly shaped by religion in its origins and continues to depend in fundamental ways on religious understandings of the nature of the human person and of society. This interdependence of law and religion is hard for us to see because we have been taught to believe in the effectiveness and necessity of disestablishment . . . but if we look carefully, it is there.

I will talk this afternoon about one aspect of this interdependence. I will talk specifically about the kinds of words that legislators and judges and

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1. This lecture is published as given. It has been lightly edited and includes minimal footnotes to enable a reader to find the cases, books and articles to which the author refers. The full paper on which this lecture was based will be published in WILLI BRAUN & RUSSELL T. MCCUTCHEON, EDS., INTRODUCING RELIGION (forthcoming 2007 from Equinox Press, U.K.).

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lawyers use when they talk about religion—in statutes, in courtrooms, and in legal decisions . . . and I will talk only about the modern Anglo-American context, although there are interesting ways in which this linguistic interdependence reveals itself across space and time in human history. I am going to talk about some contemporary British cases—and use those cases as examples to help us to think more broadly about the relationship between law and religion in the modern West.

Historically speaking, the conditions of this relationship of law and religion changed significantly in the early modern period when law began to be separated from religion and religion became an object of law . . . and once the new nation-states of Europe began acknowledging the religious fragmentation and diversity of their populations. At one time, the Roman Church had mostly acted as legal spokesperson for Christians. When the Roman Church lost its monopoly after the Reformation and modern states developed independently of the churches, it was no longer sufficient to leave that language about religion to the churches. Modern societies then needed to develop a working legal language *about* religion to allow them to effectively and persuasively regulate religion—now that it had been *separated.* This new language was necessary for the purpose of protecting religious freedom, for the purpose of preserving the neutrality of government, and for the simple purpose of managing the religious lives of a country's residents. People of Europe began to think of religious identity as separate from political identity and citizenship. In most cases, this new language was largely borrowed from the dominant religious tradition: As a simple example, the synonyms for religion in the west, "faith" and "belief" are largely derived from a Christian theological understanding of the proper relationship of individuals to their god and often makes a poor descriptor for other religious ways of being. Law has also borrowed from other languages about religion, languages developed by philosophers, anthropologists, sociologists, and those who study comparative religions.

We do not have time this afternoon to trace this entire history, although it is arguably at the heart of the modern relationship and remains fundamentally unresolved today. We will move quickly to twentieth century Britain and look at how the later results of these changes are still working themselves out. My argument in the larger project, of which this is a part, will be that the way in which lawyers and legislators and judges talk about religion is a function of its church/state arrangements. That language is often less successful, in legal terms, and less convincing when it tries to talk in general terms about all religion, or religion in general, than when it speaks from the perspective of one religious community. This claim may seem counterintuitive because we want to think that successful laws about religion ought to be inclusive and non-

discriminatory. But, I would argue, that as it moves away from the assumptions and rulings of an established religious authority and relies on general categories, law does a poor job of protecting freedom—as scholars of religion never tire of pointing out, those general categories are not very reliable instruments.

To differentiate among these various languages about religion, I will suggest that legal language about religion can be typed, roughly speaking, as "established" or "dis-established," depending upon whether the language used is the language of a dominant religious tradition or whether the language used is general or comparative in nature. "Established" legal language uses the words of the natives—that is, of the theologians and clerics—to talk about religion. "Dis-established" legal language must rely more on abstract comparative categories. Most modern legal systems rely on a hybrid rhetoric that both attempts humanistic/social-scientific generalizations about religion and depends on theological assumptions from within one or more dominant religious traditions.

All law depends on comparative categories, of course. Law is judged fair in part to the degree that it is general. Like cases should be judged alike. The question is: What words should one use to be fair about religion, legally speaking, in a pluralistic liberal democracy? And when are religions alike?

But . . . let us look at some cases—for that is what lawyers do . . . cases that show how legal language about religion is shaped by underlying social and cultural assumptions about what religion is and by the available categories in a particular legal context. These English cases were decided in the last few decades. I use these English examples because first, there is a very real sense in which all modern legal systems are dealing with a similar set of issues today about governing religiously diverse populations—and we should be learning from one another; second, because the unfamiliar, but closely related, can sometimes help us to see things better closer to home; and third, simply because I find them fascinating.

## *II. The United Kingdom*

### *A. Re* St. Stephen Walbrook[2]

This first case illustrates what I am calling "established" legal language about religion. Remember, the Church of England has been legally "established" since the English Reformation in the sixteenth century. That

2. *Re* St. Stephen Walbrook, 2 All E.R. 578 (1986).

has meant, roughly speaking, that the theological categories of the Church of England are also legal categories; the doctrines of the Church of England are formally part of the fabric of British law; and the Queen of England is ruler of both church and state. This special relationship between church and state has persisted in modified form over almost four centuries, even in the face of the decline of church attendance and the growth of tolerance, secularization and religious diversity. Until the year 2000, there was no law guaranteeing religious freedom in the United Kingdom.

About twenty years ago, a petition came before the courts in England concerning the church of St. Stephen Walbrook, in London, a church that is considered by some to be the finest work of the great English Restoration architect, Sir Christopher Wren. St. Stephen's had been seriously damaged during World War II. During the restoration of the building in the 1970s, the rector of the church contracted with Henry Moore, the well-known English sculptor, to design a new altar. The original altar had been situated at one end of the church faced by the congregation in box pews. The new altar was to be placed under the central dome with movable chairs surrounding it.

Because the historic churches of London are legally protected, changes to the design of the church require special permission. The petition to authorize a change goes initially to the London Consistory Court. In this case, the case of St. Stephen Walbrook, the chancellor of that court denied such permission.[3] The reason he gave was that the new Henry Moore altar was *theologically* incorrect. Canon law provides that: "In every church and chapel a convenient and decent *table*, of wood, stone, or other suitable material, shall be provided for the celebration of the Holy Communion."[4] The chancellor's considered judgment was that the Moore sculpture was not a "table." "There is," the chancellor said, "no dispute as to its intrinsic beauty."[5] But, as a matter of *law*, he said, it was not a table, "a *convenient and decent* table," as required by the statute. (It weighs ten tons and is made of Italian marble. British newspapers referred to it as the camembert cheese.)[6]

In his 1986 judgment explaining his decision, the chancellor cited many old English cases tracing the history of several centuries of common law decisions about communion tables—but first he quoted from the rector's

3. *See Re* St. Stephen Walbrook, 2 All E.R. 705 (1986) (rejecting permission as a matter of law, not discretion).

4. *Id.* (emphasis added).

5. *Id.*

6. *See* photograph of the new altar, http//:s4all.nl/~twomusic/concerts/Walbrook/source/01walbrookmoore.html.

testimony at the trial. The rector testified at trial that, when defining the commission, he had said to Moore as follows:

> I begged him to forget any altars he had ever seen, if he had in fact seen any, and to think of something going back to the dawn of history, something primitive and inseparable for man's search for a meeting place with his God. I implored him to think of the stone altar on which Abraham was prepared to sacrifice Isaac and of the stone of we know not what size or shape set up by Jacob at Beth-el, with the declaration "This is the House of God and this is the gate of Heaven."[7]

It is not difficult to see why the Chancellor was worried. This language is a long way from the decorous protestant language of the statute, which speaks of "a convenient and decent table!" Indeed, the rector's language—and by implication Moore's sculpture—was dangerously close to being pagan, non-Christian, or, even, as he went on to point out, Roman Catholic. An "altar," the chancellor said was different from a table because it was "a place where a sacrifice is to be made, a repetition at every Mass of the sacrifice of our Lord at Calvary."[8] "This," he added, "was the view of the Mass as held in the *unreformed* Church of England immediately before the Reformation."[9] (In contrast, he was implying, to the *reformed* Church in England, which held that the sacrifice only occurred once, and was merely remembered at the communion meal.) Returning to the evolution of the common law rule, which had originally required a movable wooden table, he conceded: "[A] holy table is no longer illegal merely because it is not movable, or because it is made of stone. But, he insisted, with stubborn literalism, "the holy table in the church must still be a table."[10]

The appeal from the Chancellor's decision was taken to the Court of Ecclesiastical Causes Reserved. There it was heard by five judges, two of whom were bishops of the Church of England and three of whom were senior high court appellate (that is "secular") judges. It fell to the Bishop of Chichester to consider the theological issues. (There was also a dispute as to the aesthetic appropriateness of the sculpture, in view of the architectural significance of the building, an issue which was addressed by the other judges.) In a lengthy and learned judgment, the Bishop gently but firmly corrected the chancellor's legal and theological history to fit our more ecumenical time. He said that to use the words "altar" and "sacrifice" did not necessarily imply that

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7. *Re* St. Stephen Wallbrook, 2 All E.R. 705 (1986).
8. *Id.*
9. *Id.* (emphasis added).
10. *Id.*

the communion meal was a repetition of the sacrifice at Calvary, a view that, he said, Catholic teaching would also reject. These words—altar and sacrifice—are more capacious. They refer to the attitude of the whole people present—who sacrifice themselves as well. Rejecting the narrow legalism that limited those words to the first event, the bishop concluded that an altar could indeed be a table within the meaning of the statute.

We see here how what I am calling "established" legal language about religion—that is the language of a particular church, can work to permit change over time. The courts adapt and update the law concerning the specifications for the communion table to conform Church of England practice to contemporary theology and social change, moving incrementally from a seventeenth century rule requiring a movable wooden table to a nineteenth century rule allowing a table that is neither movable nor of wood—and finally to a twentieth century rule allowing an altar to be a table. Along the way, the hostile Reformation anti-Catholic polemic is left behind and the liturgical churches are found to agree on the appropriate furniture for the Eucharistic meal. The categories of comparison are "table," "altar," and "sacrifice." These categories, while having the possibility for more universal use, were here carefully bounded and defined within a commonly accepted canon or repertory of possibilities—and a common history—that of the Church of England.

What we see, I would argue, is a classic, even elegant and persuasive, case of legal reasoning in established mode, complete with an established legal authority to tell you what religion is, when the occasion arises. If you disagree with it, you do know with whom you must argue. You must argue with the learned Bishop, an officer of the State, about his reading of the church fathers.

I do not want to give the impression that such "established" elegance is the rule in the U.K. today—or that the British courts and the religious lives of most persons in Britain today—or ever—coexist in a paradise of progressive accommodation. Indeed, perhaps 3% of Englishmen are now active members of the Church of England. Most actively religious persons in England today are dissenting Protestants, Roman Catholics, Hindus and Muslims, people whose religious lives have often only been reluctantly accommodated by the various British establishments—legal, religious and social. But, this kind of tight and relatively closed legal language about religion has made room for them and may serve as a benchmark.

Let us briefly consider two other contexts in which British law is encountering non-Anglicans, and in which we can begin to see the strengths and the limits of what I am here calling "established" legal reasoning.

### *B. International Society of Krishna Consciousness*

In 1973, George Harrison, the Beatle, bought a mock-Tudor house called Piggott's Manor in the village of Letchmore Heath, northwest of London, and donated it to the International Society of Krishna Consciousness (ISKCON)—a Hindu movement commonly known as the Hare Krishnas. (Letchmore Heath is an exclusive and affluent bedroom community for people working in London.) Planning Commission permission for use of the property, which had previously served as a nursing college, was under class C2 as a "residential theological college." The new ISKCON center was unexpectedly hugely successful with both Anglo converts and South Asian immigrants as a place of worship, as well as a place of training. Bhaktivedanta Manor, as it was re-named, began to attract huge crowds for Hindu festivals, sometimes up to 15,000, especially for Janmasthami, the fall festival celebrating the birth of Krishna. The resulting traffic congestion caused severe tensions with the local community—as well as a legal challenge. Public worship was not contemplated as a permissible activity for a theological college under the class C2 planning category.

A British religious studies scholar, Malory Nye, became involved as an advisor in the protracted and acrimonious dispute with the local planning council, lasting more than twenty years—in which ISKCON sought conversion of the property to class D1, which would permit it to be used as a place of worship. The book he wrote is a wonderful study in local government and the cultural politics of the local integration of immigrant populations.[11] The whole process was greatly complicated by Letchmore Heath's presence in the Green Belt, a conservation zone around London designed to preserve the traditional English countryside—for those who can afford it.

An ongoing difficulty for the authorities of the village of Letchmore Heath over the years was that the practices of ISKCON did not look like worship either to the local population or to the existing legal categories. Most troublesome was the annual festival to mark Krishna's birth, a festival that attracted huge crowds. Professor Nye recounts that a hearing was held to determine whether a Krishna *lila* drama—which is performed during the festival to celebrate the birth of Lord Krishna, a Hindu deity—was indeed a religious event, rather than a "public entertainment." Nye recounts that he successfully persuaded the court that a Krishna *lila* drama is "like a nativity play." Having accepted initially that Bhaktivedanta Manor fit into the category

11. MALORY NYE, MULTICULTURALISM AND MINORITY RELIGION IN BRITAIN: KRISHNA CONSCIOUSNESS, RELIGIOUS FREEDOM AND THE POLITICS OF LOCATION (London 2001).

of "residential theological college," the Commission now also, by analogy, allowed that Hindu worship was, in some sense, like Christian worship.

Within the tight legal constraint of what I am here calling "established" legal reasoning, a new religion makes its claims for legal recognition by analogy to the practices of the established religion. In an established legal regime the courts are not asked to think about what religion is in general—because the law does not protect religion in general—but just whether a stone altar can be a table or whether a play about Krishna is *like* a nativity play. Change, whether within the tradition, as in the case of St. Stephen's Walbrook, or by extension to other traditions, as in Letchmore Heath, is argued through the use of "native" categories.

Eventually, through the skillful politics of members of ISKCON who learned to use the planning process, an accommodation was reached to the satisfaction of both the village and the devotees of Krishna. One might even argue that religious freedom—of a sort—perhaps religious tolerance is a better word—was here achieved, not through the use of constitutional guarantees, which were non-existent in the U.K. at the time and, in any case, have arguably provided limited protection in such cases in the U.S., but through established legal reasoning—through analogy to existing cases—and local politics. This is a freedom that makes no pretense to absolutist notions and which must acknowledge the complex and ambiguous nature of religious realities. Such accommodation, however, takes time, of course. It can also result in the sacrifice of distinctive religious identity by the new religion when its practices are assimilated to the categories of another religion—of course a Krishna play is really in some ways very different from a nativity play. As with Hannukah in the U.S., the price of acceptance is the willingness of the newcomer to be misunderstood. Such political accommodation also requires a critical mass of the new community to achieve recognition. It is a messy process—but perhaps necessarily so.

### *C. Satanic Verses*

There are limits to theology and politics, though, and to such incremental extensions, particularly in the short run. In 1991, as many of you will know, Salman Rushdie and his publisher, Viking Penguin, were charged with blasphemy in the writing and publishing of *The Satanic Verses*.[12] *The Satanic Verses* is a novel in the magic realist style. It is about many things—the

12. SALMAN RUSHDIE, THE SATANIC VERSES (Viking, 1989).

immigrant experience in Great Britain, what it means to be a Muslim in the modern world, and the nature of myth and storytelling. Some of the characters and events in the novel are retellings of stories from the Qu'ran and stories about Muhammad and his family. Many who read *The Satanic Verses* were deeply offended by what they saw as its irreverent attitude toward holy things. It was, they thought, blasphemous.

Now England is one of the few European countries that still prosecutes people for blasphemy—although such prosecutions are rare. The most recent conviction was in 1977.[13] Blasphemy became an offense at common law in England after the Restoration of 1660. What had previously been an exclusively ecclesiastical offense became, at that time, a crime against the state. When Henry VIII "nationalized" the English church he set in motion a process that eventually involved a fusing of religious and secular jurisdiction—and Christianity was thenceforth understood to be a formal part of the law of England. To offend the church was to offend the state. Blasphemy was, in other words, a crime against establishment itself. It was akin to sedition. The modern version of the common law offense of blasphemy, the rule applied in the Rushdie case, was announced in a 1950 judgment: "Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established." It is a strict liability offense.

Many readers indeed found *The Satanic Verses* to contain "contemptuous, reviling, scurrilous or ludicrous matter" but the magistrate in the Rushdie case refused to extend the blasphemy law to criminalize such offenses against Allah, Mohammad, the Qu'ran, or Islam. His decision is conventionally understood to reflect narrow religious prejudice and the unholy hold Christianity has on the English consciousness. But, as the language of the rule plainly states and his judgment emphasizes, it is not religion in general, or even Christianity in general, that is protected by British blasphemy laws. It is the state. However true, worthy, or analogous to Christianity, Islam is not the established religion of England, and therefore it is not protected by its laws. In such a case, the judge said it is up to Parliament, not the courts, to change the law . . . because such an expansion would not just expand the category of religion to reflect demographic changes and increased tolerance. Expansion would change the nature of the state. (Prince Charles, the heir to the British throne, has in fact

13. *See* Regina v. Gay News Ltd., Q.B. 10 (1979) (convicting Gay News and its publisher of blasphemy for the publication of an "obscene poem and an illustration vilifying Christ in his life and in his crucifixion").

proposed such a change. He has argued that the British monarch should become a "defender of faith," rather than a "defender of *the* faith," proposing, rather naively to my mind, a multiple religious establishment.)

In his summary of the history of the law of blasphemy, Judge Watkins, the judge in the Rushdie case, discussed changes in the blasphemy law that had been achieved over the centuries through the kind of reasoning which we saw at work in *St. Stephen Walbrook.* He mentioned, for example, that during the nineteenth century, reflecting the rationalist tenor of the times, the law of blasphemy had been modified to add the qualifier "a scurrilous vilification." No longer would a "sober reasoned attack on the Christian religion" be illegal. Like the law about the communion table, the law of blasphemy had been adjusted to social change, to protect "rational" criticism of the church.

An extension beyond Christianity, however, would raise serious problems of definition, as the judge pointed out. While Judge Watkins was not unsympathetic to the petitioners in the Rushdie case, and said so repeatedly, occasionally showing some disdain for the novel itself, he did not see a way to extend the law—through conventional legal reasoning—to protect the petitioner. Islam is not *like* the Church of England in the way that a stone altar might be like a table, if a bishop says so, or even the way the existing planning categories might be stretched to say that a Krishna play is like a Nativity play, because Islam in the United Kingdom has a fundamentally different relationship to the common law. Such a change was up to parliament, not the courts.

Judge Watkins also considered the claim that failure to extend the law would violate certain sections of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms guaranteeing freedom of religion. Judge Watkins worried that application of the European Convention to the blasphemy law would cause social unrest. Prosecuting blasphemy of all religions would, he thought,

> Encourage intolerance, divisiveness and unreasonable interference and interferences with freedom of expression. Fundamentalist Christians, Jews or Muslims could then seek to invoke the offense of blasphemy against each other's religion, doctrines, tenets, commandments, or practices; for example, for denying the divinity of Jesus Christ; or for denying that the Messiah had yet to come; or for denying the divine inspiration of the Prophet Muhammed, and so on.

You can see him envisioning a perfect cacophony of charges and counter charges. In other words, blasphemy only works as a legal concept in an established regime. You need a state religion to tell you what counts as

blasphemy—and protecting all religions is a different constitutional order of business.

These three English examples illustrate three levels of reasoning about religion—*St. Stephen Walbrook*, interpreting established church law using native concepts, Letchmore Heath, interpreting the practices of new property owners by analogy to native concepts, and the Rushdie case—the limit case—which might be seen as refusing to alter the English Constitution through the use of an abstract category: "faith" or "religion." The farther you get from established legal language, the more unstable the language becomes—and the more tenuous its explicit acknowledgment of state authority and the more ambiguous its connection with social facts. (Interestingly, since 2000, England has now embarked on this project of guaranteeing religious freedom . . . but there is as yet very little case law interpreting the new law.)

## *III. The United States*

The U.S. experience would suggest that Judge Watkins was right to be cautious. In the American case, there is no accepted language in which to reason legally about religion. While we no longer prosecute blasphemy, we do at times try to accommodate religion—yet we are not at all agreed about what religion is. Legal reasoning about religion in the U.S. thus also follows a distinct pattern. While Christian, mostly Protestant, cultural and theological assumptions abound in U.S. law, and it is common to refer to the U.S. as having long enjoyed a *de facto* establishment of liberal Protestant Christianity, formal legal reasoning about religion in the U.S. operates without consultation with religious authorities, bishops or otherwise. It is not analogical. "Disestablishment," U.S. style, means that legal reasoning about religion must logically begin with general categories, not with native concepts. In a purist sense, to use native concepts—to talk to bishops, for example—would be to establish religion. But where are these general categories to come from?

If one looks at the authorities cited by American judges one finds a bewildering grab bag of theories about religion that they have gleaned from philosophers, liberal theologians, literary figures, sociologists, and even their own musings. Judges fall back on what they learned in Sunday School or their college world religions course. Without the discipline of an established religious authority, U.S. judges reach for the unstable world of unregulated religion and the highly contentious world of the academic study of religion. In the *Yoder* case, Justice Burger defined religion through a comparison with his

reading of Henry David Thoreau's religious sensibility.[14] In *Epperson*, the creationism case, the court consulted Langdon Gilkey, a prominent liberal Protestant theologian.[15] In the Santeria case, the Supreme Court cited the *Encyclopedia of Religion*.[16]

Categories such as the opinion/act distinction, characterizations such as "pervasively sectarian" and "devotional," academic theories such as syncretism, and armchair comparativism, are all marshaled in an attempt to shore up what is an increasingly difficult claim to maintain—namely that religion can be defined in such a way that it can be legally protected and maintained as separate. My view is that neutrality is as much a practical move on the part of the court, as an ideological one. Neutrality is the only way to get them out of the business of pretending that they are bishops. (To take only one of the most recent religious cases from the Supreme Court, one wonders what the Supreme Court can possibly think it means by a "bona fide faith," words used by the majority in *Cutter v. Wilkinson*,[17] and how they hope to make such a finding.)

## *IV. Conclusion*

But let us step back from the cases for a minute and think about religion more generally—in the U.K. and in the U.S.—because it is not just established and disestablished legal *language* about religion that is different. I want to be clear about that—that is what the English cases help us with. Established and disestablished religions are also different. Let me briefly talk about those differences.

The Church of England is territorially organized. Anglican vicars, until very recently, all held their appointments to particular parishes for life. They had freeholds, legal property rights, in their jobs. English bishops are referred to by the names of their geographical dioceses. So, the Bishop of Durham, in casual conversation, is addressed as and known as simply Durham. He is identified legally—as well as sacramentally—with the geographical space he administers for the Church. The Church of England, both at the time of its

14. *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (comparing Amish values to the philosophical and personal values of Thoreau).

15. Epperson v. Arkansas, 393 U.S. 97 (1968).

16. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 524–534 (1993) (discussing Santeria, including iconography and animal sacrifice).

17. *See* Cutter v. Wilkinson, 544 U.S. 709, 723 (2005) (discussing the scope of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)).

legal creation during the reign of Henry VIII and in its high imperial heyday, has been intimately bound up with English national identity and English law.

A 1995 *New Yorker* article about the Church of England[18] described what the author conceived to have been one of its last glory moments: the consecration of the new modernist cathedral in Coventry in 1962—built to replace St. Michael's, a medieval church destroyed by German bombers:

> On Consecration Day, all the old English power structures were shining and on display as if in a doll's house: the Bishop, with his crozier and cope; the Lord Mayor, with his chain of office; the soldiers and policemen, saluting; the loyal subjects waving Union Jacks in the direction of the young Queen. She was at the center of the pageant in her dual role as head of the nation and of the Church, with the title—handed down from Henry VIII—Defender of the Faith.[19]

The same article suggested that with the post-imperial disintegration of the monarchy, the church and other British institutions, Englishmen are reverting to a kind of pantheism, what Fraser describes as,

> [A] communion with shrubberies and rockeries, with the song thrush at the birdbath, with the look in the eye of a reliably well-behaved dog. Even the landscape seems to have been molded into a paradisial national theme park. Great masses of British tourists tramp through places of natural beauty the way people in Chaucer's day used to visit Christian shrines. Especially favored are places that have been elevated and set apart from the actual by having appeared first in literature and then on television: Hardy's Wessex, Wordsworth's Lakes, Herriot's Dales.[20]

It is almost as if the slow drawing back of an established Christianity has revealed an older establishment—the primordial religion of England, a religion represented both in the way that the Church of England—even in its collapse—is tied to the land, and in the religious affection of Englishmen for their landscape.

Interestingly, many scholarly accounts of the history of the Church of England begin with its pre-Christian Celtic antecedents in ancient Britain, rather than with Henry VIII, so that the continuity is provided by the sacred geography, not by the Thirty-nine Articles or by the monarchy. In England, as elsewhere in Europe, Christian churches and Christian shrines were superimposed on existing pagan holy places. The old gods were renamed but they remained in place and at home giving substance and location to the new

18. Kennedy Fraser, *Straying from the Way*, THE NEW YORKER, Dec. 4, 1995, at 48.

19. *Id.* at 57.

20. *Id.* at 48.

imported ideologies. Pilgrimage to these shrines has often involved an elision of distinction—sometimes unstated, but also at times explicit—between pagan and Christian, a sort of deference on the part of the latecomer to the sacred presence in the land. One sees an echo of this deference in the rector's charge to Henry Moore with respect to St. Stephen Walbrook and in the Green Belt legislation in the ISKCON case.

This sense of place that seems to transcend all of the religious particularities of English religion and to be in some way surviving the disintegration of ecclesiastical structures—and the assimilation of new forms of worship—is singularly lacking in American religion—in disestablished religion. While religion in America has peculiarly American characteristics, those characteristics are not characteristics of place because American religion—even American civil religion—is not a religion of place. It is a religion of belief—and it resides in the individual, not in the land.[21]

Long before the drafting of the United States Constitution, the move across the Atlantic by European Christians can be understood as the beginning of what became and continues to be an ongoing disestablishment, or a succession of disestablishments, of religion in the Americas, a disestablishment that did not simply legally deprivilege it, but that profoundly changed its nature. In his first essay in *The Lively Experiment*, "The American People: Their Space, Time, and Religion," Sidney Mead talked about the vast empty spaces that confronted the new Americans and the dissolving power of that space on old world religions.[22] He described the Puritans like this:

> [F]rom the beginning, the subtle magic of space began to work upon the tight little islands of the transplanted authoritarians themselves, eroding their most ingeniously contrived and zealously guarded barriers of creed and logic and doctrine, until, by the time of Crévecoeur, it was no more than the repetition of a platitude to say that "zeal in Europe is confined . . . there it is a grain of powder inclosed, here it burns away in the open air, and consumes without effect."[23]

Mead used the word "space." He was interested in the effect of intellectual space on theological dogmatism. There was indeed "space," but there was no

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21. The possible exceptions—such as, the various memorials in Washington, Graceland, and battlefields made holy by the blood of martyrs, Wounded Knee, Gettysburg, Waco—perhaps prove the rule, seeming to celebrate human achievement, or failure, rather than the presence of the gods. Native American religious geography is also an exception, but its almost complete suppression marks another distinction from the European case.

22. SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA (Harper & Row, 1963).

23. *Id.* at 14.

"place." Americans were constantly on the move. Mead also quoted reluctant pioneers overwhelmed by the space singing of "coming home." Home and place were not, however, in America, or even in Europe. They had been millennially transferred out of space and time.

The new freedom, first spatial and then, later, legal, gave rise to distinctly new religious forms, forms brought to life by the great awakenings. Mead describes the primary new form in the United States, American Protestant denominationalism, as being characterized from its beginning in the antebellum period by a sectarian tendency leading to historylessness, the voluntary principle, the mission enterprise, revivalism, pietism and competition. The new form was not just a new kind of Christianity, however. It was a new kind of religion, a kind of religion to which all subsequent religious imports have had to conform, more or less.

The new religion was singularly unconnected to a sacralized material world, and had a different relationship to law—and not just because of the emptiness of the land. J.G.A. Pocock, in an essay on the Virginia Statute for Religious Freedom, described the Reformation as having produced a competition between three kinds of religion: a religion of the Flesh—the sacramental Roman Church; a religion of the Word—inspired by Luther and Zwingli; and a religion of the Spirit—the sects of the radical reformation.[24] Pocock said: "There are a great many senses in which the Reformation was the revolt of the Word of God against the Body of Christ, compelling revision and, in some cases (although not all), diminution or abandonment of the creed that the Word had become Flesh."[25] Further, he said, that "there appeared congregations and sects willing to put forward, in various forms, the antinomian claim that the presence of the Spirit among them emancipated them in one sense or another not only from the priests of the Flesh, but also from the ministers of the Word and the magistrates of the judicial order."[26] Pocock characterized the Virginia Statute, and by implication the First Amendment, as being founded in an attempted establishment of the Word—the Word in its rational enlightened Deist form—as over and against the Flesh and the Spirit. The Flesh—incarnated religion—the religion of priests—was firmly rejected by Jefferson when the Word—the enlightened Word—was enshrined. But, the spirit remained, lurking around, in the presence of the Baptist support for the

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24. J.G.A. Pocock, *Religious Freedom and the Desacralization of Politics: From the English Civil Wars to the Virginia Statute, in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

25. *Id.* at 46.

26. *Id.* at 51.

First Amendment—and then in the flourishing of evangelical religion in the nineteenth and twentieth centuries—in spite of Jefferson's effort to establish religion as a system based on opinions formed in the mind. But neither the religion of the Word nor the religion of the Spirit has a place. The place and the law had been left behind with the Flesh.

We have yet to understand how to talk about this really rather new religion, legally. Deregulation of religion has allowed religion to dissolve into the culture in a profound way.

# ARTICLES