Research Handbook on Law and Religion

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PART III

RELIGION-STATE RELATIONS

7. Establishment and encounter

Perry Dane

1. INTRODUCTION

1.1 The Puzzle(s) of Religion-State Dispensations

The law of 'religion and law' encompasses a range of questions, including individual and group religious liberty, religious institutional autonomy, and religion-state dispensations.[1] By 'religion-state dispensations', I mean the sorts of norms of religious establishment and disestablishment, separation and interaction, and institutional, financial, and expressive relationships generally addressed by the American Establishment Clause[2] and its cognates (and antitheses) elsewhere.[3]

These various dimensions of 'religion and law' overlap. They also interact both with each other and with other aspects of any given constitutional order in both obvious and more subtle ways. I will need to say more about some of those interactions. Still, with all that said, the first thing to notice specifically about religion-state dispensations in various legal systems is their dramatic diversity. Even among Western liberal states that otherwise share basic constitutional and moral traditions, the range of approaches to this basic set of questions is stunning. The United States has a powerful, if constantly litigated, Establishment Clause, while the United Kingdom has a 'church by law established'.[4] French national and legal identity contains in its heart the distinct norm of *laïcité*, while other countries, such as Germany, embrace a non-preferential but casually cooperative relationship with a variety of religious traditions and communities.

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[1] For my own overview of these pieces of the 'religion and law' constellation and their relation to each other, see Perry Dane, 'Constitutional Law and Religion' in Dennis Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2010). For my more recent effort to make some sense of the relationship between religious liberty and religious institutional autonomy, see Perry Dane, 'Master Metaphors and Double-Coding in the Encounters of Religion and State' (2016) 53 *San Diego L Rev* 53.

[2] 'Congress shall make no law respecting an establishment of religion …' US Constitution, Amendment 1.

[3] See, eg, Constitution of Denmark, Art 4 ('The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State'); Constitution of France, Art 1 ('France shall be an indivisible, secular, democratic, and social republic'); Constitution of Iran, Art 1 ('The form of government of Iran is that of an Islamic Republic'); Constitution of Timor-Leste, Art 12, sec 2 ('The State promotes the cooperation with the different religious denominations that contribute to the well-being of the people of East Timor'), Art 45, sec 1 ('To all is guaranteed the freedom of conscience, religion and worship and the religious denominations that are separated from the State').

[4] See Margaret H Ogilvie, 'What is a Church by Law Established?' (1990) 28 *Osgoode Hall LJ* 179.

Looking beyond these peer states to other countries that at least nominally espouse liberal democratic values, the range of religion-state arrangements is even broader.

The puzzle here is especially striking because the differences among basic religion-state dispensations are much wider than the differences in other real or at least espoused rights-related constitutional norms, including freedom of expression, due process – and most notably, even the other dimensions of law and religion such as religious liberty and institutional autonomy.[5] Moreover, authoritative international and regional human rights conventions say next to nothing about religion-state dispensations (as distinguished from guarantees of freedom of religion or conscience) and judicial interpretations of those documents have emphasized what Europeans call the 'margin of appreciation' recognizing the legitimacy of various forms of religious establishment, disestablishment, separation, and interaction.[6]

Part of this disparity is surely due to differences in religious history, including the history of relations between religion and state, and even differences in the theological assumptions that find their way into foundational constitutional norms.[7] Another explanation might be that differences in religion-state dispensations might best be thought of as structural rather than individual rights provisions.[8] Nations, including liberal Western nations, organize their systems of government in profoundly different ways – parliamentary, presidential, and hybrid, with variations on each; unitary, symmetrically or asymmetrically federal, devolved, confederated; and so on. Seen in that light, the sharp differences in the structural relations between the state and religion or religious communities might seem less striking or surprising.

Both these explanations, though, suffer from a certain degree of question-begging. Why should distinctive national religious histories have an outsized influence on the religion-state dispensations of countries that otherwise share a common constitutional and human rights patrimony? And why should we think of such dispensations as

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[5] That is not to say that there are no other serious differences among liberal democratic constitutional systems. Consider, for example, the various views on the constitutional protection of 'hate speech'. See Michael Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 *Cardozo L Rev* 1523.

[6] See generally, Peter W Edge, *Legal Responses to Religious Difference* (The Hague, Kluwer Law International, 2001); Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13 *Eccles LJ* 287; Michael J Perry, 'A Right to Religious Freedom – The Universality of Human Rights, the Relativity of Culture' (2004–2005) 10 *Roger Williams UL Rev* 385; Peter G Danchin, 'Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law' (2008) 33 *Yale J of Int'l Law* 1; Jónatas EM Machado, 'Freedom of Religion: A View from Europe' (2005) 10 *Roger Williams UL Rev* 451, 476–85.

[7] See generally, Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago, University of Chicago Press, 1965); Perry Dane, 'Separation Anxiety' (2007) 22 *J of Law & Religion* 545; Joan Lockwood O'Donovan, 'The Church of England and the Anglican Communion: A Timely Engagement with the National Church Tradition? (2004) 57 *Scottish J of Theology* 313.

[8] Cf Kyle Duncan, 'Subsidiarity and Religious Establishment in the United States Constitution' (2007) 52 *Vill L Rev* 67; Carl H Esbeck, 'The Establishment Clause as a Structural Restraint on Governmental Power' (1998) 84 *Iowa L Rev* 1.

inherently 'structural' rather than rights-focused? I will be circling back, if only implicitly, to both these questions.

For now, I want to suggest a different challenge: Can we at least articulate, amid this profound diversity, a normative minimum – or normative common denominator – for theoretically acceptable religion-state dispensations? This normative minimum would obviously not be a full-fledged set of rules or doctrines, but it could be the basis for evaluating specific regimes; more importantly, it might help suggest richer normative conversations within given legal and political systems.

This chapter does not offer such a normative minimum. If anything, it ends up emphasizing the complexity of that task and the ironies we might confront as we proceed. But it does give an account of how we might begin to talk about such a normative minimum. It also tries to explain how that conversation might fit into a broader normative vision of the encounter between religion and state. And it applies the account, and the broader vision, to a few select examples.

1.2 The Plan of this Chapter

Normative constraints on religion-state dispensations will necessarily have two distinct (if, again, overlapping) sources. The first set of sources are general political and constitutional principles. Those might take any form, though I will be assuming here a broadly liberal and democratic vision of the state. Some theorists assume that such a vision is all we need to say something definitive about the proper shape of religion-state dispensations. But I will, in section 2 of this chapter, argue otherwise. Thus, I will look to a second conversation – a more internal account of the state's specific encounter with religion, religious communities, and religious persons. I shall, in section 3, try to describe that account in broad terms, and then in section 4 illustrate it by way of a set of examples, looking in part at some of the spatial metaphors that have deeply influenced attitudes about religion and state in various regimes. Section 5 will suggest that even this picture is not so simple, and that any thorough discussion – whether descriptive or normative – would need to take account of both the dynamic character of the encounter between religion and state and its many ironies and layers of meaning.

2. LIBERAL CONSTITUTIONALISM

2.1 Crucial but Not Enough

The first thing I need to emphasize is this: general political and constitutional principles, at least of the right sort, are crucial to assessing the decency of any religion-state dispensation. The broadly conceived fundamental pillars of liberal democracy – including equal regard and personal freedom – will rule out-of-bounds many such dispensations and many of the ways in which certain nation-states use religion as a tool of oppression. But I will take most of that for granted in this chapter. Instead, I want to argue that these basic norms cannot tell the full story, or even the

most interesting part of the story, of a normative account of religion-state dispensations. We can only fill that gap by looking elsewhere.

Consider, then, two very general but basic commitments of modern liberal constitutionalism: democratic governance and religious liberty. These are, it bears emphasis yet again, crucial. But I suggest that they do not suffice to generate the thicker content necessary for a more complete normative picture of religion-state dispensations.

2.2 Democracy

2.2.1 Democracy and theocracy

This is not the place to attempt to give a thorough account of democratic governance or liberal democratic theory. Anything I say here on the constraints that democratic norms might place on the religion-state dispensation will necessarily be general and open-ended.

That said, it might be useful to proceed in three steps. Consider, first, the classical notion of 'democracy' as a form of government distinguished from other forms such as tyranny or oligarchy. From that simple perspective, it might at least be said that a state committed to 'democracy' could not allow a religion-state dispensation that amounted to defining the state as a 'theocracy'.[9] As I have argued elsewhere, however, even as intuitive an idea as 'theocracy' is more complicated and ambiguous than it might appear to be at first glance.[10]

The most obvious definition of 'theocracy' might be the 'direct and unmediated rule of God'. But theocracy, understood in that sense, is 'in human terms, exactly the opposite of what it might seem to be. It is not a form of autocracy but of anarchy'.[11] Indeed, some profound religious thinkers, including Martin Buber and the Russian revolutionary Dmitry Sergeyevich Merezhkovsky, have been drawn at least to the idea of theocracy precisely because of its anarchic potential to liberate each individual to do what is 'right in his own eyes'.[12] Moreover, even if we put to one side the pull of anarcho-theocracy and assume that the 'rule of God' must necessarily be mediated by human agents, then if those agents are the people or their elected representatives, it follows – as a practical matter – that a theocracy may indeed also possibly be a democracy. To put it differently, a religion-state dispensation arguably could commit a

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[9] Cf Josephus, *Against Apion*, vol 2 (Loeb Classical Library edn, H St J Thackeray trans, 1926) *165.

[10] Perry Dane, 'Foreword: On Religious Constitutionalism' (2015) 16 *Rutgers J of Law & Religion* 460. This piece introduced three remarkable essays outlining possible Islamic, Jewish, and Christian constitutions that were first delivered as part of a symposium on religious constitutionalism at Rutgers Law School. See Patrick McKinley Brennan, 'An Essay on Christian Constitutionalism: Building in the Divine Style, for the Common Good(s)' (2015) 16 *Rutgers J Law & Religion* 478; Steven F Friedell, 'A Jewish Constitution' (2015) 16 *Rutgers J Law & Religion* 541; Asifa Quraishi-Landes, 'Islamic Constitutionalism: Not Secular, Not Theocratic, Not Impossible' (2015) 16 *Rutgers J of Law & Religion* 553.

[11] See Dane, 'Foreword'.

[12] Judges 17:6. See Dane, 'Foreword'; Samuel H Brody, *Martin Buber's Theopolitics* (Bloomington, IN, Indiana University Press, 2018).

polity to a religious mission – as much as any other national ideal – while still leaving deliberation regarding the requirements of that mission in conventional democratic mode.[13]

One might still ask, of course, about precisely how to fine-tune possible normative constraints on the relationship between a state's religious mission and its people's exercise of their democratic will. For example, do the norms of democracy require that the people retain the freedom to reject the polity's 'religious mission' and adopt a different dispensation? Would it be inconsistent with the essence of democratic governance for a specific dispensation to be so entrenched constitutionally as to be impervious to democratic reconsideration? Does the Iranian constitution, even apart from all its other details, violate fundamental norms of democratic governance in its basic provision that 'The official religion of Iran is Islam and the Twelver Ja'fari school, and this principle will remain eternally immutable'?[14] The answer might depend, at least in part, on the more general question whether democracy can countenance *any* unamendable or irreformable constitutional provisions.[15] And, if so, should such unamendable provisions be limited to those that arguably undergird democratic governance itself, or can they also include structural provisions such as those guaranteeing one or another relationship between the state and its constituent parts?[16]

2.2.2 Democracy and theocrats

'Theocracy' can also refer to something quite different – not the hypothetically mediated rule of God, or the rule of God mediated by democratic will, but the rule of religious or ecclesiastical authorities. In that sense, the Vatican State is a theocracy. So was, at least arguably, the Hindu Kingdom of Nepal before the uprising that culminated in the dissolution of the monarchy in 2008.[17]

Theocracy of that sort is not a live issue in the West, even in nations with established churches. Nor, for that matter, is it in its pure form even often an issue outside the West. For as I also pointed out in a previous article, even full-fledged religious constitutions – which is to say constitutions that go beyond religious 'establishment' to a more fundamental and thoroughgoing commitment to a specific religious confession – do not necessarily put religious authorities themselves in charge of the bulk of state government as such.[18] Indeed, pure institutional theocracies are rare even in non-democratic regimes, and, as I will emphasize later, have been rare historically even in regimes that made no claim to being democratic.

The task, therefore, if the idea of democratic governance is to be a constraint on religion-state dispensations, is not merely to distinguish 'democracy' and 'theocracy' as forms of government in the classical sense, but also to assess specific institutional

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[13] Cf Brian Leiter, *Why Tolerate Religion?* (Princeton, Princeton University Press, 2012) ch 5.

[14] 'Constitution of the Islamic Republic of Iran', Art 12.

[15] See the essay by Richard Albert and Yaniv Roznai in this *Research Handbook*, ch 8.

[16] See, eg, Basic Law of Germany 79(3).

[17] See Anne T Mocko, *Demoting Vishnu: Ritual, Politics, and the Unraveling of Nepal's Hindu Monarchy* (Oxford, Oxford University Press, 2015).

[18] Dane, 'Foreword'.

arrangements in a more fine-grained fashion from the point of view of democratic principles. Such assessments, however, are not necessarily obvious. Clearly, the principle of democracy, broadly understood, requires that any constitution that claims to be democratic needs to be based on some version of popular rule over general affairs of state. But modern states, even of the most secular bent, are not pure democracies that leave all decisions to popular rule; indeed, modern democratic theory is decidedly suspicious of pure democracy.[19] Modern states, for example, often vest substantial authority in administrative agencies and expert functionaries of various sorts, though they subject both to legislative and judicial supervision. One might ask, in that light, whether democratic theory could also abide a system in which religious authorities play a role in governance that is subject to either popular or constitutional override.[20] Conversely, most modern Western states vest in courts the power of constitutional review over legislative and executive acts. So, could democratic theory also abide a system, as in Iran, in which the ordinary organs of parliamentary government can be overridden by religious authorities? Modern constitutions allow for the exercise of authority by various intermediate institutions, from corporations to families, not to mention – in federal or devolved regimes – entire geographic regions. Thus, what would democratic theory have to say about vesting power in distinct religious communities and their duly-constituted authorities?

2.2.3 Democracy and public reason

The point of this exercise so far has been to suggest that religion-state dispensations can and should be constrained by democratic principles, but not necessarily in ways all that different from other features of constitutional design. Furthermore, I have at least hinted that democratic principles, in any case of the sort I have been discussing, will have little to say at all about any of the large variety of religion-state dispensations in the Western family of nations.

The discussion so far has conspicuously left out, however, with some malice aforethought, two important pieces of the democratic quilt. One of these concerns the aspect of democratic theory that concerns individual rights, as distinct from popular rule. I will return to that topic in the next section of the essay, specifically discussing norms of religious liberty as a constraint on religion-state dispensations. The other piece, which I want to address first, deals more directly with the conditions for popular rule itself.

At least since John Rawls, some versions of democratic theory, or more accurately liberal democratic theory, have focused on the idea that lawmaking, and maybe even

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[19] See generally Robert A Dahl, *A Preface to Democratic Theory* (Chicago, University of Chicago Press, 1956) ('It is an observable fact that almost no one regards political equality and popular sovereignty as worth an unlimited sacrifice of … other goals'); Erwin Chereminsky, 'Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making' (2006) 86 *Boston U L Rev* 1069, 1075 ('the United States is not a pure democracy; it is a constitutional democracy where the acts of all government officers are subordinate to the Constitution. Any enforcement of the Constitution is antidemocratic if democracy is defined solely as majority rule').

[20] See generally Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA, Harvard University Press, 2010).

public political discourse, should be limited to matters amenable to so-called 'public reason'. This is the notion that public political arguments and rationales be, in principle, 'shared, accessible or acceptable' among all members of the polity.[21] In fact, one might even say that enacting laws grounded only in religious arguments – justifications that are not defensible through the language of 'public reason' – is itself a form of 'theocracy', even if neither God nor religious authorities are put directly in charge of the state. More to the point, perhaps, commentators have sometimes suggested that the 'public reason' principle is simply a generalization of constitutional norms along the lines of the American Establishment Clause, and that, in turn, it would have profound and powerful consequences for how we should evaluate religion-state dispensations in other states.

This is not the place to rehash the vast literature on 'public reason'. But two important points are worth making. The first is simply that in recent years, many legal and political philosophers have persuasively moved away from the most restrictive accounts of acceptable arguments and acceptable laws within liberal regimes. For example, Kevin Vallier, one of the leading voices among a younger generation of political philosophers, has effectively argued that the standard of 'public reason' should be replaced by a much less restrictive requirement of 'intelligible reasons'.[22]

In any event, it is not clear that even a standard of 'public reason' could necessarily referee among the various forms of religious establishment and disestablishment found in modern Western states. After all, it is perfectly possible to articulate entirely 'public,' secular and instrumental reasons for even very 'thick' forms of religious establishment, at least of the sort found in some Western states. And conversely, arguments for 'high walls' of separation between religion and state have historically been, and can continue to be, grounded in profoundly religious ideas that are likely inaccessible to much of the population, including believers and nonbelievers alike.

In sum, then, principles of democratic governance can constrain the range of acceptable religion-state dispensations to exclude many of the worst excesses manifest both in world history and in many nations today. But those limits will have little *additional* bite – specific to the question of religion-state dispensations – in nations already committed to some broadly-defined version of the liberal consensus. They are thus unlikely to provide the tools with which to draw more robust conclusions about the practical questions that arise in modern constitutional democracies about norms of religious establishment and disestablishment.

2.3 Religious Liberty

2.3.1 Rights

General principles of democratic governance can contribute only a bit to articulating a consequential minimum standard for religion-state dispensations. The specific idea of

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[21] Kevin Vallier, 'In Defense of Intelligible Reasons in Public Discourse' (2016) 66 *Phil Q* 596. Vallier himself does not endorse the 'public reason' principle. He proposes instead the more forgiving standard of 'intelligible reasons'.

[22] See Kevin Vallier, *Liberal Politics and Public Faith: Beyond Separation* (New York, Routledge, 2014); Vallier, 'Defense of Intelligible Reasons'.

religious liberty can take up some of that slack. But again, the ultimate payoff is less than one might think.

The precise extent and limits of religious liberty are themselves deeply contested. My own view, which I have argued elsewhere and will discuss here again, is that norms of religious liberty – much like norms of religion-state dispensations – cannot be explained entirely within the framework of liberal constitutionalism.[23] That is particularly true with respect to the continuously contested question of whether religious believers should have at least a prima facie claim to exemption from certain otherwise-applicable laws. Still, religious liberty is *also* a feature of liberal constitutionalism, and that is how I want to understand it in this section of the chapter.

Thus, for purposes of the current discussion, let us just stipulate that whatever the norms of individual and group religious liberty against government coercion are thought to be, those norms should constrain the shape of religion-state dispensations. This most obviously suggests, for example, that the establishment of one religion should not go so far as to ban the practice of other faiths, as was once common in Europe and remains the law in too many places. If there are to be restrictions on religious practices, they should be even-handed and minimally intrusive.

Little of this, though, engages directly and consequentially with most of the live foundational debates that occur in various states, especially Western states, about the scope of religious establishment and disestablishment. Obviously, regimes of religious establishment and disestablishment should not employ the coercive power of the state to trample on religious liberty. Nor, for that matter, should such regimes compromise freedom of speech or the press or rights of assembly or other essential liberties. But we knew that already.

Some important questions of detail do arise. For example, one might, as I intimated above, ask whether the extension of French-style *laïcité* to bar the wearing of certain religious garb in schools or other public contexts violates individual religious liberty, or whether the state's commitment to secularism and collective national identity is sufficiently compelling to override the right to religious expression and observance. But even if the imperatives of religious liberty did constrain *laïcité* in some contexts, they would not challenge its basic character. Nor, for that matter, would norms of individual religious liberty have much to say about the current form of English-style establishment or American-style separationism. Put another way, while there will certainly be normative challenges at the boundary between any religion-state dispensation and any theory of religious liberty, working out those challenges would not necessarily help us think through the core norms that might limit such dispensations in the first place.

2.3.2 Feelings

But maybe religious liberty is not only about limits on the coercive power of the state. Developments in the past few decades in American Establishment Clause doctrine and parallel moves in other legal systems might support a broader account centered on

[23] See Dane, 'Constitutional Law and Religion'; Perry Dane, 'Maps of Sovereignty: A Meditation' (1991) 12 *Cardozo L Rev* 959.

identity, equal citizenship, and belonging. Specifically, the so-called 'endorsement test',[24] extrapolated to a more general normative principle, could be read to suggest that religion-state dispensations are illegitimate if their effect is to make adherents of some religious faiths (or no faith) reasonably perceive themselves as political 'outsiders', and adherents of other faiths perceive themselves as 'insiders' in their shared polity.

As I have also argued elsewhere, however, this essentially psychological view of the Establishment Clause is deeply flawed.[25] It ignores the deeper political and religious values undergirding American separationism, values that should commend themselves to 'insiders' as well as 'outsiders'. Furthermore, by extension in other jurisdictions, it would necessarily ignore whatever values have motivated, and might continue to justify, their very different religion-state dispensations. Moreover, psychological perceptions of 'insider' and 'outsider' status are complicated and often paradoxical. Many non-Anglicans, for example, feel a genuine attachment to the ceremony and tradition of England's 'church by law established'. France's *laïcité*, or for that matter, American separationism, which purport to detach national identity entirely from religion, can provoke a different form of alienation. In any event, the psychology of status is not a primitive or exogenous variable; to the contrary, it is often socially determined, which is to say that any given set of principles and doctrines regarding establishment and disestablishment will themselves set up expectations as to what should provoke feelings of political betrayal. Finally, if we are in the business of trying to articulate a lasting set of principles that might help us evaluate religion-state dispensations, it seems parochial in the extreme to base those principles on this age's fleeting therapeutic mindset and its accompanying politics of identity and culture of grievance.[26]

3. EXISTENTIAL ENCOUNTER

3.1 A Different Perspective

The norms by which we might evaluate any religion-state dispensation are necessarily at least partially embedded in a larger matrix of values, among which are principles of democratic governance and religious freedom. But the thrust of my argument so far has been that any constraints that either democratic governance or religious freedom (or for that matter other individual rights) might place on religion-state dispensations are obvious and, at least for states in the Western liberal tradition, not often likely to be profound.

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[24] See generally Kent Greenawalt, *Religion and the Constitution – Volume 2: Establishment and Fairness* (Princeton, Princeton University Press, 2008).

[25] See Perry Dane, 'A Tale of Two Clauses: Privacy, Establishment and Constitutional Reason' (2018) 26 *William & Mary Bill of Rights J* 939. See also Perry Dane, 'Prayer is Serious Business: Reflections on *Town of Greece*' (2014) 15 *Rutgers J of Law & Religion* 611.

[26] Cf Mark Lilla, *The Once and Future Liberal: After Identity Politics* (New York, Harper Collins, 2017). I find Lilla's work bracing, and important for my own project, without necessarily endorsing in full his more general conclusions about our current political moment.

This might simply mean that there is little to say, beyond the trite, in assessing religion-state dispensations in societies that otherwise respect democratic governance and individual rights. Or, to the contrary, it might suggest that, while acknowledging the power and value of liberal democratic constitutionalism, we also need to look elsewhere for wisdom on the subject at hand. In the remainder of this chapter, I propose precisely that. I want to look for guidance in a different perspective, both older and broader than the discourses of democracy and rights. I have argued elsewhere that whole range of relations between religion and the state – not only questions of establishment and disestablishment but also religious liberty and religious institutional autonomy – can best be addressed by way of a single set of master metaphors.[27] 'These metaphors', I propose, 'coalesce around the basic idea that religion is a sovereign realm distinct from the state, its government, and its claims'.[28] Moreover, 'the relationship between government and religion should be understood as an "existential encounter," in which each side tries to make sense of and decide whether or how to make room for the other'.[29]

> That term 'existential encounter' is meant to convey several important ideas. First, it suggests that what is at stake here is not merely a set of legal doctrines or policy prescriptions, but something deeper and more constitutive. The sovereign nation-state, in some sense, looks out at the world around it and sees other entities that do not easily fit into its own internal sovereign architecture. Some of these are … communities … whose normative commitment is to a transcendent source of meaning and obligation. In all these cases, the sovereign state must step outside a purely internal frame and try to make sense of the existential Other.
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> Second, though we can try to articulate purposes and justifications for the legal structures arising out of this encounter, they are not at the end of the day reducible to purposes and justifications …
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> Third, the encounter between church and state … is powerfully two-sided. Just as the state needs to make sense of the religious nomos and decide how to understand the boundaries of competence and deference between the two realms, religious communities need to make sense of the state and decide to what extent its claims can be accommodated within what might otherwise seem the absolute and cosmic claims of divine governorship.
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> Fourth, while these master metaphors of jurisdiction, sovereignty, and dialogical encounter are by some lights jurisprudentially radical, their practical normative payoff is – at least in the abstract – more complicated and open-ended. Religious traditions can recognize the legitimacy and authority of the state without necessarily subordinating themselves to it in all cases. And, the state can acknowledge the claims of religious communities without necessarily deferring to them.[30]

In the essay from which I have just quoted at length, I discuss these ideas principally in the context of trying to understand certain sorts of claims to religious liberty and institutional religious autonomy. But they are even more germane to questions regarding religious establishments and disestablishments.

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[27] Dane, 'Master Metaphors and Double-Coding'.
[28] Ibid, 54.
[29] Ibid, 55.
[30] Ibid, 55–6.

Consider, then, James Madison's famous Remonstrance, one of the great foundational texts for the master metaphors of jurisdiction, sovereignty, and encounter.

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe.[31]

Though Madison's words have implications for all aspects of the jurisprudence of law and religion, he wrote these words in the immediate context of a proposal to provide non-preferential government aid to religiously-affiliated schools. His powerful argument, which has helped shape American thinking ever since, was that religion should be 'wholly exempt' from the cognizance of government.[32]

Madison's emphasis on the sovereign claims of the 'Governour of the Universe' – apart from and prior to the authority of civil society – was fundamental to his especially robust separationism and the American tradition of disestablishment. But it was not sufficient. Madison's vision also relied on a rich tapestry of explicit and implicit, deeply American, theological, political, and historical claims. I sympathize with those claims and would defend them vigorously in the American constitutional and political context. But, as a matter of first principle, and as is evident in other multi-jurisdictional and inter-jurisdictional relationships, distinct sovereigns need not always build a wall between themselves. They can also interact, cooperate, and even intermesh. They can embrace common principles and even common obedience to an abstract higher mission, including a spiritual mission.

But the principles of jurisdiction, sovereignty, and encounter, do have some meaningful minimum normative content that can be applicable across the board. More importantly, these metaphors can help motivate and guide normative conversations that go the very heart of the questions surrounding various religion-state dispensations, even if they do not and cannot produce determinate answers to every specific question.

3.2 The Church Should Not Subsume the State; The State Should Not Subsume the Church

If the spheres of religion and civil society are each in some way sovereign, and if they must try to make sense of each other in a process of genuine encounter, then at least the following holds: church and state must respect each other's essential independent dignity. The church should not subsume the state and the state should not subsume the church. The church should not merely be an agency or instrument of the state and the state should not merely be an agency or instrument of the church. More generally, both state and church must resist the inevitable and understandable temptation to the sort of

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[31] James Madison, 'Memorial and Remonstrance Against Religious Assessments' in Jack N Rakove (ed), *James Madison: Writings* (New York, Library of America, 1999) 29, 30.

[32] Ibid. Cf *School District of Abington Township v Schempp*, 374 US 203, 281 (Brennan J, concurring) ('the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice').

juridical solipsism that understands the rights and authority of the other as the products of sufferance – even a guaranteed sufferance – rather than genuinely mutual encounter. The commitment to genuine encounter and the retreat from juridical solipsism need not be explicit; I have elsewhere discussed the process of 'double-coding' by which legal doctrine can simultaneously affirm and deny its own most radical implications.[33]

These propositions, at their most general, dovetail with the principles I discussed earlier. The proposition that the church should not subsume or overwhelm the state roughly corresponds to the ideal of democratic governance, while the proposition that the state should not subsume or overwhelm the church corresponds to the ideal of religious liberty. Thus, John Locke could say that he

> esteem[ed] it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.[34]

But they run deeper and broader than that. The Reverend Martin Luther King Jr famously declared that 'The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and the critic of the state, and never its tool'.[35] But, just as important, the normative position I am advancing taps deeply into broad patterns that have existed and continue to exist even in legal and state systems with little or no commitment or even understanding of either democracy or religious liberty. Thus, in the Christian West, a basic theoretical and practice disjunction between church and state traces itself back at least to the investiture controversy of the eleventh and twelfth centuries, and arguably much earlier to the normative imagination of the early pre-Constantinian church. That disjunction also found expression in central Christian theological images such as the division between the 'Two Kingdoms'.[36] Similarly, Islamic history and tradition going back to the successors of Mohammed has often (if inconsistently and complicatedly) separated, functionally and theoretically, the role of the Caliph as the head of government and legislator of public law from that of Muslim jurists as the expounders of religious practice and private law.[37]

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[33] Dane, 'Master Metaphors and Double-Coding', 75–83.

[34] John Locke, *A Letter Concerning Toleration* in John Tully (ed), *A Letter Concerning Toleration* (Indianapolis, Hackett Publishing Co, 1983) 52.

[35] Martin Luther King Jr, *Strength to Love* (Minneapolis, Fortress Press, 2010) 59.

[36] For an incisive study of how that tradition has played out specifically in Protestant Reformed thought, see David VanDrunen, *Natural Law and the Two Kingdoms: A Study in the Development of Calvinist Social Thought* (Grand Rapids, Eerdmans, 2009).

[37] See generally John Strawson, 'Revisiting Islamic Law: Marginal Notes from Colonial History' (2003) 12 *Griffith L Rev* 362. See also Ira M Lapidus, 'The Separation of State and Religion in the Development of Early Islamic Society' (1975) 6 *Int J Middle East Stud* 6; Quraishi-Landes, 'Islamic Constitutionalism'. To be sure, in some eras and places the Caliph could also be conceived in profoundly theological terms as God's viceregent on Earth. See Hüseyin Yılmaz, *Caliphate Redefined: The Mystical Turn in Ottoman Political Thought* (Princeton, Princeton University Press, 2018).

These patterns reflect, however imperfectly, some deeper intuitions. Religion and state as we now understand them are distinct human projects. For the church to be simply co-extensive with the state, whether it is subsuming or subsumed, risks confusing or conflating the task of prudential governance that looks to specific interests – a task that is deeply honorable and important in its own right – with religion's appeal to the transcendent and its attendance to universal interests. It risks raising the symbolic and practical stakes of practical politics to an often dangerous and unmanageable height, and risks co-opting and degrading religious ideas and practices to the service of political identity and solidarity. It constricts whatever deliberate space the state might otherwise have, and it dulls or even mutes the church's necessarily oppositional prophetic voice. It encourages and exaggerates from both ends the temptation to the sheer exercise of power. While religion, as such, is not inherently more prone to violence than other human enterprises, the conflation of religion with state power has historically been a particularly toxic catalyst to both grotesque internal oppression and to war.[38]

To be sure, the normative benchmarks I have just described are very general. They run the same risk, which I identified in the first part of this piece, of generating judgments that are obvious or banal, and not necessarily germane to the live controversies regarding actual contemporary religion-state dispensations, especially in the liberal West. But I propose that they do have deeper and more incisive power if they are understood as prods to conversation rather than simple rules, and if we take the trouble to examine specific religion-state dispensations holistically. That means attending to at least three layers of any given dispensation: its legal structure, the historical roots and theoretical undergirding of that structure, and the granular details that arguably betray the ethic of genuine existential encounter on the ground. For it is particularly in the modern liberal state that these little betrayals can expose a deeper and more disturbing failure of the imagination.

4. FOUR METAPHORS OF ENCOUNTER

As I noted at the start, though, this chapter is not nearly so ambitious. My effort here will not be to render a final verdict on any given religion-state dispensation, except by insinuation. Instead, I will be focusing on several powerful and influential models or discourses – metaphors – about the relationship between religion and state. I will also have a little to say about the contemporary practical instantiations of those models, but not in a way that tries to be conclusive or complete.

4.1 The 'Wall of Separation' – and Beyond

I am an American legal academic who has long felt deeply drawn to the American tradition of church-state separation. I have, as here, often looked to James Madison's Remonstrance as an essential text for thinking about the entire range of questions in the

[38] See David Martin, *Does Christianity Cause War?* (Oxford, Oxford University Press, 1998).

jurisprudence of religion and the state. It might therefore seem natural to consider American separationism, at least in its broad outlines, to be the best and highest expression of the principles of engaged existential encounter that I just tried to set out.

Well, maybe it is. Or maybe it isn't. But be that as it may, I have also emphasized that encounter and mutual juridical recognition does not necessarily demand separation. It can in fact be grounded in cooperation or even interaction. Moreover, the idea of mutual existential encounter, in which neither church nor state subsumes the other, is even consistent, broadly speaking, with the idea that both church and state should ultimately be responsible to God – so long as neither the church nor the state assumes that the other is (with respect to the specifics of governance) the authoritative voice of God. Consider, for example, the complex and varied dynamics apparent in at least some of the idealized religious constitutions described in that recent symposium issue of the *Rutgers Journal of Law and Religion* to which I alluded earlier.[39]

The American Madisonian model is built on a physical image – the wall of separation. The other three models I want to discuss here are also grounded in spatial metaphors. That should not be surprising. Human conceptual reasoning, including legal reasoning, often proceeds from physical metaphors.[40] More specifically, the process of encounter, at some level, invites resort to the spatial imagination.[41] These metaphors cannot exhaust the inquiry, but they might at least help frame it.

4.2 'Interlocking Jigsaw'

It might be helpful to begin by looking at the complex images that have helped shape the religion-state dispensation that – among Western liberal states – seems most at odds with the American model and against which the American consensus has so explicitly contrasted itself.[42] I am referring to the English system of religious establishment in place since the days of King Henry VIII.

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[39] See note 10.

[40] See Mark L Johnson, 'Mind, Metaphor, Law' (2007) 58 *Mercer L Rev* 845; Gary Peller, 'The Metaphysics of American Law' (1985) 73 *Calif L Rev* 1151; Burr Henly, '"Penumbra": The Roots of a Legal Metaphor' (1987) 15 *Hastings Const LQ* 81; Richard Thompson Ford, 'Beyond Borders: A Partial Response to Richard Briffault' (1996) 48 *Stan L Rev* 1173; cf Jamie G Carbonell, 'Metaphor and common-sense reasoning' in Jerry R Hobbs and Robert C Moore (eds), *Formal Theories of the Commonsense World* (Norwood, NJ, Ablex Publishing Corp, 1985).

[41] Cf Benjamin L Berger, 'The Aesthetics of Religious Freedom' in Lori G Beaman and Winnifred Fallers Sullivan (eds), *Varieties of Religious Establishment* (New York, Routledge, 2016) 33. For my earlier effort to understand aspects of legal pluralism by way of spatial imagery, see Dane, 'Maps of Sovereignty'.

[42] See, eg, *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 132 S Ct 694, 703 (2012) ('Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. … By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government – unlike the English Crown – would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own'); *Engel v Vitale*, 370 US 421, 425–9 (1962) ('It is a matter of history

The Church of England is the church by law established in England.[43] The Queen is the Supreme Governor of the Church. She appoints its bishops and archbishops, on the advice of her Prime Minister from a list of two forwarded by a church commission. Parliament also has at least nominal authority over the official text of the Book of Common Prayer, though it has in increments relinquished most of its practical power on the question. At the same time, the Queen must be in communion with the Church and her coronation oath obligated her to maintain the Church. Indeed, the coronation itself is a religious ceremony conducted in Westminster Abbey and presided over by the Archbishop of Canterbury who anoints the monarch with oil. Moreover, both archbishops and 24 additional diocesan bishops sit by right as full members in the House of Lords and regularly both speak and vote on the entire gamut of national legislation. Measures enacted by the Church's own Synod, within its jurisdiction, are treated as legislative acts. The Church and its instrumentalities are treated as public bodies or public authorities for some purposes and not others.

Yet, as this short and general catalogue might already have made clear, the state and the established Church in England, though deeply entangled with each other, are still also two partners to what I have been calling an existential encounter. Neither subsumes the other and neither is simply an instrument or agency of the other. The state, despite the existence of an established church, is in most functional respects,

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that [the] practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. … [Some groups] decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion. It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. … By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs').

[43] The Church of Scotland is also officially recognized in that part of the United Kingdom for a status akin to its establishment, but its entanglement with government is much less thoroughgoing. See Francis Lyall, *Church and State in Scotland: Developing Law* (New York, Routledge, 2016) ch 4. The Anglican Churches in Ireland and Wales were officially disestablished in 1869 and 1920, respectively.

rigorously secular. The Church retains its own voice and its own distinct relations with other international provinces of the Anglican Communion and other faiths both within and outside Britain. The Church feels free to speak, even prophetically, on matters of public affairs. Furthermore, politicians feel free to opine on Church matters, including its ecclesiology. As one commentator has put it, the state and the established Church in England form an 'interlocking jigsaw'.[44] Meanwhile, at least in the current version of the English dispensation, other faiths enjoy a vigorous right of religious exercise and, outside the particulars of the regime of establishment itself, genuine practical and theoretical equality.

This image of an 'interlocking jigsaw' comes into further focus when considered in the context of some of the intellectual roots of the English dispensation. The Church of England was famously the product of a combination of royal pique and Reformation theology, with a large dose of pre-existing legal debates[45] and political hostilities. Its special status has been justified in a variety of different ways, shifting over the centuries. To some extent, in common with other venerable British institutions, its most compelling justification has simply been the distinctively British form of pragmatism known as 'muddling through'.[46]

Nevertheless, it is worth especially considering the pivotal text in Book VIII of Richard Hooker's *Laws of Ecclesiastical Polity* – an important effort at theoretical justification with its own striking and illuminating geometric metaphor. Hooker, in defending the role of King and Parliament in overseeing and regulating the Church of England after its separation from Rome, did not dispute the basic conceptual distinction between church and state as it had developed over the centuries. Indeed, he found that distinction vital to understanding the self-governance of the Church when it was a minority presence in a polity. But he emphasized that the Church was a community of lay faithful and not just an ecclesiastical organization – a conviction that was crucial to Anglicanism's self-understanding from its origins to the present day.[47] More relevant for our purposes, he argued that in England, the political community and the religious community happened to coincide:

> We hold, that seeing there is not any man of the Church of England but the same man is also a member of the commonwealth; nor any man a member of the commonwealth, which is not also of the Church of England; therefore as in *a figure triangular* the base doth differ from the sides thereof, and yet one and the selfsame line is both a base and also a side; a side simply, a base if it chance to be the bottom and underlie the rest: so, albeit properties and actions of one kind do cause the name of a commonwealth, qualities and functions of another

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[44] David Rogers, *Politics, Prayer, and Parliament* (2000) 16. See also, eg, Mark Chapman, Judith Maltby and William Whyte (eds), *The Established Church: Past, Present, and Future* (London, T & T Clark International, 2011).

[45] See, eg, Christopher Saint Germain, *The Doctor and Student* (original 1518, Muchall edn, 1874).

[46] See Peter Hennessy, *Muddling Through: Power, Politics, and the Quality of Government in Postwar Britain* (London, Victor Gollancz, 1996). Cf Peter Hennessy, *The Hidden Wiring: Unearthing the Constitution* (London, Victor Gollancz, 1995); Anthony King, *The British Constitution* (Oxford, Oxford University Press, 2007).

[47] See Robert M Andrews, *Lay Activism and the High Church Movement of the Late Eighteenth Century: The Life and Thought of William Stevens, 1732–1807* (Leiden, Brill, 2015).

sort the name of a Church to be given unto a multitude, yet one and the selfsame multitude may in such sort be both, and is so with us, that no person appertaining to the one can be denied to be also of the other.[48]

Hooker's conceit that 'there is not any man of the Church of England but the same man is also a member of the commonwealth; nor any man a member of the commonwealth, which is not also of the Church of England' was, of course, not true even in its own day, and only apparently true by force of religious repression. And it is certainly not true today. Nor is it defensible even as an ideal. It respects neither genuine democracy nor religious liberty. But I am more interested here with the absolute parity between church and state that is explicit in Hooker's 'figure triangular'. The King governs the Church not because political authority is supreme over religious authority but because, in the peculiar (if imagined) circumstances of the English Church and commonwealth, he can legitimately exercise both political and religious authority.

Hooker's 'figure triangular' and today's 'interlocking jigsaw' are both thoroughly continuous and yet radically different. The transition from one to the other can best be understood, perhaps, as part of a larger set of national, historical, intellectual, and constitutional transformations. Henry VIII was, if not quite an absolute ruler, close to one. Today's sovereign is a constitutional monarch who acts largely on instruction from her Prime Minister and whose 'Royal Assent' to legislation is never withheld. Queen Victoria reigned over an empire. But Elizabeth II is the Head of a Commonwealth while remaining the Queen of the United Kingdom of Great Britain and Northern Ireland, as well as Queen of Canada, Australia, New Zealand, and 12 other independent sovereign states that she counts as her 'realms'. And, similarly perhaps, the 'figure triangular' or 'interlocking jigsaw' constituted by England and its church 'by law established' is now simultaneously transformed from a coincidence of coercive authority to what the theologian Joan Lockwood O'Donovan calls a 'dialectic of proclamation and jurisdiction',[49] embedded in a much more complex, pluralistic, free, and loose religious and national geometry. Indeed, as I have emphasized in other work,[50] among the most articulate defenders of the continued established status of the Church of England has been the now-retired Chief Rabbi of the United Hebrew Congregations of the Commonwealth, Rabbi Lord Jonathan Sacks, for whom the Church of England in the current English polity is now the 'host' who helps members of other faiths 'feel at home'.[51]

All this might seem like no more than an example of British exceptionalism, or even quaintness. But at least one prominent sociologist, Grace Davie, has argued that the distinctly 'weak' form of religious establishment in the current English religion-state dispensation allows the official church to

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[48] Richard Hooker, *Of the Laws of Ecclesiastical Polity, Book VIII, ch 1.2* (c 1553) (emphasis added). See also, eg, RR Williams, 'Richard Hooker on the Church and State Report' (1971) 82 *Churchman* 99.

[49] See O'Donovan, 'The Church of England and the Anglican Communion'.

[50] See Dane, 'Prayer is Serious Business' and Dane, 'A Tale of Two Clauses'.

[51] Jonathan Sacks, 'Antidisestablishmentarianism – a Great Word and a Good Ideal', *The Times*, 20 July 2002.

> use its still considerable influence to include rather than exclude, to acknowledge rather than to ignore, and to welcome rather than reject. Even more positive are its capacities to create and to sustain a space within society in which faith of any kind is taken seriously – doing so by means of its connections with the state.[52]

4.3 'Separate Spheres'

I have so far surveyed two very different expressions of existential encounter between religion and state, represented by the American and English models. The range of alternatives is much broader than these, however. To illustrate that point, it might be helpful to mention – if only by way of the briefest possible excursus – another powerful spatial metaphor more influential in theoretical discussions than in actual constitutional practice. I refer here to the 'sphere sovereignty' doctrine of Abraham Kuyper, who was both the most important theologian in the Dutch Reformed tradition in modern times and, for a short time, the Prime Minister of the Netherlands.

Kuyper's theology might be summarized in two propositions. The first is that 'there is not a square inch in the whole domain of our human existence over which Christ, who is sovereign over *all*, does not cry: "Mine!"'.[53] The second – deeply influenced by the Calvinist commitment to notions such as the 'two kingdoms' and 'common grace'[54] – is that practical dominion in human affairs needs to be divided among a constellation of 'separate spheres, each with its own sovereignty', including not only the state and the church, but also the family, science, education, the arts, and so on.[55] The point to be made is simply that there is no necessary contradiction between these two propositions. As I have already emphasized, both in the discussion of 'theocracy' and in trying to explain what I mean by 'existential encounter,' a commitment in principle to divine authority says relatively little about the practical definition of human authority or the relationship of distinct institutional forms such as church and state.

Kuyper's sphere sovereignty in some ways resembles American ideas about church and state, and can certainly inform them,[56] though it rejects in foundationalist terms the secularist or at least agnostic strain in the American dispensation. It also resembles the English conceptual distinction (itself drawn from earlier traditions) between Church and Commonwealth, but without the institutional entanglement of the two. If nothing else, then, at least for purposes of this skeletal discussion, it both fills a gap in the logical space of possibilities and helps sharpen our normative imaginations.

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[52] Grace Davie, 'Establishment' in Mark Chapman, Sathianathan Clarke, and Martyn Percy (eds), *The Oxford Handbook of Anglican Studies* (Oxford, Oxford University Press, 2015) ch 20. For a more diverse and wide-ranging set of essays on the nature of, and prospects for, the Church of England as the 'Church by law established', see Chapman, Maltby and Whyte, *The Established Church*.

[53] Abraham Kuyper, 'Sphere Sovereignty' in James D Bratt (ed), *Abraham Kuyper: A Centennial Reader* (Grand Rapids, Eerdmans, 1998) 488 (original emphasis).

[54] Cf VanDrunen, *Natural Law and the Two Kingdoms*.

[55] Kuyper, 'Sphere Sovereignty', 467.

[56] See, eg, Paul Horwitz, 'Churches as First Amendment Institutions: Of Sovereignty and Spheres' (2009) 44 *Harvard Civil Rights-Civil Liberties L Rev* 79.

4.4 'The Church is in the State'

American separationism, the current form of English establishmentarianism, and the Reformed commitment to separate spheres for the operation of divine grace – as radically different as they are from each other – recognize the distinct sovereign dignity of religion and state. More generally, a genuine existential encounter between religion and state can take many forms and operate under a variety of different assumptions.

But that does not mean that every religion-state dispensation – even every contemporary Western dispensation – fares so well. Consider again the question of French-style *laïcité*. *Laïcité* in certain respects tolerates both more aid to and entanglement with religion than would be allowed under the American Establishment Clause. Thus, for example, the French state subsidizes certain religious activities and still actually owns a large proportion of religious property, particularly historic church buildings. Moreover, relations between the state and various religious communities are typically channeled through semi-official bodies such as 'the Protestant Federation of France, the Representative Council of French Jewish Organizations, the Orthodox Inter-Episcopal Committee of France, and finally, among the most recent arrivals, The Union of Buddhists of France'.[57]

Still, the most current and deeply emblematic arguments regarding law and religion in France concern legislation banning Muslim headscarves and other obvious religious garb in schools and certain public spaces. To be sure, questions regarding religious garb arise in other legal systems, but usually in the context of efforts to challenge or at least seek religion-based exemptions from regulations that are at least ostensibly neutral and generally applicable. But the ban in France and in other countries with similar laws grounded in similar legal and political traditions are explicitly directed at private religious practices *because* they are religious.

As commentators have pointed out, the ban on religious garb reveals three central features of the French jurisprudence of religion and law. First, it differs from other forms of separationism and governmental secularism in its basic aspiration. American-style separationism, for example, although it has sometimes been accused of overly privatizing religion, nevertheless generally seeks only to erect some sort of boundary between religion and the state. It leaves most bona fide private conduct untouched. Indeed, American separationism can be understood as an effort to assure a secular government for the sake of nurturing, or at least allowing, a religious society. *Laïcité*, however, seeks to separate religion not merely from the state but from the public realm more broadly. To the extent that private conduct in the public realm threatens the secular character of that space or the essentially secular identity of the nation, it is suspect. Hence the ban on religious garb. Second, the French dispensation, despite its nominal attitude of neutrality toward religion, has nevertheless attempted in a variety of contexts to distinguish 'good' religion and 'good' religious practices from 'bad' ones.[58] Third, French *laïcité* emphasizes the enforced primacy of unitary citizenship and

[57] Raphael Liogier, '*Laïcité* on the Edge in France: Between the Theory of Church-State Separation and the Praxis of State-Church Confusion' (2009) 9 *Macquarie LJ* 25, 32.

[58] See Liogier, '*Laïcité* on the Edge in France.'

republican identity over any possibly competing religious commitments and sectarian affiliations.[59]

This current controversy is thus not merely the product of current French unease with immigration or a push to assimilation, both of which are apparent in many Western states. It has deeper and thicker roots. To the extent that certain current French laws test the limits of liberal democratic principles of religious liberty, they do so, paradoxically perhaps, in large part because of elements in the French religion-state dispensation that helped shape some of the strands of modern liberal democratic thinking in the first place.

This is not the place to discuss *laïcité* in all its complexity, including its compromises and contradictions. Nor do I want to canvass *laïcité's* complicated genealogy or its place in larger dialectics within French political thought.[60] In its most recent form, *laïcité* is a product of political and constitutional developments in the late nineteenth and early twentieth centuries. But its roots go back earlier, to – among other things – the anti-clericalism of both the French Revolution period and the late nineteenth century,[61] as well as the thinking of Jean Jacques Rousseau, including his distrust of intermediate institutions competing with the state.[62]

I want, though, just to look briefly at an even older source: the Gallicanism that for several centuries stoked controversies between pre-revolutionary French monarchs and the Roman Catholic Church. Gallicanism has often been compared to Anglicanism, in that both defended the local church and royal prerogatives over against Papal authority.[63] The two movements certainly shared and exchanged intellectual and

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[59] See Cécile Laborde, 'Secular Philosophy and Muslim Headscarves in Schools' (2005) 13 *J of Politics & Phil* 305. This central idea was played out most dramatically long before the inauguration of the formal norm of *laïcité* in the debate over Jewish emancipation and the French revolutionary insistence that Jews should give up their juridical autonomy if they hoped to gain full equality as individual citizens of the state. See Paula Hyman, *The Jews of Modern France* (Berkeley, CA, University of California Press, 1998) chs 2–3.

[60] See generally Steven Englund, 'Church and State in France Since the Revolution' (1992) 34 *J of Church & State* 235.

[61] See Sudhir Hazareesingh, *Political Traditions in Modern France* (Oxford, Oxford University Press, 1994) 90.

[62] 'It is important, then, that in order to have the general will expressed well, there be no partial society in the State, and every citizen state only his own opinion. … That if there are partial societies, their number must be multiplied, and inequality among them prevented. … These are the only precautions that will ensure that the general will is always enlightened, and that the people make no mistakes': Jean-Jacques Rousseau [Victor Gourevitch (trans)], 'The Social Contract' in *'The Social Contract' and Other Later Political Writings* (Cambridge, Cambridge University Press, 1997) 60. See John R Bowen, *Can Islam Be French? Pluralism and Pragmatism in a Secularist State* (Princeton, Princeton University Press, 2010) 7. For a tendentious, but nevertheless illuminating, interpretation of Rousseau's views and their consequences for modern thought, see Robert A Nisbet, 'Rousseau and Totalitarianism' (1943) 5 *J of Politics* 93.

[63] See John Hearsey McMillan Salmon, 'Gallicanism and Anglicanism in the Age of the Counter-Reformation' in *Renaissance and Revolt: Essays in the Intellectual and Social History of Early Modern France* (Cambridge, Cambridge University Press, 1987) ch 7. Salmon very helpfully emphasizes not only the intellectual affinities and differences between the two

theological resources. In some respects, Gallicanism was more moderate than Anglicanism. After all, even the most resistant French kings continued to recognize the primary of the Pope and they never actually broke with the Church in Rome as Henry VIII did. But I want to home in on one important, resonant, slogan in the Gallican rhetorical arsenal.

Catholic Gallicanism, in some respects like Reformation Anglicanism, had two intertwined and sometimes confused strands. The first was conciliar, ecclesiastical, or episcopal Gallicanism, which was a movement within the Church favoring conciliar as against purely Papal authority and local as against purely centralized authority. That theological position remains a live option within Catholic theological discourse. The second strand of Gallicanism, however, often manifesting as 'Royal Gallicanism' though it had other forms as well, centered on certain claims of the French Kings and the French State more broadly to prerogatives with respect to ecclesiastical appointments, Church property, and the like.[64] Defenders of Royal Gallicanism tended to emphasize a formula that traces back to Saint Optatus in the fourth century of the Common Era,[65] and which would, in turn, survive the demise of the French *ancien régime* and figure in the rhetoric of the French Republic's deliberations about the place of religion: 'The State is not in the Church, but the Church is in the State'. Indeed, one variation on that slogan by the eighteenth-century jurist Joseph-Nicolas Guyot read: 'The State is not in the Church, but the Church is in the State, which existed before it and which received it into its protection'.[66] Thus, in one juridical gesture, Gallican legal theory argued the antithesis *both* to the American separationist claim that 'Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe' *and* to the English establishmentarian

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movements but also the interpersonal influences among figures in the two countries that helped shape both movements.

[64] See Peter Campbell, *Power and Politics in Old Regime France, 1720–1745* (London, Routledge, 1996) 271–2; Dale K Van Kley, 'Catholic Conciliar Reform in an Age of Anti-Catholic Revolution' in Kathleen P Long (ed), *Religious Differences in France: Past and Present* (Kirksville, MO, Truman State University Press, 2006) 91.

[65] OR Vassall Phillips, trans, *The Work of St Optatus, Bishop of Milevis Against the Donatists* (London, Longman, Green, 1917) Bk 3, pt III, 132. Optatus' own text reads, 'The State is not in the Church, but the Church is in the State, that is to say, in the Roman Empire …' and in that context his statement was meant literally and not only metaphorically, in that the Church existed wholly within the Empire but the Empire was only partially Christian. Even in that original context, however, Optatus' observation is interesting and provocative: The Bishop, as part of his extended polemic against the schismatic Donatists, attacked their founder Donatus for falling into a rage at a delegate from the Emperor and 'burst[ing] out with these words: "What has the Emperor to do with the Church"', ibid, 131. Donatus' words might sound remarkably prescient to modern ears, but Optatus' response, drawn from scripture, is that the Church owes the Empire its prayers and loyalty 'that with them we may lead a quiet and tranquil life', ibid, 132 (quoting 1 Timothy 2:1).

[66] John McManners, *Church and Society in Eighteenth-Century France: The Clerical Establishment and its Social Ramifications* (Oxford, Oxford University Press, 1999) 169, translating and quoting from Joseph-Nicolas Guot, *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale* (1775–1783) Vol 30, 140. See also Eoin Daly, 'The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives' (2012) 32 *Oxford J of Legal Stud* 583.

argument that the church and the civil commonwealth, though distinct, could be governed together as in a 'figure triangular'.

I have obviously not tried to connect all the dots in this brief account. But I trust I have said enough to suggest that the tendency in the French regime of *laïcité* both to entangle itself in the regulation of religious practices and to relegate religion to a private sphere (separate not just from government but from the entire public realm while defining equal citizenship in unitary republican terms) are not contradictory impulses. Rather they flow from a single deeply statist and monist conception of state authority with respect to the religious life. Moreover, this image of the 'church in the state' helps explain why measures such as the ban on Islamic head scarves are not *just* arguably contrary to liberal norms of individual religious liberty, but also represent a failure to engage in the honest, genuine, existential encounter that I have been arguing is a vital additional normative measure for a decent and adequate religion-state dispensation.[67]

5. THE COMPLICATIONS OF ENCOUNTER

The previous part surveyed, tourist-style, four general forms that a religion-state dispensation might take, as captured by four distinct spatial metaphors. The simple lesson, again, is two-fold: First, any decent religion-state dispensation must adhere to the general norms of democratic governance and individual liberty that rightly constrain any constitutional arrangement, but it should also respect the distinctive imperative of genuine and mutual encounter between religion and state. Second, judged in terms of that imperative to encounter, and perhaps in other ways, the deep metaphors at the heart of both American disestablishment and English establishment look a tad, or more, better than the guiding metaphor that helped inspire French *laïcité*.

As I have conceded all along, though, the full story – any complete normative inquiry – would necessarily be more complicated. I have dipped into some of the granularity of the systems I surveyed, but only selectively and for my own purposes. (That is what I just meant by 'tourist-style'.) I have also not discussed, except by implication, the larger grand historical developments that help structure each of these metaphors, including the rise of modernity and the inauguration of the 'the secular age',[68] which were arguably themselves the product of religious thought and religious developments.[69] Nor, if 'encounter' is really the master metaphor at the heart of this examination, have I taken nearly adequate account of the degree to which the process of encounter is inevitably permeated by the sort of 'jurispathic' violence that Robert

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[67] See also Liogier, '*Laïcité* on the Edge in France'. For a somewhat more optimistic view of the current model of French *laïcité*, especially in the context of Rawlsian liberalism, see Daly, 'The Ambiguous Reach of Constitutional Secularism in Republican France'.

[68] Charles Taylor, *A Secular Age* (Cambridge, MA, Harvard University Press, 2007).

[69] See Brad S Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Cambridge, MA, Harvard University Press, 2012); John Milbank, 'The Reformation at 500: Is There Any Cause for Celebration?', *ABC Religion & Ethics (Australian Broadcasting Corporation)* 30 October 2017: <http://www.abc.net.au/religion/articles/2017/10/30/4757583.htm>

Cover so brilliantly discussed,[70] not to mention more mundane instances of bad faith and opportunism. Still, all these matters – however important they would be to the full story – are beyond my more modest brief here.

Nevertheless, I do want to conclude by at least sketching two specific complicating variables in the stories of religion-state dispensations. The first is irony. The second is dynamic, even dialectical, change wrought by the process of encounter itself.

5.1 Ironies

As I have been suggesting all along, any complete normative inquiry into specific religion-state dispensations would need to consider their granular details as well as their larger assumptions. One way to understand those details might be to keep an eye out for the manifest and subtle ironies that can creep into any dispensation and confound or at least fine-tune normative judgments.

5.1.1 Pyrrhic victories

The most obvious form of irony in the Western context might be what Justice William J Brennan called the 'pyrrhic victory'.[71] Pyrrhic victories enter the conversation when religion-state dispensations grounded in some form of separationism excuse specific breaches in the wall by trying to justify the state's occasional practice of religion in ostensibly secular terms. Thus, for example, a court might describe official governmental prayers as merely 'a tolerable acknowledgment of beliefs widely held among the people of this country',[72] or list a set of ostensible purposes for such prayer that excludes 'the most obvious purpose of genuine prayer – to pray'.[73] The effect of such rationales, if they are taken seriously, is simply, in Madison's words, to valorize the 'unhallowed perversion of the means of salvation',[74] and thus betray any reasonable norms of genuine existential encounter between religion and state. To that extent, unabashedly non-separationist regimes, as in England, clearly have the upper hand.

The lure of (and narrow escape from) the trap of pyrrhic victory was also apparent in the European context in the much-discussed *Lautsi* case, in which the Grand Chamber of the European Court of Human Rights considered a challenge under various provisions of the European Convention on Human Rights of the mandatory display of crucifixes in Italian public schools.[75] I have no interest here in suggesting a definitive

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[70] Robert Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97 *Harv L Rev* 4.

[71] *Marsh v Chambers*, 463 US 783, 811 (1983) (Brennan J, dissenting). I should mention, in the interests of full disclosure, that I clerked for Justice Brennan during the Term of Court that *Marsh v Chambers* was decided and worked on his dissent.

[72] *Marsh v Chambers*, 463 US 783, 792 (1983).

[73] See Dane, 'Prayer is Serious Business,' 628 (discussing *Town of Greece v Galloway*, 134 S Ct 1811 (2014)).

[74] Madison, 'Memorial and Remonstrance', 32.

[75] See *Lautsi v Italy* [2011] ECHR 2412. A Chamber of the Court's Second Section had earlier declared that the display of the crucifix violated Article 2 of Protocol No 1, along with

view of the crucifix controversy.[76] Rather, I want to focus on the justifications proposed for the State's appropriation of that religious symbol. Consider thus the view advanced in the Italian court system (as reported by the Grand Chamber) that the crucifix somehow transcended its religious particularity – that it

> was a historical and cultural symbol, possessing on that account an 'identity-linked value' for the Italian people, in that it 'represent[ed] in a way the historical and cultural development characteristic of [Italy] and in general of the whole of Europe, and [was] a good synthesis of that development'.[77]

Indeed, the Italian courts went so far as to argue that

> in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the State – principles which underpin our Constitution.[78]

Similarly, an Italian court held that the crucifix, despite its evident religious meaning, could also 'be seen as a symbol capable of reflecting the remarkable sources of the civil values referred to above, values which define secularism in the State's present legal order'.[79] That is to say, the crucifix could be perceived, through a chain of symbolic and historical connections, not only as a secular symbol of sorts, but even more emphatically as a symbol of secularism.

There is no denying that symbols, including the crucifix, can have multiple meanings and that religion and culture often interpenetrate. Nevertheless, when the Italian State seems to want to appropriate and co-opt a deeply religious symbol and transform it, not only into a token of national history and identity, but more emphatically as a marker (however unconvincingly) of the state's non-religious identity, *that*, if nothing else, would subvert the imperatives of genuine respectful existential encounter and dialogue between the state and religion. Moreover, those arguments, if accepted by the Grand Chamber, would have given supporters of the crucifix a pyrrhic victory even more glaring and pointless than in the American prayer cases.

To its credit, the Grand Chamber did not adopt or rest on this sort of justification for the display of the crucifix. It left the issue much more open, noting that the crucifix,

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Article 9, of the European Convention on Human Rights: *Lautsi v Italy*, App No 30814/06 (ECHR, 3 November 2009).

[76] For what it is worth, I do tend to agree with the Grand Chamber's view that the display of a 'passive' symbol such as a crucifix does not as such necessarily violate liberal democratic norms of individual and group religious liberty. As suggested earlier in this chapter I would prefer that our normative principles regarding such questions not uncritically accept 'this age's fleeting therapeutic mindset and its accompanying politics of identity and culture of grievance'. See text accompanying note 24.

[77] *Lautsi*, para. 15 (quoting Italian Administrative Court).

[78] Ibid, 6.

[79] *Lautsi*, para. 16 (quoting judgment (no. 556) dated 13 April 2006 of the *Consiglio di Stato*).

'whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity' and that the regulations mandating its display 'confer on the country's majority religion preponderant visibility in the school environment'.[80] It nevertheless allowed the display as falling within the 'margin of appreciation' accorded to states subject to the Convention. In an important and even moving sense, then, the Grand Chamber's judgment reflected an important confluence of three important conversations – between the Italian State and its Catholic religious patrimony, between Italy and the pan-European effort to mediate among different models of religion-state dispensation, and, finally, between liberal democratic values and the existential encounter of religion and state.

5.1.2 Ambiguous surrenders

Irony can also take a very different and much more normatively difficult form. Sometimes, clear betrayals of the imperative to genuine, respectful, existential encounter can produce the space within which a productive encounter or at least genuine self-revelation can nevertheless take place.

Not surprisingly, perhaps, both Judaism as we know it and Christianity emerged almost two thousand years ago out of among the most violent and one-sided examples of such betrayals by the imperial state. For Jews, the cataclysmic destruction of the Second Temple in 70 CE by Roman forces helped precipitate the radical reorientation we know as Rabbinic Judaism. In Christian belief, the Roman crucifixion of Jesus set the stage for his resurrection and the unleashing of God's salvific grace.

My illustration here, though, is more contemporary and much more ambiguous. It also comes from outside the general Western consensus that has been my focus throughout most of this chapter. Consider for just a few pages the religious and political dynamic in the last few decades of Indonesian history.[81]

After independence, the new Indonesian state adopted a commitment to 'monotheism' as one of its guiding principles and required any religious tradition that aspired to official recognition to be monotheistic and subscribe to a sacred text. This constitutional commitment was a compromise with political forces arising out of factions within the majority Muslim population that wanted Indonesia to declare itself an Islamic state. A commitment to 'monotheism', then, was a way to acknowledge and enforce a central tenet of Islam without alienating the significant Christian minority in many parts of the country. At the same time, the idea of monotheism as a principle of national law took on a life of its own in the effort to build and sustain a national identity and imagined community based on a faith that could transcend narrower religious allegiances – especially in the face of successive corrupt and sometimes genocidal dictatorial governments. Thus, we have in the Indonesian case in the first

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[80] Ibid, para 71.

[81] I base myself here on accounts in Adrian Vickers, *A History of Modern Indonesia* (2nd edn, Cambridge, Cambridge University Press, 2013); Adrian Vickers, *Bali: A Paradise Created* (2nd edn, Singapore, Tuttle Publishing 2012); Martin Ramstedt (ed), *Hinduism in Modern Indonesia* (London, Routledge Curzon, 2004); Jeremy Menchik, 'Productive Intolerance: Godly Nationalism in Indonesia' (2014) 56 *Compar Stud in Society & History* 591. I also draw upon personal observations during a visit to Bali.

decades of independence not only a clearly illiberal state but a sort of simultaneous co-optation between the state and religion.[82]

But one further detail is worth noting. At first, the new religious dispensation in Indonesia did not include Balinese Hinduism – a unique religious tradition related to but clearly different from the more familiar Indian forms of Hinduism – as an officially recognized religion. Instead, Balinese Hinduism was treated as merely a traditional practice in the same league as those of various tribal groups in scattered parts of the country. The reaction of the Balinese was to emphasize that they were in fact monotheists – that the variety of divinities represented in Balinese Hindu temples were manifestations of a single Godhead. In fact, virtually every Balinese Hindu temple – from small temples in family compounds to the most prominent temples on the island – includes a tall pillar on top of which is an empty chair symbolizing Sang Hyang Widhi Wasa, the Godhead who is beyond representation.

So with respect to Balinese Hindus, the Indonesian state has exerted the sort of coercive power that violates *both* conventional standards of political morality and the ethic of genuine existential encounter that I have tried to outline here. The paradox and irony, however, is that Balinese Hindu 'monotheism' is not an inauthentic accretion. It taps into the traditional belief system of Balinese religion and into reform efforts that have been percolating on Bali for some time. So, viewed from a somewhat different perspective, the developments I have outlined did arise out of a genuine, if illiberal and coercive, encounter in which a religious commitment catalyzed a sense of inter-religious national identity. That inter-religious national identity in turn galvanized latent but vital and genuine forces within an ancient and multi-faceted constellation of practices, beliefs, texts, and spiritualities in a single corner of that nation. This might all seem strange, both normatively and otherwise, unless we notice that 'existential' encounters can never be fully subject to rules of order and might well encompass – sometimes at the same time – both dreadful oppression and genuine opportunities for self-revelation.

The judgment of history might therefore not be entirely unkind to the Indonesian religion-state dispensation. Nevertheless, for purposes of constructing a coherent normative account, the hypothetical judgment of history cannot be a completely adequate guide. While recognizing and appreciating the complexities, contradictions, ironies, and contingencies of the historical processes in which religious and political forces interact, we must still be willing to make some claims about the bounds within which a decent state should confine itself. The irony in this case, then, is two-fold, as Indonesians and Balinese between them try to make sense of their own religion-state dispensation, and as the rest of us come to terms with the potential self-contradiction in any effort at normative assessment.

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[82] I leave out of this account the true tragedy of modern Indonesian history – the murder of hundreds of thousands of citizens in the massacres attendant on Suharto's seizure of power and its long aftermath. See John Roosa, *Pretext for Mass Murder: The September 30th Movement and Suharto's Coup d'Etat in Indonesia* (Madison, University of Wisconsin Press, 2006). Vickers, *History of Modern Indonesia*, chs 6–7.

5.2 The Dynamics of Encounter

The label of 'irony' reflects the multiple layers that can coexist in any religion-state dispensation. But a different constellation of layers is apparent when we consider the dynamic processes by which religion-state dispensations change and evolve over time.

The course of conversation is, by nature, dynamic. It does not stand still. Indeed, the role of existential encounter in the framing and continuous reimagining of religion-state dispensations suggests two levels of dynamic complexity. One is the dialogue between church and state. The other is the relationship – which is not only additive but at least in part interactive and mutually correcting – between the fruits of that dialogue and the dictates of the reigning general constitutional theory.

5.2.1 Transformations and debates

The various examples of national systems and legal regimes and doctrines that I have discussed here only confirm the inherent instability of any one dispensation. The English stiffly-constructed 'figure triangular' of Hooker's time has evolved into the 'interlocking jigsaw' of today's 'weak' establishment – which at least some commentators understand as a pillar of pluralistic democracy. French Gallicanism has evolved, with a variety of intermediate steps, from a rhetoric supporting royal claims over religious institutions to violent revolutionary anti-clericalism to today's version of secularism – a secularism that not only pays too little heed to the religious voice but also defies, or asks us to redefine, the norms of liberal constitutionalism.

Again, it is also worth looking briefly outside the purely Western orbit. I noted earlier that classical Islam often respected at least a form of separation between the authority of a decentralized, often plural, religious *nomos* and the powerful, but limited, jurisdiction of the central government over pragmatic questions of public policy.[83] But as I suggested even then, the story is more complex: over the centuries these two power centers of Islamic societies made claims upon each other whilst the very nature of the state and the caliphate were continuously contested and renegotiated.[84] Today, the various wings of Islamic political-religious thought continue to be shaped by that long, dialectical, process. But they are also deeply influenced by the assumptions of liberal modernity. Thus, 'liberal' Islamic thinkers are clearly trying to find points of contact between pre-modern Islamic dispensations and the assumption of liberal constitutionalism.[85] But 'radical' Islamists, who reject not only such liberal constitutionalism but also more traditional expressions of pluralism and separation of spheres, are – despite their failure to acknowledge the fact – simply painting on an equally Western canvas of holistic statism that rejects encounter in favor of control.

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[83] See text accompanying note 35.

[84] See eg, Hugh Kennedy, *Caliphate: The History of an Idea* (New York, Basic Books, 2016); Yılmaz, *Caliphate Redefined*.

[85] See Quraishi-Landes, 'Islamic Constitutionalism'. For my own review of another, interestingly different, such effort, see Perry Dane, Review of Abduallahi Ahmed An-Na'-im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, MA, Harvard University Press, 2008) in *Ancient Traditions: New Conversations, the Blog of the Center for Jewish Law and Contemporary Civilization at Cardozo Law School*, 8 March 2011, <http://ssrn.com/abstract=1843627> and <http://blogs.yu.edu/cjl/2011/03/08/islam-and-the-secular-state/>.

5.2.2 'The wall of separation' redux

Some of the most interesting, and frankly, unsettling changes are occurring, however, in the place where this chapter began – in the contemporary American religion-state relationship and its Madisonian premises. American separationism was born in large part out of a distinct theological vison married to Enlightenment constitutionalism and the pragmatics of an unusually religiously diverse new nation.

Today, all these ingredients are threatened in several distinct ways. In the conversation between religion and state, many of the religious interlocutors simply no longer accept the founding theology. At the same time, many of the custodians of the constitutional conversation seem to want to subsume the distinctive existential encounter between religion and state in a more abstract, flatter, discourse of rights. From one side of the ideological spectrum, the argument is that religion might not be 'special'.[86] From the other side, the claim is that rigorous adherence to the old separationist imperative might constitute 'discrimination' against religion.[87] Meanwhile, the separationist imperative itself, even among its defenders, is too-often defended, yet not with the traditional, distinctively American argument, that 'a union of government and religion tends to destroy government and to degrade religion'.[88] Rather, it is defended in terms of much shallower and unconvincing arguments about psychological alienation and political identity.[89]

These developments are, to my mind, lamentable. They are worth critiquing and resisting. But they are also the products of an ongoing conversation that, as with any existential encounter, neither can nor should assume that any premises must simply remain above the fray.

6. CONCLUDING THOUGHTS

The broad perspective I have tried to articulate in this chapter is complex. But the notion of an imperative to encounter remains useful and important. It might also help us reach unexpected conclusions and see some of the richness and paradox that can appear along the way.

The bounds of our Western judgments of religion-state dispensations are – I will say it again – partly defined by what we have come to call liberal constitutionalism. But they are also partly defined by the imperative to recognize the inadequacy of any state's totalizing pretensions and the sheer existential reality of plural, co-existing, spheres of authority.

The normative account I have suggested in this chapter is intentionally elastic – or at least elastic enough to admit American separationism, English establishment, and Dutch Reformed sphere sovereignty, while it admittedly takes a dimmer view of French

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[86] See Micah Schwartzman, 'What If Religion Is Not Special?' (2012) 79 *U Chi L Rev* 1351; Nelson Tebbe, 'Government Nonendorsement' (2013) 98 *Minn L Rev* 648.

[87] See *Trinity Lutheran Church v Comer*, 137 S Ct 2012 (2017).

[88] *Engel v Vitale*, 370 US 421, 431 (1962).

[89] For my laments on this score, see Dane, 'Prayer is Serious Business' and Dane, 'A Tale of Two Clauses'.

laïcité and at least one small piece of Italian self-congratulation. Each state constitutional tradition will impose its own bounds – as it should. I observed at the start that the striking diversity of forms that religion-state dispensations can take, even in the liberal West, 'is surely due to differences in religious history, including the history of relations between religion and state, and even differences in the theological assumptions that find their way into foundational constitutional norms'. Another way of putting it is that the process of existential encounter between religion and state will itself, in its varied particulars, constitute a sort of negotiation over the specific terms of that encounter. Thus, while it is important to try to construct a sort of normative minimum, it is also vital to respect, continue to argue over, and constructively and imaginatively compare to each other, the thicker and more determinate norms within specific regimes.