Property Rights and the Limits of Religious Liberty

✦

James A. Montanye

Western nations maintain variously high walls of separation between church and state. One consequence of this separation is the ongoing dilution, often preceding the occasional disappearance from "public" life, of traditional religious practices and symbols—display of the Ten Commandments, for example. This drift leads some philosophers of religion to conclude that official government neutrality toward religion has constructively "privatized" it (Trigg 2007).

Another consequence of separation and neutrality is a perceived loss of social unity within Western nations, which is coincident with the diminished public display of religious symbolism. This loss is more easily felt than quantified, however, and it is evidently felt most tenderly by philosophers of religion and others who are both privately religious and strongly attached to their society's old ways.

Western scholars of many stripe also worry that the West's insistence on official religious neutrality, tolerance, sensitivity, inclusion, and pluralism—especially to the extent of coddling militant elements of foreign religions and cultures—falls nowhere short of being naively, fatuously, and irresponsibly suicidal. The atheist philosopher Sam Harris offers a blunt assessment of the present situation: "Many religious moderates have taken the apparent high road of pluralism, asserting the equal validity of all faiths, but in doing so they neglect to notice the irredeemably sectarian truth claims of each. . . . So long as it is acceptable for a person to believe that he knows how God wants everyone on earth to live, we will continue to murder one another on account of our myths" (2004, 15, 134). Events surrounding the construction of an Islamic cultural center near New York City's "ground zero" site and the worldwide

James A. Montanye is a consulting economist living in Falls Church, Virginia.

The Independent Review, v. 16, n. 1, Summer 2011, ISSN 1086–1653, Copyright © 2011, pp. 27–52.

consequences in 2010 of a tiny Florida congregation's plan to commemorate the events of September 11, 2001, by burning copies of the Qur'an evince the intensity of feeling all around.

American's sense that their legal and social policies are dangerously out of synch with contemporary reality was heightened in the early 1990s after militant, foreign-born Muslims bombed New York City's World Trade Center. Concern peaked following the subsequent bombing of a U.S. warship off the coast of Yemen and the spectacular attacks of September 2001 against New York City and Washington, D.C. European concerns, by comparison, are the consequence not only of recent militancy, but also of longstanding immigration issues that were exacerbated by the removal of travel restrictions among European Union member countries. The theoretical foundation for the West's universal concerns remains Samuel Huntington's seminal book *The Clash of Civilizations* (1996).

The upshot is that philosophers, political theorists, economists, and even behavioral biologists now search for comprehensive and principled answers to questions regarding the nature and rational limits of religion in public life. The great issues include, first, identifying the principled distinctions between "legitimate" and "illegitimate" religions, and, second, identifying the proper accommodation for legitimate religious beliefs and practices within pluralist societies.

In this article, I examine the development of religious toleration and accommodation as well as current efforts to shape and perhaps to reverse its direction. I argue that thinking about the limits of religious liberty in terms of property rights and rational individual behavior—that is, thinking outside the traditional philosophical-political-legal box—casts the most intellectually challenging issues in objective and tractable terms.

From Religious Homogeneity to Toleration, Separation, Neutrality, and Individual Liberty

The development of religious liberty in Western civilization is a relatively recent phenomenon that nevertheless spans several centuries. In antiquity, notes the historian Charles Freeman with reference to ancient Rome, "[r]eligious practice was closely tied to the public order of the state and with the psychological well-being that comes from the following of ancient rituals. Religious devotion was indistinguishable from one's loyalties to the state, one's city and one's family" (2003, 68). Slaves' loyalties ran only to their masters (Wiedemann [1981] 1988, 33).

The subsequent rise of Christianity engendered in Western societies the present sense that religion is both an intrinsic aspect of human nature and an inalienable matter of conscience and self-fulfillment. Religion came to be viewed as an individual *right*, which the state was positively obliged to protect and which it was forbidden ever to limit or deny.

Medieval sovereigns disputed claims that religious matters lay beyond the state's purview. Rather, religious homogeneity was considered to be instrumental both to national unity and to the maintenance of state power. Religious pluralism, in contrast, was disruptive to both of these ends. Also disruptive, however, were the state's coercive attempts to preserve a unity of faith in the face of developing pluralism. Realpolitik dictated, on balance, that pluralism should be tolerated, but only to the extent necessary to preserve domestic peace and order, and then only until religious unity could be restored with relative ease.

The case of the French Protestants (Huguenots) is the premier example of sovereign pragmatism at work along these lines. The Edict of Nantes (1598) established a grudging toleration of Protestants in Catholic France. The edict's guarantees were progressively narrowed and weakened until those that remained were renounced in 1685. The messy domestic and international consequences of this renunciation spawned open debate across Europe regarding the limits of sovereign authority over religion and other aspects of public and private life.

Samuel von Pufendorf's treatise *Of the Nature and Qualification of Religion, in Reference to Civil Society* ([1687] 2002) was among the early philosophical works about religious toleration. On the basis of a contract theory of the state, Pufendorf argued that the sovereign has a duty to protect the citizens' natural rights and that this duty does not extend to dictating religious beliefs and practices. Pufendorf's work was followed by John Locke's better-known *Letters on Toleration* ([1689] 1824), four in all. Locke similarly argued that the care of men's souls fell outside of the sovereign's legitimate bailiwick and that, in any event, such care was better left to the soul's individual possessor.

These views of toleration grew to ground Western thinking and policy regarding religious liberty. They also ground the modern trend toward valuing religious pluralism as an end in itself. The state is now seen as having an affirmative obligation to support and encourage religious diversity for its own sake, neither preferring one religion to any other nor preferring conventional religions to such alternatives as atheism, witchery, Satanism, and pop psychology.

Western civilization's quest for religious liberty and diversity produced notable developments in political philosophy and the literature of liberty. Article 10 of the French National Assembly's Declaration of the Rights of Man and the Citizen (1789) requires that "[n]o one must be persecuted on account of his opinions, including religious ones, provided the manifestations of these do not disturb the public order established by legislation." The First Amendment to the U.S. Constitution (1791) requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble." The European Convention on Human Rights (1953) asserts that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or

private, to manifest his religion or belief, in worship, teaching, practice and observance" (sec. 9.1). It goes on to affirm that the "[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others" (sec. 9.2). The modern German Constitution (1949) takes religious neutrality to the limit by treating all churches, nonreligious *Weltanschauungs*-Societies, and non-Christian *Religionsgesellschaften* as equivalent public corporations *(Körperschaft öffentlichen Rechts)*.

Virtually all charters of religious liberty are qualified by the need to maintain public order. The American legal scholar Steven Smith notes that "[a]lthough the [Supreme] Court has offered a variety of rationales for its interpretation and implementation of the establishment clause, probably the most common justification has evoked the need to prevent civil strife in matters of religion. In the last decade or so [since about 1985] this 'civil peace' rationale has been refined and extended to include the 'nonalienation' rationale" (1995, 116). These charters conspicuously do not distinguish among religions on the basis of perceived "legitimacy." The German Constitution, for example, overtly places all religious and secular public organizations on an equal footing. By comparison, U.S. courts—tax courts, in particular—have divined that the First Amendment's "practice" clause applies to all organizations that (1) advocate a belief in some ultimate, transcendental truth, (2) produce the means for realizing this truth, (3) comprise a community of believers, and (4) assert standing as a religion or church ("Religion" 2010). Having cleared these relatively low hurdles, religious organizations are constitutionally insulated against having to prove the validity and merits of their ideological claims (*United States v. Ballard,* 322 U.S. 78 [1944]). "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his beliefs on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with" (*Davis v. Beason,* 133 U.S. 333, 342 [1890]).

Despite the German Constitution's overtly neutral stance, considerable play exists in the joints between theory and praxis. For example, whereas Americans regard the Church of Scientology as a harmless sect whose members at worst are the willing victims of a preposterous hoax (atheists, of course, regard all religious organizations in this way), many Germans are openly disgusted by it. The German state itself appears to discriminate against members of this church, especially if the member's name is Tom Cruise and he happens to be filming a historical novel on German soil. Revulsion can be intense among private individuals as well. At a recent philosophy of religion conference, a German professor of religion and law refused to respond to a question regarding Scientology's official and unofficial status in Germany despite polite but firm insistence from the conference's chair that he do so. The professor volunteered only that the query (from me, as it happened) provided a propitious

opportunity for a coffee break! The episode was a thoroughly remarkable display of intolerance by an academic philosopher whose own presentation lamented the decline of religion in public life.

Official religious toleration, like official toleration of virtually anything, often leads to private entrepreneurial exploitation and, in return, to public overindulgence. In *Remmers v. Brewer* (494 F.2d 1277 [8th Cir. 1974], cert. denied, 419 U.S. 1012, 95 [1974]), a federal appeals court upheld a lower court decision granting constitutional protection to a nascent jailhouse religion called the Church of the New Song. The petitioners sought not only official recognition of their religion, but also and among other things the serving of sacramental Harvey's Bristol Cream sherry and steak to incarcerated church members every Friday at 5:00 P.M. Although affirming the church's religious status on constitutional grounds, the court expressly retained the option of revisiting its finding "should it subsequently appear that the Church of the New Song is a hoax and front, as claimed by the state." An appeals court subsequently remanded the case for further findings and deliberation after church members were discovered using their religious liberty to engage in criminal activities (529 F.2d 656 [8th Cir. 1974]).

The ready evidence does not indicate whether church members ever enjoyed ritual Sabbath meals at taxpayer expense. They probably did not; otherwise, American prisons by now would sport Michelin quality ratings. The episode nevertheless evinces the need for imposing principled limits on the meaning of "religious liberty," particularly where individuals can exploit legal toleration for private advantage (Trigg 2007, 47). It also indicates the need to impose principled limits on religious "accommodation," which the Supreme Court has found to be qualitatively different than "support for" religion (*Lemon v. Kurtzman*, 403 U.S. 602 [1973]). The distinction is a tricky one because both treatments constructively require all individuals to bear, to one extent or another, the external burden of other individuals' religious practices.

The Process of Religious Liberty

Western charters of religious liberty are regarded as bulwarks against the political infringement of all rights related to individual conscience. Often overlooked, however, is the fact that none of these charters provides *unlimited* scope for religious exercise. Courts consistently have approached religious liberty as being absolute in matters of *belief*, but not of *behavior* (Trigg 2007, 52). Religious liberty in pluralist societies is constrained at the point where behavior interferes either with the maintenance of public order and morals or with all individuals' legitimate rights.

The First Amendment's original purpose was *not* to protect religious freedom absolutely—or at all, for that matter. Rather, its purpose was to limit the new federal government's power by specifically prohibiting Congress from making laws regarding religious "establishment" and "practice." The amendment thus left to the individual states and to the people the responsibility not only for defining the legitimate limits of

religious freedom, but also for treating myriad, controversial (in retrospect) public practices that abounded in colonial times, including public support for clergymen, compulsory church attendance, religious qualifications for public office, and blasphemy prosecutions, among other things (S. Smith 1995, 120). Steven Smith quotes the legal scholar Donald Drakeman in part: "If someone had been prescient enough to think of [modern church–state problems], the Founding Fathers would almost assuredly have said: 'That's none of our business. We're here to put shackles on this new federal Congress, not to decide some local tax or school issues.' . . . Church–state controversies were abundant before and after 1789, but they did not surface in the Unites States Congress because they were not federal issues" (1995, 48). Moreover, the Constitution's framers held no monolithic views regarding the metes and bounds of religious liberty. Rather, individual opinions differed for many reasons, including whether the individual framer's underlying political interest was essentially legislative, judicial, or administrative (Muñoz 2009).

Only with the evolution of Fourteenth Amendment interpretation did Congress and the federal courts acquire the sweeping authority over religious liberty that the First Amendment specifically forbade (see *Cantwell v. Connecticut,* 310 U.S. 296, 60 [1940]; *Everson v. Board of Education,* 330 U.S. 1, 67 [1947]). Despite church–state separation and official religious neutrality, the transfer of constitutional authority to federal hands did not benefit religious liberty. Smith calls attention to the ironies:

> [W]e ought to remember that in this country every state had rid itself of its official religious establishment within a few decades of the founding—without judicial compulsion. . . . John Noonan observes [that] the [First Amendment's "establishment" and "practice" clauses] "had absolutely no impact" on the states and "no apparent impact on Congress and the president." Since entering the field, however, the Court has done little to shield religious freedom against what might be seen to be the most powerful governmental threat to it—that is, the national government. John Noonan points out: "The United States Supreme Court never found a law made by Congress to infringe religious liberty. The blandness of academic acolytes of the Court conceals this dismaying fact. The Court has been portrayed as the champion of religious liberty. It has not been the champion against the co-equal branch of government whose power the [First] Amendment had been written to curb." (1995, 125)

The 1954 insertion of the phrase "under God" into the Pledge of Allegiance to the American flag illustrates the point. The idea for a civic pledge originated in a youth-oriented magazine in 1892. The text remained a private enterprise until 1942, when a wartime Congress nationalized it within a codified set of "rules and customs pertaining to the display and use of the flag of the United States of America" (chap. 435, 56 Stat. 377). The pledge subsequently became a compulsory morning ritual for

American schoolchildren. It was recited in tandem with a separate, nondenominational, and now banned prayer to "Almighty God," which acknowledged our dependence upon him and begged his blessings upon us. The pledge's "under God" clause was inserted twelve years later (chap. 297, 68 Stat. 249) not to honor God, but to differentiate the United States symbolically from godless Communist states. The flag's unofficial civilian salute already had been changed, from an extended right arm (palm up) to the now-familiar right-hand-over-heart pose in order to distinguish a moral America from amoral National Socialism. The Supreme Court winked constitutional approval for the "under God" clause in *Elk Grove Unified School District v. Newdon* (542 U.S. 1 [2004]).

Discussions surrounding the pledge and its controversial clause consistently miss its most salient point. The pledge itself is a prayer—a Nicene-like creed to be recited in government-operated schools and at miscellaneous public functions. It addresses not God in heaven, but "our father, who art in Washington." The God of old-time religion and the revised salute were instrumental afterthoughts, invoked to contrast "one nation" ("us") against godless and amoral enemies ("them"). The pledge stands as a secular prayer to America's *civil* religion.

The "high wall of separation" between church and state in the United States and other Western countries is semipermeable, allowing the church to encroach on the state, but not the other way around. In the alternative, it arguably constitutes a spite fence erected by the state for the purpose of distorting competition between the nation's spiritual and civil religions. As Smith notes,

> Robert Baird, the nineteenth century religious historian, believed that [Thomas] Jefferson was "a very bitter enemy to Christianity, and we may even assume that he wished to see not only the Episcopal church separated from the state in Virginia, but the utter overthrow of everything in the shape of a church throughout the country." With respect to Jefferson's famous Virginia Statute for Religious Freedom, Baird opined that "it gave its author great satisfaction, not because it embodied the principles of eternal justice, but because by putting all religious sects on an equality, it seemed to degrade Christianity. . . . It was this that made the arch-infidel chuckle with satisfaction." If this suspicion is correct, then Americans like Jefferson may have embraced a third position, which may aptly be called a "heretical" view both because it broadly rejected the prevailing orthodoxy and because its proponents seem to have found it prudent to be discreet about their actual opinions. (1995, 20, footnotes omitted)

A fourth and most pragmatic interpretation hinges on Jefferson's deep distrust of religious factions, which he shared with the Constitution's "father," James Madison. In Madison's view, which drew from Montesquieu's ([1748] 1977) political theory and Adam Smith's ([1776] 1976) political economy, factional influences, including

religious ones, were best controlled by encouraging rather than by limiting their proliferation. This counterintuitive approach, as presented in *The Federalist* No. 51, rested on the idea that allowing "ambition . . . to counteract ambition" would cause malign factional influences to cancel spontaneously (Madison, Hamilton, and Jay [1787] 1961, 322). Both Madison and Jefferson understood that religion cloaked naked self-interest especially well. They also recognized that state power in a democratic republic would quickly become the weapon of choice for perpetual Hobbesian warfare. Echoing Adam Smith, Madison argued that religion posed little threat to democracy so long as congregations remained small and geographically dispersed *(The Federalist No. 10)*. Jefferson was more cynical, believing, among other things, that clergymen should be barred from public office.

Alexis de Tocqueville ([1835/1840] 1988) and others subsequently observed that Madison's constitutional separation of church and state consistently benefitted both religion and state. In short, separation and neutrality prevented the clergy from being co-opted and lulled into desultory complacency by official sinecures, as had occurred throughout Europe. These policies also fostered robust competition among religious and secular institutions, while facilitating the spontaneous and peaceful accommodation of ethnic and religious diversity. These results bring to mind Adam Smith's familiar assertion: "By pursuing his own interest [the individual] frequently promotes that of the society more effectually than when he really intends to promote it" ([1776] 1976, 1:477–78).

The natural and most profitable relationship between church and state is a competitive one. Both institutions compete for relevance in pluralist societies by fostering social cohesion and wealth creation, and both alleviate private despair by providing ultimate objects of faith, worship, and devotion (Montanye 2009). Moreover, both institutions form around human predispositions that cause individuals to seek reciprocal relationships, not only with the people around them, but also with gods, as in the case of classical religion, and with charismatic and numinous individuals, as in the case of secular, civil religions. Western governments in fact have developed the appearance of functioning as *personal* states, *as if* possessing all the essential qualities of a personal god, including omniscience, omnipotence, and benevolence. Government paradoxically has come to epitomize the *deification* of secular power.

Competition between religion and state has two significant implications. First, religion's influence everywhere is greatest where the state is indifferent, ineffectual, hostile, corrupt, or untrustworthy. Obvious examples include Polish Catholicism under communism and modern Islam in countries where the state is especially predatory and self-serving. Religion becomes ascendant in such places because it facilitates cooperation, trust, and exchange among ordinary and disaffected individuals. The second implication here, conversely, is that religion's significance wanes—or, as Friedrich Nietzsche wrote, "God is dead"—where the state delivers prosperity. The United States, for example, has become a post-Christian society that practices consumption and worships redistributive democracy (see Bloom 1992).

The alternative to separation between church and state would be for the stronger institution to direct its weaker rival's competitive policies. The result would be no different than permitting Microsoft to regulate Apple or vice versa.

The foregoing commentary is not to deny that religion's disappearance from official public life entails some measure of social cost (all public and private choices entail costs) and that separation and neutrality give rise to some curious paradoxes. For example, "[l]aws establish a deontological order that refrains from teleological insights. They cannot promote a certain world-view or reply to questions concerning the meaning of life. . . . The reign of law therefore neutralizes exactly those creeds and religious attitudes it enables people to assume" (not attributed).[1] However, philosophers of religion and others too often dwell on costs and paradoxes while ignoring the net social benefit that separation and neutrality produce. The reasons why philosophers focus as they do often escape articulation, but they appear to be related to normative private preferences and to the concentration of professional capital in philosophical and theological ideals. In any event, such philosophers' efforts are of general concern only to the limited extent that they become policy relevant, which unsurprisingly is the stated goal of many philosophers of religion.

Religious Liberty in Philosophical and Legal Thought

Philosophers of religion can be romantic thinkers whose pronouncements often confirm the philosopher Roger Trigg's view that the "rhetoric of human rights can float free of its groundings" (2007, 86). One believing Christian academic argued a familiar position at a 2010 philosophy of religion conference: "Religious freedom is an absolute right, because it is rooted in the primordiality of existence, which is itself determined as freedom" (not attributed). A German participant in the conference lamented what he saw as the regrettable passing of the old order caused by his country's constitutional doctrine of religious neutrality:

> This formal precondition, introduced in 1949 according to the equality principle, manifests its importance in present days. Since a pluralistic society is on its way, the state searches for legal contracts with new growing religious groups, mainly Muslims that fit into the given legal pattern of a *Körperschaft öffentlichen Rechts*. Meanwhile the Christian Churches are constantly losing members. Therefore the approved legal order is getting under the pressure of an intercultural politics and is on the way to deliberate itself from its contingent historical roots in Christianity. (not attributed)

1. Several quotations given here are not attributed to their sources because they are drawn from drafts of unpublished conference papers that were circulated for discussion, but not for attribution. The source citations are thus given as "not attributed."

A Dutch conferee argued in support of blasphemy laws, although not necessarily for prosecutions:

> Where there is no social cohesion, there is no justice and harmony, and after a while no well-being either. Therefore, blasphemy as bitter ridicule or denigration of what is holy for others is an offense against somebody's integrity. When it involves groups of people it can be dangerous for "the fabric of society." Criticism should be much more precise and not offend what is really ultimate and holy to people. I am afraid that in the old Athens and Jerusalem the leaders misunderstood what was really at stake. Therefore, the state should prohibit blasphemy but not be quick to punish. Social cohesion is helped not by punishments but by a state policy that stimulates the exchange of views and proper knowledge about worldview traditions and cultures. (not attributed)

Blasphemy laws per se, which punish offenses against God, are presumptively unconstitutional under U.S. law. Offenses comprising "bitter ridicule or denigration," by contrast, fit comfortably within the ambit of "hate speech" directed against individuals and groups. U.S. state legislatures and courts presently proscribe and punish such offenses, notwithstanding the First Amendment's strict wording. At least one local jurisdiction has pursued a "hate crime" prosecution for burning the Qur'an in public. The Netherlands has similar legal constructions, which were used in 2009 to prosecute a prominent and somewhat nasty politician, Geert Wilders, for insulting Muslims and inciting hatred against them by speaking publically about the "Islamization of the Netherlands," an offense that the public prosecutor characterized as an "illegal observation." Wilders was acquitted of the charge in late 2010, thereby avoiding a one-year jail term. Such laws and prosecutions often feel welcome, but they also entail a downside—that "[t]he increasing tendency to invoke psychological harms to curb the exercise of traditional freedoms constitutes the greatest threat to [classical] liberalism today" (Mueller 2009, 18).

The totality of these expressed views evinces a pattern of normative preferences among philosophers, politicians, and lawyers. Their best efforts to discover the limits of religious liberty demonstrate a point broached by the legal scholar Steven Smith:

> [T]here is no single or self-subsisting "principle" of religious freedom; there is only a host of individuals with a host of different opinions and notions about how much and what kind of scope government ought to give to the exercise of religious beliefs and practices. . . . The theorist in effect adopts one among the competing positions and then grants other faiths only the freedom that the preferred position permits. Whether such a theory deserves to be called a theory of religious freedom at all seems doubtful. . . . [R]eligious freedom, like many other matters of both

> personal and political concern, is inherently a prudential matter that cannot plausibly be confined to or regulated by "theory." Moreover, theoretical reflection cannot vindicate the position of "neutrality" that judges and scholars have struggled to define but instead shows that position to be illusory. Consequently, insofar as scholars seek to derive the Constitution's principle of religious freedom from political or legal theory, they are consigned to continuing frustration. (1995, 11, 75, 16)

Smith notes that "modern judges and theorists have aspired to do much more [than simply to protect religious liberty]. . . . [S]pecifically, [they have sought] to develop a theory that is 'neutral' as among competing religious and secular positions—neutral, as the supreme Court has repeatedly put it, both among religions and between religion and nonreligion" (75). He goes on:

> The function of a theory of religious freedom is [either] to mediate [that is, to trade off] among a variety of competing religious and secular positions and interests, or to explain how government ought to deal with these competing positions and interests. To perform that function, however, the theory will tacitly but inevitably privilege, or prefer in advance, one of those positions while rejecting or discouraging others. But a theory that privileges one of the competing positions and rejects others a priori is not truly a theory of religious freedom at all—or, at least, it is not the sort of theory that modern proponents of religious freedom have sought to develop. This is a simple statement of the conundrum. . . . A theory of religious freedom will necessarily depend on—and hence will stand or fall along with—more basic background beliefs concerning matters of religion and theology, the proper role of government, and "human nature." (1995, 63)

The upshot, Smith argues, is that the quest for comprehensive constitutional and legal principles of religious liberty—and, by extension, for philosophical principles—is a "foreordained failure." A recent book by the politician-lawyer-theologian John Danforth (2006) makes clear that principles of religious liberty, especially in regard to the treatment of women and homosexuals, are elusive even within religious sects, including his own Episcopal Church in particular. Danforth nevertheless argues that religion holds great promise as a foundation for resolving the most challenging problems of a contentious world.

The apparent impossibility of a "neutral" theory of religious liberty is reachable by philosophical avenues as well:

> Law prevents any privileging of a particular religious tradition. In order to ensure that, a modern society establishes religious rights in a plurality of ways (rights to choose one's own confession and to live according to

> religious convictions as well as rights of assemblies and self-organisation). Its usage, however, presupposes the recognition of rules that do not depend on religious beliefs. The reign of law therefore neutralises exactly those creeds and religious attitudes it enables people to assume. As a consequence, the relationship between religion and law seems to be based on a dividing line between the private and the public sphere. But even though the boundary line in many respects presents itself as a wall of separation, well constructed and forever fortified, in other respects it scarcely resembles the Great Wall of China. It sometimes looks rather like a porous dividing line. The distinction between private and public for example as well as the gap between the legal sphere and religious life in particular has been developed within a western Christianity. Both distinctions are not naturally given facts, they highly depend on presuppositions and experiences other religions do not share. (not attributed)

By both legal and philosophical lights, then, religious neutrality is never truly neutral. Moreover, neutrality drives religion from official public life under the guise of protecting religious liberty. Whether this result is a priori good or bad is not deducible from legal and philosophical arguments alone. As indicated earlier, however, the trend of history indicates that the result has been both publicly and privately beneficial on balance.

Separation and neutrality curtail the state's authority to employ religious symbols in the course of doing the public's business. They also may prevent private individuals and groups from using limited public (common) space and facilities to display religious symbols. Religion has become "privatized" in this sense, although this change does not imply that religion is being driven underground. Privatization means only that the religious trappings of particular faiths are eliminated from public ceremonies and rituals. This elimination is done in the name of pluralism, diversity, inclusiveness, sensitivity, and so forth, but it has also served the maintenance of public order in the face of growing religious and ethnic pluralism and factional entrepreneurship.

What remains of public religious symbolism in the United States is a permissible fringe called "ceremonial deism." This label comprises long-established secular practices, symbols, and expressions that have lost their essential religious content over time ("Ceremonial Deism" 2010; Corbin 2010; "Religion" 2010). Ceremonial deism remains legally permissible so long as its distant religious echoes are not publically reamplified (*Lemon v. Kurtzman*, 403 U.S. 602 [1971]). The most controversial "ceremonial" issues today concern the display of crucifixes and the Ten Commandments in public buildings, especially in courthouses and in government schools. More trivial examples abound. Official Christmas tree displays on public grounds are an example. The evergreen tree is a pagan symbol of the winter solstice. It became associated with Christianity long after Christianity associated itself with the solstice. The tree presently symbolizes and catalyzes the commercial spirit of midwinter gift

giving, like the demigod Santa Claus, which embodies the pagan spirit of the three Magi. Nevertheless, the spirit of pluralism and inclusion now triggers a right for factions to display unambiguously religious symbols alongside public Christmas tree displays (*County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 [1989]). One consequence is that an oversize menorah now complements the National Christmas Tree on public grounds behind the White House. The Supreme Court explains that such religious artifacts are merely a "passive symbol" that reminds us of the holiday's traditional (that is, its religious) roots (*Lynch v. Donnelly*, 465 U.S. 668 [1984]). The Court has yet to deal with expressions of private religious faith uttered by public officials in the line of duty (Espinosa 2009), perhaps because these comments are recognized and accepted as being both nonofficial and not readily conducive to entrepreneurial claims by competing religious and secular interests.

In sum, the best thinking by philosophers, lawyers, and jurists has failed to produce either a consistent or a consistently applied theory of religious liberty. Further thinking along these lines seems likely to produce only more frustration and foreordained failures. What is needed, therefore, is an analytical approach that tackles these issues outside of the traditional philosophical-political-legal box. In the remainder of this article, I argue for a theory of religious liberty that is based on property rights and a presumption of individual rationality.

Economics and the Public Sphere

The economist and Nobelist James Buchanan aptly notes that "[w]e live together because social organization provides the efficient means for achieving our individual objectives and not because society offers us a means of arriving at some transcendental common bliss" (1975, 1). This social cohabitation does not imply harmonious internal homogeneity. Religious and secular groups form spontaneously within established societies to facilitate the pursuit of private interests, which may be tangible or intangible, pecuniary or nonpecuniary (Montanye 2009). These groups are commonly called "factions," which Madison, writing in *The Federalist* No. 10 and echoing David Hume, defined as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community" (Madison, Hamilton, and Jay [1787] 1961, 78). Social consensus and harmony become increasingly difficult to achieve as factional diversity builds, social fragmentation occurs, and competition for resources increases correspondingly.

Rational social organization creates a conceptual space commonly called the "public sphere." This informal label has many meanings. On one level, it refers to the official conduct of the public's collective business–legislative proceedings, for example. On another level, it refers to "common" public resources, such as government buildings, grounds, and roads, with which both public and private activities are conducted. On still another level, it refers to a society's culture and other bits of

common knowledge. Statements and arguments about “religion in the public sphere” often imply several, essentially different meanings. The lack of an unambiguous reference point creates misunderstanding and confusion.

Distinguishing *economically* between the private, public, and political spheres of life provides the necessary reference standard not only for clarifying meaning, but also for overcoming the existing philosophical and legal obstacles to an objective theory of religious liberty.

The “public sphere” conceptually represents the “common” space in which all members of a society share costs and benefits collectively. The metes and bounds of this space are ideally defined by economic efficiency, as Buchanan’s terse statement implies. A few goods and services rationally are provided collectively because they cannot be provided efficiently and may not be provided at all by private individuals. Economists term goods of this sort “public goods” (Buchanan [1968] 1999; Cowan 1992). These goods are distinguished from other economic goods by three considerations: (1) the total cost of production is fixed (that is, marginal cost is zero) with respect to the number of individuals consuming them; (2) individuals cannot be excluded from consuming them; and (3) individuals benefit from consumption whether they contribute resources to help cover the cost of production or not. National defense is a familiar example of a good that essentially meets these criteria. Public goods by definition serve all individuals’ interests, even in pluralist societies. They consequently belong to the “public sphere.”

Also located in this sphere are the symbols of many civil religions, such as environmentalism (Nelson 2009). Although civil religions often fragment into multiple competing sects of worshippers, a single, collective outcome ultimately must be chosen—standards for “clean” air and water, for example. Hence, their inclusion.

In religiously homogeneous societies, such as ancient Rome, public provision of religious ceremonies and rituals also might be warranted on public-goods grounds. The same condition might have held for religion in colonial America as well. For example, Article 3 of Massachusetts’s constitution of 1780–1833 provides:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a Community, but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore to promote their happiness and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest the Legislature [with authority to provide for mandatory church attendance and support of churches from public funds]. (qtd. in Smith 1995, 19–20)

The people of colonial Massachusetts viewed religion as a public good that was instrumental to the production of many desirable ends that were both publicly

beneficial (collective order) and privately beneficial (individual happiness). The lack of significant religious diversity in Massachusetts's Congregationalist society justified public support for religion on efficiency grounds.

The positive case for public support had evaporated by 1833, though, whereupon Massachusetts dropped the public-funding provision from its constitution. Support for religion by then failed the public-goods test because the society had become religiously diverse. The multiplication of religious sects increased the total cost of producing religious goods. Moreover, public attempts to economize on religious expenditures would have penalized some worshippers by obliging them to fund not only their own separate services, but also the public services of religions with which they disagreed. The practical lesson is that religiously pluralist societies are better off (or at least no worse off) on balance when religion is funded privately rather than collectively. The principle of subsidiarity ultimately dictates that all individuals living in pluralist societies must assume direct responsibility for the care of their own souls. Religion thus returns to the quasi-private sphere of its origin.

"Privatization" of this sort admittedly creates free-riding opportunities for individuals to consume religion's public benefits without contributing resources to their production. This situation arguably results in the production of "too little" religion. However, the trend of history indicates that the *net* benefits of such privatization are positive.

Shifting the production of religion from the public to the private sphere does not end the story, however. Even when religion is "privatized," its costs and benefits often spill over onto society at large, thereby enlarging the "public sphere" without proper warrant. Religious activity is "private" in the economic sense only so long as its costs are fully borne and its benefits fully captured—that is to say, costs and benefits are "internalized"—by the individual who undertakes the activity. Prayer, for example, is essentially private in the economic sense because it externalizes no cost and cannot be claimed a priori to externalize any benefits. Moreover, the assertion in Matthew 6:6 that God rewards individuals who pray in private suggests that religion, properly considered, begins and ends with prayer, thus locating it within the private sphere. Religion becomes public only when its costs and benefits are "externalized"—that is, when they spill over into the public sphere (Buchanan [1968] 1999).

Rational individuals welcome the externalization of religion's *benefits,* which include, among other things, wealth-creating cooperation and trust, division of labor, and exchange of economic goods. Externalized *costs*, however, are a different matter. A majority of individuals might be persuaded to accept small cost externalities (Sunday morning traffic congestion, for example) on the grounds that virtually all personal activities entail some negative public economic consequences. By comparison, religious beliefs and practices can externalize potentially extraordinary and odious costs that are too large to overlook; obvious examples include public sacrifices, the torture and killing of heretics, and the forceful overthrow of civil authority. Religiously homogeneous societies internalize these costs by definition. Religiously pluralist

societies, by contrast, tolerate externalized costs, by and large, only so long as two conditions are satisfied: (1) the public benefits outweigh the associated costs; and (2) the public costs, however reckoned, are neither extraordinary nor odious.

Public order in religiously pluralist societies is maintained in part by using the state's plenary police power to regulate religious cost externalities. This official function complements two other legitimate public activities: (1) defining and producing public goods, as characterized previously; and (2) defining and enforcing private-property rights, which form the basis of economic cooperation and exchange. I consider the relationship between property rights and religious liberty at length in the following section.

The legitimate scope of public authority in pluralist societies must be narrowly drawn. A society, unlike the individuals it comprises, is not animistic. It has neither intentions nor a will of its own, and it neither chooses nor acts of its own accord. As a consequence, all actions on behalf of society are taken by inherently self-interested individuals. A correlative proposition is that a durable (that is, an "efficient") pluralist society cannot be the product of intelligent design because individual values are subjective and incommensurable and because the knowledge required to design a pluralist society is irretrievably dispersed throughout the populace (Hayek 1988).

The translation between individual tastes and social choices necessarily (and unrealistically) requires that choices not be biased either by public decision makers' private tastes and conspicuous venality or by factional entrepreneurs' malign influences. Any failure to clear these hurdles virtually assures that an imposed design for religious pluralism will give some individuals an advantage at others' expense. However, even a properly functioning democracy cannot guarantee that majority preferences will be translated faithfully into collective choices. The economist and Nobelist Kenneth Arrow discovered that the method of majority voting commonly used

> for passing from individual to collective tastes fails to satisfy the conditions of rationality. . . . If consumers' values can be represented by a wide range of individual orderings, the doctrine of voters' sovereignty is incompatible with that of collective rationality. . . . If we exclude the possibility of interpersonal comparisons of utility, the only methods of passing from individual tastes to social preferences which will be satisfactory and which will be defined for a wide range of sets of individual orderings are either imposed or dictatorial. (1963, 3, 63, 59)

In sum, a fully principled religious liberty cannot emerge from the democratic process except by coincidence.

Western societies circumvent these inherent logical and practical limitations by insulating particular categories of individual "rights," including religious rights, from majoritarian political and judicial processes. This insulation is accomplished in the case of religion through the belt-and-suspenders approach of separation and

neutrality. This approach developed because it entails a second-best arrangement that all competing religious and secular factions rationally prefer. Every faction prefers, as first best, an arrangement that favors its own interests without regard for the other parties' interests. However, recognizing that political fortunes shift with elections, all factions accept separation and neutrality as being the least potentially disadvantageous institutional structure during politically lean years. As Adam Smith noted, "The [religious] sect which had the good fortune to be leagued with the conquering party, necessarily shared in the victory of its ally, by whose favor and protection it was soon enabled in some degree to silence and subdue all its adversaries. Those adversaries had generally leagued themselves with the enemies of the conquering party, and were therefore the enemies of that party" ([1776] 1976, 2:313). The economist Dennis Mueller similarly observes that "[t]he purpose of a constitutional right protecting the freedom to attend religious services is not to protect people from being physically prevented by other citizens from practicing their religion, but rather to protect them from future legislative majorities that might pass laws prohibiting certain religious practices" (2009, 278). The "privatization" of religion in democratic societies is intelligible by these lights alone.

Religious Liberty as Property Rights

The wording and interpretation of the religious liberty charters quoted earlier make clear that religious rights in pluralist societies are absolute in matters of *belief*, but not in matters of *behavior*. Religious liberty cannot be absolute as to behavior because religious practices externalize cost burdens that are potentially extraordinary and odious and that otherwise infringe on other individuals' legitimate rights. Buchanan accordingly notes that "[f]ew if any rights [in society] are absolute in either a positive or negative sense" (1975, 9). This rule holds equally for religious and secular rights, which are of the same form when viewed from the economic perspective. As Buchanan goes on to argue, and as Germany's Constitution implicitly recognizes, it is a mistake to draw an "overly sharp distinction between closely related sets of human actions" (1975, 9).

A society therefore must discover a principled and universally applicable method for demarcating the overall limits of individual liberty. The same method will yield, in turn, a constructively neutral theory of religious freedom. Attempting to distinguish philosophically between "legitimate" and "illegitimate" religions, by contrast, is a flawed approach whose most likely outcome is foreordained failure.

One key to discovering the legitimate limits of religious liberty lies in a proper understanding of "property rights." The label itself is misleading in one sense because the rights at issue belong to individuals, not to property. Individuals exercise rights over property for their own ends, and so the focus of inquiry properly rests on individuals. This understanding underlies the characterization of economic thinking given by the Austrian economist Ludwig von Mises: "The economic principle is a

general principle of . . . all rational action [that is] capable of becoming the subject matter of a science. . . . All rational action is economic. All economic activity is rational action. All rational action is in the first place individual action. Only the individual thinks. Only the individual reasons. Only the individual acts" ([1922] 1981, 88). Sociologists of religion Rodney Stark and Roger Finke similarly begin their consideration of religion's human side "with the assumption that people make religious choices in the same way that they make other choices, by weighing the costs against the benefits. But what are the benefits; why do people want religion at all? They want it because religion is the only plausible source [or perhaps the most efficient means] of certain rewards for which there is a general and inexhaustible demand" (2000, 85). Conceiving religious liberty in economic terms is apropos because all aspects of religion in the public sphere are consequences of rational, individual action (Oslington 2003).

Following established legal and economic traditions, it is fruitful to analyze the limits of religious liberty specifically in terms of property rights. Nevertheless, modern texts on religion, law, and economics rarely consider religious liberty in this way (see, for example, Mueller 2009, 271–315). This neglect is surprising, given that the First Amendment's author, James Madison, aptly viewed not only religious rights, but all human rights, as property rights. Madison drew from John Locke and foreshadowed John Stuart Mill when he wrote that property "embraces every thing to which a man may attach a value and have a right; *and which leaves to every one else the like advantage*. [It includes] . . . a man's land, or merchandize [*sic*], or money . . . [as well as] his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them" ([1792] 1906, 6:101, emphasis in original). Madison's view of religious liberty was grounded on Locke's earlier view that equated property with an individual's ownership of things and of self (the *"suum"*). This view conceives property rights not only as being coextensive with title and possession, but also as being inviolable, as evinced in the roughly coeval characterization of property rights given by the English jurist William Blackstone: "So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community" ([1765] 1979, 1:135). Both Madison (1791) and the French National Assembly (1789) nevertheless recognized the need to place restrictions on the exercise of religious rights in order to safeguard both the public order and the many legitimate rights of all individuals.

Implicit in this recognition is the idea that property rights ultimately rest on *utility* rather than on morality. As John Stuart Mill noted in his essay on utilitarianism, "When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by education and opinion. . . . To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask, why it ought? I can give him no other reason than general utility" ([1861] 1985, 252). Modern

understanding of human nature reveals that the sense of property rights is deeply rooted in the human psyche as well as in philosophical and economic conceptions of utility, having evolved for reasons that are connected with individual survival and reproduction (Pipes 1999, chap. 2). By any view, however, property rights rest on something more substantial than gossamer notions of morality.

The modern legal and economic view of property is that ownership entails not a single right, but rather a great many separate and separately alienable rights that are gathered together, like individual sticks, into many large bundles. This perspective is nicely summarized by the legal scholar Bruce Ackerman, whose lucid explanation warrants quotation at length:

> I think it is fair to say that one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. They learn that only the ignorant think it meaningful to talk about owning things free and clear of further obligation. Instead of defining the relationship between a person and "his" things, property law discusses the relationships that arise *between people* with respect to things. More precisely, the law of property considers the way rights to use things may be parceled out amongst a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-à-vis other potential users; indeed in the modern American system, the ways in which user rights may be legally packaged and distributed are wondrously diverse. And it is probably never true that the law assigns to any single person the right to use any thing in absolutely *any* way he pleases. Hence, it risks serious confusion to identify any single individual as *the* owner of any particular thing. At best, this locution may sometimes serve as a shorthand for identifying the holder of that bundle of rights which contains a range of entitlements more numerous or more valuable than the bundle held by any other person with respect to the thing in question. Yet, like all shorthands, talk about "the" property owner invites the fallacy of misplacing concreteness, of reification. Once one begins to think sloppily, it is all too easy to start thinking that "the" property owner, by virtue of being "the" property owner, must *necessarily* own a *particular* bundle of rights over a thing. And this is to commit the error that separates layman from lawyer. For the fact (or is it the law?) of the matter is that property is not a thing, but a set of legal relations between persons governing the use of things. . . . Whenever a judge says Jones rather than Smith is "the" property owner, he should be understood to mean: "in one or another resource conflict between Jones and Smith, the legal system places an entitlement in Jones's bundle of rights rather than [in] Smith's bundle." Simply because Jones won in the battle over resource use X, it does not follow that he will win in the battle over use A. It is perfectly possible that the court will locate the right to use

> A in Smith's bundle rather than Jones's. Both bundles are bundles of property rights, though one may be more ample than the other. The real question for the law—scientifically understood—is not to identify "the" right of "the" property owner through some mysterious intuitive process but to determine in whose bundle one or another right may best be put. (1977, 26–27)

Ackerman notes that the placement of rights occurs along two lines:

> One is "Efficiency"—which among the competing rules will maximize something-or-another-that-sounds-like-Social-Utility [in other words, "Which individual or social group can bear the burden with the smallest loss in overall utility?"]. The other theme is less well developed but is becoming clearer, if only in reaction to the growing Utopian chorus. This stream of talk I shall call Kantian simply to suggest its general concerns ["that individuals are entitled to certain rights simply because they are autonomous beings worthy of respect—rights which cannot be overridden simply by an appeal to general Utility"]. (1977, 42, embedded quotes are from 64 and 71)

The legal and political scholar Jennifer Nedelsky joins the discussion:

> If property is not a "thing," not a special entity, not a sacred right, but a bundle of legal entitlements subject, like any other, to rational manipulation and distribution in accordance with some vision of public policy, then it can serve neither a real nor a symbolic function as boundary between individual rights and governmental authority. Property must have special nature to serve as a limit to the democratic claims of legislative power. . . . The most recent cases suggest that some of the [Supreme Court's] justices are deliberately trying to emphasize the thing-like quality of property so that they can use it as a barrier, while others seem to accept that when property is seen as a bundle of rights, it is not a boundary, but a basis for calculation. (1990, 238)

The utility of property-rights theory accordingly lies in determining which of the separate rights constituting the rights bundle called "human rights" are to be regarded and treated a priori as inalienable by pluralist societies (rights of religious belief, for example) and which are not (particular rights of behavior).

The economist's view of property rights completes the picture:

> Property rights of individuals over assets consist of the rights, or the powers, to consume, obtain income from, and alienate these assets. Obtaining

> income from and alienating assets require exchange; exchange is the mutual ceding of rights. Legal rights, as a rule, enhance economic rights, but the former are neither necessary nor sufficient for the existence of the latter. The rights people have over assets (including themselves and other people) are not constant; they are a function of their own direct efforts at protection, of other people's capture attempts, and of government protection. I suggest that the structure of rights is designed to allocate ownership of individual attributes among parties in such a way that the parties who have a comparative advantage in managing those attributes that are susceptible to the common-property problem will obtain rights over them. People acquire, maintain, and relinquish rights as a matter of choice. Individuals take such actions directly in the private sector and indirectly, through the state, in the public sector. People choose to exercise rights when they believe the gains from such actions will exceed their costs. Conversely, people fail to exercise rights when the gains from owning property are deemed insufficient, thus placing (or leaving) such properties in the public domain. What is found in the public domain, therefore, is what people have *chosen* not to claim. As conditions change, however, something that has been considered not worthwhile to own may be newly perceived as worthwhile; conversely, what was at first owned may be placed in the public domain. (Barzel 1989, 2, 49, 65, emphasis in original)

The inseparable relationship between property rights and rational human activity explains why economists counsel against drawing an "overly sharp distinction between closely related sets of human actions" (Buchanan 1975, 9).

Western societies conspicuously have chosen to protect religious rights to a far greater extent than other rights bundles. The state's authority to constrain religious liberty by removing selected rights from the bundle ordinarily is limited to the state's police power for protecting life, tangible property, public order, and, to some extent, public morality. Conversely, the state is prohibited from preferring some religions over others. Moreover, the state's police power must be exercised in ways that accommodate religion on favorable and nondiscriminatory terms. For example, public order might be secured more easily by curtailing religious practices than by restraining outside efforts to disrupt a target group's religious worship. Proceeding in the most expeditious manner, however, would grant hecklers a de facto veto over a legitimate exercise of lawful rights to speech, assembly, and so forth. U.S. law consequently prefers religion over expediency, as it does with many facets of the First Amendment's guarantees.

The favorable treatment afforded religion stands in stark contrast to the present status of other rights bundles. In the United States, for example, the state has arrogated virtually total authority over property rights, routinely taking and redistributing them at will for ad hoc moral, utilitarian, and political reasons.

The legal scholar Richard Epstein describes the situation bluntly: "The state now can rise above the rights of the persons whom it represents; it is allowed to assert novel rights that it cannot derive from the persons whom it benefits. Private property once may have been conceived as a barrier to government power, but today that barrier is easily overcome, almost for the asking. . . . Under the present law the institution of private property places scant limitation upon the size and direction of the government activities that are characteristic of the modern welfare state" (1985, x). Epstein's characterization, like Nedelsky's implied concerns, does not presently apply to the bundle of rights that constitutes religious liberty. The separation of inherently religious rights from the legislative and judicial processes creates a shield of Kantian-influenced legal protection around Epicurean ideals of religious self-discovery and fulfillment. Close vigilance nevertheless remains warranted, lest entrepreneurial social pressures cause the state to begin taking and redistributing these rights as well, as many philosophers of religion and other interested factions presently wish to see done.

Leaving religious rights in the hands of private individuals creates possibilities for social gains through private bargaining and exchange. The idea of economic gains arising in this fashion underlies the idea of trade-offs. Individuals routinely trade off—that is, they rationally exchange—one state of affairs for another of greater subjective value. Trade-offs can arise through open negotiation or through tacit, voluntary agreements to refrain from exercising potentially harmful rights that have not already been sequestered by the state's police power. Spontaneous trade-offs are often rooted in social processes that inculcate a panoply of civilized norms for peaceful coexistence, norms that only sociopaths and social entrepreneurs violate. These trade-offs spontaneously balance competing religious and secular interests across the breadth of pluralist societies. Societies come to be defined by the aggregate pattern of these rational exchanges. As the historian of ideas Isaiah Berlin explains,

> We must choose, and in choosing one thing lose another, irretrievably perhaps. If we choose liberty, this may entail a sacrifice of some form of organization which might lead to greater efficiency. If we choose justice, we may be forced to sacrifice mercy. If we choose democracy, we may sacrifice a strength that comes from militarisation or from obedient hierarchies. If we choose equality, we may sacrifice some degree of individual freedom. If we choose to fight for our lives, we may sacrifice many civilized values, much that we have labored greatly to create. (1991b, 201–2)

In economic terms, "[t]he extent to which an individual, or the community of individuals, may be willing to trade off the liberty that remains present even in the Hobbesian jungle for the stability promised in regimes with varying degrees of formal restrictiveness will depend on the nastiness of the jungle, the value placed on order, the costs of enforcement, and on many other factors" (Buchanan 1975, 34). In any

event, diverse social trade-offs are possible only when property rights are well defined and enforced and privately controlled.

Philosophers and others often deny the legitimacy of trade-offs where religion is at issue. This denial may arise from Kantian and Epicurean concerns. Or it may arise out of ancient philosophical errors holding that all genuine questions of value have a single true answer and that all genuine answers are knowable, harmonious, compatible, and never in conflict (Berlin 1991a, 209). It might even arise from a sense that trade-offs are simply distasteful in the context of religion and morality; as Edmund Burke's phrased it, "The age of chivalry is gone. That of sophisters, economists, and calculators has succeeded" ([1790] 1960, 387). Nevertheless, as Steven Smith notes, theories of religious liberty turn explicitly on the mediation of rights: "The function of a theory of religious freedom is [either] to mediate [that is, to trade off] among a variety of competing religious and secular positions and interests, or to explain how government ought to deal with these competing positions and interests" (1995, 63). This mediation must occur through either voluntary exchange or compulsion. The trick for society is to get the formal balance between these alternatives approximately right. Beyond that point, theory and experiences teach that an efficient distribution of rights will tend to emerge, even in the face of contrary legal compulsions, so long as the rights themselves are clearly defined (Coase 1960; Ellickson 1991).

Conclusion

The key to building a comprehensive philosophy of religious liberty lies in appreciating religion from the perspective of rational, individual action. Religion is a purposeful economic activity whose exercise externalizes both costs and benefits. Externalized *benefits* pose no problems for social policy because all individuals rationally welcome them. The externalization of extraordinary, odious, and disproportionate *costs*, however, is a wholly different matter. The state's police power is called on to remove from the overall bundle of human rights those alienable rights whose unfettered exercise would allow individuals to spill costs into the common "public sphere."

Philosophers and others often seek to distinguish directly between "legitimate" and "illegitimate" religions. A better approach, which is widely recognized and applied in constitutional law, jurisprudence, and economics, is to identify the property rights whose exercise would burden the "public sphere" unduly and to remove them consistently from every individual's overall bundle of rights. A comprehensive conception of religious liberty structured along these lines avoids discriminating both among religions and between religious and secular activities, while simultaneously protecting both the public order and the legitimate rights of all private individuals. This approach is preferable on consistency grounds as well because, as Buchanan argues, it avoids "overly sharp distinction between closely related sets of human actions" (1975, 9). Individual actions taken in the name of religion must be evaluated

in the same manner as all other individual actions that externalize costs into the public sphere.

The economic notion of "public goods" offers the only plausible justification for enlarging public accommodation and support for religion. However, this justification holds only so long as public involvement benefits all individuals. Otherwise, economic efficiency and the principle of subsidiarity dictate that the care of souls must rest entirely with private individuals. The case for subsidiarity also wins on strictly empirical grounds: the trend of history revels that both society and religion benefit from official separation and neutrality. As Steven Smith notes, "[I]n [America] every state had rid itself of its official religious establishment within a few decades of the founding—without judicial compulsion" (1995, 125). Complementing this point are Tocqueville's observations on the robustness of religion in America, where religious pluralism arose spontaneously, vis-à-vis Europe, where the state played an active role in religion's structure and conduct.

These points attest to the value of separation and neutrality. The burden of proof accordingly rests with the individuals and factions that advocate greater public involvement in religious issues per se and, in particular, the augmentation of rights bundles held by ostensibly legitimate religious factions.

References

Ackerman, Bruce. 1977. *Private Property and the Constitution*. New Haven, Conn.: Yale University Press.

Arrow, Kenneth. 1963. *Social Choice and Individual Values*. 2d ed. New Haven, Conn.: Yale University Press.

Barzel, Yoram. 1989. *Economic Analysis of Property Rights*. New York: Cambridge University Press.

Berlin, Isaiah. 1991a. The Apotheosis of the Romantic Will. In *The Crooked Timber of Humanity*, 207–37. New York: Alfred A. Knopf.

————. 1991b. European Unity and Its Vicissitudes. In *The Crooked Timber of Humanity*, 175–206. New York: Knopf.

Blackstone, William. [1765] 1979. *Commentaries on the Laws of England*. 4 vols. Chicago: University of Chicago Press.

Bloom, Harold. 1992. *The American Religion: The Emergence of a Post-Christian Nation*. New York: Simon and Schuster.

Buchanan, James. 1975. *The Limits of Liberty: Between Anarchy and Leviathan*. Chicago: University of Chicago Press.

————. [1968] 1999. *The Demand and Supply of Public Goods*. Indianapolis, Ind.: Liberty Fund.

Burke, Edmund. [1790] 1960. Reflections on the Revolution in France. In *Edmund Burke: Selected Works*, edited by W. Bate, 343–423. New York: Modern Library.

Ceremonial Deism. 2010. *Wikipedia*. Available at: http://en.wikipedia.org/wiki/Ceremonial_deism.

Coase, Ronald. 1960. The Problem of Social Cost. *Journal of Law and Economics* 3, no. 2 (October): 1–44.

Corbin, Caroline Mala. 2010. Ceremonial Deism and the Reasonable Religious Outsider. *UCLA Law Review* 57: 1549–99.

Cowan, Tyler, ed. 1992. *Public Goods and Market Failures: A Critical Examination*. New Brunswick, N.J.: Transaction.

Danforth, John. 2006. *Faith and Politics: How the "Moral Values" Debate Divides America and How to Move Forward Together*. New York: Viking.

Ellickson, Robert. 1991. *Order Without Law: How Neighbors Settle Disputes*. Cambridge, Mass.: Harvard University Press.

Epstein, Richard. 1985. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, Mass.: Harvard University Press.

Espinosa, Gaston, ed. 2009. *Religion and the American Presidency: George Washington to George Bush*. New York: Columbia University Press.

Freeman, Charles. 2003. *The Closing of the Western Mind: The Rise of Faith and the Fall of Reason*. New York: Alfred A. Knopf.

Harris, Sam. 2004. *The End of Faith: Religion, Terror, and the Future of Reason*. New York: Norton.

Hayek, F. A. 1988. *The Fatal Conceit: The Errors of Socialism*. Chicago: University of Chicago Press.

Huntington, Samuel. 1996. *The Clash of Civilizations and the Remaking of World Order*. New York: Touchstone.

Locke. John. [1689] 1824. Four Letters on Toleration. In *The Works of John Locke in Nine Volumes*, 12th ed., vol. 5. London: Rivington. Available at: http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=764&Itemid=28.

Madison, James. [1792] 1906. Property. In *The Writings of James Madison,* edited by G. Hunt, 6:101–03. New York: Putnam.

Madison, James, Alexander Hamilton, and John Jay. [1787] 1961. *The Federalist Papers*. New York: New American Library.

Mill, John Stuart. [1861] 1985. Utilitarianism. In *The Collected Works of John Stuart Mill*, edited by J. Robson, 10:203–60. London: Routledge and Kegan Paul.

Mises, Ludwig von. [1922] 1981. *Socialism: An Economic and Sociological Analysis*. Indianapolis, Ind.: Liberty Fund.

Montanye, James. 2009. Civilization Without Romance. *Essays in the Philosophy of Humanism* 17, no. 2 (Fall–Winter): 103–28.

Montesquieu, Charles Louis de Secondat. [1748] 1977. *The Spirit of the Laws*. Berkeley and Los Angeles: University of California Press.

Mueller, Dennis. 2009. *Reason, Religion, and Democracy*. New York: Cambridge University Press.

Muñoz, Vincent. 2009. *God and the Founders: Madison, Washington, and Jefferson*. New York: Cambridge University Press.

Nedelsky, Jennifer. 1990. *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy.* Chicago: University of Chicago Press.

Nelson, Robert. 2009. *The New Holy Wars: Economic Religion vs. Environmental Religion in Contemporary America*. Oakland, Calif., and University Park: Independent Institute and Pennsylvania State University Press.

Oslington, Paul, ed. 2003. *Economics and Religion*. 2 vols. Cheltenham, U.K.: Edward Elgar.

Pipes, Richard. 1999. *Property and Freedom*. New York: Vintage Books.

Pufendorf, Samuel von. [1687] 2002. *Of the Nature and Qualification of Religion, in Reference to Civil Society.* Translated by Jodocus Crull. Edited and with an introduction by Simone Zurbuchen. Indianapolis, Ind.: Liberty Fund.

Religion. 2010. *The Free Dictionary.* Available at: http://legal-dictionary.thefreedictionary.com/Religion.

Smith, Adam. [1776] 1976. *An Inquiry into the Nature and Causes of the Wealth of Nations.* Edited by Edwin Cannan. Chicago: University of Chicago Press.

Smith, Steven D. 1995. *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom*. New York: Oxford University Press.

Stark, Rodney, and Roger Finke. 2000. *Acts of Faith: Explaining the Human Side of Religion*. Oakland: University of California Press.

Tocqueville, Alexis de. [1835/1840] 1988. *Democracy in America*. 2 vols. New York: Perennial Library.

Trigg, Roger. 2007. *Religion in Public Life: Must Faith Be Privatized?* New York: Oxford University Press.

Wiedemann, Thomas. [1981] 1988. *Greek and Roman Slavery.* London: Routledge.

SUBSCRIBE NOW AND RECEIVE A FREE BOOK!

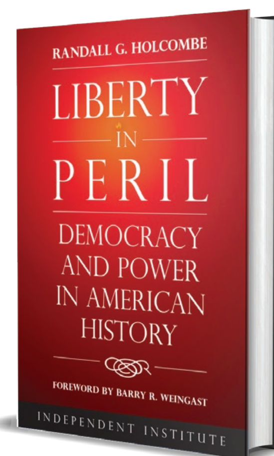
"***The Independent Review*** does not accept pronouncements of government officials nor the conventional wisdom at face value."
—**JOHN R. MACARTHUR**, Publisher, *Harper's*

"***The Independent Review*** is excellent."
—**GARY BECKER**, Nobel Laureate in Economic Sciences

Subscribe to [*The Independent Review*] and receive a free book of your choice such as ***Liberty in Peril: Democracy and Power in American History***, by Randall G. Holcombe.

Thought-provoking and educational, [*The Independent Review*] is blazing the way toward informed debate. This quarterly journal offers leading-edge insights on today's most critical issues in economics, healthcare, education, the environment, energy, defense, law, history, political science, philosophy, and sociology.

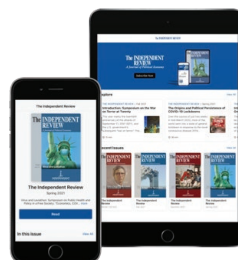
Student? Educator? Journalist? Business or civic leader? Engaged citizen? This journal is for YOU!



Order today for more *FREE* book options

SUBSCRIBE

The Independent Review is now available digitally on mobile devices and tablets via the Apple/Android App Stores and Magzter. Subscriptions and single issues start at $2.99. **Learn More.**



INDEPENDENT INSTITUTE, 100 SWAN WAY, OAKLAND, CA 94621 • 1 (800) 927-8733 • ORDERS@INDEPENDENT.ORG