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## Divisiveness, National Narratives, and the Establishment Clause

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## Divisiveness, National Narratives, and the Establishment Clause

Gilad Abiri\*

### *Abstract*

*The Supreme Court habitually justifies the Establishment Clause as a means to prevent political division, protect the civil peace, and forestall citizen alienation. In spite of this popularity among the judiciary, legal scholars have emphatically rejected the political division theory. They state that religion is not especially divisive, and that even if it was, there is no reason to think non-establishment will prevent such political harm. This rejection relies on the misconception that the validity of the political division theory requires that all forms of religion must foment civil strife. This is a mistake. Often, laws apply to a wider category than to the core of what they seek to address. If this is the case, then even if non-establishment comes to merely prevent an especially erosive type of state and religion involvement, it may still be a valid and useful theory.*

*In this Article, I argue that the political division theory is compelling when it is applied to a religion which seeks to collapse the distinction between politics and religion. To achieve this, I portray one such form of establishment of religion: American Christian Nationality, an ideology which sees the United States as having deep religious meaning and promotes Christianity as the central attribute of American identity. This Article will show that the combination between nationality and religion is uniquely divisive because it promotes a religious-based exclusionary understanding of who is a “real” American citizen. Many of the canonical Establishment Clause doctrines seem*

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*tailored to protect against government involvement in such religious movements.*

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I. Introduction

During the Value Voters Summit held in Washington, D.C., in September 2016, Donald Trump, then a contender in the Republican presidential primaries, made a statement that was met with a standing ovation. He started by declaring that under his administration, “our Christian heritage will be cherished, protected, defended like you’ve never seen before.”<sup>1</sup> He went further to declare his disdain for the Johnson Amendment, which prohibits tax exempt religious institutions from supporting or opposing political candidates, stating that it “blocked our pastors and ministers and others from speaking their minds from their own pulpits. If they want to talk about Christianity, if they want to preach, if they want to talk about politics, they are unable to do so.”<sup>2</sup> In a more recent tweet,

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1. Eugene Scott, *Trump Says He’s Fulfilled His Promises to Christians, but He Really Means White Evangelicals*, WASH. POST (Oct. 15, 2017, 10:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/10/15/trump-says-hes-fulfilled-his-promises-to-christians-but-he-really-means-white-evangelicals/>.

2. Ellen Aprill, *Trump Wants to Force You—the Taxpayer—to Pay for*

President Trump applauded the fact that “[n]umerous states introducing Bible Literacy classes, giving students the option of studying the Bible. Starting to make a turn back? Great!”<sup>3</sup> These controversial statements—unparalleled in modern presidential history—show that we are at a watershed moment with regard to the separation of church and state. This demands that, as a society, we re-engage with, and perhaps recommit to, the fundamental justifications for keeping religion out of politics, and politics out of religion.

Nearly fifty years ago, in *Lemon v. Kurtzman*, Chief Justice Warren Burger declared that the purpose of the Establishment Clause of the First Amendment is to protect against the harmful political effects of state involvement in religion.<sup>4</sup> In his words, “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.”<sup>5</sup> He is not alone; in fact, the *political division theory* for non-establishment is by far the most often cited justification for the separation of church and state in Supreme Court cases.<sup>6</sup> In stark contrast to its popularity among the justices, an overwhelming majority of legal scholars have emphatically rejected the political division theory as judicial folly.<sup>7</sup> Religion, they argue, is not an especially divisive force in American Society, and even if it was, there is no reason to think that non-establishment will resolve this divisiveness.

In this Article, I argue that the political division theory, if understood correctly, is actually a fitting justification for the Establishment Clause. Specifically, I argue that in opposing the political division theory, most scholars assume this theory entails that all forms of religion must foment civil strife and endanger peaceful politics. This is a mistake; even if non-establishment is used to merely prevent one especially erosive type of establishment, it may still make sense to separate church

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*Campaigning from the Pulpit*, WASH. POST (Feb. 3, 2017, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2017/02/03/trump-wants-to-force-taxpayers-to-pay-for-campaigning-from-the-pulpit/>.

3. Donald J. Trump (@RealDonaldTrump), TWITTER (Jan. 28, 2019, 8:21 AM), <https://twitter.com/realdonaldtrump/status/1089876055224184833>.

4. 403 U.S.602, 622 (1971).

5. *Id.*

6. *See infra* Part II.

7. *See discussion infra* Parts II.A.1, II.B.1.

and state generally. This result has crucial implications for the interpretation of the Establishment Clause and its specific doctrines.

To achieve this, I portray one such form of establishment of religion: American Christian Nationality,<sup>8</sup> an ideology which sees the United States as having a deep religious meaning and promotes Christianity as the central attribute of American identity. I will show that this combination between nationality and religion is both uniquely divisive and can be largely addressed by adherence to non-establishment doctrine. I argue, first, that the equation of American identity with Christianity (or any religion for that matter) will necessarily alienate and exclude many American citizens. Such an exclusion could create grave political harm. Subsequently, I argue that this harmful effect can be (and in fact, is) abated by a strict interpretation of the Establishment Clause. Strong methods of separation of church and state put significant hurdles in the way of the political project of Christian nationality. This danger is not hypothetical, as tales of woe, like the ascent to dominance of Hindu nationalism in India, suggest that Jefferson's wall of separation may need bolstering.

This Article offers three central contributions: first and foremost, it intervenes in the debate on the meaning and justification of the Establishment Clause and seeks to put theoretical weight in support of the intuitive strength and judicial popularity of the political division theory; second, it argues that the political division theory should influence Establishment Clause doctrine, potentially distinguishing between public facing and reclusive types of governmental involvement in religion; third, this Article offers an innovative conceptualization of the challenge that religious nationality

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8. The choice of the term "nationality" is intentional. In choosing it, I follow the contemporary lead of the important political theorist David Miller in his book *On Nationality*, and, classically, of John Stuart Mill in his *Considerations on Representative Government*. See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (Prometheus Books, 2006) (1861); DAVID MILLER, *ON NATIONALITY* (David Miller & Allen Ryan eds., 1995). The issue of using the more common term "nationalism" is that it is often interpreted as including moral condemnation, and is thought to include positions that are unpalatable from a liberal perspective. This does not fit the thrust of this Article, which does not seek to morally condemn either American Civic Nationality or Christian nationality. For this reason, I chose to try and avoid such interpretative baggage by using another term.

poses for liberal constitutionalism generally, and specifically for American First Amendment doctrine. By doing so, it offers a novel analysis of Christian nationality in the context of constitutional law.

*First*, the Article first lays out the two main variations of the political division theory: the civil peace variation and the alienation rationales variation for non-establishment and explores the common objections they face. In both of these theories, the purpose of non-establishment is the prevention of the harmful political effects of religion. These rationales are commonly based on the argument that religion as an ideology is, by its nature, especially divisive and entrenched. Therefore, conflicts surrounding it are particularly pernicious. Consequently, under these rationales, at least one of the purposes of the separation of church and state is to eliminate the ability of religious groups to compete for state power. These rationales lead constitutional courts toward either judicial neutrality or to a strict interpretation of non-establishment. Legal scholars summarily dismiss these rationales, noting that religion as a topic is not especially divisive in the United States, and asserting that race and inequality appear to provide far more significant sources of social strife. Religious groups are also not necessarily more intolerant than other ideological groups, as attested to by the many progressive religious denominations. This is commonly believed to mean that the civil peace and alienation rationales fail to explain the distinctiveness of religion in the Establishment Clause.

*Second*, the Article starts addressing these objections by developing an account of the ideology of Christian nationality. Focusing on the American case, both contemporary and historical, I define an ideology of religious (in our case Christian) nationality as one in which the ultimate provider of legitimacy for state power is not the people, but the Divine. With their insistence on Divine rather than civil authority, ideologies of religious nationality inevitably seek a unification of politics and religion. Supporters of Christian nationality view Christianity as the defining mark of the nation; they also view the authority of the state as derived from a divine source, and not from the will of the popular sovereign; finally, they see the nation-state as an important part in the divine program.

*Third*, the Article argues that Christian nationality in the

United States has the unique status of an *intimate rival*. It is *intimate* of mainstream politics since Christians are able to—due to significant overlap with American civil religion—successfully present themselves as the carriers of the authentic character of the nation-state and utilize modern political tools. And it is *rival* because Christians promote a vision of society and politics which fundamentally challenges the political identity of the state generally, and American civil nationality specifically. This means that unlike outright rivals, such as communist parties or competing national groups, Christian nationality is able to co-exist with American civil nationality while vying for political and cultural power.

*Fourth*, based on my account of the *intimate rivalry* of Christian nationality, this Article argues that although the civil peace and alienation rationales fail when applied to religion generally, they are far more persuasive when applied to Christian nationality. There are two reasons to believe Christian nationality is an especially divisive ideology. First, unlike most other religious ideologies, Christian nationality is theologically invested in the behavior of the state and its citizens. As part of this, Christian nationality promotes an exclusionary idea of who is a fully fledged American, which is very likely to create alienation and resentment if promoted by the state. Equating being an American with being a Christian is quite literally dividing the citizen body along religious lines. Second, adherents to Christian nationality exhibit higher intolerance levels than almost any other group. These are fundamentalist and revivalist religious movements, which see themselves as the only source of morality and knowledge in society. These mechanisms of intolerance, together with the fact that, as an intimate rival, Christian nationality is uniquely situated to influence and even dramatically transform the state, make the case that the fear of the divisive political effect of Christian nationality is well warranted.

The Article then turns to argue that this state of affairs supports a policy of non-establishment. This is because of two reasons: first, the main alternative to non-establishment, namely free exercise, seems ineffectual in the face of an ideology which is concerned with getting the state itself to behave in a way more consistent with their religious beliefs; second, non-establishment seems tailored to battle the risk of intimate

rivalry. If the fear is that Christian nationality is more capable of influencing the state than other religious ideologies, then that is a reason to build the wall of separation of church and state both high and tall. Subsequently, I argue that although the political division theory is convincing *only* in the case of an ideology that combines religion and nationality, it is still reasonable to apply the Establishment Clause to religion as a general category. This is because it is both impossible and undesirable for courts to make a distinction between dangerous and benign forms of religion.

*Lastly*, the Article explores some possible policy implications of the proposed interpretation of the political division theory. First, I argue that although the impossibility of accurately identifying religious nationality in the United States makes it reasonable to prohibit the establishment of any religion, non-establishment may still be applied in different intensities: tailoring the treatment to the different concerns raised by the vector of the proposed establishment. I will suggest that it makes sense to distinguish expansive establishment from generic establishment. Expansive establishment seeks to transform the political sphere, which must be suspect under the political division theory, while establishment seeks to defend religious communities and enable them to survive, and perhaps even thrive.

The Article proceeds as follows: *Part II* presents and analyzes the civil peace and alienation rationales for non-establishment. *Part III* provides background definitions, distinguishes between religious and civic nationality, and concisely outlines both American civil religion and American Christian nationality. This part concludes by developing the argument that American Christian nationality has a status of *intimate rivalry*. *Part IV* suggests that the civil peace and alienation rationales are far more plausible when applied to Christian nationality. *Part V* offers preliminary thoughts on how to advance Establishment Clause theory in accordance with the political division theory.

## II. The Rejection of the Political Division Theory

The vast majority of liberal constitutional regimes, including that of the United States, consider religion as a



distinct phenomenon warranting special treatment. In the United States, the 1993 Religious Freedom Restoration Act (“RFRA”) states that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless this burden promotes a “compelling governmental interest” in the least restrictive way possible.<sup>9</sup> Successful claims were brought under this statute, and similar ones passed by states, under the Free Exercise Clause of the First Amendment for religious exemptions in the fields of compulsory education,<sup>10</sup> rules regulating animal slaughter,<sup>11</sup> health insurance regulation,<sup>12</sup> civil rights statutes, and more. At the same time, the most dramatic example of treating religions distinctly is the separation of church and state. Under the Establishment Clause of the First Amendment, religious organizations are, in principle, excluded from receiving any government support. The pervasiveness of doctrines and statutes that expressly single out religious beliefs<sup>13</sup> suggests that these beliefs possess special attributes and functions that distinguish them from non-religious beliefs. Indeed, the anomalous and special status of religion is a central topic in constitutional theory and in case law.

The goal in this Part, and in the Article generally, is to lay out one attempt to solve the conundrum of the special status of religion under the Establishment Clause. In so doing, this Part will examine the political division theory, which holds that the reason for separating church and state is that religion based political conflict is especially divisive. This Part will examine

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9. Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb-1 (2019).

10. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the free exercise clause outweighs the government interest in education).

11. Humane Slaughter Act, 7 U.S.C. § 1902 (2018) (defining “slaughtering in accordance with the ritual requirements of the Jewish faith” and similar procedures prescribed by other faiths as “humane” notwithstanding the general rule that humane slaughter of livestock requires that the animals be stunned before “being shackled, hoisted, thrown, cast, or cut”).

12. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (claiming an exemption, under the RFRA, from the contraceptive coverage mandate issued under the Patient Protection and Affordable Care Act).

13. See ANTHONY BRADNEY, *LAW AND FAITH IN A SCEPTICAL AGE* 34 (2009) (“Special provisions with respect to religion can be justified on the grounds that they help the State to accommodate the complex variety of views of the good that exist within its borders”); REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 110–11 (2d ed. 2013).

the two main variations of the political division theory—the “Civil Peace” and “Alienation” rationales—as well as the main criticisms directed at them.

It is impossible to precisely define the threshold of validity and persuasiveness a constitutional justification must pass in order to be considered valid. Still, constitutional rationales for non-establishment need to provide good answers to two central questions. The first is what makes religion distinctive in a way that warrants special state treatment. That is, the rationale must explain why religion “deserves a level of legal protection that most other human interests and activities do not receive.”<sup>14</sup> For example, if I suggest that the distinctiveness of religion is that it has psychologically pleasing rituals, it can be pointed out that national culture or football leagues have many similar rituals. It is not necessary to find an attribute that is unique to religion; it is sufficient to identify a function or value that is served by religion in a more effective or essential manner. The second question arises if the answer to this first question is plausible. In this case, the rationale must account for why this distinctiveness calls for a specific type of non-establishment regime. In the literature, these questions are encapsulated in the two criteria of distinctiveness and cogency.<sup>15</sup>

In order for any justification to be clear, the nature of the justification must be identified. Non-establishment is an umbrella term for several distinct legal and political ideas. Gideon Sapir identifies four distinct positions associated with non-establishment: (1) strict interpretation; (2) neutrality interpretation; (3) non-coercion interpretation; and (4) non-

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14. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 198 (1991).

15. *Id.* at 198–99.

The distinctiveness requirement demands that a rationale identify something distinctive about religion that explains why religion deserves a level of legal protection that most other human interests and activities do not receive. . . . Finally, a rationale must meet the cogency requirement. It must credibly explain not only how religion is distinctive, but how it is distinctive in a way that calls for a constitutional principle forbidding governmental regulation or interference in matters of religion. *Id.*

institutionalization interpretation.<sup>16</sup>

Under strict interpretation, non-establishment requires establishing a “secular public moral order.”<sup>17</sup> This position requires a hermetically sealed separation between religion and state, with no government involvement in supporting or endorsing any type of religious symbols or institutions. The strict interpretation even forbids the government from an “acknowledgment of religion.”<sup>18</sup>

The neutrality interpretation requires the state “to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or non-practice, observance or nonobservance.”<sup>19</sup> It follows that “religion is to be left as wholly to private choice as anything can be.”<sup>20</sup>

Under the non-coercion interpretation, the “state may single out religion in general or any religious denomination as more valuable than other options. A state should not, however, take action, or enact policy or law, that has the intention or effect of coercing people to accept any specific religion or religion in general.”<sup>21</sup>

The non-institutionalization interpretation does not prohibit any government support, endorsement, or even coercion. Instead, it prohibits religion from becoming part of the government. The state may not integrate religious institutions into its administration or legal system.<sup>22</sup>

These four ideas will be utilized when examining the rationales of non-establishment.

#### A. The Civil Peace Rationale

The civil peace justification for the special treatment of religion contains two basic assertions. The first is that religion presents a serious and powerful source of social tension and conflict. The second is that dealing with this tension requires

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16. See Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 587–93 (1999).

17. *Id.* at 588.

18. *Id.* at 592.

19. *Id.* at 588.

20. *Id.* at 588–89.

21. *Id.* at 590–91.

22. See Gidon, *supra* note 16, at 592.

the non-establishment of religion.

This rationale is the most frequently articulated justification for religious freedom and non-establishment in American courts. For example, in a statement in *Walz v. Tax Commission of New York City*,<sup>23</sup> in which the Supreme Court established that tax exemptions for religious buildings do not violate the Establishment Clause, Justice Harlan wrote that, “[w]hat is at stake” in the First Amendment’s religion clauses “is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.”<sup>24</sup> This danger is not completely averted by acting according to a principle of government neutrality which allows government involvement which treats all religions equally. According to Justice Harlan, “[a]lthough the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.”<sup>25</sup> Justice Harlan also joined Justice Goldberg’s concurring opinion in *Schempp v. Abington School District*,<sup>26</sup> wherein Goldberg stated that instituting bible readings in public schools crosses into “the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude.”<sup>27</sup> Similar language is used by Justice Black in a passionate dissent in *Board of Education of Central School District No.1 v. Allen*,<sup>28</sup> in which the Supreme Court allowed school boards to let students from parochial schools borrow books at no cost, where he argues that

To authorize a State to tax its residents for such church purposes is to put the State squarely in the religious activities of certain religious groups that happen to be strong enough politically to write their own religious preferences and prejudices

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23. 397 U.S. 664 (1970).

24. *Id.* at 694 (Harlan, J., concurring).

25. *Id.* at 695.

26. 374 U.S. 203 (1963).

27. *Id.* at 307 (Goldberg, J., concurring).

28. 392 U.S. 236 (1968).

into the laws. This links state and churches together in controlling the lives and destinies of our citizenship—a citizenship composed of people of myriad religious faiths, some of them bitterly hostile to and completely intolerant of the others.<sup>29</sup>

In Black's opinion, the profusion of faiths among the citizen body and the potential antagonism among faiths makes any movement towards establishment fraught with peril. Here, he finds the grounding rationale of the Establishment Clause:

The First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny. And I still believe that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide. The Court's affirmance here bodes nothing but evil to religious peace in this country.<sup>30</sup>

Writing in the majority opinion in *Lemon v. Kurtzman*,<sup>31</sup> in which the Court found that state funding for secular education which takes place in religious schools violates the First Amendment, Chief Justice Burger developed the civil peace justification further. In the case, Burger offers the three-pronged *Lemon* test for deciding whether a government act violates the Establishment Clause: (1) does the statute have a secular purpose?; (2) does the statute serve to primarily advance or inhibit religion?; and (3) will the statute result in an

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29. *Id.* at 251 (Black, J., dissenting).

30. *Id.* at 254.

31. 403 U.S. 602 (1971).

“excessive government entanglement” with religion?<sup>32</sup> The civil peace rationale is integrated into the entanglement prong of the *Lemon* test. Whenever a state action towards a religion has “divisive political potential,”<sup>33</sup> it constitutes excessive entanglement and is thus unconstitutional. Chief Justice Burger further argues that state funding of religious schools poses a significant risk of divisiveness. According to him, this type of educational program will inevitably promote political involvement in response to religious pressures:

Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare, and voters to choose.<sup>34</sup>

Here the unique nature of religious beliefs become pertinent:

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.<sup>35</sup>

The idea of divisiveness remained a key concern of the Court’s establishment jurisprudence for at least a decade following

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32. *See id.*

33. *Id.* at 622.

34. *Id.*

35. *Id.*

*Lemon*.<sup>36</sup>

More recently, the civil peace rationale provided the basis for Justice Breyer's dissent in *Zelman v. Simmons-Harris*.<sup>37</sup> The majority opinion held that a school voucher program in Ohio did not violate the Establishment Clause. Although Breyer joined in the dissenting opinion of Justice Souter, Breyer wrote separately in order "to emphasize the risk that public voucher programs pose in terms of religiously based social conflict."<sup>38</sup> He did so because he believed "that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program."<sup>39</sup> Explaining the centrality of the civil peace rationale to the 20th century Court's Establishment Clause jurisprudence, he starts by suggesting that "[t]he Court appreciated the religious diversity of contemporary American Society."<sup>40</sup> He also expresses his understanding that the "status quo favored some religions at the expense of others," and understanding the "Establishment Clause to prohibit (among other things) any such favoritism."<sup>41</sup> The reason this prohibition entails strong separation, and not a regime of equal treatment, is due the historical lessons that "show that efforts to obtain equivalent funding for the private education of children whose parents did not hold popular religious beliefs only exacerbated religious strife . . ."<sup>42</sup> A governmental school voucher program, under conditions of intense religious diversity, would necessarily cause political conflict among different religious groups which would naturally have divergent concerns over the implementation of such a program. If so, "how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?" Since it is likely that a government cannot successfully meet such a challenge, "the Court has

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36. See Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L. J. 1667, 1692 (2005).

37. 536 U.S. 639 (2002).

38. *Id.* at 717 (Breyer, J., dissenting).

39. *Id.*

40. *Id.* at 721.

41. *Id.*

42. *Id.* at 722.

recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife.” As the scholar Michael Garnett has explained, for Breyer, the

[I]dentification, prevention, and elimination of “religious strife” are integral parts of the Court’s interpretive, expositive, and enforcement tasks. That is, the construction of a “social fabric” free of “religiously based social conflict” is more than a desirable result of obeying and enforcing our Constitution’s no-establishment command—it is the command itself.<sup>43</sup>

The scholarly arguments mustered in support of the civil peace rationale can be divided into two types. The first type of argument deals with the nature of religious belief systems. These beliefs “involve the deepest questions of self and spirit” and rely on a “suppression of doubt.”<sup>44</sup> That is, they “reject reason’s authority in principle,” which makes them “less subject to persuasion.”<sup>45</sup> Because religious beliefs are often based on sources that are unquestionably authoritative for adherents, such as revelation, the moral force of these sources is so great that they resist compromise, regardless of the consequences. The combination of the rejection of reason and the inability to compromise “threatens to disrupt political processes when it is not only uncompromising but undiscussable and, from a secular standpoint, radically arbitrary.”<sup>46</sup> It follows that religious conflicts are harder to resolve because the sides have a harder time discussing, negotiating, and reaching a *modus vivendi*.

The second type of argument deals with the nature of a religious community as an all-encompassing cultural group. Such a cultural group

[C]overs various important aspects of life: it defines people’s activities . . . determines

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43. Garnett, *supra* note 36, at 1674.

44. Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 360 (1996).

45. Christopher L. Eisgruber, *Madison’s Wager: Religious Liberty in the Constitutional Order*, 89 Nw. U. L. Rev. 347, 372 (1995).

46. *Id.* at 373.



occupations . . . and defines important relationships . . . . It affects everything people do: cooking, architectural style, common language, literary and artistic traditions, music, customs, dress, festivals, and ceremonies. . . . The culture influences its members' taste, the types of options they have and the meaning of these options, and the characteristics they consider significant in their evaluation of themselves and others.<sup>47</sup>

The nature of religious belief operates as the unifying logic of the religious community as an encompassing cultural group. It creates a common language and provides common assumptions that both unite the religious community and isolate it from the rest of the polity. This means that the divisive potential of religion is relatively high.

How do these two types of arguments support the separation of religion from state? In applying the civil peace rationale to the context of non-establishment, Kent Greenwalt argues that “[i]nvariably, some tensions will exist between adherents of different religions who believe each other to be fundamentally misguided about ultimate truth. But the tensions are bound to increase if those adherents see themselves in a struggle for state support—financial and other—and for the levers of political power.”<sup>48</sup> Thus, the elimination through neutrality or a strict version of non-establishment limiting the ability of religious groups to compete over state power is the goal of the separation of church and state. This logic is complemented by the idea that granting a wide array of religious freedoms and exemptions generally minimizes the area of friction between the state and religion. Non-establishment eliminates one of the most crucial issues religious groups can fight about with each other and with the state, and religious freedom eliminates many of the causes of religious friction with the state. Thus, concern over the divisive and potentially threatening nature of conflicts between religious groups and the state justify a prudentially established combination of religious freedoms and non-establishment.

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47. Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 SOC. RES. 491, 498 (1994).

48. 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 11 (2009).

## 1. Debunking the Civil Peace Rationale

The first criticism of the civil peace rationale for non-establishment is that there is no reason to believe that religion, as a general category, is especially divisive. That is, the civil peace rationale does not meet the distinctiveness requirement, as it is unclear why divisions or conflicts based on religion are “worse than divisions along the lines of race, gender, age, ethnicity, or economic class.”<sup>49</sup>

In order to distinguish between religion as a general category and these other sources of social conflict, it must be established that religion is an especially significant cause of conflict. This seems to be historically implausible, at least in the case of the United States. As Michael Smith argues, “[o]ur most divisive social issues since the constitutional revolution of 1937 have included the completion of industrial unionization in the late 1930s; McCarthyism in the early 1950s; the campaign for racial equality from the middle 1950s onward; prolongation of the Vietnam War; and perhaps the Watergate scandal.”<sup>50</sup> Indeed, even putting aside this strong historical counterfactual evidence, there remains the strong conceptual problem that the characterization of religious belief upon which the civil peace rationale apparently relies is not necessarily accurate and may not even represent a reasonable supposition. Many religions accept that fallibility and self-deception are mainstays of human existence. Some reject revelation and see religious value in human reason and lived experience. For this reason, many liberal religious denominations do not seem more or less intolerant than their secular counterparts.<sup>51</sup> Consequently, it is difficult to support the distinctiveness of the civil peace challenge of religion as a general category.

Even if we do accept that religion causes civil strife in a way that warrants special status, it does not follow that the appropriate treatment must be strong forms of non-establishment. Indeed, Ahdar and Leigh support this argument,

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49. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1838 (2009).

50. Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 97 (1983).

51. Sapir, *supra* note 16, at 595–96.

claiming that a society in which “a few, more-or-less equal-sized religions dominate the landscape is a situation tailor-made for a policy of religious tolerance.”<sup>52</sup> However,

[A] nation where one religion is dominant (with, say, 90 percent adherence) may not need to placate the minority religions by adopting a policy of toleration. If the minority faiths are disruptive, militant ones, toleration may still be prudent; but if the minority religions are quiet, pacifist and powerless, suppression may pose few, if any, problems.<sup>53</sup>

Similarly, Michael Sandel points out that “under present conditions, such calculations [about how to avoid civil strife] may or may not support the separation of church and state . . . . A strict separation of church and state may at times provoke more strife that it prevents.”<sup>54</sup> That is, there are circumstances in which civil peace may not warrant even a weaker, non-coercive, interpretation of non-establishment.

These powerful critiques reflect why the vast majority of the scholars criticize the Court’s use of the divisiveness/civil peace test. When it is applied to religion as a general category, it fails to persuade that religion is especially divisive in light of historical evidence to the contrary, thus failing to meet the distinctiveness criteria. Even if this failure is overcome and religion is considered divisive, non-establishment may not necessarily alleviate the problem, thereby not meeting the cogency criteria. Non-establishment may, in fact, make the problem much worse.

Closely related to the civil peace rationale is the nonalienation rationale.

## B. The Nonalienation Rationale

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52. AHDAR & LEIGH, *supra* note 13, at 71.

53. *Id.*

54. MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 64 (1998).

Even if the premise that religion as a general category is so socially disruptive that it may seriously threaten the political order, the possibility that the establishment of religion may cause milder political harm must still be considered. One such harm that has received increased attention in recent decades is the danger of establishment creating increased political alienation among non-adherents. In the United States, this rationale is usually associated with Justice O'Connor's development of what is called the endorsement test. In her concurrence in *County of Allegheny v. ACLU*,<sup>55</sup> Justice O'Connor argues that an endorsement of religion

[S]ends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval of religion conveys the opposite message. . . . We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to non-adherents that they are outsiders or less than full members of the political community. An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization . . . but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our

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55. 492 U.S. 573 (1989).

pluralistic political community.<sup>56</sup>

In this case, the Court appears to be concerned that any establishment or endorsement of a religion by the state will harm religious minorities and secular citizens, whose “faith will not be the one that the government observes and whose symbols will not be displayed.”<sup>57</sup> That is, endorsement is a symbol that the state deems some religious group more “worthy” than others, which could lead to some citizens seeing “themselves as demeaned and excluded by state institutions . . . .” As a result, “they might physically withdraw from such institutions, come to feel alienated from such institutions.”<sup>58</sup> The nonalienation rationale, then, supports strict non-establishment.

In order to find that the nonalienation rationale provides plausible support for non-establishment, the distinctiveness criteria must be met. The idea here is that religious identity and affiliation are a “core part of one’s sense of self. Other mutable attributes, such as political affiliation, are generally viewed as more tangential and ephemeral.”<sup>59</sup> The centrality of religion means that the stakes of being “within or without” religious membership, “can be very high: being fulfilled and redeemed or eternally damned; being welcomed as a member of the community or shunned.”<sup>60</sup> These stakes lie at the core of the concern with the government favoring religious beliefs “at the cost of disparaging others, and further, that the . . . government will valorize some citizens at the cost of disparaging others.”<sup>61</sup> If the idea that endorsement of religion as a general category leads to especially high levels of alienation is accepted, it can be cogently concluded that strict non-establishment will solve this problem.

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56. *Id.* at 625–28 (O’Connor, J., concurring in part).

57. 1 DOUGLAS LAYCOCK, *RELIGIOUS LIBERTY: OVERVIEWS & HISTORY* 39 (2010).

58. Daniel Brudney, *On Noncoercive Establishment*, 33 *POL. THEORY* 812, 819 (2005).

59. Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 *OHIO ST. L. J.* 89, 147 (1990).

60. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 61–62 (2007).

61. *Id.* at 62.

## 1. Debunking the Nonalienation Rationale

The fundamental critique of the civil peace rationale as it applies to religion as a general category is similar to that applied to the nonalienation rationale. This leads to the question of whether endorsement of religion rises to the level of uniqueness in creating alienation among citizens, which seems difficult to establish affirmatively. To plausibly meet the uniqueness criteria, we must accept that religion is generally more central for peoples' relationship to the state than are their national identity or values. Consequently, the state's endorsement of a religion would alienate more citizens or alienate them in a more radical way than would the state's endorsement or promotion of views that conflict with that religion's morality or group identity. While this premise may apply to a minority of citizens holding strong or fundamentalist religious views, it does not necessarily apply to a majority of religious adherents.

Even if the distinctiveness of religion in relation to the nonalienation rationale is accepted, the question remains as to whether non-establishment would lead to less alienation generally. The evidence indicates otherwise. Many non-establishment cases are so controversial that it makes it hard to argue that they necessarily, or possibly, reduce citizen alienation.

Although nonalienation is related to the civil peace rationale, it appears to lack the self-evident sense of importance found in the civil peace rationale. It seems clear that maintaining political stability and preventing serious political strife is a meaningful goal. It is not so clear that preventing citizens from being alienated by political decisions rises to this level. Indeed, it seems that in "a pluralistic culture, alienation is inevitable."<sup>62</sup> Therefore, it appears that some beliefs and values can be included in a nation's laws and policy, notwithstanding any religious content. The fact that those who do not like these beliefs and values may well feel somewhat like outsiders<sup>63</sup> is not sufficient to justify applying non-establishment measures.

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62. Koppelman, *supra* note 49, at 1840.

63. See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

To conclude, we find that the civil peace and alienation rationales fail in both the distinctiveness and cogency requirements when applied to religion as a general category. The reason for this is perhaps the sheer scope of phenomena covered by the general category of religion. The question then arises as to what would happen if these rationales were applied to a distinct, but related, subcategory such as religious nationality.

### III. American Religious Nationality

#### A. Civic and Religious Nationality

The modern nation-state is expansive, its reach encompassing every aspect of social, economic, and political life.<sup>64</sup> The stability and effectiveness of a state in its national form is contingent on its capacity to maintain sovereignty over a geographic territory.<sup>65</sup> This implies the supremacy of the state over other normative structures and power centers. Indeed, a state can be defined by its ability to constrain other potential wielders of authority and power. For the state to be able to constantly maintain this monopoly, it must be considered legitimate by the citizen body. That is, the state is reliant on the set of beliefs, myths, and ideas that enable its citizens to recognize that state power is a force to which they should adhere.<sup>66</sup> In nation-states, whether liberal or not, the ideologies

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64. *See generally* GRAEME GILL, *THE NATURE AND DEVELOPMENT OF THE MODERN STATE* (2016) (reviewing the literature dealing with the attributes of the modern nation state).

65. *Id.* at 5.

The modern state is sovereign, or the ultimate source of authority within the territory under its jurisdiction . . . . Internally, it means that there are no authorities higher than the state. The citizen cannot appeal against the state to any other authority; the state is supreme, and its will cannot be countermanded . . . . Externally, state sovereignty means that other states recognize the authority of a state within its borders and accept that that state can speak for its citizens in international affairs. *Id.* at 8–9.

66. This idea of legitimacy is broadly based on the idea of constitutional legitimacy found in CARL SCHMITT, *CONSTITUTIONAL THEORY* 8 (Jeffrey Seitzer

explaining and justifying state power can be termed nationality.

Nationality, understood as a comprehensive category including both civic and religious nationality, is an ideology of order which joins “state, territory[,] and culture.”<sup>67</sup> According to Anthony Giddens, nationality is the “cultural sensibility of sovereignty.”<sup>68</sup> This implies, in part, that the ideology of nationality includes an “awareness of being subject to authority invested with the power of life and death.”<sup>69</sup> It is such an ideology which enables the state to hold the monopoly over the “legitimate use of physical force”<sup>70</sup> within a given territory. A state is a political body which is sovereign over a territory, which differs analytically from the concept of a nation. A nation is a type of community which can either support the sovereignty of an existing state or promote a political program of the nation achieving sovereignty over a territory.<sup>71</sup> The development of a sense of national unity is a key part of any project of nation-building. Historically, the emergence of such “imagined national communities”<sup>72</sup> across the world marked the “shift from dynastic realm to national state.”<sup>73</sup> When and where national identity and ideology are successfully integrated into the political realm, they become unquestionable assumptions for a large majority of citizens.

These definitions do not address the content of the narratives through which the connections among nation,

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ed., trans., 2d ed. 2008) (1928) (stating “legitimacy is obtained only through the representation of the unified will or the historical existence of the people”).

67. Roger Friedland, *Money, Sex, and God: The Erotic Logic of Religious Nationalism*, 20 *SOC. THEORY* 381, 387 (2002).

68. 2 ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* 219 (1985).

69. MARK JUERGENSMEYER, *THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE* 32 (1993).

70. Max Weber, *Politics as a Vocation*, in *WEBER’S RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION* 9 (Tony Waters & Dagmar Waters eds., trans., 2015) (1946).

71. Many minority nationalist groups operate within a social and political context of a separate majority nationality. That is, they have a national project which is distinct from the one promoted by the state within which they operate. See generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995) (discussing the accommodation of such minority national groups in liberal states).

72. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALITY* (Verso ed. 2006) (applying, first, the concept of imagined communities to national groups).

73. GILL, *supra* note 64, at 102.



territory, and culture are established and justified. It is this open-ended nature of nationality which requires an additional ideological element. What is it that connects a particular group to a territory? What is the authority which justifies and legitimates a nation-state? Both the civic and religious varieties of nationality differ in their answers to these questions. I share the theoretical position that nationality and religion<sup>74</sup> are cut

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74. That defining religion is hard is a fact both true and banal. However, it is still important to offer a plausible working definition. Minimally then, we can define religion as the human response to a reality perceived as sacred. It grounds human experience in a reality which is beyond this world. Maintaining this type of enterprise requires massive cultural support. It is thus common to see religions embrace: (1) myths of the sacred origins of the world, humanity, and the specific religion; (2) rituals and modes of worship that relate the practitioners to the myths and the sacred; and (3) codes of conduct which govern the behavior of those who belong to the religion. See SCOTT R. APPLEBY, *THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION* 8–9 (1999). This type of description is suggestive of the profound ways in which religion regulates, inspires, and influences human society. One more important aspect is its ability to create order at the face of anomic and chaotic human experience. Clifford Geertz, for example, sees religion as attempting to give an ordered coherence to the utter chaos of everyday reality; in fact, it is part of his definition of religion, which for him is: “(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.” Clifford Geertz, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 90 (1993). The cosmic disorder can make sense when contrasted with Divine order. In the words of Peter Berger, “the sacred cosmos, which transcends and includes man in its ordering of reality, thus provides man its ultimate shield against the terror of anomy.” PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 19 (2011). One can divide the scholarship on the subject of the sacred into two wide tribes: phenomenologists on the one hand and culturalists on the other. The first kind examines the sacred as a basic structure of the human experience of the world. The latter understands the sacred as an identifiable quality of social life. The sacred is socially/culturally constructed within a specific historical context. See generally GORDON LYNCH, *THE SACRED IN THE MODERN WORLD: A CULTURAL SOCIOLOGICAL APPROACH* (2012) (exploring the distinction between phenomenologists and culturalists). William James, Rudolf Otto, and Mircea Eliade are good representations of phenomenologists. Otto defines the sacred as the experience of *mysterium tremendum et fascinans* (“overwhelming and fascinating mystery”); for him the holy constitutes a category of interpretation and valuation peculiar to the sphere of religion. See generally RUDOLF OTTO, *THE IDEA OF THE HOLY* (1958). For Eliade, sacred time, space, and things represent a more intense “reality” around which the rest of the human world is structured. See generally MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (1959). On the side of the culturalists we can find Max Weber, Emile Durkheim, and Peter Berger. Durkheim divides human life

from a similar cloth<sup>75</sup> and will follow Mark Juergensmeyer's view that both religion and nationality are ideologies of order. By this I mean that they are both frameworks that conceive

[Of the] world in coherent, manageable ways; they both suggest that there are levels of meaning beneath the day-to-day world that give coherence to things unseen; and they both provide the authority that gives the social and political order its reason for being. In doing so they define for the individual the right way of being in the world and relate persons to the social whole.<sup>76</sup>

This view rejects the conception of the state as merely a form of social contract or purely democratic institution, and replaces it with the idea of a community grounded on a system of faith. A prominent adherent to this view, Anthony Smith, asserts that nationality is a system of faith as "binding, ritually

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into two symbolic realms: sacred and profane. The latter is the realm of routine experience that we can know through our senses. We experience this natural world of everyday life as comprehensible, knowable and taken-for-granted. The sacred, in contrast, is separated from everyday experience; it is an object of worship, inspiring feelings of awe among its believers. Durkheim believes that the sacred is a socially constructed symbolic representation of society itself. *See generally* EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (2008). Berger represents the most sophisticated version of sacred culturalism. He elaborates the idea, stating that religion is the human enterprise by which a sacred social world is established. PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1967). Since the sacred exists beyond the everyday, but is still experienced through rituals and symbols, it is experienced as both being independent of humanity and yet being accessible. The sacred social world is constructed on the concreteness of sacred social institutions. My approach to the sacred is culturalist and is roughly based on Berger's idea.

75. For different variations on this idea, see EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 419 (2008) ("If religion has given birth to all that is essential in society, it is because the idea of society is the soul of religion"). *See generally* CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. Chi. Press ed. 1985) (1888) ("All significant concepts of the modern theory of the state are secularized theological concepts"); Rogers Brubaker, *Religion and Nationality: Four Approaches*, 18 *NATIONS & NATIONALISM* 2 (2012) (discussing the different ways of understanding the relationship of religion and nationality).

76. JUERGENSMEYER, *supra* note 69, at 31.

repetitive, and collectively enthusing” as any other.<sup>77</sup> It also involves a “system of beliefs and practices that distinguishes the sacred from the profane and unites its adherents in a single moral community of the faithful.”<sup>78</sup> As Juergensmeyer explains, both religion and nationality “are expressions of faith, both involve an identity with a loyalty to a large community, and both insist on the ultimate moral legitimacy of the authority invested in the leadership of the community.”<sup>79</sup> It does not follow that religious nationality, as it is defined herein, is identical to civic nationality. Rather, the differences between religious and civic nationality are comparable to the differences between different members of the same species, as opposed to the differences between completely alien entities.

In the United States today, civic nationality and religious nationality are the two main narrative variants through which territory, state, and culture are connected. Civic nationality justifies government acts and policies on the basis of the interests, values, and civic political institutions of “the people.” The American people are called to sacrifice in Afghanistan and Iraq purportedly in order to promote their democratic values and protect the United States from terrorism. The people are also seen as constituting the intrinsic, fundamental authority for the United States Constitution.<sup>80</sup> In the United States, it is commonly understood that the binding agent of “the people” are civic institutions. Civic, or liberal, nationality “locates the nation as a group of citizens, each of whom bear, and have a history of exercising, the same legal rights vis-à-vis the state.”<sup>81</sup>

According to religious nationality, the ultimate provider of meaning is not the people but the Divine. The popular sovereign is meaningful only inasmuch as it has a crucial role in the Divine plan. For Christian nationality, the story of the American people is not merely one of national liberation from oppressors and

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77. ANTHONY D. SMITH, *CHOSEN PEOPLES: SACRED SOURCES OF NATIONAL IDENTITY* 4–5 (2003).

78. *Id.* at 4–5, 15.

79. JUERGENSMEYER, *supra* note 69, at 16.

80. *See generally* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (showing how the American people have repeatedly confronted the Constitution in the name of the popular sovereign); PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997) (analyzing the idea that the rule of law is rule of the people).

81. Friedland, *supra* note 67, at 387.

subsequent self-definition but is another step in the fulfillment of the Divine plan on earth. Consequently, religious nationality holds that religion is the distinguishing and defining characteristic of the nation and the State.<sup>82</sup> They believe that the fundamental authority of state power is “derived from divine sources, not from the historical decisions of a particular people.”<sup>83</sup> Finally, according to adherents on religious nationality, the state has a crucial role in the Divine plan or process. For them, national politics are a Divine command.<sup>84</sup>

Not all forms of political religion constitute religious nationality. Religious nationality includes only those religious movements that view the state not solely as a political instrument but rather as a crucial part of their religion. In the words of Roger Friedland:

Religious nationalisms are a particular form of politicized religion, that is religious movements that engage in political projects that make the state not only a medium, but an object, of collective action. The specificity of their project is located in their desire to transform the nature of the nation-state itself. They all seek to make religion the nation-state’s institutional ground.<sup>85</sup>

Historically, American civic nationality incorporates and supports the two major concepts of liberal secularism and civil religion with regard to the relationship of politics and religion. Philip Gorski presents this conceptual triangle: “religious nationalists wish the boundaries of the religious and political communities to be as coterminous as possible; liberal secularists seek to keep the religious and political communities as separate

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82. Roger Friedland & Kenneth B. Moss, *Thinking Through Religious Nationalism*, in WORDS: RELIGIOUS LANGUAGE MATTERS 423, 449 (Ernst Van Den Hemel & Asja Szafraniec eds., 2016) (stating “[a]t its most basic, religion constitutes the ‘we’ of the nation-state”).

83. *Id.* at 450.

84. *Id.* at 449 (stating “the nation itself can have religious meaning if its constitution, survival, and actions are understood to have redemptive or soteriological significance”).

85. Roger Friedland, *The Institutional Logic of Religious Nationalism: Sex, Violence and the Ends of History*, 12 POL., RELIGION & IDEOLOGY 1, 2 (2011).

as possible; and civil religionists imagine the two spheres as independent but interconnected.”<sup>86</sup> Let us now turn to an examination of American civil religion, which will lay the groundwork for understanding Christian nationality.

## B. American Civil Religion

It is true that not all politicized religion constitutes religious nationality. However, at least in the American case, the acceptability and centrality of politicized religion within civic nationality has made the political ascendance of Christian nationality possible. This section will focus on how the prevailing civil religion in the United States prepared the ground for the emergence of Christian nationality. What emerges from this examination is the understanding that the political and cultural centrality of the civil religion’s stance that politics and religion are interrelated serves to legitimize and enable the belief that politics and religion are one and the same.

As Robert Bellah described, there “exists alongside of and rather clearly differentiated from the churches an elaborate and well-institutionalized civil religion in America.”<sup>87</sup> This civil religion has its own set of beliefs, which is maintained and developed by various rituals and folk practices. The civil religion also employs narratives which are drawn from Christianity, but which operate independently from these origins. According to Bellah, behind the American civil religion lie, “biblical archetypes: Exodus, Chosen People, Promised Land, New Jerusalem, and Sacrificial Death and Rebirth.”<sup>88</sup> However, civil religion uses these symbolic structures to produce “its own prophets and its own martyrs, its own sacred events and sacred places, its own solemn rituals and symbols.”<sup>89</sup> The central tenet of American civil religion is that God has a unique plan and place for the United States.

The religious and biblical interpretation of American history can be traced back to the start of the first European

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86. PHILIP GORSKI, AMERICAN COVENANT: A HISTORY OF CIVIL RELIGION FROM THE PURITANS TO THE PRESENT 7 (2017).

87. Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS: J. AM. ACAD. ARTS & SCI. 1, 1 (1988).

88. *Id.* at 21.

89. *Id.*

colonies in North America. The early settlers saw their journey as a mission to establish a perfect Christian polity. They believed that, like the ancient Israelites, they were called by God to be a light onto the nations.<sup>90</sup> In a sermon composed while sailing towards New England, John Winthrop, one of the founders of the Massachusetts Bay Colony, declared that upon arrival, “[w]e shall find that the God of Israel is among us,” and, as a result

[W]e must consider that we shall be as a city upon a hill. The eyes of all people are upon us. So that if we shall deal falsely with our God in this work we have undertaken, and so cause Him to withdraw His present help from us, we shall be made a story and a by-word through the world.”<sup>91</sup>

In a sermon before a Hartford Congregation in the 17th century, Reverend Samuel Wakeman proclaimed that, “Jerusalem was, New England is. They were, you are . . . God’s covenant people.”<sup>92</sup> The Israelites were, for the New Englanders, a model to both emulate and transcend. The colonists viewed the newly colonized continent as uniquely appropriate for establishing New Jerusalem and bringing about redemption. The theologian Jonathan Edwards declared that the new continent was discovered so “that the new and most glorious state of God’s church on earth might commence there; that God might in it begin a new world in a spiritual respect, when he creates the new heavens and new earth.”<sup>93</sup> For Edwards, Christ’s reign was bound to “begin in America” because when God returns, he is likely to wish to start anew: “[w]hen God is about to turn the earth into a paradise, he does not begin his work where there is some growth already, but in

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90. CONRAD CHERRY, *GOD’S NEW ISRAEL: RELIGIOUS INTERPRETATIONS OF AMERICAN DESTINY* 27 (1998) (“They believed that, like Israel of old, they had been singled out by God to be an example for the nations (especially for England).”).

91. John Winthrop, *A Model of Christian Charity*, WINTHROP SOCIETY, [https://www.winthropsociety.com/doc\\_charity.php](https://www.winthropsociety.com/doc_charity.php) (last visited Nov. 9, 2019).

92. SACVAN BERCOVITCH, *THE PURITAN ORIGINS OF THE AMERICAN SELF* 61 (1975).

93. CHERRY, *supra* note 90, at 55–56.

the wilderness.”<sup>94</sup> Edwards saw the old world as the place of Christ’s crucifixion, and thus “shall not have the honour of communicating religion in its most glorious state to us, but we to them.” Furthermore, the fact that “America was discovered about the time of the Reformation” was no coincidence for Edwards, but rather a sign that the redemption would start in the New World.<sup>95</sup> By citing from the book of Isaiah, Edwards concluded that “the progression of God’s Kingdom had always been from east to west: first from Israel to Rome, and now from Rome to America.”<sup>96</sup>

The American War of Independence, the establishment of the United States, and the creation of the Constitution became the founding events of the civil religion of the United States. In a sermon entitled “A Sermon on the Commencement of the Constitution,” given in 1789, the clergyman Samuel Cooper details the “striking resemblance” between the circumstances of the new and unique state and “those of the ancient Israelites.”<sup>97</sup> Like the Israelites, “we rose from oppression”; like them, “we were led into a wilderness, as a refuge from tyranny”; like them, “we have been pursued through the sea”; like them, “we have been ungrateful to the Supreme Ruler of the world” and have been accordingly punished.<sup>98</sup> However, this “day, this memorable day, is a witness, that the Lord, he whose hand maketh great, and giveth strength unto all, hath not forsaken us, nor our God forgotten us.”<sup>99</sup> In a similar vein, the 18th century clergyman and former president of Harvard University Samuel Langdon stated that this “excellent constitution of government” was given by “God in the course of his kind providence.”<sup>100</sup> The colonists’ perception of themselves as New Israel became sharper during and after the revolution. King

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94. *Id.* at 55–56.

95. *Id.*

96. *Id.*

97. A Sermon on the Commencement of the Constitution, TEACHING AMERICAN HISTORY, <https://teachingamericanhistory.org/library/document/a-sermon-on-the-commencement-of-the-constitution/> (last visited Dec 29, 2019).

98. *Id.*

99. ELLIS SANDOZ, POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1730–1805: IN TWO VOLUMES 631 (2012).

100. Samuel Langdon, Political Sermon at Exeter, New Hampshire: The Republic of the Israelites: An Example To The American States (June 5, 1788), <https://www.consource.org/document/the-republic-of-the-israelites-an-example-to-the-american-states-by-samuel-langdon-1788-6-5/>.

George III was cast in the role of Pharaoh, the Atlantic Ocean as the Red Sea, George Washington as Moses, and John Adams as Joshua. In fact, Langdon went so far as to suggest that “instead of the twelve tribes of Israel, we may substitute the thirteen states of the American union.”<sup>101</sup> For Ezra Stiles, the former president of Yale College, the establishment of the United States was a crucial event in the progression of Christianity. In a sermon before the Connecticut Assembly, Stiles maintained that all attempts of converting the world to Christianity “shall prove fruitless, until the present Christendom itself be recovered to primitive purity and simplicity.”<sup>102</sup> It is God’s design that

[C]hristianity is to be found in such great purity, in this church exiled into the wilderness of America; and that its purest body should be evidently advancing forward, by an augmented natural increase and spiritual edification, into a singular superiority—with the ultimate subserviency to the glory of God, in converting the world.<sup>103</sup>

The belief in the new nation’s Divine narrative was not limited to men of the cloth. When Congress directed John Adams, Benjamin Franklin, and Thomas Jefferson to design a seal for the new state, Franklin suggested the image of “Moses lifting his hand and the Red Sea dividing, with Pharaoh in his chariot being overwhelmed by the waters,”<sup>104</sup> and with a motto in great popular favor at the time, “[r]ebellion to tyrants is obedience to God.”<sup>105</sup> Jefferson proposed “a representation of the children of Israel in the wilderness, led by a cloud by day and pillar of fire by night.”<sup>106</sup> In fact, Jefferson concluded his second inaugural address with the words, “I shall need . . . the favor of

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101. *Id.*

102. Ezra Stiles, Political Sermon at the General Assembly of the State of Connecticut: The United States Elevated to Glory and Honor 57 (1783), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1041&context=etas>.

103. *Id.*

104. CHERRY, *supra* note 90, at 65.

105. *Id.*

106. *Id.*



that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life.”<sup>107</sup> For Americans at that time, the American Revolution was the era in which God had delivered the colonies from Britain (Pharaoh),<sup>108</sup> revealed the role of the nation in the Divine plan, and established the fledgling republic as an example of freedom and republican government for the rest of the world to see.

In subsequent decades, the expansion westward and the sheer magnitude and wealth of the newly settled land reinforced the idea that Americans had been chosen by God.<sup>109</sup> It is during these early years of growth that the term Manifest Destiny became popular. As Albert Weinberg describes it, Manifest Destiny “expressed a dogma of supreme self-assurance and ambition—that America’s incorporation of all adjacent lands was the virtually inevitable fulfillment of a moral mission delegated to the nation by Providence itself.”<sup>110</sup> This was justified and grounded in the idea that “nature or the natural order of things destined natural boundaries for nations in general and the United States, the nation of special destiny, in particular.”<sup>111</sup> Now, during this period of abundance, in contrast to earlier manifestations, the reason for the Divine election of the United States becomes clear: its geographic bounty, its

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107. *Id.* at 65.

108. *Id.* at 69–70.

Thus we are acting over the like sins with the children of Israel in the wilderness, under the conduct of Moses and Aaron, who was leading them out of a state of bondage into a land of liberty and plenty in Canaan. Again, we are ready to marvel at the unreasonable vileness and cruelty of the British tyrant and his ministry, in endeavouring to oppress, enslave and destroy these American States, who have been some of his most peaceable and profitable subjects. And yet we find the same wicked temper and disposition operating in Pharaoh king of Egypt above 3000 years ago. *Id.*

109. *Id.* at 113 (“The magnitude and rich natural resources of the western American wilderness strengthened the conviction that Americans were the chosen people. Surely this was a land intended for the new children of Israel.”).

110. *Id.* at 116.

111. ALBERT KATZ WEINBERG, *MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY* 1–2, 43 (1935).

superior government, and its moral goodness.<sup>112</sup>

The second foundational moment of American civil religion is clearly the American Civil War. Both the Union and the Confederacy identified their causes with American Divine destiny. In the North, for example, the clergyman Henry Ward Beecher described the war as a fight against Satan: “I thank [the Confederacy] that they took another flag to do the Devil’s work and left our flag to do the work of God.”<sup>113</sup> At the same time, in the South, many religious leaders argued that slavery was ordained by God, and “the abolition spirit is undeniably atheistic,” thus, “we defend the cause of God and religion.”<sup>114</sup> While many interpreted the war as a fight between good and evil, some, such as Abraham Lincoln, saw it as a sign of Divine punishment for the entire nation. As Lincoln wrote in a personal note late in 1862, “[i]n the present civil war it is quite possible that God’s purpose is something different from the purpose of either party—and yet the human instrumentalities, working just as they do, are of the best adaptation to effect His purpose.”<sup>115</sup>

Similar ideas suffuse American political discourse to this day. As the historian Conrad Cherry observed

Beheld from the angle of governing mythology, the history of the American civil religion is a history of the conviction that the American people are God’s New Israel, his newly chosen people. The belief that America has been elected by God for a special destiny in the world has been the focus of American sacred ceremonies, the inaugural addresses of our presidents, the sacred scriptures of the civil religion. It has been so pervasive a motif in the national life that the word “belief” does not really capture the dynamic role that it has played for the American people, for it passed

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112. CHERRY, *supra* note 90, at 117 (“According to the exponents of Manifest Destiny, God’s New Israel was elected for clear or manifest reasons—because of its superior form of government, its geographical location, and its beneficence.”)

113. *Id.* at 164.

114. *Id.* at 165.

115. *Id.* at 166.

into “the realm of motivational myths.”<sup>116</sup>

The conviction that America has a divine destiny, and the strong analogy with the ancient Israelites, does not mean that American civil religion constitutes Christian nationality. Adopting Gorski’s approach presented above, religious nationalist views call for a unification of politics and religion, while civil religion considers politics and religions to be simply somewhat connected spheres. It is possible to believe that the United States has been transported through history on the wings of providential eagles, while at the same time thinking that religion generally, and Christianity specifically, should have nothing to do with politics. Nevertheless, some of the thinkers discussed here as representing the tradition of American civil religion do come very near religious nationalist waters. For example, the belief of the early Puritans, many of whom lived in theocratic colonies, that the Divine calling of the New England colonies was to build a perfect Christian polity, can clearly be characterized as religious nationalism in nature. The close affinity between American civil religion and Christian nationality underlies this Article’s argument that America’s civil religion facilitated the emergence of a strong form of Christian nationality, making it both familiar and legitimate. The idea that Providence can be witnessed in action in the history of the United States, a common trope of America’s civil religion, makes the idea of the United States as a Christian nation less of a radical leap. The next section will examine American Christian nationality.

### C. American Christian Nationality

Gorski views American Christian nationality as a “a toxic blend of apocalyptic religion and imperial zeal that envisions the United States as a righteous nation charged with a divine commission to rid the world of evil and usher in the Second Coming.”<sup>117</sup> As discussed above, adherents of Christian nationality see religion and politics as fused, with Christianity and citizenship being closely aligned. According to Gorski,

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116. *Id.* at 19.

117. GORSKI, *supra* note 86, at 2.

American religious nationalist ideology is fueled by two biblical narratives. The first is the conquest narrative, as it appears in the biblical Prophets, in which the Israelites are commanded to conquer the Land of Israel and in which the themes of bloody war, animal sacrifice, and Divine interventions are rife.<sup>118</sup> In the Book of Numbers (33:53), the Israelites are commanded to “[t]ake possession of the land and settle in it.”<sup>119</sup> This directive takes a bloodier turn in Deuteronomy (20:16) where they are commanded to “not leave alive anything that breathes”<sup>120</sup> in the cities that God was giving them. The utter destruction of the people inhabiting the land is justified by the need for religious purity. If those inhabitants were to be kept alive, “they will teach you to follow all the detestable things they do in worshiping their gods, and you will sin against the Lord your God.”<sup>121</sup> The conquest narrative is one of holy war and settlement expressed in the language of sacrifice and just wars.

The second Biblical narrative identified by Gorski as foundational for American Christian nationality is apocalyptic, and “conjures up visions of . . . the rapture such as one [found] in the book of Daniel and the Revelation of John.”<sup>122</sup> In this narrative, the world is in a state of moral decline and natural disasters are becoming increasingly frequent. This is the background for an apocalyptic battle between “the forces of good and evil,”<sup>123</sup> which ultimately destroys the world. Finally, “Christ swoops down from the sky, accompanied by the hosts of heaven, to defeat the forces of evil and bind the power of Satan.”<sup>124</sup> American politics, understood apocalyptically, are a stage for a cosmic showdown between God and Satan.

Although, as earlier discussed, religious nationalist ideology has deep roots in American history, reaching back to the colonial period, it did not gain significant political potency until the rise of the Christian right in the latter half of the 20th century. It is at this point that the narratives of apocalypse and conquest

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118. *Id.* at 18–20 (describing the dynamic of conquest and apocalypse in religious nationality).

119. *Numbers* 33:53.

120. *Deuteronomy* 20:16.

121. *Deuteronomy* 20:18.

122. GORSKI, *supra* note 86, at 19.

123. *Id.* at 22.

124. *Id.*

combined to create a true Christian nationality in the United States.

This Part's goal is to show that modern American Christian nationality is a qualitatively different ideology than former religious political movements.<sup>125</sup> As will be seen, the foundations of this relatively new movement are vastly different from the more benignly vague civil religious ideas of a providential wind filling the sails of the American state, replacing the ideology of civil religion with the belief that the United States was, and is, a Christian nation and a crucial actor in the redemption of the world. This radical shift involves developing a comprehensive political program based on supporters of Christian nationality's strict understanding of biblical truth, thereby promoting a vision of the true America and of true Americans as being Christian.

This movement and its ideas—usually referred to as Christian conservatism, Christian nationality, or the Christian right—represent a major political ideology in contemporary American society.<sup>126</sup> These terms are also used to refer to a

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125. MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM 6 (2006)

The United States has always been a pious country, given to bursts of spiritual fervor, but Christian nationality is qualitatively different from earlier religious revivals. Like America's past Great Awakenings, the Christian nationalist movement claims that the Bible is absolutely and literally true. But it goes much further, extrapolating a total political program from that truth, and yoking that program to a political party. It is a conflation of scripture and politics that sees America's triumphs as confirmation of the truth of the Christian religion, and America's struggles as part of a cosmic contest between God and the devil. It claims supernatural sanction for its campaign of national renewal and speaks rapturously about vanquishing the millions of Americans who would stand in its way. *Id.*

126. In this Article, I will use Christian nationality as the general name for American religious nationality, and the Christian Right to mean a more concrete political movement constituted by these organizations. For an overview of the rise of the Christian Right, see FRITZ DETWILER, STANDING ON THE PREMISES OF GOD: THE CHRISTIAN RIGHT'S FIGHT TO REDEFINE AMERICA'S PUBLIC SCHOOLS (1999); MICHAEL LIENESCH, REDEEMING AMERICA: PIETY AND POLITICS IN THE NEW CHRISTIAN RIGHT (2014); ANDREW R. MURPHY, PRODIGAL NATION: MORAL DECLINE AND DIVINE PUNISHMENT FROM NEW ENGLAND TO 9/11 (2008).

network of political lobbying groups, political actors, and religious organizations that began operating in the United States in the late 1970's.<sup>127</sup> These include, among others, Jerry Falwell's Moral Majority, Tim LaHaye's Council for National Policy, Beverly LaHaye's Concerned Women for America, Ed McAteer's Religious Roundtable, and James Dobson's Focus on the Family and Family Research Council. While many of these organizations atrophied and became irrelevant, the relevance and power of the Christian nationality movement has endured, and the movement remains exceptionally relevant in contemporary American politics. This success can be explained, in part, by the ability of the movement to develop "multiple power centers, creating a potent combination of organization and diffusion. Its center of gravity shifts constantly, and coalitions are forever forming and dissolving . . . . Any of the movement's figureheads or political allies could fall tomorrow and Christian nationalism would thrive undiminished."<sup>128</sup> In fact, "[t]he movement is deeply rooted in the American social structure, drawing its strength from a vibrant, well-politicized religious constituency and from that constituency's impressive organizational infrastructure . . . . In short, the Christian Right will not go away."<sup>129</sup>

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127. See Michael J. McVicar, *The Religious Right in America*, OXFORD RES. ENCYCLOPEDIA OF RELIGION (2016)

The phrase Religious Right refers to a loose network of political actors, religious organizations, and political pressure groups that formed in the United States in the late 1970s. Also referred to as the Christian Right, representative organizations associated with the movement included Jerry Falwell's Moral Majority, Tim LaHaye's Council for National Policy, Beverly LaHaye's Concerned Women for America, and Ed McAteer's Religious Roundtable. Leaders and organizations associated with the Religious Right made a broad-based religious appeal to Americans that emphasized traditional family values, championed free-market economics, and advocated a hardline foreign policy approach to the Soviet Union. They also criticized secular and materialistic trends in American culture that many in the Religious Right associated with the moral and economic decline of the nation. *Id.*

128. GOLDBERG, *supra* note 125, at 16.

129. DUANE MURRAY OLDFIELD, *THE RIGHT AND THE RIGHTEOUS: THE CHRISTIAN RIGHT CONFRONTS THE REPUBLICAN PARTY* 225 (1996).

Although it is possible that Christian nationalist views may be quite widely spread amongst American Christians (67% of American citizens believe that the United States is a Christian nation),<sup>130</sup> the recognizable sub-group that represents the best representative for American Christian nationality is what John Green named “traditionalist evangelicals,” constituting approximately 12.6% of American citizens in 2004.<sup>131</sup> In a study conducted at the end of the 20th century, 92% of evangelical Christians said they believed America was founded as a Christian nation; the same percent believed that Christian values were currently under serious attack; and 95% believed that they were witnessing the breakdown of American society.<sup>132</sup> This seems to indicate that Christian nationality is a central ideology amongst American evangelicals, which makes it significant both politically and culturally.

After a retreat from politics during the so-called liberal era in the United States—from the 1960’s through the early part of the 1970’s, when prayer in schools was banned and abortions were legalized by the Supreme Court—conservative Christians reentered the public sphere during the 1970’s. Jerry Falwell, one of the leading figures of the nascent Christian Right, described their reemergence:

Things began to happen. The invasion of humanism into the public school system began to alarm us back in the sixties. Then the *Roe v. Wade* Supreme Court decision of 1973 and abortion on demand shook me up. Then adding to that gradual regulation of various things it became very apparent the federal government was going in the wrong direction and if allowed would be harassing non- public schools, of which I have one of 16,000 right now. So step by step we became

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130. See Pew Forum on Religion & Public Life, *69% Say Liberals Too Secular, 49% Say Conservatives Too Assertive: Many Americans Uneasy with Mix of Religion and Politics*, PEW RES. CTR. (Aug. 24, 2006, 2:00 PM), <https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/287.pdf>.

131. John C. Green, *The American Religious Landscape and Political Attitudes: A Baseline for 2004* (2004), <https://assets.pewresearch.org/wp-content/uploads/sites/11/2007/10/green-full.pdf>.

132. CHRISTIAN SMITH ET AL., *AMERICAN EVANGELICALISM: EMBATTLED AND THRIVING* 139 (1998).

convinced we must get involved if we're going to continue what we're doing inside the church building.<sup>133</sup>

According to these modern adherents to Christian nationality, America is God's country and plays a key role in the providential plan. The Christian nationalist version of American history is a tale of a Godly country that has been corrupted and fell from grace, holding that

Charles Darwin's theory of evolution eroded people's faith in man's dignity and God's supremacy. The great universities that once saw Christianity as the root of all knowledge turned away from scripture and toward the secular philosophies of a decadent Europe, which put man at the center of the universe. Franklin Delano Roosevelt's New Deal brought socialism to America and began the process by which government, rather than churches, became the guarantors of social welfare.<sup>134</sup>

The fall was even more pronounced in the field of sexuality, with homosexuality becoming increasingly mainstream, and Christianity being banished from the public sphere. However, according to Christian nationality, God had a plan, and he "changed the hearts of a few people, and before long, there was a great revival in the country. Conservative evangelical churches mushroomed. Believers shed their apathy, got organized, and elected godly men."<sup>135</sup> This general historical narrative promoted by religious nationalist groups is nicely captured in *The Light and the Glory*, an evangelical Christian history book, in which the United States is described as a new Israel:

In the virgin wilderness of America, God was

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133. ED DOBSON ET AL., *THE FUNDAMENTALIST PHENOMENON: THE RESURGENCE OF CONSERVATIVE CHRISTIANITY* 144 (1981).

134. GOLDBERG, *supra* note 125, at 7.

135. *Id.* at 8.



making His most significant attempt since ancient Israel to create a new Israel of people living in obedience to the laws of God, through faith in Jesus Christ. Not surprisingly, Christian Nationalist histories go back to the Puritans. It was them, they contend, who “made possible America’s foundation as a Christian nation.”<sup>136</sup>

Again, in the words of Falwell:

The heritage of the Puritan Pilgrims is one not of a church, but of a nation; these were men and women who were not only the progenitors of a state, but also the ancestors of a nation. We can thank these courageous people who laid the religious foundation of our nation for the freedom and liberty we so liberally enjoy today.<sup>137</sup>

For Christian evangelicals, the United States was founded according to the Divine plan, and its society and politics should adhere to God’s laws. Like ancient Israel, the United States is an attempt to bring redemption to the world, and it is a major actor in the struggle against evil. Central for the Christian nationalist worldview is the idea of the corruption of America. The status of the United States as a redemptive force is under constant peril in their eyes, being challenged by those who try to secularize society. These challenges are reflected most powerfully in the new social acceptance of abortion and LGBT rights, which the Christian evangelicals consider abhorrent behavior. These issues help animate Christians’ call for action. Adherents of Christian nationality are “troubled patriots, who believe that America has broken its covenant and drifted from its original purpose. Thus they are determined to bring their country back to its spiritual beginnings, reminding Americans repeatedly that theirs is a biblical republic.”<sup>138</sup> The ideology of the contemporary American religious nationalist critique is “an indictment of national sin” based on a “story of a prodigal nation

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136. LIENESCH, *supra* note 126, at 141.

137. *Id.* at 145.

138. *Id.* at 155.

that has fallen away from its covenant.”<sup>139</sup> For supporters of Christian nationality, the legalization of abortion in *Roe v. Wade* is central to the understanding of American moral decline. Falwell writes that “if we expect God to honor and bless our nation, we must take a stand against abortion.”<sup>140</sup> This is a powerful call for action: the United States has strayed from its Divine path, and it is up to the adherents of American religious nationality to redeem it.

Christian nationality sees the political legitimacy of the American state as grounded on being a Christian nation in covenant with God. It is believed that the United States has a crucial role to play in the unfolding of God’s plan. As a result, any unwillingness to follow biblical principles and the outline of this plan will result in great harm both to the nation and the world. It follows that the state must act in accordance with Christian norms. The Christian nationalist narrative calls for a unification of religion and politics, with the latter subservient to the former. The strongest version of this view, held by a minority of backers of Christian nationality, is Dominionism, which represents the “idea that Christians have a God-given right to rule.”<sup>141</sup> People who hold this view, or Dominion theologians, believe that “the inheritors and custodians of this world are Christians who can ‘name it and claim it’ by divine right.”<sup>142</sup> Christian Reconstructionists, the sect which introduced Dominionism to the American scene, advocate for the replacement of “American civil law with Old Testament biblical law.”<sup>143</sup> In recent decades, the “tone” of Dominion theology has “softened and it has become increasingly palatable to mainstream evangelicals.”<sup>144</sup> While it is still a marginal position even within Christian nationalist circles, its extreme positions help expose the crucial difference between American civil religion and American Christian nationality. The latter, even in its milder forms, calls for the unification of politics and religion

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139. MURPHY, *supra* note 126, at 88.

140. *Id.* at 90–91.

141. GOLDBERG, *supra* note 125, at 13.

142. GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 174 (1990).

143. GOLDBERG, *supra* note 125, at 13.

144. James Aho, *Christian Heroism and the Reconstruction of America*, 39 *CRITICAL SOC.* 545, 546 (2012).

and insists that America is a Christian nation and must behave accordingly. This is why the legalization of abortion and same-sex marriage, as examples of anti-biblical state behavior, became the rallying cry of Christian nationality.

The belief in the necessary confluence of religion and politics makes Christian nationality a powerful and comprehensive political ideology. The civil religious position that politics and religion are somewhat related is, in contrast, quite weak. The idea that the United States is a shining city upon a hill, and that it has a proactive and providential role in the world, does not necessitate the aggressive involvement of any particular religious view in political disputes. This ideological distinction and the interrelationships among civil religion, Christian nationality, and civic nationality will be discussed next.

#### D. Intimate Rivalry

The civil religion tradition represents a major strain in American civic nationality in that it is a valid and fully acceptable part of public discourse which supports the legitimacy of state authority. Civic nationality is a “master narrative,” or a set of stories that make political authority legitimate or illegitimate to the people. Master narratives are ways of assembling popular social movements and coalitions so that they have the potential to create dramatic changes in politics.<sup>145</sup> The master narrative of civic nationality is comprised of a set of stories which legitimize the state as it currently is, not necessarily in all its details, but in the perception of its basic character. These narratives are supported by the state through rituals, education, and rhetoric.<sup>146</sup> They are also produced

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145. ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIC LIFE: HINDUS AND MUSLIMS IN INDIA* 55 (2002).

By “master narratives” I mean the major organizing devices for mass politics, or the leading political idioms that mobilize large numbers of people. Master narratives tell stories that make the critical issues in politics intelligible to the masses. They are ways of putting together popular social coalitions so that politics can be altered and political power won. *Id.*

146. See generally DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* (1988) (explaining the centrality of rituals in political life).

independently from the state in the private sector, in popular culture, and literature.<sup>147</sup> The content and limits of civic nationality are in constant flux. In any society, but especially in a pluralist and democratic environment, many voices may be found competing to have their legitimacy enhanced by being perceived as an integral part of mainstream national culture. Crucially, being perceived as *not* being a part of the “legitimate” discourse of civic nationality can generate immense opposition to ideological positions and political movements. It suffices to recall the extensive cultural, political, and legal hostility once directed against the American Communist Party.

American mainstream nationality is primarily civic and liberal, consisting of a narrative centered on the will, interests, and values of the American people. However, this secular narrative exists in a symbiotic relationship with the narratives of American civil religion. It is this alliance which makes Christian nationality a palatable voice in American politics.

The argument developed in this Part is that although Christian nationality promotes positions which differ radically from—and, in fact, are adverse to—those of today’s civic nationality, Christian nationality faces almost no resistance. This may be due to the intersections between the ideas of Christian nationality and those of the American civil religion. As stated previously, the two ideologies hold fundamentally different positions regarding the relationship of the state to religion. Nevertheless, the ideas and positions of America’s civil religion, which have been, and still remain, part of the mainstream of political discourse in the United States, make Christian nationalist ideology sound acceptable and legitimate to many. This relationship can be labelled *overlapping legitimation*. Both narratives operate concurrently in society to explain and justify state authority.

In the master narratives of both civic and Christian nationality, authority rests in the metaphysical realm. The Divine is an analogous cultural institution to the sovereign, making the Divine and the sovereign potential rivals; both can potentially guarantee order in society and both claim final, supreme authority. Crucially, they also both give moral

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147. *E.g.*, PAUL W. KAHN, FINDING OURSELVES AT THE MOVIES: PHILOSOPHY FOR A NEW GENERATION (2013) (holding that the cultural imagination of popular sovereignty is maintained by popular culture).

credence to life-and-death decisions, including the right to kill and the call to make a sacrifice.<sup>148</sup> It is an oxymoron to imagine two entities as being supreme, as one can be called to sacrifice either by the sovereign or by God, but not by both.<sup>149</sup> Thus, either God or the sovereign can decide matters of life and death, but not both.

The United States Constitution is a good example of a civic nationalist text, as demonstrated by its opening words: “We the People of the United States” that “ordain and establish this Constitution for the United States of America.”<sup>150</sup> There is no mention of God as the ultimate authority behind the state. It is the will of the popular sovereign that is the source of the law and the foundation of the nation itself.<sup>151</sup> Contrast this with the many different proposals for a Christian amendment to the constitution which often include the words, “Almighty God as the source of all authority and power in civil government,” or state that they accept the “Divine Authority of the Holy Scriptures, the law of God as the paramount rule.”<sup>152</sup>

A major force behind the strength of the Christian nationalist narrative is the idea that civic or secular nationality

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148. See generally JUERGENSMEYER, *supra* note 69, at 32 (stating “the awareness of being subject to an authority—an authority invested with the power of life and death—gives nationality its potency”); PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 7 (2011) (“Liberal theory puts contrast at the origins of the political community; political theology puts sacrifice at the point of origin.”).

149. Roger Friedland, *Religious Nationalism and the Problem of Collective Representation*, 27 ANN. REV. SOC. 125, 128 (2001) (“Religious discourse is replete with martial metaphor, of battles and enemies, of position and siege . . . Religion, a cosmology accomplished through violence, its cosmic war vicariously experienced and domesticated by rite, is thus inherently a natural competitor to the nationality of the secular state.”).

150. U.S. CONST. pmbl.

151. PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 17 (2005)

The sovereign will, we say, is the source of law, and indeed of the nation itself. To identify with the popular sovereign is to understand the self in and through will. It is to read the self—quite literally the finite body—as a point of access to, and expression of, the nation, which confronts us as an ultimate value. *Id.*

152. DANIEL K. WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 17 (2010) (explaining that similar language was part of the Constitution of the Confederate States).

is a corrupting ideology. That is, that only Christian nationality authentically represents what the nation was once and what it ought to be. In the United States, the ideology of Christian right is an indictment of American secularism and liberalism. The emergence and increasing strength of these ideological forces after the 1960's in the face of what they called "secular humanism" was accompanied by placing blame on the United States for leaving the divine path and losing God's protection.<sup>153</sup> Pat Robertson tells the story:

Until modern times, the foundations of law rested on the Judeo- Christian concept of right and wrong and the foundational concept of Original Sin . . . . Modern, secular sociology, however, shuns such biblical teachings in favor of an evolutionary hypothesis based on the ideas of Darwin, Freud, Einstein, and others. This view, often called "secular humanism," takes the view that man has evolved from the slime and that with time and ever greater freedoms, mankind will ascend to the stars. These ideas, which are contrary to the Word of God, have led directly to the bitter conflict and social chaos of our day . . . . The legacy of the 1960s is still with us today. The free- love, anti- war, psychedelic 1960s proclaimed not only the right of dissent but the right to protest against and defame the most sacred institutions of the nation.<sup>154</sup>

The corrupting influence of American liberal humanism is a cause and a call for Christian action, as Jerry Falwell describes it:

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153. See MURPHY, *supra* note 126, at 80 ("From the beginning, the Christian Right had been driven by a powerful narrative of imperiled national promise, of a prodigal yet once chosen nation that had forsaken its moral and spiritual foundations in favor of secular humanism."); John Keller, *The Two Jeremiads in American Political Thought*, W. POL. SCI. ASS'N 2011 ANN. MEETING PAPER (Feb. 22, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1766824](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766824).

154. PAT ROBERTSON, *THE TURNING TIDE* 112–13 (1993).

Things began to happen. The invasion of humanism into the public school system began to alarm us back in the sixties. Then the *Roe v. Wade* Supreme Court decision of 1973 and abortion on demand shook me up . . . . So step by step we became convinced we must get involved if we're going to continue what we're doing inside the church building.<sup>155</sup>

The narrative contrasts this corrupt, inauthentic national existence with both the shining past and with contemporary Christian communities. In the words of Bruce Lincoln, “[t]here is a good, faithful Christian America that has been brought to mortal peril by the actions and views of another part of the nation that is secular and immoral. Secular America was the problem, to which Christian America . . . was the solution.”<sup>156</sup> Consequently, supporters of Christian nationality see it as their duty to bring America back into the grace of God.

When religious nationality is a legitimate part of the national narrative, its adherents are able to promote their point of view and agenda by using the political machine of the state. Although they hold a radically different understanding of the state, and call for major transformation of that state, the fact that they are seen as a plausible and acceptable part of the national narrative means that they do not meet the same exclusionary and aggressive opposition met by others. This creates a relationship of *intimate rivalry*, which is quite unique. In fact, due to the fact that Christian nationality is a socially plausible legitimating narrative of the state, it is able to present itself as merely a reforming force. In this manifestation, the state has been corrupted and led away from its wholesome roots by civic nationality and liberalism, and needs to be shepherded back by the religious nationalists.

This vision is captured well by the softer-spoken founder of the Christian Coalition, Ralph Reed, who promises in his book that if Christian activists had their way

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155. ED DOBSON ET AL., *THE FUNDAMENTALIST PHENOMENON: THE RESURGENCE OF CONSERVATIVE CHRISTIANITY* 144 (Jerry Falwell ed., 1981).

156. BRUCE LINCOLN, *HOLY TERRORS: THINKING ABOUT RELIGION AFTER SEPTEMBER 11*, at 38 (2d ed. 2006).

America would look much as it did for most of the first two centuries of its existence, before the social dislocations caused by Vietnam, the sexual revolution, Watergate, and the explosion of the welfare state. Our nation would once again be ascendant, self-confident, proud, and morally strong. Government would be strong, the citizenry virtuous, and mediating institutions such as churches and voluntary organizations, would carry out many of the functions currently relegated to the bureaucracy.<sup>157</sup>

This America, Reed proclaims, is the authentic America. By actively engaging in politics, winning elections, and confirming sympathetic judges, the Christian right will be able to beat back the forces of secularism and “[t]ake America [b]ack.”<sup>158</sup>

Due to the relatively broad acceptability of their national Christian message, and the fact that many of their beliefs overlap with those held by other groups, including conservatives, libertarians, and non-nationalist religious groups, the Republican Party (“the GOP”) has been able to integrate Christian right into its ideologies and become highly influential.<sup>159</sup> Although they do not hold sway over American politics as a whole, the Christian right has exerted its political power within the GOP, and adherents of Christian nationality have become a major force within the GOP in the last few decades. As Daniel Williams wrote in his book about the rise of the Christian right, while “evangelical Christians had become Republicans, the Republican Party had also become Christianized, and it was becoming increasingly difficult to tell the difference between the Christian Coalition’s issue positions and the GOP platform.”<sup>160</sup> Their near-domination of one of the two major political parties is an immense achievement for Christian nationality and was a result of decades-long political action. During this time

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157. RALPH REED, *POLITICALLY INCORRECT: THE EMERGING FAITH FACTOR IN AMERICAN POLITICS* 36–37 (1994).

158. *Id.* at 37.

159. See FRANCES FITZGERALD, *THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA* 411 (Simon & Schuster ed., 2017).

160. WILLIAMS, *supra* note 152, at 231.



Conservative Christians have flocked to local and state party caucuses, taking control of the Republican apparatus in at least eighteen states—not only evangelical strongholds in the South but also such apparently unlikely places as Minnesota, Iowa, and Oregon. By conventional wisdom, about one-fourth of the delegates to the Republican national convention are thought to be affiliated with this bloc, giving them substantial platform influence.<sup>161</sup>

This made the Christian right the de facto king makers in the GOP.

The presentation of Christian nationality—not as a revolutionary force but as a legitimate opposition—has also been facilitated by Christian nationality's basic acceptance of the idea of democratic rule. That is, they accept "the political apparatus of the modern nation-state."<sup>162</sup> Most Christian nationalist leaders and thinkers consider both democracy and the Constitution extremely important. The agenda of Christian nationality takes issue with the content and source of authority of politics, but not with the form they currently take. Although some supporters of Christian nationality see democracy only as a means to achieving a theocracy,<sup>163</sup> the mainstream voices see it, and constitutional republicanism, as "most consistent with the biblical view of the nature of man and the danger of power,"<sup>164</sup> and, therefore, as "the one great hope of freedom in a sin-cursed world."<sup>165</sup>

The evidence indicates that Christian nationalist ideology represents a fundamental alternative to American civic nationality. Its adherents are able to present themselves as the

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161. KENNETH D. WALD & ALLISON CALHOUN-BROWN, *RELIGION AND POLITICS IN THE UNITED STATES* 230 (6th ed. 2010).

162. JUERGENSMEYER, *supra* note 69, at 6.

163. GEORGE GRANT, *THE CHANGING OF THE GUARD: BIBLICAL PRINCIPLES FOR POLITICAL ACTION* 51 (Gary North ed., 1987).

164. JOHN EIDSMOE, *GOD AND CAESAR: BIBLICAL FAITH AND POLITICAL ACTION* 17 (1997).

165. ED DOBSON & EDWARD E. HINDSON, *THE SEDUCTION OF POWER: PREACHERS, POLITICS AND THE MEDIA* 131 (1988).

carriers of the true, pure nature of the nation-state. They also accept and use the current political mechanisms of the nation-state, including democracy, to advance their agenda. As a result, Christian nationality, unlike other forms of threatening opposition, such as communism or minority nationality, is able to co-exist with civic nationality while vying for political and cultural power.

This thick account of Christian nationality—both historical and contemporary—will be key in demonstrating that the political division theory—when applied to it—is persuasive. This is the task of the next Part.

#### IV. Christian Nationality and the Political Division Theory

Part II of this Article laid out the political division theory and its main critiques. It demonstrated that when applied to religion generally, the political division theory makes little sense. Part III turned to the history and ideology of American Christian nationality and offered a new conceptualization of its relationship with American national identity: intimate rivalry. This Part will strive to show that when applied to Christian nationality, the political division theory is plausible and useful. I will present this in two stages: first, arguing that this religious nationalist ideology is uniquely divisive and perilous (the distinctiveness criteria); and second, arguing that it can be prevented by a strict interpretation of non-establishment (the cogency criteria).

##### A. The Distinctiveness of Christian Nationality

What makes Christian nationality unique through the prism of the political division theory is that it promotes the idea that the American identity is grounded in a specific religion.<sup>166</sup> National identity can be more or less inclusive and more or less morally and politically attractive.<sup>167</sup> In order to understand this

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166. GORSKI, *supra* note 86, at 7 (explaining that religious nationalists wish the boundaries of the religious and political communities to be as coterminous as possible; liberal secularists seek to keep the religious and political communities as separate as possible; and civil religionists).

167. *See generally* CRAIG J. CALHOUN, NATIONALISM (1997); MARGARET CANOVAN, NATIONHOOD AND POLITICAL THEORY (1998); SMITH, *supra* note 77.

spectrum, we must distinguish between the encompassing nature of all state-oriented national identities (such as civil nationality and Christian nationality) and how inclusive they make membership in the common political identity. By the encompassing nature, I mean the fact that it both sees the state and the entire citizen body as their subject. In this sense, all national identities are—to a large extent—exclusionary: they rely on a strong distinction between members and non-members and are naturally hostile towards competing national movements.<sup>168</sup> The key conceptual point, because the encompassing nature is a constant in all state-oriented national identities, is that the main moral distinction between national identities is going to be the inclusivity of their membership threshold. In cases (like Christian nationality) in which the ideology is exclusive and intolerant, the encompassing nature of national identities exacerbates the moral problem tenfold. When a reclusive religious group is intolerant, the fact that they seek to separate themselves from the state and society makes it possible to resolve the issue by cultural accommodation. This is not true when we combine an encompassing nationality with an intolerant ideology. In this case, the subject of the exclusivity and intolerance becomes the state itself. This is the reason that promoting American identity, which is grounded in a specific religion, poses an especially severe danger for political division. How does this take shape in the case of Christian nationality?

The center of American Civic nationality, for instance, is commonly held to be a much more morally palatable form of common political identity. This inclusivity seems to derive from at least two sources. The first is the fact that civil American identity is grounded in a common political/legal project and values that are often seen as encapsulated by the Constitution.<sup>169</sup> If an American is defined by being a part of the

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168. SCHMITT, *supra* note 75, at 28 (“The distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or disassociation [sic] . . . [the enemy] is, in an especially intense way, existentially something different and alien, so that in extreme cases conflicts with him are possible.”).

169. CRAIG CALHOUN, *NATIONS MATTER: CULTURE, HISTORY, AND THE COSMOPOLITAN DREAM* 42 (2007) (“[C]ivic nations can in principle be open to anyone who agrees to follow their laws. Citizenship in the state is seen as primary rather than prior membership in a descent group or cultural tradition.”).

political project of the United States, then joining the nation is quite possible. This is in contrast to more ethnic nations which are connected by an imagined primordial, pre-political, ties.<sup>170</sup> If being Danish is being a part of the “ethnos” of Danes, it is all but impossible for an immigrant to join. The second reason behind the inclusivity of American Civic nationality is that it is an ambiguous and thin political ideology. As Craig Calhoun puts it: “civic nations can in principle be open to anyone who agrees to follow their laws. Citizenship in the state is seen as primary, rather than prior membership in a descent group or cultural tradition.”<sup>171</sup> The legitimacy generated by American Civic nationality comes with very little concrete ideological strings, and is thus “relatively flexible and all purpose.”<sup>172</sup> American civil nationality is concerned with the ultimate source of political legitimacy—“We the People”—but is not attached to a well-defined political ideology. Agreeing that “the People” are the source of political authority is far easier than accepting that the United States has a crucial role to play in the Divine plan. This makes the unifying civil identity in the United States quite inclusive, potentially including all individuals (or citizens) within its boundaries. The fact that American Civic nationality is grounded on participation in a political project, and that it is ideologically ambiguous, makes it perfectly suited for creating social solidarity in a nation as diverse and populous as the United States.

This is not true in the case of Christian nationality. The first issue here is the explosive combination of the normative thickness of religion with the encompassing nature of a nationalist ideology. As I just stated, a part of the political attractiveness of American Civic nationality is that it is a thin (and thus more easily inclusive) ideology. Christian nationality is on the other side of the spectrum: it attaches American national identity to a very limited set of ideological options and to membership in one (albeit diverse) religious group. It is true that religion as a defining feature of a nation functions differently than ethnicity: there is perhaps more of a possibility

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170. *Id.* at 41 (“Ethnic nationalism, conversely, refers precisely to rooting political identity and obligation in the existence of a prepolitical collective unit—the nation—which achieves political subjectivity by virtue of the state.”).

171. *Id.* at 42.

172. CANOVAN, *supra* note 167, at 74.

for a newcomer to “convert” into “We the People” than to join a group unified by primordial ties. However, this does not mean that Christian nationality is able to fulfill the solidarity enhancing role of civic nationality. Equating being an American with being a Christian is quite literally to cause “political division along religious lines,” which is, in the words of Chief Justice Burger, “one of the principal evils against which the First Amendment was intended to protect.”<sup>173</sup> By equating the nation with religion, Christian nationality implies that someone who is not of the faith cannot be a “true” American. This leaves a large percent of the citizen body unavoidably feeling alienated and excluded. Combine this with the heavy political and moral ideological baggage of Christian nationality, which is not only invested in defining the American people, but also with the ways in which they and their country conducts themselves. Here, we find a political identity and ideology which is deeply invested in both identifying the ultimate authority (the Divine) and laying down significant ideological constraints on the operation of political authority and on membership in the nation.<sup>174</sup> America is not only a Christian nation, but it must also act as one. This brings us right back to the political division theory, which comes, in the words of Justice Black, to prevent linking “state and churches together in controlling the lives and destinies of our citizenship—a citizenship composed of people of myriad religious faiths, some of them bitterly hostile to and completely intolerant of the others.”<sup>175</sup> Although this may not be a valid concern when applied to other reclusive religious groups, like the Old Order Amish, it is directly relevant when applied to a religious ideology whose subject is the identity and behavior of the state itself.

The status of Christian nationality as an intimate rival in American politics and culture makes its divisive potential even more pronounced. The status of intimate rivalry means that the supporters of Christian nationality are spared much of the political, legal, and cultural pressures other radical groups face. For example, compare the moral and political rejection quite justly experienced by white nationalist groups in the United States with the way in which the GOP has embraced Christian

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173. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

174. See discussion *infra* Part III.C.

175. *Bd. of Educ. Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting).

nationality.<sup>176</sup> This rejection occurs despite the fact that many of the policies promoted by white nationality and Christian nationality actually overlap.<sup>177</sup> Being a legitimate part of the political culture allows Christian nationality to escape much of this disapprobation and, even more significantly, enables it to harness the political and legal institutions of the state for its own goals. Using this institutional capacity, American Christian nationality, as an intimate rival, is able to apply its encompassing and intolerant ideology in ways unavailable to other groups seeking to transform the regime, whether from the right or the left, thus creating a profoundly uneven democratic playing field. It is hard to identify another political movement which enjoys this status.

Christian nationality tends to reflect fundamentalist, orthodox religious convictions.<sup>178</sup> Religious national movements are revivalist in nature, presenting themselves as strong alternatives to civic nationality and the western “corruption” of liberalism. They are often reliant on a strong redemptive narrative, which justifies, or even demands, intense state intervention in the social and moral life of citizens.<sup>179</sup> Groups like those in the Christian right “seek to protect and deepen religious identity—to promote a formidable religious presence—by competing with other religious movements and with secular institutions and philosophies for resources and allegiances.”<sup>180</sup> In fact, the collective identity of adherents to Christian nationality may make their need to distinguish themselves from other groups even stronger than that of other fundamentalist religious groups. For example, studies have found that “Christian nationalism influences whites’ regulating of racial boundaries (evidenced in intermarriage attitudes) above and beyond the independent effects of political conservatism or religious exclusivism.”<sup>181</sup> The same holds true regarding animus

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176. See discussion *infra* Part III.D.

177. See Samuel L. Perry & Andrew L. Whitehead, *Christian Nationalism and White Racial Boundaries: Examining Whites’ Opposition to Interracial Marriage*, 38 ETHNIC & RACIAL STUD. 1671 (2015) (examining the ideological overlap between white nationality and Christian nationality).

178. See sources cited *infra* notes 163–66.

179. See generally GORSKI, *supra* note 86.

180. GABRIEL A. ALMOND ET AL., STRONG RELIGION: THE RISE OF FUNDAMENTALISMS AROUND THE WORLD 17 (2003).

181. Perry & Whitehead, *supra* note 177, at 1672.

towards immigrants.<sup>182</sup> The belief that the United States is a Christian nation also “increases desires for group conformity and strict control for both criminals and ‘troublemakers.’”<sup>183</sup> Some sociologists suggest that the reason for the hybrid identity of Christian nationality, or even religious nationality generally, is that the more unified one’s identity, the higher the perception of threat from outsiders.<sup>184</sup> Because the identity of adherents of Christian nationality is more unified than that of other adherents to strong religions which also may have national identities, it is highly plausible that supporters of Christian nationality are less tolerant. In short, the members of the Christian right tend to hold a range of fundamentalist religious beliefs and engage in fundamentalist religious practices, which provide them with their sources of loyalty and knowledge in society. Consequently, there is strong evidence to support a presumption of intolerance associated with the category of religious nationality, in contrast to the category of general religious belief. At the very least, this presumption is valid regarding the religious understanding of the legitimacy and purpose of the state. Religious nationality is often in the position of both rejecting the rule of reason and accepting revelation as the basis for its ideology. While it cannot be said that religion generally produces more intolerance and is thus especially divisive, in the case of religious nationality, it is reasonable to argue that it does produce more intolerance and is especially divisive.

It can, therefore, be seen that Christian nationality is an ideology that is very likely to be intolerant; that has a deeper, more divisive and alienating understanding of the state; and is uniquely situated to influence and even dramatically transform the state. Christian nationality transforms the struggle for political power and state support into a religious conflict with both other religions and adherents of civic nationality. These characteristics form the basis of the distinctiveness of Christian nationality in light of the civil peace and alienation rationales.

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182. See Eric Leon McDaniel et al., *Divine Boundaries: How Religion Shapes Citizens’ Attitudes Toward Immigrants*, 39 AM. POL. RES. 205 (2011).

183. Joshua Davis, *Enforcing Christian Nationalism: Examining the Link Between Group Identity and Punitive Attitudes in the United States*, 57 J. SCI. STUDY RELIGION 300, 300 (2018).

184. *Id.* at 303.

Given that this description of the distinctiveness of Christian nationality's challenge to the civil peace is accepted, the cogency criteria must then be examined. I argue that the cogency criterion is met, thus supporting a policy of non-establishment.

To understand this conclusion, the first step is to examine the proposition that the encompassing and public nature of Christian nationality makes other measures, such as freedom of religion, less effective in achieving a *modus vivendi*. This means that the "Jeffersonian compromise," described by Richard Rorty as the idea that "we shall not be able to keep a democratic political community going unless the religious believers remain willing to trade privatization for a guarantee of religious liberty,"<sup>185</sup> does not apply to Christian nationality. If religious freedoms and exemptions are sufficient to sustain a relatively strife-free relationship between religious groups and the state, then strict or neutral non-establishment does not follow from the political division theory. In constitutional language, this means that if guaranteeing the free exercise of religion is sufficient to produce and sustain civil peace, why is non-establishment, understood through the prism of the political division theory, necessary? However, because the ideological subject matter of Christian nationality is the identity and behavior of the United States as a whole, providing exemptions from generally applicable laws does nothing to mitigate or eliminate Christian nationality's belief that the United States is being corrupted by the current ruling ideologies of civic nationality and liberalism. Adherents to Christian nationality are deeply interested in "dominating the realms of American institutional morality . . . or simply put, creating a state beholden to Christian beliefs."<sup>186</sup> Ensuring that the state does not coerce them into acting against their deeply held beliefs is simply insufficient in the case of an ideology which is interested in coercing the state to behave in accordance with their beliefs. A plausible solution to this problem is to apply non-establishment in order to make it harder for Christian nationality to succeed in transforming the state and the public sphere into a less inclusive, more Christian, place.

The intimate rivalry of Christian nationality is another

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185. Richard Rorty, *Religion as Conversation-Stopper*, 3 UNIV. ST. ANDREWS: COMMON KNOWLEDGE 1, 3 (1994).

186. Davis, *supra* note 183, at 300–01.



reason which makes non-establishment an especially relevant remedy. One can argue that because Christianity is a part of the overlapping legitimation of the state, it is already partially and informally established. While it is implausible that anyone would state that the United States is a Jewish country, for many Americans it is perfectly reasonable to state that it is a Christian country. In essence, according to the political division theory presented herein, there is no need to be especially concerned with the establishment of any of the minority religions. In contrast, the fact that Christianity is already so ingrained in American civic nationality makes establishment of Christianity an actual risk. This prospect, combined with the ideological imperative of transforming the United States into a Christian nation, strengthen the case for non-establishment. If the status of intimate rivalry makes Christian nationality uniquely capable of influencing the state, then it is both judicious and prudent to make the wall of separation both high and formal.

If the civil peace and alienation rationales convincingly apply only to religious nationality or similar ideologies, why not just forbid the state from being involved in institutions and policies related to Christian nationality? Why is across-the-board non-establishment necessary to prevent just one type of state-religion entanglement? There are two main reasons. The first is that it is impossible for a court to distinguish accurately between what constitutes civil peace endangering type of religion and a benign one. That is, the fact that Christian nationality should be kept at arm's length does not mean that this can be translated into useful, and even somewhat accurate, judicial tools. In short, the inability to fairly identify the subcategory of Christian nationality makes it necessary to separate a more recognizable criterion: that of "religion" from the state. This is a similar case to that of freedom of speech protections under the First Amendment. Here, although not all speech is actually valuable and, thus, warrants protection, courts are perceived as inappropriate institutions to make this distinction. Thus, First Amendment doctrine protects a much wider category of speech than what is actually valuable speech.<sup>187</sup> In analogy, the political division theory, as presented here, seeks to prevent

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187. See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

a certain type of political danger posed by a particular kind of establishment. However, since courts are not equipped to decide which religious phenomena is actually dangerous, the constitution separates religion as a general category.

To conclude, the goal of this Part of the Article is to show that although the political division theory for non-establishment can be quite easily dismissed when applied to religion as a general category, it is quite persuasive when applied to Christian nationality. Let me turn to the potential ramifications this version of the political division theory may hold for Establishment Clause doctrine.

### V. The Constitutional Implications of Political Division

If one of the principal goals of non-establishment is to prevent the political promotion of a religiously defined civic identity, then this goal should influence our interpretation of the Establishment Clause.

The political division theory presented in this Article strongly supports almost all of the existing, and well-established, Establishment Clause rules. The state, for instance, is not permitted to engage in any speech that endorses or promotes religion.<sup>188</sup> This disables government officials and institutions from endorsing and promoting Christian nationality in their official capacity. In a concurrence in *Lynch v. Donnelly*, Justice O'Connor makes the connection between formal endorsement and political identity explicit, stating that "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."<sup>189</sup> Religion cannot be a threshold condition for membership in the political community. This also encompasses the rule that the state may not use a religious test as a condition for public office.<sup>190</sup> One of the major political harms of the equation of Christian Identity and American Identity is that this will exclude non-Christians (or the incorrect kind of Christians) from political power. This type of rule makes certain, at least formally, that this will not occur.

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188. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

189. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

190. See, e.g., *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Another type of rule that fits well with the political division theory is the one that requires that laws have a secular legislative purpose.<sup>191</sup> This cuts at the root of any attempt to promote legislation that is mainly motivated by religious norms.

The common principle among all of the rules and cases that fit well within the political division theory is that they protect the public sphere and the state from being captured by religion. The general normative thrust of the political division theory is that it is deeply concerned about establishment which seeks to transform the political and public spheres. The rules that govern the purposes of legislation and the identity of the legislators seem to protect against such concerns. As was discussed above, the distinctive attribute of Christian nationality is its theological concern with the identity and behavior of the nation and the state. The type of establishment that adherents of Christian nationality seek to promote is one that is meant to reform the public sphere and the state to conform to their religious ideology. It is not surprising that they seek to reverse the chain of cases which removed religion from public schools: first, establishing in *Engel v. Vitale*<sup>192</sup> that official state-school prayer violates the Establishment Clause; and then in *Abington Township v. Schempp*<sup>193</sup> that public school-sponsored religious activities, including bible readings, was also unconstitutional. It is the encompassing and nature of Christian nationality which makes it so different than other religious movements.

What, however, does the political division theory have to say about religious establishment that *clearly does not* seek to transform or reform the public and political sphere? On the other end of the spectrum from Christian nationality lie insular, reclusive religious groups, such as Chassidic Jews or Old Order Amish. The desire to transform public institutions is completely foreign to these groups. Rather, they seek to protect themselves from being transformed by society, and often do not care at all for the identity and behavior of the state when it does not concern itself with them. Does state support (in whatever shape)

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191. For a discussion of the requirement that laws have a secular legislative purpose, see Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 95–98 (2002), and the cases discussed therein.

192. See 370 U.S. 421 (1962).

193. See 374 U.S. 203 (1963).

to the education systems of reclusive religious groups raise the same set of concerns as the school prayer cases? If we are convinced that the main concern of non-establishment is to prevent religious capture of the state, then it would appear that supporting these groups seems less hazardous. In this way, the political division theory opens the door for a more lenient interpretation of the Establishment Clause when it comes to involvement with religion which is not public-facing. As discussed above, non-establishment has (at least) four possible interpretations: (1) strict separation; (2) neutrality; (3) non-coercion; and (4) non-institutionalization. Strict separation, which is about creating a secular public order, seems to meet the concerns of the political division theory when it applies to it establishment which has the potential for transforming the political sphere. However, potentially, when it applies to establishment which merely enables religious communities to maintain their identity by isolating themselves from society, perhaps a more lenient standard, such as the non-coercion interpretation (which allows government intervention with religion as long as it does not coerce anyone to accept religion) is a better fit.

## VI. Conclusion

The prevalence of the political division theory of non-establishment in the Supreme Court is warranted. The political division theory makes perfect sense when applied to a religion which seeks to collapse the distinction between national politics and religion. Christian nationality falls well within this category. The encompassing theological investment of the ideology of Christian nationality in the behavior and identity of the United States makes it especially divisive. If this type of ideology is adopted and promoted by state organs, this will clearly create great alienation and resentment among US citizens. This is a worthy goal for the Establishment Clause.