

HOW RELIGIOUS FREEDOM IN AMERICA HAS USHERED IN THE DEATH OF GOD

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ABSTRACT

Though their placement may not have been intended as especially meaningful, the fact that the religion clauses are found within the first phrase of the First Amendment of the United States Constitution does hold a certain level of prominence in the minds of the American people. This psychoemotional attachment to the First Amendment, particularly to the freedoms of religion, is evidenced by the prolific litigation and interpretation that has evolved over the last 230 years to decipher the nuances of the clauses. Such devotion is unsurprising, given the extraordinary level of careful negotiation the Framers poured into drafting these provisions. Over time, the American approach to religion, demonstrated by the ebbs and flows within the religious economy of the nation, has even come to bear some resemblance to our free-market economy, inclusive of certain characteristics of the later stages of capitalism that were predicted by Marx. In this regard, the impacts of the Anti-Establishment clause, the failure of the government to take an affirmative position within the religious economy, seem to parallel the consequences of an unregulated market. Turning to Free Exercise, McConnell points toward Nietzsche and the Death of God in reference to a selective, even insincere, multiculturalist perspective that has consumed the traditional liberalist paradigm. While religion may be *constitutionally* protected, the realities of modernity may have rendered the first phrase of the First Amendment far less effective than what was initially desired. Despite the Framers best efforts, the future of religion in America may yet fail to possess the qualities of a confident pluralism, comfortably shared between the sacred and the secular.

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INTRODUCTION

The United States Constitution is among the most succinct around the world at just over 7,700 words, inclusive of amendments—and despite being one of the oldest Constitutions, it has been amended a relatively few number of times.¹ One might presume that such economy of language would render the text clear and concise, with the priorities and purposes of the Framers leaping off the pages from among each carefully constructed phrase; however, the copious body of interpretive literature, arising from a myriad of theoretical, philosophical, and jurisprudential perspectives, makes it exceedingly apparent that the meanings underlying each provision are not so easily discerned. This is particularly true for the first clause of the First Amendment, proclaiming the freedoms of religion, which reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”² Those sixteen words spark no less than six monumental questions, each of which have been extensively litigated and analyzed with the hope of determining what “freedom of religion” means in the United States, including:

- (1) What is “religion”?
- (2) What is “the free exercise of” religion?
- (3) What is a law “prohibiting” the free exercise of religion?
- (4) What is an “establishment of religion”?
- (5) What is a law “respecting” an establishment of religion?
and
- (6) Do Free Exercise accommodations violate the Establishment Clause?³

While each of these questions are doubtlessly compelling, the question here asks whether or not the diligent efforts by the Framers to articulate sufficiently potent protections for religious freedom, capable of withstanding the unpredictable development and dynamic expansion of a new nation, were effective? Perhaps not. And certainly not in the manner envisioned in 1789.

¹ *Constitution Rankings*, COMPAR. CONSTS. PROJECT (Nov. 17, 2019, 4:33 PM), <https://comparativeconstitutionsproject.org/ccp-rankings/>.

² U.S. CONST. amend. I.

³ MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 821 (3d ed. 2017).

I. SAFEGUARDING RELIGIOUS FREEDOM IN THE UNITED STATES

Before an appreciation can be had for what it means to safeguard religious freedom, it is imperative to recognize the multifaceted role religion holds in our society. Religion is “an indispensable mechanism of integration of human beings.”⁴ Religion also provides a meaningful frame of reference by which an individual may cultivate a greater understanding of history and social change.⁵ Religion extends beyond “faith, doctrine, and precept” to holistically encompass “rite and ceremony, community and authority, hierarchy and organization.”⁶ Finally, according to some belief systems, religion is “the origin of all fundamental ideas in human thought and belief.”⁷ As a cornerstone of human existence and experience, the desire to protect religion from manipulation, oppression, or undue influence of any kind, is readily understood.

In the era preceding the American Revolution, the relationship between Church and State was not only profound, but unyielding. The combined authority of the Act of Supremacy of 1534⁸ and the Act of Uniformity⁹ ensured that the British crown was “the only supreme head on the earth of the Church in England.” Furthermore, at the time of the Founders, in Spain the Inquisition was still operational.¹⁰ The Puritans, among others, had fled to the New World to escape religious oppression; therefore, it is certainly no surprise to find that concerns about the relationship between the government and the church, and about the ability to practice one’s faith, would ultimately be included in the Constitution that would come to govern this emerging nation. While a prohibition against religious oaths as a prerequisite to being sworn into public office appears in the main text of the Constitution, it is the provisions

⁴ ROBERT A. NISBET, *THE SOCIOLOGICAL TRADITION* 229 (2005).

⁵ *Id.* at 230.

⁶ *Id.*

⁷ *Id.* at 231.

⁸ David Ross, *Henry VIII’s Act of Supremacy (1534) – Original Text*, BRITAIN EXPRESS, <https://www.britainexpress.com/History/tudor/supremacy-henry-text.htm> (severing England’s connection with the Roman Catholic Church).

⁹ *First Act of Uniformity 1549*, TUDOR PLACE, http://www.tudorplace.com.ar/Documents/first_act_of_uniformity_1549.htm (making the Book of Common Prayer the only legal form of worship within the Church of England).

¹⁰ RICHARD DAVIS, *TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN RELIGION* 302 (Daniel K. Judd ed. 2003).

found within the text of the First Amendment that placed America's religious economy on its current path.

A. The Anti-Establishment Clause

Through the processes of drafting, revising, and debating how to articulate a prohibition on the government to establish a state religion, the Framers were keenly aware of four troubling characteristics of the Church of England that the American people did not want to see emulated: "government control over doctrine and personnel, suppression of alternative faiths, religious tests for office, and compelled church attendance and support."¹¹ Of this the Framers were certain, but the greater challenge was to formulate the phrasing of freedom from such distasteful enmeshment between church and state in a manner that the separate states could agree upon and ratify. The pressure to succeed was immense, even from a somewhat outside perspective – Tocqueville asserted that "nothing . . . is more necessary to the preservation of liberty in a democracy than absolute separation of religion from state and its politics."¹²

Eventually, the words we are familiar with today were selected, and, of course, the Amendment was ratified; however, that certainly was not the end of the debate surrounding establishment of religion or the separation of Church and State.¹³ It was not until 1947 that the Anti-Establishment Clause was incorporated to the states,¹⁴ and it would be almost another twenty-five years before the Supreme Court of the United States would set out what exactly constituted an "establishment of religion." Specifically, the Court said, "a law must (1) have a secular purpose; (2) have a "primary effect" that "neither advances nor inhibits religion;" and (3) not foster an "excessive entanglement" between government and religion."¹⁵ While seemingly a cohesive test, the debate raged on. A little more than ten years later, the *Lemon* test was redefined in a two-pronged format, emphasizing (1) "whether government's actual purpose is to endorse or disapprove of religion," and (2) "whether, irrespective of government's actual purpose, the practice under

¹¹ PAULSEN ET AL., *supra* note 3, at 822.

¹² NISBET, *supra* note 4, at 236.

¹³ See generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 536-37 (3d ed. 2005) (summarizing the longstanding controversy surrounding the entanglement of church and state in the United States).

¹⁴ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947).

¹⁵ PAULSEN ET AL., *supra* note 3, at 822 (summarizing the decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

review in fact conveys a message of endorsement or disapproval.”¹⁶ Today, while we may be able to point to what the Founders were trying to *avoid* through the Anti-Establishment Clause, it is less clear what they were attempting to *achieve*.

B. The Free Exercise Clause

Unfortunately, the Free Exercise Clause offers just as little insight into the Framers’ long term intentions for preserving religious freedoms in the United States. It is generally accepted that the Free Exercise Clause enables believers to personally determine their religious beliefs; however, the scope of protection that encompasses the actual “exercise” of those beliefs has been heavily debated by the Founders, legislature, and courts since at least 1785.¹⁷ Common sense might suggest the inclusion of religious speech, worship, assembly, publication, and education,¹⁸ but there are known caveats that carve out exclusions from the umbrella of protection afforded by the Free Exercise Clause. For example, “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”¹⁹ Essentially, religious beliefs are fully protected, but various acts of religious conduct are not.²⁰ In the midst of such debate, the Free Exercise Clause, like the Anti-Establishment Clause, was not incorporated to the states until the 1940s.²¹

II. AMERICA’S RELIGIOUS ECONOMY

While the debates surrounding the First Amendment religious freedoms were playing out in the halls of legislature and in the courtrooms across the country, the ramifications of prioritizing religious freedom on such a fundamental level unfolded with dynamic results. These innovative freedoms fueled clergy to zealously recruit new adherents²², which produced an energetic,

¹⁶ Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984).

¹⁷ PAULSEN ET AL., *supra* note 3, at 1088-94.

¹⁸ John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 395 (1996).

¹⁹ Empl Div., Dept. of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990).

²⁰ Reynolds v. United States, 98 U.S. 145 (1879).

²¹ Cantwell v. Connecticut, 310 U.S. 296 (1940).

²² ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA 1776-2005: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* 3-5 (2008).

free market; however, instead of goods and services²³, this was the market for salvation, but economic principles still apply to the examination of the religious economy.

A. Defining the Religious Economy

Competitive free markets, absent government intervention, have several distinct advantages (i.e., incentivized productivity, promotion of efficiency, no requirement for centralized direction or organization, associations with freedom and choices²⁴); however, no market is *perfectly* efficient, so a limited amount of government involvement, predominantly to enhance competition, is typically accepted.²⁵ Religious economies are fundamentally no different – they have their “customers” and those who serve them, “their organizational structures, their sales representatives, their product, and their marketing techniques.”²⁶ When our government adopted a *laissez faire* approach to religion, many specialized faiths emerged, compelling intense competition among clergy to retain their adherents.²⁷ However, those who believed “good manners forbade recruiting from a colleague’s flock were ill-equipped to hold their own in a free-market.”²⁸

B. The Churching of America

The competitive religious economy that was made possible by the First Amendment freedoms of religion produced explosive results for much of our nation’s history. In 1776, only about 17% of the population was affiliated with a church; however, that steadily increased to about 37% in 1860, 51% by 1906, and 62% in 1980.²⁹ At our founding, over half of all adherents were members of either a Congregationalist, Episcopalian, or Presbyterian church, yet these “old mainline denominations” would be unable to stand the test of time, likely due to their inability to keep pace with an extremely competitive market.³⁰ Alternatively, among the denominations that could remain competitive in a saturated market, the growth

²³ REBECCA M. BLANK & WILLIAM MCGURN, IS THE MARKET MORAL? A DIALOGUE ON RELIGION, ECONOMICS, & JUSTICE 14 (2004).

²⁴ *Id.* at 15-6.

²⁵ *Id.* at 17.

²⁶ FINKE & STARK, *supra* note 22, at 9.

²⁷ *Id.* at 11.

²⁸ *Id.* at 112.

²⁹ *Id.* at 22-23.

³⁰ *Id.* at 55.

experienced was staggering – in less than 100 years (1776 to 1850), the Methodist denomination grew from 65 churches to 13,302 churches.³¹

After the Civil War, the Methodists remained successful, but the competition for congregants was increasingly intense, even within denominations. While Baptists and Methodists faced little competition from other denominations in recruiting African Americans³², “an unaffiliated congregation of Methodist freed slaves was considered a “prize” and representatives of two or three Methodist denominations would often be recruiting the congregation at the same time.”³³ Meanwhile, the Catholic church was reaping the rewards of westward expansion (i.e., the Louisiana Purchase (1803), the annexation of Texas (1845), and the Treaty of Guadalupe Hidalgo (1848)) in newly acquired, predominantly Catholic territories.³⁴ The Catholic church also found stability and growth in urban, ethnic parishes where the church could function as a hub for immigrants striving to navigate a new country, possessing distinct sociocultural needs.³⁵

The turn of the century brought with it a tumultuous tide of reduction and expansion for different denominations, varying based on the approach they had chosen to implement in the face of an emerging modernity. Baptists and Methodists began tempering their theology, and were increasingly known for their well-educated and handsomely-compensated clergy, indicating secularization, especially in the North.³⁶ Others expressed the need to “eliminate the large numbers of extra churches which [were] not worth what they cost,” from an “over-churched” rural America.³⁷ Numerous factions within denominations, most notably within the Methodist church, began to unify in the 1930s³⁸, before the suburban sprawl of the 1940s and 1950s generated a demand for more churches.³⁹ What remained was a practically “standardized” American Protestant

³¹ *Id.* at 57.

³² FINKE & STARK, *supra* note 22, at 99-101.

³³ *Id.* at 190-91.

³⁴ *Id.* at 148-49.

³⁵ *Id.* at 139, 155.

³⁶ *Id.* at 185.

³⁷ *Id.* at 209.

³⁸ FINKE & STARK, *supra* note 22, at 198.

³⁹ *Id.* at 224.

denomination⁴⁰, seemingly bereft of all the vitality and vibrancy indigenous to the more competitive years of the religious economy.

C. Declines in Church Adherence

After over 200 years of religious freedom guaranteed at the highest level, by the Constitution of the nation, something within our society began to change:

[A]s populations have shifted and as communities have eroded, religion in America has also become transformed. Fearing membership declines, congregations have changed their structures, their message, and their approach. Instead of attempting to transcend narrow individualism and consumerism, they have adapted to it, developing therapeutic rather than religious messages; instead of trying to counteract the forces that have undermined genuine community, they have created their own counterfeit versions disconnected from their own neighborhoods; and instead of acting as organizations that enhance the richness of the local community, they have focused on building loyalty to the congregation.⁴¹

Though these congregations were striving for self-preservation, history has not been favorable to this approach. Often, “as denominations have modernized their doctrines and embraced temporal values, they have gone into decline.”⁴² This is supported by data indicating a decline in membership within mainstream Protestant denominations in excess of fifty percent since 1965.⁴³

III. FREE EXERCISE AND THE DEATH OF GOD

According to Jacques Ellul, “when one destroys a religion, one will see the social group come apart,”⁴⁴ and despite all efforts to sincerely and whole-heartedly safeguard religious freedom in the United States, nearly since day one, there now seems to be trouble brewing in paradise. In one sense, “freedom of religion came to be

⁴⁰ *Id.* at 225.

⁴¹ JOEL M. CHARON, *THE MEANING OF SOCIOLOGY: A READER* 348 (7th ed. 2002) (citing JOHN F. FREIE, *COUNTERFEIT COMMUNITY: THE EXPLOITATION OF OUR LONGINGS FOR CONNECTEDNESS* 135-36 (1998)).

⁴² FINKE & STARK, *supra* note 22.

⁴³ JACQUES ELLUL, *PERSPECTIVES ON OUR AGE: JACQUES ELLUL SPEAKS ON HIS LIFE AND WORK* 76 (Willem H. Vanderburg ed. 2004)

⁴⁴ *Id.*

seen as less important than freedom *from* religion."⁴⁵ In another, tolerance for the faith-based differences of others has drifted into indifference; yet, that particular concern may not be so startling considering Thomas Jefferson's perspective: "it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."⁴⁶

Today, "religion in public is at best a breach of etiquette, at worst a violation of the law;" still, "religious freedom is to be protected, strongly protected—so long as it is irrelevant to the life of the wider community."⁴⁷ Yet it still seems contradictory to call religion irrelevant when it is a natural facet of the human experience, when it provides explanations that science can't, and when it fundamentally encourages us to live.⁴⁸ The government consistently strives to remain religiously neutral by not establishing a state religion and by not impeding the rights of the people to freely exercise their beliefs; however, "somehow, "neutral" came to mean "secular"—as if agnosticism about the theistic foundations of the universe were common ground among believers and nonbelievers alike."⁴⁹ Is this the religious freedom the Founders had envisioned? For believers, what would God think of the bland, watered-down version of nonsectarian religious practice that our society permits?⁵⁰ As a result of the American free-market approach to religion, what if God is dead?

A. Death of God Theology

Have you heard of the madman who on a bright morning lighted a lantern and ran to the marketplace calling out unceasingly: "I seek God! I seek God!"—As there were many people standing about who did not believe in God, he caused a great deal of amusement. Why! is he lost? said one. Has he strayed away like a child? said another. Or does he keep himself hidden? Is he afraid of us? Has he taken a sea-voyage? Has he emigrated?—the people cried out

⁴⁵ Michael W. McConnell, *God is Dead and We Have Killed Him: Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 174 (1993).

⁴⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed. 1955).

⁴⁷ McConnell, *supra* note 45, at 165.

⁴⁸ ELLUL, *supra* note 43.

⁴⁹ McConnell, *supra* note 45, at 174.

⁵⁰ DAVIS, *supra* note 10, at 307.

laughingly, all in a hubbub. The insane man jumped into their midst and transfixed them with his glances. "Where is God gone?" he called out. "I mean to tell you! *We have killed him*,—you and I! We are all his murderers! But how have we done it? How were we able to drink up the sea? who gave us the sponge to wipe away the whole horizon? What did we do when we loosened this earth from its sun? Whither does it now move? Whither do we move? Away from all suns? Do we now dash on unceasingly? Backwards, sideways, forwards, in all directions? Is there still an above and below? Do we not stray, as through infinite nothingness? Does not empty space breathe upon us? Has it now become colder? Does not night come on continually, darker and darker? Shall we not have to light lanterns in the morning? Do we not hear the noise of the grave-diggers who are burying God? Do we not smell the divine putrefaction?—for even Gods putrify! God is dead! God remains dead! And we have killed him! How shall we console ourselves, the most murderous of murderers? . . . Shall we not ourselves have to become Gods, merely to seem worthy of it? There was never a greater event, —and on account of it, all who are born after us belong to a higher history than any history hitherto!"—Here the madman was silent and looked again at his hearers; they were also silent and looked at him with surprise. As last he threw his lantern on the ground, so that it broke in pieces and was extinguished. "I come too early," he then said, "I am not yet at the right time. This prodigious event is still on the way, and is travelling—it has not yet reached men's ears. Lightning and thunder need time, the light of the stars needs time, deeds need time, even after they are done, to be seen and heard. This deed is as yet further from them than the furthest star, —*and yet they have done it!*"⁵¹

⁵¹ FRIEDRICH NIETZSCHE, *THE JOYFUL WISDOM* 125 (Thomas Common trans. 1964) (this title is often translated as *THE GAY SCIENCE*).

“According to Nietzsche, ‘God is dead’ not because he has ‘died’ in a literal sense *but because modernity has undermined the cultural bases that previously made belief in God meaningful.*”⁵² What is unique in the American religious landscape is that modernity, the modernity that “killed” God, finds its roots in the Protestant Ethic, which eventually relegated religion “to the margins of public life”⁵³ through enmeshment with a capitalist system.

B. The Protestant Ethic

At the end of the nineteenth century, it was not unusual to encounter higher levels of socioeconomic achievement in communities that were both Protestant and capitalist.⁵⁴ Though largely faded into history now, the underlying commonality is a value system based in Puritan ideals (i.e., the innate goodness of work, acquisitiveness, the methodological organization of one’s life, delayed gratification)⁵⁵ that, when secularized through a capitalist lens, transform into an “ethically compelling” “calling” that serves God via economic pursuits.⁵⁶ Max Weber explained this shift toward the acquisition of capital and the diminishment of Puritan values as an ostensibly natural consequence of people finding enjoyment in their material possessions.⁵⁷ Furthermore, Weber indicated that “the rise of a free market unencumbered by religious restrictions” was one of a select few causes of the development of capitalism in the West.⁵⁸

C. Liberalism, Post-Modernism, and Selective Multiculturalism

In the context of the Death of God, supplemented by an understanding of how Puritan values became the foundation for modern American capitalism, the progression from liberalism to

⁵² DAVID ASHLEY & DAVID MICHAEL ORENSTEIN, *SOCIOLOGICAL THEORY: CLASSICAL STATEMENTS* 448 (6th ed. 2005).

⁵³ McConnell, *supra* note 45, at 178.

⁵⁴ JOHNATHAN H. TURNER ET AL., *THE EMERGENCE OF SOCIOLOGICAL THEORY* 201 (3rd ed. 1995) (citing MAX WEBER, *PROTESTANT ETHIC* 25 (Talcott Parsons trans. 1958).

⁵⁵ *Id.* at 211 (citing WEBER, *supra* note 54, at 89).

⁵⁶ NISBET, *supra* note 4, at 259.

⁵⁷ TURNER ET AL., *supra* note 54, at 207 (citing WEBER, *supra* note 54, at 176).

⁵⁸ *Id.* at 204 (citing MAX WEBER, *GENERAL ECONOMIC HISTORY* 207-70 (Frank Knight trans. 1961).

selective multi-culturalism becomes more ascertainable. Initially, “liberalism meant many things, but above all it meant that every person has the freedom to worship God in accordance with the dictates of his own conscience”⁵⁹ Post-modernism, on the other hand, is defined by four key points:

(1) the self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted. (4) Because language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence, all propositions and all interpretations, even texts, are themselves social constructions.⁶⁰

In a pattern similar to the realization of Puritans that they may enjoy their material possessions, post-modernists⁶¹ recognized that the “neutrality” of liberalism was, in fact, “based upon patriarchal, white, male, European, and bourgeois interests and values.”⁶² Through this lens, the post-modernist ideology, particularly within the public school system, comes into focus. “American” values of “democratic patriotism, liberal Protestantism, and the virtues of hard work, self-discipline, and self-reliance,”⁶³ imparted in schools are not the “neutral” principles they are often asserted to be. The problem is that, while these value-laden principles are able to infiltrate schools, questions about how to adeptly instruct students about history, biology, and sex persist; moreover, religious views have been actively excluded from educational environments, including from the study of subjects

⁵⁹ McConnell, *supra* note 45, at 166-67.

⁶⁰ *Id.* at 182 (citing Peter C. Shanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508-09 (1992)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 178.

where religion assuredly had meaningful influence on the discipline (i.e., history, social studies, humanities).⁶⁴

These perspectives are often painted in the guise of “multi-culturalism;” however, in reality, they are decidedly not multi-cultural.⁶⁵ Rather, “the post-modernist advocate pleads for open-mindedness to various points of view (multi-culturalism) when out of power and suppresses dissent (political correctness) when in power.”⁶⁶ Here, as with the transformation of Puritan beliefs into capitalist values, religion is left vulnerable to exclusion, suppression, or indifference that loses the “wisdom of the ages” to the unrelenting evolution of society.⁶⁷

IV. IMPLICATIONS FOR RELIGIOUS FREEDOM IN AMERICA

At this point, the religious economy and the capitalist economy begin to coalesce; however, it is imperative to recall that, “when the First Amendment was proposed and ratified, the government had little or no involvement in education, social welfare, or the formation and transmission of culture.”⁶⁸ Then, maintaining the “wall of separation between church and state” was not as complex as it is now; however, that does not necessarily mean that the metaphor is flawed.⁶⁹ In economic terms, government intervention for the purposes of overcoming market inefficiencies is accepted⁷⁰; therefore, there is, perhaps, a gate in the wall that divides Church and State in America. That said, “expansion of government activity is believed to encroach on individual choice.”⁷¹ So, if there is a gate, it should be kept locked. But does that wall still matter with what religion in the United States has become in light of capitalist influences?

A. Marx on Capitalism

It is nearly impossible to thoroughly discuss any economic system, particularly a capitalist system, without addressing the perspectives of Karl Marx. In a capitalist system, Marx presents two foundational concepts: simple reproduction, and conversion of

⁶⁴ *Id.* at 180.

⁶⁵ McConnell, *supra* note 45, at 179.

⁶⁶ *Id.* at 187.

⁶⁷ *Id.*

⁶⁸ *Id.* at 177.

⁶⁹ *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

⁷⁰ BLANK & MCGURN, *supra* note 23, at 43.

⁷¹ *Id.* at 51.

surplus value into capital.⁷² First, simple reproduction involves the following behavioral pattern: (1) workers produce products, (2) products generate surplus value for capitalists, (3) capitalists pay wages to workers, (4) workers pay wages back to capitalists in order to buy the products they produced.⁷³ Second, conversion of surplus value into capital refers to reinvestment – the rich get richer.⁷⁴

Based on these two principles, and guided by a belief that the collapse of capitalism would be “inevitable”⁷⁵, Marx made three significant predictions about capitalist economies: (1) “proletarians would be forever separated from owning or controlling private property, even their own labor;” (2) “proletarians would become more and more impoverished and that an industrial army of poor people would be created” (forced to work anywhere, anytime, for any wages); and (3) “the rate of profitability would fall and bring on industrial crises of ever greater severity. Eventually, then, a class-conscious and impoverished proletariat will overthrow a chaotic capitalist system in favor of a more humane and cooperative one.”⁷⁶

The result of free-market capitalism, then, is that impoverished workers who are unable to sustain their purchasing power will purchase fewer products, which will lead to fewer products being produced, reducing the number of workers to generate the goods, which pressures capitalists to further reduce costs, and so on, until all human and capital resources are depleted.⁷⁷ Whatever our values may be, this type of exploitive and alienating system is incapable of safeguarding those values in the absence of government intervention.⁷⁸

1. What is “*Late Capitalism*”?

In part, late capitalism is a system that is nearing the foreseeable demise predicted by Marx. More precisely, late capitalism has four distinguishing characteristics: (1) “the prominence of finance capital markets and cross-national investment, often resulting in exploitation of so-called

⁷² TURNER ET AL., *supra* note 54, at 159.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 162.

⁷⁶ *Id.* at 159-60.

⁷⁷ James Kurth, *The Rich Get Richer*, AM. CONSERVATIVE (Sept. 25, 2006, 12:00 AM) <https://www.theamericanconservative.com/articles/the-rich-get-richer/>.

⁷⁸ Eliot Spitzer, *Bull Run*, NEW REPUBLIC (Mar. 22, 2004), <https://newrepublic.com/article/67470/bull-run>.

“underdeveloped nations;” (2) “governmentality under which citizens are encouraged to pursue their own freedom, and where “freedom” turns out to dovetail with consumerism;” (3) “forms of cultural production whereby social identities and differences are manufactured, marketed, and consumed;” and (4) “ideology that legitimates “free markets” with talk of “the self-made man” and “individual responsibility” while obscuring the extent to which social conditions, social networks, and classes of origin are keys to success in a capitalist regime.”⁷⁹

2. *The Religious Economy*

Just as unregulated capitalism will, according to Marx, ultimately lead to an irreparable and inevitable breakdown in the system, unregulated religion may not be as conceptually stable in practice as it is on paper. Despite a track record of over 200 years of success associated with the express freedoms of religion that are at work within the United States, church adherence is declining. Just as the costs of participation in capitalism can become too high for workers to continue in their roles, the demands of religious adherence can become too high for a believer to remain affiliated with the church.⁸⁰ Alternatively, the role of religion in one’s life may become so minimal that it blends with and is obscured by other sociocultural and economic norms and values. In recent research with teenagers, based on an interview with a participant who perceived God’s presence in her life because she has “a house, parents, . . . the internet, . . . a phone . . . cable,” it would seem that, at least for that individual, “what is taken to be good is not derived from Protestantism but invisibly comes from late capitalist middle-class norms—but the latter are passed off as what God wants for us.”⁸¹ Presented in another way, ““religious” cultural tradition has been completely domesticated by the norms of late capitalism.”⁸²

“To the extent that people seek religion—and not all do—the demand is the highest for religions that offer close relations with the supernatural and distinctive demands for membership, without isolating individuals from the culture around them.”⁸³ People seek

⁷⁹ Craig Martin, *William James and Jesus Christ in Late Capitalism: Our Religion of the Status Quo*, 42(4) *STUD. IN RELIGION/ SCIENCES RELIGIEUSES* 477, 503 n.1 (2012).

⁸⁰ *Id.* at 488-89.

⁸¹ *Id.* at 491.

⁸² *Id.* at 492.

⁸³ FINKE & STARK, *supra* note 22, at 275.

out “potent, vivid, and compelling” religious experiences that provide psychoemotional or spiritual rewards of the same degree; however, the religious organizations capable of providing such a religious experience are also those that command “the highest price in terms of what the individual must do to qualify for these rewards.” The end result is achieved through a cost-benefit analysis.⁸⁴ Is it worth it to adhere to stringent religious doctrine in exchange for the experience?

A. Confident Pluralism

As a direct result of the religion clauses of the First Amendment, religious pluralism exists in the United States. This includes those who are the most impassioned, strict believers who adhere to the most rigorous practices, those who are more “spiritual” than “religious,” and those who adhere to a religious belief system that is indistinguishable from capitalist norms. The existence of pluralism of this kind gives rise to potential conflicts between differing groups, and inspires the question of how we are to coexist with such pervasive and profound differences.⁸⁵ The answer lies in “confident pluralism.”⁸⁶ Confident pluralism is the idea that people can, indeed, coexist harmoniously, despite their differences; moreover, collective pluralism encompasses a “right to differ” that is not “aggressive” but is characterized by integrity in one’s convictions.⁸⁷ Confident pluralism maintains the suspicion of state power that is present in free market economies; however, rather than being overtly competitive in a desire to squash any competitors, confident pluralism is committed “to letting those differences coexist, unless and until persuasion eliminates those differences.”⁸⁸

These two premises rest upon a foundation of three “aspirations:” tolerance, humility, and patience. Tolerance means “a willingness to accept genuine differences, including profound moral disagreements.”⁸⁹ Humility allows for the possibility that an individual’s own beliefs may not be “right” or “good” and affords the possibility to persuade or be persuaded.⁹⁰ Finally, patience

⁸⁴ *Id.* at 282.

⁸⁵ John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 591 (2015).

⁸⁶ *Id.* at 591.

⁸⁷ *Id.* at 591-92.

⁸⁸ *Id.* at 592.

⁸⁹ *Id.* at 597.

⁹⁰ *Id.* at 599.

“recognizes that contested moral questions are best resolved through persuasion rather than through coercion”—a process which takes time.⁹¹

To implement a confident pluralism, robust associational freedoms will help preserve the sanctity of private groups against government intrusion.⁹² Additionally, “a stronger defense of the public forum—the physical and metaphorical places where government allows viewpoints to become voices”—would be beneficial to the facilitation of a confident pluralism.⁹³ Third, greater discretion and discernment in the distribution of government funds, particularly in an effort to delineate between persuasion and coercion, would also be meaningfully contributory to supporting the implementation of confident pluralism in the United States.⁹⁴

V. CONCLUSIONS

In terms of the Anti-Establishment Clause, the failure of the government to take an affirmative position within the religious economy seems to be resulting in the type of economic downturn predicted by Marx in reference to free-market capitalism. Competition has been fierce, yet church adherence is in decline. Regarding the Free Exercise Clause, the loss of meaning in religious practice, in some cases obscured by capitalist norms that have become disconnected from their Puritan origins, has carried Nietzsche’s madman and the Death of God into the post-modern era. Despite decades of astronomical growth, the future of religion in the United States rests on unstable footing, undermined by the very protections meant to preserve religious freedom: economic inefficiency in the absence of effective regulation and the freedom to worship in whatever irrelevant way you desire. It is doubtful this is what the Framers envisioned; yet all hope is not lost. Through the promotion of a confident pluralism, perhaps religion in the United States can reclaim the fervor of its past and revitalize the next generation in their spiritual lives.

⁹¹ Inazu, *supra* note 85, at 599.

⁹² *Id.* at 604.

⁹³ *Id.* at 606.

⁹⁴ *Id.* at 608-09.