STRUCTURAL MODELS OF RELIGION AND STATE IN JEWISH AND DEMOCRATIC POLITICAL THOUGHT: INEVITABLE CONTRADICTION? THE CHALLENGE FOR ISRAEL

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INTRODUCTION

Toward the end of its sixth decade, the State of Israel faces significant external and internal challenges for its ongoing existence and social stability. The main external challenges are Iran's nuclear program and terror attacks by regional and global terrorist organizations like Hamas, Hezbolla, and Al-Qaeda. The main internal challenges are connected to Israel's dual identity as a Jewish and democratic state. This unsolved duality appears in two of the most significant Israeli basic laws, as well as in the 1948 Proclamation of Independence,[1] and is the main issue that Israeli society is nowadays concerned about. It has a direct impact on two different spheres, both of which involve bitter social conflicts: the identity of Israel as the national homeland of the Jewish people, and the role of the Jewish religion in the Israeli secular regime. This Article focuses on the latter aspect, proposing a new methodology to deal with the challenge. I will show that, as opposed to the prevailing view, the conflict between Jewish and democratic ideas on religion and state is not unsolvable. Israel can structure the relationship between religion and state in a way which might be endorsed by both Jewish and democratic thought, and propose the initial methodology that should be employed to achieve it. Thus, this Article starts from

[1] *See* Basic Law: Human Dignity and Liberty, 1992 S.H. 90 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm ("The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state."); *see also* Basic Law: Freedom of Occupation, 1994, S.H. 90 (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm; STATE OF ISRAEL: PROCLAMATION OF INDEPENDENCE (Isr. 1948), *available at* http://www.knesset.gov.il/docs/eng/megilat_eng.htm.

Israel's dual identity, but eventually illuminates the meaning of this duality in a different light.

It is quite clear that the external challenges mentioned above are related not only to Israel. In the beginning of the third millennium, the whole world is concerned about Iran's nuclear program and about terror. The debate over the legitimacy of Israel's identity as the Jewish national state is also related to the general debate over the legitimacy of the idea of a "nation state" (or "ethnic state"),[2] and over the status of ethnic minorities in such a state. It is less apparent, however, that finding an overlap between Jewish and democratic ideas on religion and state is relevant beyond the Israeli context—Israel is the only country which defines itself as both Jewish and democratic. Nevertheless, the attempt to find a common ground between Judaism and democracy on religion and state is very relevant outside of Israel, as well. Different from modern Christianity, both Judaism and Islam are closely similar in some aspects, creating a special difficulty for such an attempt. Thus, the following attempt and the methodology it employs might indicate a promising direction regarding not only Judaism and democracy, but also Islam and democracy.

Part I of this Article discusses the essentiality of this project to Israel's social stability and cultural development, as well as its significance in a broader, global context. Part II elaborates upon the proposed methodology, distinguishing it from two kinds of previous

[2] *See* Ulrich Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 143, 150 (Michel

attempts to handle the issue, and further discussing its relations to a methodology used by Michael W. McConnell in a different context. The proposed methodology involves the use of a framework of structural models for drawing possible relationships between religion and state. Basically, this is a continuum with identity between religion and state on one side, hostility between them on the other, and a range of other models of relationships in between the poles (e.g. "establishment" or "separation"). Part II further points to the disadvantages of using this framework, but argues that finding an overlap on the continuum between models that democratic thought might accept and those which might be endorsed by Jewish thought is the best way to currently address the issue.

Part III discusses the range of models that modern democratic political and legal theory may accept. The American political and legal discussion on the issue is more developed than in any other modern democracy, and it is the main source of influence on the democratic perspective of the Israeli discourse. Therefore, this discussion serves as a prototype for a democratic discussion in general. Identifying and analyzing the main themes and arguments which are involved in the American discussion, I will show that each of them separately, needless to say their different combinations, may generate quite a wide range of models of the relationship between religion and state, from a kind of "establishment" to a kind of "hostility." Part IV discusses the Jewish perspective on the structural model of religion and state. It opens with the political thought of

Rosenfeld ed., 1994) (discussing the idea of an ethnic state).

Maimonides, one of the main canonical Jewish philosophers and legal scholars, and continues with another well known Jewish scholar, Rabenu Nissim ben Reuben Gerondi ("Ran"). The analysis of Maimonides' and Ran's theories will show that while the Maimonidean model is on the far edge of the continuum, requiring a kind of union between religion and state or total subordination of state to religion, Ran's theory opens the door for various models of relationships between the two, from "union" to "separation."

Part V concludes this Article with an identification of the range of models accepted by both democratic thought (as expressed in American political-and-legal-theory discussion on religion and state) and Jewish thought (as expressed in Maimonides' and Ran's political theories). Also, the conclusion explains the potential consequences of such an overlap to Israel and then further discusses some reflections on the general attitude that underlies the attempt. Finally, the conclusion points to some broader methodological implications, outside the issue of religion and state.[3]

[3] The attempt to find an overlap between Jewish and democratic attitudes on religion and state involves a preference for Judaism over other religions in the following three aspects: (1) In the way the question is formulated—whether there is an overlap between democratic and *Jewish* (not any other religious) attitudes toward religion and state; (2) in the true nature of the question—the real question concerns not the Jewish attitude toward the involvement of the state with religion in general, but the degree of connection between the state and *Judaism*; (3) the expected range of answers also envelops the preference for Judaism (because of the political nature of Judaism, an overlap between Jewish and democratic attitudes about religion and state will be more easily found in models that acknowledge some degree of connection between the two). This triple preference is not obvious, especially given the division of the Israeli population, which is: 80% Jews, 16% Arabs (mostly Muslims) and about 4% Christian and other religions. *See* CENTRAL BUREAU OF STATISTICS, 56 STATISTICAL ABSTRACT OF ISRAEL 2005, tbl. 2.1 (2005), http://www1.cbs.gov.il/shnaton56/st02_01.pdf; *see also* CENTRAL BUREAU OF STATISTICS, ISRAEL IN FIGURES 2005 10 (2005), http://www.cbs.gov.il/publications/isr_in_n05e.pdf (explaining Israel's population statistics for 2005 in English). Indeed, the difficulties that religious minorities might encounter as a result of a special role given to a specific religion

I. RELIGION AND STATE: THE NEED TO FIND AN OVERLAP BETWEEN JEWISH AND DEMOCRATIC ATTITUDES

Finding a way to handle the issue of religion and state that is compatible with both Judaism and democracy is essential for Israel in two independent aspects: the possibility of achieving a constitutional ordering of this issue, and the possibility of continuing the long-running cultural progress of integration between Jewish and western cultures. Part I discusses and elaborates this two-pronged argument. Regarding the first prong, this Part discusses the background of the Israeli arrangements of religion and state, argues for their inadequacy and for the need to constitutionally address the issue, and then establishes the argument that a potential overlap is a condition to enable honest and successful discussion. As for the second prong, this Part explains in a broader cultural context the need to find connections between Judaism and democracy regarding the possible arrangements of religion and state. Part I concludes with the significance of such an attempt as a model for finding common ground between Muslim and democratic cultures regarding religion and state.

in a state is one of the main factors addressed in the democratic discussion about religion and state. *See infra* Part III. Moreover, in the Israeli situation the difficulties of religious minorities are moderated by the fact that mainstream Judaism does not have missionary aspirations. *See* JOSEPH R. ROSENBLOOM, CONVERSION TO JUDAISM: FROM BIBLICAL PERIOD TO THE PRESENT 74-75 (1978) (arguing that Judaism had different attitudes in ancient times but admits that since the middle ages the anti-missionary attitude prevailed). Furthermore, there is a large overlap between Israeli religious minorities and the ethnic (or national) Arab minority. As members of a national minority, the difficulties that Arab citizens experience are much broader than the question of the role of the Jewish religion in the state. These difficulties are connected to the general existence of a Jewish national state, which endorses the Jewish culture and has a Zionist narrative that deeply contradicts their national narrative. Although this latter issue is beyond the limits of this article, it helps to understand the relatively moderated form of the problem of religious minorities in the Israeli context.

A. An Initial Overlap as a Condition for Israeli Public Discussion about Religion and State

1. Religion and State in Israel: Background

As opposed to many other countries, Israel does not have any supreme-law document which determines the fundamental principles that should underlie the relationship between religion and state.[4] It does not even have any satisfactory regulation related to daily matters. Since Israel's founding in 1948, questions of religion and state were managed through what was called the "Status Quo" Doctrine.[5] As its name indicates, the doctrine preserved (or at least was assumed to preserve) a wide range of legal and practical arrangements of religious matters which were prevalent during the very beginning of Israel as an independent state.[6] These arrangements mainly originated from two sources: legal arrangements that existed in Palestine during the period of the Ottoman rule and the British mandate (e.g. religious courts with exclusive jurisdiction over matters of personal status),[7] as well as arrangements that were adopted by some Zionist institutions.[8] The doctrine tied together the state and religions in general—for instance, it included the establishment of the Ministry of Religious Affairs

[4] Numerous countries have constitutions which generally address the relationship between religion and state. *See*, *e.g.*, U.S. CONST. amend. I; RIGES GRUNDLOV [Constitution] pt. 1, § 4 (Den.); SUOMEN PERUSTUSLAKI [Constitution] § 76 (Fin.); GRUNDGEZETZ [GG] [Constitution] art. 4 (F.R.G.).

[5] *See* CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 31 (1984).

[6] *Id*. at 34.

[7] *See* Amnon Rubinstein, *Law and Religion in Israel*, 2 ISR. L. REV. 380, 384 (1967).

[8] *See* LIEBMAN, *supra* note 5, at 31.

which was generally in charge of governmental engagement with religious matters—but particularly connected the state and the Jewish religion. Part of the doctrine included the establishment of public Jewish religious schools alongside the regular schools,[9] some enforcement of Jewish dietary laws in the public sphere (basically exempting non-Jews),[10] and exemption of orthodox yeshiva students from compulsory army service, granted by the minister of defense.[11] Underlying the doctrine was, as one scholar truly asserted, "the perception that it served as a necessary condition for the emergence, maintenance and stability of democracy in Israel"—making it unnecessary to handle very sensitive and potentially explosive issues.[12]

2. The Current Need for Handling the Issue of Religion and State

The issue of religion and state must be addressed by the state of Israel, regardless of the adequacy or inadequacy of the status quo arrangements. This is because the strategy behind the status quo is no longer able to achieve its own goals; it can no longer serve as an informal "gag rule" and accomplish stability.[13] In Israel of recent

[9] *See* State Education Law, 5713-1953, 7 LSI 113 (1952-53) (Isr.); *see also* Stephen Goldstein, *The Teaching of Religion in Government Funded Schools in Israel*, 26 ISR. L. REV. 36, 41 (1992).

[10] *See* Festival of Matzot (Prohibition of Leaven) Law, 5746-1986, 40 LSI 231 (1985-86) (Isr.); Pig-Raising Prohibition Law, 5722-1962, 16 LSI 93 (1961-62) (Isr.) (providing exemptions for scientific research, zoological gardens, and specified localities).

[11] *See* HCJ 3267/97 Rubinstein v. Minister of Defense [1998] IsrSC 55(2) 255, *available at* http://elyon1.court.gov.il/eng/verdict/framesetSrch.html (providing the background of the exemption of orthodox students from service in the military).

[12] Dr. Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 618 (1999).

[13] *Id.* at 630 ("The status quo doctrine has become vulnerable to major changes, a fact that

years, conflicts about specific applications as well as fundamental principles in the area of religion and state became more and more common, both in the political as well as in the legal sphere.

In the political sphere, parties which gained elections used their mandate to substantially and unilaterally change some of the arrangements of the status quo. For instance, one example is the governmental decisions to dismantle the Ministry of Religious Affairs and take some of its responsibilities and subordinate some of the remaining to the Prime-Minister's Office.[14] Prime Minister Ehud Barak said, at an initial stage of the process, that it was a "first and important practical step to achieve a civil social agenda."[15] Obviously, the process was severely criticized by religious parties.[16]

In the legal sphere, Israel's Supreme Court invalidated some traditional components of the status quo doctrine. For example, it nullified the above-mentioned exemption of orthodox yeshiva students from army service on the basis that this exemption is a

prevents it from functioning effectively as a gag rule.").

[14] *See* Bureau of Democracy, *Human Rights, and Labor, Israel and the Occupied Territories: International Religious Freedom Report 2005*, http://www.state.gov/g/drl/rls/irf/2005/51601.htm (last visited Sept. 7, 2006).

> In March 2004, the Ministry of Religious Affairs was officially dismantled and its 300 employees reassigned to several other ministries. As a result, the Ministry of the Interior now has jurisdiction over religious matters concerning non-Jewish groups; the Ministry of Tourism is responsible for the protection and upkeep of all holy sites, and the Prime Minister's office has jurisdiction over the nation's 134 religious councils (one Druze and the rest Jewish) that oversee the provision of religious services to their respective communities.

Id.

[15] Press Release, Ehud Barak, Prime Minister of Israel, Mar. 9, 2000, *available at* http://www.pmo.gov.il/PMO/ (translated from Hebrew).

[16] *See, e.g.*, DK (2005)(V) 40-42 (parliamentary speech of Knesset Member Meir Porush, an ultra-orthodox representative), *available at* http://www.knesset.gov.il/plenum/data/103841605.doc.

"primary arrangement" and should be established in legislation, not granted by the executive branch.[17] Another example is the Supreme Court decision to invalidate "administrative regulations which restricted the importation of non-kosher meat" because it "violated freedom of occupation."[18] These and other decisions[19] unsurprisingly led to frequent attacks by the conservative parts of the Israeli Jewish population on the Supreme Court's "pretended impartiality," and to recurring attempts to limit its power.[20] An extreme illustration of the political and social instability that this situation caused took place just

[17] HCJ 3267/97 Rubinstein v. Minister of Defense [1998] IsrSC 55(2) 255, par. 39 *available at* http://elyon1.court.gov.il/eng/verdict/framesetSrch.html. The Court postponed the effective date of the invalidation in order to enable the government to adapt to the new legal situation, and in the meantime the Prime-Minister appointed a committee (comprised of ultra-orthodox, religious and secular members) to propose a statute to regulate the issue. The proposal of the committee, which was different from the former arrangement, was enacted during the year 2002. *See* Postponement of Military Service for Yeshiva Student whose Torah Is Their Calling Law, 2002 S.H 521. Lately, Court affirmed the constitutionality of this law, but at the same time declared that unless the law and its requirements are more seriously applied, it might become unconstitutional in the future, because a sweeping exemption from compulsory military service infringes the human dignity of those Israelis who do serve. *See* HCJ 6427/02 The Movement for Quality Government in Israel v. The Knesset [2006], *available at* http://elyon1.court.gov.il/files/02/270/064/a22/02064270.a22.HTM (This is another example for the deep involvement of the Israeli Supreme Court in the field of religion and state which I described above.).

[18] *See* HCJ 3872/93 Meatrael Ltd. v. Minister of Commerce and Indus. [1993] IsrSC 47(5) 485; *see also* Sapir, *supra* note 12, at 638.

[19] The fear of the consequences of judicial review of legal arrangements in the area of religion and state was intensified by the Supreme Court ruling in United Mizrahi Bank Ltd. v. Migdal Village that at least two of the basic laws that the Israeli parliament had enacted, on Human Dignity and Liberty and on Freedom of Occupation, were parts of a progressive constitution. As such, they enable Court to invalidate ordinary laws of the Knesset, including laws which deal with religion and state matters. *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Vill. [1995] IsrSC 49(4) 221.

[20] Examples for such an attempt are proposals to establish a Constitutional Court which will have the exclusive jurisdiction on religion and state matters. The appointment of justices of the Constitutional Court will be done in a different manner than the appointment of current Supreme Court justices, in order to guarantee more representation of conservative parts of the population. *See, e.g.*, Draft Bill P/1875 (2000), *available at* http://www.knesset.gov.il/privatelaw/data/15/1875.rtf; Draft Bill P/3380 (2002), *available at* http://www.knesset.gov.il/privatelaw/data/15/3380.rtf; Draft Bill P/3393 (2002), *available at* http://www.knesset.gov.il/privatelaw/data/15/3393.rtf; Draft Bill P/678 (2003) *available at* http://www.knesset.gov.il/privatelaw/data/16/678.rtf.

a few years ago, in 1999, when 250,000 ultra orthodox (almost 5% of the Israeli population) demonstrated near the Supreme Court building in Jerusalem to protest against what they called its "anti-Semitic" agenda.[21] Nearby a counter-demonstration took place, comprised of mainly secular Supreme Court proponents. The fear of violence during this particular event was clear and present; and the fear of a general civil clash between the opponent parties still exists.[22]

3. Contemporary Attempts to Deal with the Issue of Religion and State

Indeed, it is difficult to disagree with the contention that the long standing status quo doctrine is not as effective as it used to be in creating social stability. From this narrow perspective alone, there is an urgent need to readdress the sensitive issue of religion and state. Recently, individuals raised this notion, combining it with a general rise of constitutional talk generated, inter-alia, by the abovementioned Supreme Court ruling in *United Mizrahi Bank Ltd.* and the reaction it provoked.[23]

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[21] Nomi Morris, *Protests Dividing Jews Remain Civil*, PITTSBURGH POST-GAZETTE, Feb. 10, 1999, at A-4.

[22] *See* Evelyn Gordon, *The Creeping Delegitimization of Peaceful Protest*, 7 AZURE: IDEAS FOR THE JEWISH NATION (1999) *available at* http://www.azure.org.il/magazine/magaizne.asp?id=138&search_text=creeping (discussing the "delegitimization" of anti-court demonstrations). The deep impact of these events is demonstrated in a newspaper interview of former S.C. Justice Zvi Tal from the beginning of this year. Tal, a modern orthodox, was asked about his feelings during the demonstrations which took place while he was a member of the Court. The question itself, seven years after the demonstrations, and Tal's very long answer, both show the traumatic effect that these events had on both sides. Astonishingly, Tal, a justice in Court, described his internal conflict and declared that if he could, he would attend both of the demonstrations. Shahar Ilan, *Nachonu Lanu Yamim Kashim* [We Are to Experience Difficult Times] HA'ARETZ (Isr.), Jan. 13, 2006.

[23] *See supra* note 19. It seems that the ruling intensified the constitutional talk in at least three aspects. First, the very pretension of Court to have the authority to declare that Israel has a constitution without any appealing for the people and even without full awareness of

The current situation has already prompted some projects, such as the "Foundation for a New Covenant among Jews in Matters of Religion and State in Israel."[24] The project is a covenant ("The Gavison-Medan Covenant") achieved by discussion between two representatives—an orthodox Rabbi (Yaakov Medan) and a secular Law Professor (Ruth Gavison), who tried to resolve some specific but controversial Religion and State matters, such as marriage and dissolution of marriage (currently under religious jurisdiction) and the public character of Jewish holidays.[25] The covenant attempts to find an "overlapping consensus" on these specific arrangements, without the necessity of agreeing about more fundamental questions like the general role of religion in public life.[26] Furthermore, it

the parliament to the meaning of the basic law it enacted created a counter reaction and requirement for a deliberate and consensual constitution. Second, the fear from the practical consequences of this declaration stimulates attempts to adopt an alternative constitution. Third, the legal discourse followed this and subsequent decisions by using the constitutional discourse they developed.

The connection between the developing discussion on religion and state and the comprehensive constitutional progress is not surprising to the extent that the latter, the more general, stimulated the former. It should be noted, however, that the connection is also true regarding the reverse direction. The understanding that there is an urgent need to address the issue of religion and state seems to be a main cause for the general progress, because of the fear from the consequences of the ruling in *United Mizrahi Bank Ltd*. on the issue. Moreover, about 30 years ago one scholar observed that the controversy on religion and state is "the primary reason for Israel's lack of a written constitution to this day." Donald E. Smith, *Religion and Political Modernization: Comparative Perspective*s, *in* RELIGION AND POLITICAL MODERNIZATION 3, 15 (Donald E. Smith ed., 1974). *See also* Norman L. Zucker, *Secularization Conflicts in Israel*, *in* RELIGION AND POLITICAL MODERNIZATION 95, 101-02. It is expected, therefore, that the initiation of a debate in this particular area will stimulate a general debate as well.

[24] YOAV ARTSIELI, THE GAVISON-MEDAN COVENANT: MAIN POINTS AND PRINCIPLES 6 (2004), *available at* http://www.idi.org.il/english/article.asp?id=2068.

[25] Ruth Gavison & Yaakov Medan, MASAD LEAMANA HEVRATIT HADASHA BEIN SHOMREI MITZVOT VEHOFSHIYIM BEYISRAEL [Foundation for a New Covenant among Jews in Matters of Religion and State in Israel] (2003) [hereinafter *Gavison-Medan Covenant*]; *see also* ARTSIELI, *supra* note 24, at 42-54, 63-71 (presenting the main points of the Covenant regarding marriage and Jewish holidays).

[26] ARTSIELI, *supra* note 24, at 19.

> The way of law must be one, while value systems and lifestyles will

provides practical arrangements which are more stable and just than the former arrangements of the status quo doctrine. The authors of the covenant call for the adoption of some of its general provisions in a constitution, and of the more specific arrangements in regular legislation.[27] However, in order to assure public consensus, even on those more specific arrangements, they recommend establishing special procedures that would guarantee that the legislation would be consensually accepted.[28]

Another project, called "A Constitution by Consensus," attempts to deal with religion and state matters as part of a broad effort to promote the framing of a comprehensive Israeli constitution.[29] This project, directed by the Israel Democracy Institute[30] included twelve congresses of the Institute's "Public Council," a group of around one hundred unofficial representatives of different Israeli sectors, who discussed various fundamental and controversial issues, in order to promote a social consensus and compose a proposal for a comprehensive constitution.[31] One

> remain different and variegated, each in its own way. The profound disagreement between value systems may be explored in greater depth and even expanded through genuine methods of elucidation, but without the need to defeat and dominate the other side.

Id. The different explanations that each author gave to the proposed arrangement, based on his and her own beliefs and values, reflect the same idea.

[27] *See, e.g.*, ARTSIELI, *supra* note 24, at 78, 81.

[28] *See id*. at 79.

[29] *See* The Israel Democracy Institute, Constitution by Consensus, http://www.idi.org.il/english/constitution.asp (last visited Aug. 20, 2006) (explaining the project, "A Constitution by Consensus" and its significance).

[30] The Israel Democracy Institute defines itself as "an independent non-partisan think tank." *See* The Israel Democracy Institute, A Message from the President, http://www.idi.org.il/english/article.asp?id=2f311d65becd8ee 26d98e2af07037749 (last visited Sept. 9, 2006).

[31] *See generally* The Israel Democracy Institute, Introducing "Constitution by

congress devoted its discussion to religion and state,[32] and the project as a whole culminated in a proposal for a constitution that was published in 2005.[33] The proposal includes an article requiring that the Jewish and democratic state of Israel guarantees the independence of all religions, but allow the sponsorship and supplying of religious services by the state.[34] It also includes an article determining that the Shabbat and Jewish holidays are the official state holidays but, at the same time, guarantees the right of non Jews to have a holiday on their own religious holidays.[35] However, as opposed to the covenant, the proposal does not address other very controversial religion and state matters, like marriage and dissolution of marriage, and only grants constitutional immunity to the current arrangements. Moreover, the arrangements that it does create are very general and vague.[36]

A third recent attempt to deal with the issue of religion has been made by the Constitution, Law, and Justice Committee of the Knesset (the Israeli parliament), through a process that the chairman of this commission initiated during the year of 2003.[37] This attempt

Consensus," http://www.idi.org.il/english/departments.asp?did=127 (last visited Sept. 7, 2006) (providing an overview of the "Constitution by Consensus" project).

[32] *See* THE ISRAEL DEMOCRACY INSTITUTE, LIKRAT PITRON HAHAYBET HAHUKATI SHEL YAHASEI DAT UMEDINA- HAMOATZA HATZIBURIT, HAKINUS HAREVI'I [Toward a Solution of the Constitutional Aspect of Religion and State— the 4th Congress of the Public Council] (2002), *available at* http://www.idi.org.il/english/catalog. asp?pdid=246&did=66 [hereinafter *4th Public Council*]; *see also* The Israel Democracy Institute, Why Israel Needs a Constitution by Consensus, http://www.idi.org.il/english/article.asp?id=1425 (last visited Sept. 9, 2006).

[33] ISRAEL DEMOCRACY INSTITUTE, PROPOSAL FOR A CONSTITUTION BY CONSENSUS (2005), *available at* http://www.idi.org.il/hebrew/article.asp?id=2668 [hereinafter PROPOSAL].

[34] *Id*. at 92 (article 11 of PROPOSAL).

[35] *Id.* (article 6 of PROPOSAL).

[36] It might be argued that generality is in the very nature of a constitution, but as a means for resolving the Israeli conflicts on religion and state it has made only a limited contribution.

[37] *See* Letter from MK Michael Eitan, Chairman of the Constitution, Law, and Justice

may be the most important one because it was directed by a formal body of the Israeli parliament, and reached maturity just a few months ago when the committee published an initial proposal for a comprehensive constitution.[38] However, currently the proposal is quite inconclusive and only points to possible directions. Regarding religion and state matters, for example, the proposal is indeterminate about the issue of "who is a Jew";[39] it is explicitly inconclusive regarding the status of the Jewish calendar;[40] and avoids determining what would be the legal arrangements of personal status matters.[41]

In summation, the understanding that there must be a rethinking of the issue of religion and state has led to some public debate. Yet, the debate is still in its early stage, and it is clear that there is a wide intuitive hesitation to have a profound discussion on the issue. Moreover, numerous groups have severely criticized the described compromise proposals[42] and the very initiation of some of the mentioned attempts have also been criticized.[43] It is not surprising, therefore, that some of the compromises (like the Israel Democracy Institute's proposal) avoid addressing the most difficult issues. Even the Institute's cautious and limited attempt to deal with

Committee of the Knesset, *available at* http://huka.gov.il/wiki/index.php/english (the official website of the Constitution, Law and Justice Committee of the Knesset).

[38] *See* AN ANNOTATED VERSION OF THE DRAFTS OF A CONSTITUTION 1 (Proposed Draft 2006), *available at* http://www.huka.gov.il/wiki/materials/huka_for_print.pdf. (Isr.).

[39] *Id.* at 107 (discussing article 5).

[40] *Id.* at 181 (discussing article 9).

[41] *Id.* at 197 (discussing article 12). The proposal does not address the legitimacy of an establishment of religion, although it was argued that it is due to a wide rejection of a non-establishment constitutional requirement at least as long as there is no preference of any specific religion.

[42] *See Gavison-Medan Covenant*, *supra* note 25, at 47 (Medan's description of the compromise proposals).

[43] *See id*. at 108.

religion and state matters was composed by some leading scholars at the Institute, and was not adopted by the whole varied "Public Council."

It seems that a deep fear stands in the way of an Israeli public discussion on religion and state. It leads to either attempts to maintain the current situation, or to dictate solutions without discussion and wide acceptance. What exactly is this fear about, and where does it come from?

4. The Obstacles in the Way of an Honest and Open Public Discussion on Religion and State

For the Israeli public discussion on religion and state to occur, Israel must overcome a deep fear, which currently precludes any reform. The fear seems to be a version of the fear that generated the adoption of the status quo doctrine six decades ago, which might have been even intensified after years of repression. This is the fear that a deep discussion of the issue has no potential of success and will inevitably lead to civil strife. Two assumptions seem to underlay this fear:

> 1) The image of Israeli Jewish society as divided between two main groups: those who are followers of Judaism, and those who are committed to democracy. Members of each group, so it is assumed, strictly adhere to the group's value system and disregard the value system of the other.
>
> 2) In the field of religion and state there is no way to find a common solution, because the gaps are so wide that even the very general conceptions about the

> model for structuring the relationship are sharply different. Democracy calls for a "*separation*" between religion and state,[44] while Judaism must advance a "*union*" between them.[45]

The assumptions of the public discussion might be exemplified by a February 2006 campaign advertisement of *Meretz*, an Israeli left wing party, and the Jewish religious reactions it generated. The advertisement shows an observant Jew who declares "I believe in God, but will separate religion and state"[46] and thus exemplifies the use of the concept of "separation" as a paradigm for the preferred religion and state arrangements from a democratic point of view. Moreover, by trying to surprise the observer it exemplifies the common notion that traditional Judaism, and consequently the orthodox population in Israel, opposes this kind of model. Further, the religious reactions to the advertisement, which argued that such views cannot be attributed to Judaism, reaffirmed these

[44] *See* W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 15-16 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (giving a general explanation of the simplistic notion that separation of church and state is necessary in a democracy).

[45] *See* ISAAC HERZOG (Israel's Chief Rabbi until 1959), 1 CONSTITUTION AND LAW IN A JEWISH STATE ACCORDING TO THE HALACHA 3 (1989) (putting forward the notion that Judaism requires union between religion and state). The second assumption implicitly and explicitly underlies many of the discussions on the issue. "[I]n the public discussion there are slogans of two opposite directions . . . [those that] call for *separation* of religion and state . . . and there are who call for a foundation of a *Halkhic state*." *4th Public Council, supra* note 32, at 46, 64; *see also* The Israel Democracy Institute, http://www.idi.org.il/hebrew/article.asp?id=110 (last visited Sept. 9, 2006) (providing the concluding paper of the Congress); LIEBMAN, *supra* note 5, at 15.

[46] *See* Goldman, Paul, *Think U.S. Election Ads Go too Far? See Israel's . . . : Commercial Create Buss with Crazy Cows, Talking Sperm, and Gay Marriages*, NBC NEWS, March 10, 2006, *available at* http://www.msnbc.msn.com/id/11762151/ (discussing the campaign advertisements).

assumptions.[47]

Those two assumptions exist not only in lay religion and state discussions. It is very common and deeply engrained even in the legal discourse. It seems to be one of the reasons why Gavison and Medan focus on specific practical arrangements and not on the more comprehensive underlying principles. Moreover, it is not surprising that even this cautious attempt was described as "unreal" and "hopeless."[48]

As for the first prong, the image of Israeli Jewish society as sharply divided between religious and secular members, followers of Judaism and followers of democratic values, is inaccurate. First, many apparently secular Jews are deeply connected to the Jewish religion, and even observe some of its commandments.[49] Others feel connected to the Jewish tradition in a more vague way, but this tradition is directly affected by Jewish religion.[50] On the opposite side, many orthodox Jews are also adherents of modern democratic values, either consciously and deliberately or unconsciously, affected

[47] *See, e.g.*, Kobbi Ariel, *She Has a Dog*, http://www.nrg.co.il/online/11/ART1/036/018.html (last visited Sept. 9, 2006).

[48] *See Gavison-Medan Covenant*, supra note 25, at 108.

[49] *See*, *e.g.*, SHLOMIT LEVY, HANNA LEVINSOHN & ELIHU KATZ, A PORTRAIT OF ISRAELI JEWRY: BELIEFS, OBSERVANCES, AND VALUES AMONG ISRAELI JEWS 2000 (2002). According to this study, 5% of the Jews define themselves ultra-orthodox, 12% define themselves religious, and 35% define themselves "traditionalists" (i.e., observant of parts of the Jewish commandments who do not aspire to observe all of them). Also, 79% said that they observe at least some components of Jewish religion. Regarding specific religious issues, 98% affix Mezuzah to their doorpost, and 85% observe Pesach, most of them avoid consumption of leaven. *See also* GUTTMAN INST., BELIEFS, COMMANDMENT OBSERVANCE AND SOCIAL RELATIONS AMONG THE JEWS IN ISRAEL (1993) (providing an earlier and similar study).

[50] The emergence of the literature which tries to explore and develop secular Jewish identity best proves this cultural progress. *See*, *e.g.*, WE, THE SECULAR JEWS: WHAT IS JEWISH SECULAR IDENTITY? (Deddi Zucker ed., 1999).

by the general democratic cultural surrounding.[51] Indeed, there are groups which follow the pattern of total obligation to one value system and disregard the other. These groups are considerable not only because of their size, but also because of their weight in the public discourse, which is much more than their portion of the population. Sometimes they act to arouse the belief that there is no point in discussion because "union" and "separation" cannot live together,[52] and they are the main force behind the belligerent dynamics which were described above. However, the majority seems to be willing to find a consensual solution for this complicated issue, not to win a war of the true against the false, of "sons of light" against "sons of darkness."

The second assumption is much more serious. If it is true that Judaism and democracy cannot find any common solution for the place of religion in a state even in exceptionally general concepts, it is indeed a real obstacle in the way of a profound discussion and the possibility of achieving a more comprehensive consensual solution. It will force every Jew to question what his primary obligation is. This Article seeks to refute this assumption, attempting to illustrate that the belief that there is an unbridgeable gap between even the general models of relations between religion and state held by Jewish religion and democratic thought is inaccurate. While there is a gap, it is certainly bridgeable.

[51] *See, e.g.*, *infra* Part II.B, for a discussion on the second kind of attempt to find connections between Jewish and democratic ideas.

[52] *See, e.g.*, JOSEPH AGASSI, LIBERAL NATIONALISM FOR ISRAEL: TOWARDS AN ISRAELI NATIONAL IDENTITY (1999).

B. An Initial Overlap as a Facilitator of the Integration of Jewish and Democratic Cultures

The potential to find a common ground between Judaism and democracy regarding religion and state is significant far beyond its direct consequences on achieving a comprehensive ordering of this issue. It might have a deep effect on the Israeli attempt to combine Jewish and democratic cultures. Currently, the image of the unbridgeable gaps between Judaism and democracy regarding religion and state silences not only public discussion on this particular issue, but also the "internal discussion" of many Israeli Jews between their Jewish and democratic cultural roots. Many feel that there is no point in a cultural attempt to integrate two systems which are so different in the whole image of public life and government and, consequently, are bound to profoundly clash. Moreover, such an attempt is perceived as dangerous, because it acts to legitimize a doctrine which will eventually undermine the main doctrine that one holds. Therefore, the attempt to show that the gaps between Jewish and democratic attitudes on religion and state are not unbridgeable is essential to this cultural progress as well.

C. The Jewish and Democratic Discussion as a Model for Dialogue between Democratic and Muslim Cultures

In the end of the second millennium and the beginning of the third, the rise of religions became evident.[53] The predictions of a

[53] *See* JOSE CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 11 (1994); *see also* Jonathan Fox, *Religion as an Overlooked Element of International Relations*, 3 INTERNATIONAL STUDIES REVIEW 53, 55 (2001).

decline of religion as a social and cultural phenomenon and the creation of secular and scientific society[54] were disproved even in the western world.[55] Samuel P. Huntington, in his recent famous writings, argues that the world will be designed mainly by the clash among several civilizations, divided to a large extent along religious lines.[56] Indeed, religious issues are the powers behind bitter and violent modern struggles,[57] and religious cultures are a dominant force in the political and social world.[58]

This religious clash should trigger attempts to establish a dialogue not only between adherents of different religions, but also between democratic cultures and non-democratic religious cultures.[59] Such a dialogue is important in three different aspects. First, without a dialogue, democratic cultures might be perceived as a threat to non-democratic religions, and trigger attacks and struggles. Second, finding a common basis between religious and democratic cultures

[54] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1966). The conception of decline in the role of religion in modern world caused scholars to overlook its role in many modern social progresses. *See* Daniel H. Levine, *The News About Religion in Latin America*, *in* RELIGION ON THE INTERNATIONAL NEWS AGENDA 120, 122 (Mark Silk ed., 2000) (arguing that there was a failure to notice the contribution of Christianity to the emergence of the 1960's Civil Rights Movement).

[55] *See* Smith, *supra* note 23, at 8-9 (presenting a 1970's view that third world countries were experiencing secularization and modernization).

[56] SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996); Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, 23, 25 (1993).

[57] *See* Durham, *supra* note 44, at 1 (describing the religious struggles of the 1990's around the world). After 9/11 this assertion became even clearer.

[58] *See generally* Jonathan Fox & Shmuel Sandler, *Quantifying Religion: Toward Building More Effective Ways of Measuring Religious Influence on State-Level Behavior*, 45 J. CHURCH & ST. 559-60 (2003).

[59] *See generally* 4 CHRISTIANITY AND ISLAM: THE STRUGGLING DIALOGUE (Richard W. Rousseau ed., 1985) (attempting to create a dialogue between the believers of different religions).

may contribute to the infusion of democratic values into non-democratic societies.[60] Third, attempts to find common ground may generate real amalgamation and cross-fertilization between different value systems.[61] While it is not a simplistic project, as the exclusive nature of many modern religions might cause great difficulty,[62] it would nevertheless be a worthwhile attempt.

The attempt to find a potential overlap between Jewish and democratic attitudes toward religion and state is, therefore, part of this general effort. But it is particularly important as a test case for the possibility of finding a common ground between democratic and Muslim cultures regarding this issue.[63] The classical mainstream versions of both Judaism and Islam are similar in three important (and related) dimensions, which distinguish them from the mainstream of modern Christianity. First, they include an elaborated normative system.[64] Second, this elaborated normative system deals not only with individuals' behavior, but also with governmental

[60] *See* John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707, 712-13, 770 (2001); *see also* Michelle L. Mack, *Religious Human Rights and the International Human Rights Community: Finding Common Ground—Without Compromise*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (1999); *see infra* Part III.A.2.b. (regarding this aspect of religion).

[61] *See infra* Part V.

[62] *See* James E. Wood Jr., *The Relationship of Religious Liberty to Civil Liberty and a Democratic State*, 1998 BYU L. REV. 479. *But see* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 91 (1993) (arguing that ancient religions did not claim exclusiveness and that today there are also many pluralistic religions). However, even if Carter's argument is true regarding modern Protestantism, it is difficult to describe fundamentalist Islam and even Judaism, despite its less missionary aspirations, in the same way.

[63] For a discussion about accommodation of secular authority and secular law in Islam see, for example LEONARD BINDER, ISLAMIC LIBERALISM: A CRITIQUE OF DEVELOPMENT IDEOLOGIES 128-129 (1988); Ann E. Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1015-16 (1991).

[64] *See* H. Lazarus Yafeh, *Some Differences Between Judaism and Islam as Two Religions of Law*, 14 RELIGION 175, 176-77 (1984).

character and norms.[65] In general, they equate religion and society, as opposed to Christianity.[66] Third, unlike modern Christianity, Islam and Judaism hardly accept the idea of freedom of conscience even in its narrow interpretation.[67] These three aspects[68] create a special difficulty regarding the possibility of finding a common basis between both Judaism and Islam on the one hand and democratic ideas on religion and state on the other. The importance of the attempt to do so in the Jewish context goes, therefore, far beyond its limited application to the State of Israel.

[65] Many scholars discuss this similarity between Judaism and Islam. *See e.g.*, Abraham Melamed, *Medieval and Renaissance Jewish Political Philosophy, in* 2 HISTORY OF JEWISH PHILOSOPHY 415, 417 (Daniel H. Frank & Oliver Leaman eds., 1997) [hereinafter *History of Jewish Philosophy*]; Eliezer Don Yehiya, *Manhigut Dattit uFolitit* [Religious and Political Leadership], *in* JEWISH SPIRITUAL LEADERSHIP IN OUR TIME 104, 104-05 (Ella Belfer ed., 1982) (arguing that despite this similarity, Judaism accepts the idea of civil authority, while Islam totally precludes it, but admitting that both religions claim for ordering political life through religious law). Interestingly even Locke admitted that the ancient "commonwealth of the Jews, different in that from all others, was an absolute theocracy . . ." JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 239 (Ian Shapiro ed., Yale Univ. 2003) (1689) [hereinafter LOCKE, A LETTER CONCERNING TOLERATION]; *see also* Avigdor Levontin, *HaIm Kashe LeKyaim et HaDemokratia Hayisraelit?* [Is it Difficult to Maintain the Israeli Democracy?], *in* ON THE DIFFICULTY OF BEING AN ISRAELI? 29, 29 (Alouph Hareven ed., 1983) (discussing the Jewish notion and arguing that this nature of Judaism is the main source of the difficulty in regulating the issue of religion and state in Israel); BINDER, *supra* note 63, at 129 (discussing the Islamic notion).

[66] Similarly, Hinduism and Buddhism share the same difference. *See* Smith, *supra* note 23, at 6.

[67] *See infra* Part III.A (presenting the idea of voluntarism in Christian thought). The idea of coercion in Judaism is very common, and the concise description of Rabbi Isaac Herzog exemplifies it best: "[A] positive commandment toward God is usually coerced using whip, no matter if the commandment is more important or less, and to do that there is no need for court." 1 ISAAC HERZOG, SHUT HEICHAL YITZHAK ch. A (1960) (translated by the author). The idea of coercion of religion is very common also in Islam. *See* ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 141 (2d ed. 1995). It is argued that the early Islamic views about coercion were a little bit different. *See generally* YOHANAN FRIEDMANN, TOLERANCE AND COERCION IN ISLAM: INTERFAITH RELATIONS IN THE MUSLIM TRADITION (2003); *see also* Alfred L. Ivry, *The Toleration of Ethics and the Ethics of Tolerance in Judaism and Islam, in* STUDIES IN ISLAMIC AND JUDAIC TRADITIONS 167, 176-177 (William M. Brinner & Stephen D. Ricks eds., 1986).

[68] *See* Erwin I.J. Rosenthal, *Political Philosophy in Islam and Judaism*, 17 JUDAISM 430 (1968) (presenting a general comparison between Judaism and Islam).

In conclusion, finding an overlap between Jewish and democratic views on religion and state is essential for Israel in two aspects: to enable more constructive Israeli discussion of the issue, and to facilitate the cultural effort to integrate Jewish and democratic values in general. Progress in both of these important areas is largely prevented by the common, but incorrect, notion that there are unbridgeable gaps between the general models of religion and state relationships that each side endorses. Finding and discussing an overlap in Jewish and democratic values is also essential for creating a dialogue between democratic and Muslim cultures.

II. DEFINING METHODOLOGY

Part II describes previous attempts of scholars to bridge Judaism and democracy which have direct implications in this context. It explains why these attempts, although valuable, are less appropriate to handle the challenges mentioned in Part I and elaborates the methodology used to resolve those challenges.

A. Judaism and Democracy: Other Attempts to Establish Connections

Previous studies attempting to establish connections between Judaism and democracy for religion and state issues could be classified into two main groups. One group is composed of studies which try to find practical ways in which Judaism can accommodate a secular state. For instance, one study tried to prove that, as a matter of historical fact (even if not as a matter of formal law), Jewish people accommodated models other than union between religion and

state (e.g., through recognition of a civil authority).[69] More advanced studies of this kind went beyond historical reality and explored legal ways in which the Jewish religion can accommodate non-religious authorities which enact and apply non-religious law.[70] Such studies used Jewish legal paradigms such as "law of the state is law"[71] and the concept of "communal enactments."[72]

These studies are insufficient to achieve the purposes that are described above for several reasons. First, the study about the actual accommodation of civil authority in Jewish history is an example of the naturalistic fallacy of inferring "ought" from "is": the fact that Jewish people accommodated a kind of separation between civil and religious authorities is not enough to establish that such accommodation was recognized as legitimate by the Jewish religion.[73] Truly, one may argue that the fact that Jewish sources perpetuate this reality made it part of the Jewish narrative and this fact by itself has normative significance, but this argument is far from being obvious. Second, even those studies which go beyond the "is"

[69] YEDIDIA Z. STERN, STATE, LAW, AND *HALAHKA*: PART ONE: CIVIL LEADERSHIP AS HALAKHIC AUTHORITY (Batya Stein trans., 2001).

[70] *See, e.g.*, Dr. Gidon Sapir, *Can an Orthodox Jew Participate in the Public Life of the State of Israel?*, 20 SHOFAR: AN INTERDISCIPLINARY JOURNAL OF JEWISH STUDIES 85 (2002); Nahum Rakover, *Jewish Law and the Noahide Obligation to Preserve Social Order*, 12 CARDOZO L. REV. 1073 (1991); Shmuel Shilo, *Equity as a Bridge between Jewish and Secular Law*, 12 CARDOZO L. REV. 737 (1991).

[71] *See* Shmuel Shilo, DINA DE-MALKHUTA DINA [THE LAW OF THE STATE IS LAW] 4 (The Hebrew Univ. of Jerusalem et al. eds., 1974) (explaining that "law of the state is law" was originally a legal way to recognize the validity of a non-Jewish state's civil law toward its Jewish citizens).

[72] *See generally* 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 678, 678-780 (Bernard Auerbach & Melvin J. Sykes trans., 1994) (stating that "communal enactments" is the paradigm used for the Jewish law recognition in a Jewish community's authority to regulate its rules).

[73] HERZOG, *supra* note 45, at 3.

to the clear "ought" by using legal mechanisms as "law of the state is law" or "communal enactments" are not very valuable. These mechanisms emerged in the context of the Jewish Diaspora, and their application to the different contexts of a Jewish autonomous state seems mismatched. Such a state is different than a non-Jewish state, the laws of which were accommodated through the legal mechanism of "law of the state is law," or from a small community in which the civil regulations were accommodated through "communal enactments." The fact that the Jewish religion is not silent about the character of a Jewish state, and includes sources which particularly address this issue[74] emphasizes the mismatch. Therefore, it is unsurprising that some of those who use these limited legal concepts[75] feel obligated[76] to declare that it is a practical and undesirable solution; if it was possible, they argue, Jewish law should have been applied by the state.[77] Thus, it seems that even if these limited mechanisms enable accommodation of the daily situation in Israel, they will be much less helpful in providing a common basis

[74] *See infra* Part II.B.

[75] Paradoxically, the use of these mechanisms is easier for the non-Zionist ultra-orthodox who is less interested in Halakhic imprimatur for the law of Israel, than it is for the Zionist modern orthodox who is more interested in such imprimatur and therefore invoke these legal concepts. Indeed, the comparison between the state of Israel and a non-Jewish state or a small Jewish community undermines the deep roots of Zionist ethos regarding the difference between the existence of the Jewish nation as communal minorities in states of non-Jews, and its existence in its own national state. *Compare 4th Public Council*, *supra* note 32, at 22 (presenting the views of Rabbi Yuval Sherlo, a religious Zionist leader, about this issue).

[76] The difficulty of using these mechanisms, which every modern orthodox who perceives Israel as a positive and unique phenomenon experience, is particularly strong for the modern orthodox who perceives Israel as also having religious significance. *See generally* AVIEZER RAVITZKI, MESSIANISM, ZIONISM, AND JEWISH RELIGIOUS RADICALISM (William Scott Green ed., Michael Swirsky & Jonathan Chipman trans., The Univ. of Chi. Press 1996) (1993).

[77] *See* Yaakov Bazak, *The Israeli Law and Halakhah*, *in* RELIGIOUS ZIONISM COLLECTION 543 (Simha Raz ed. 1999).

for a constitutional discussion. When the issue is a declaration of the most fundamental state principles or its identity, the willingness to use such "practical" and "undesirable" solutions will be more limited, if it exists at all. Moreover, these mechanisms will not address the second challenge that I described in the previous Part: they have limited power to relieve the fear that eventually Jewish and democratic ideas about religion and state cannot live together, and therefore will not facilitate the cultural attempt to integrate these two value systems.

A second group of studies attempts to establish connections between Judaism and democracy in a deeper way, by identifying neglected components of the highly diverse Jewish tradition which might reflect democratic principles and ideas. Examples are studies which try to establish in Judaism aspects of tolerance,[78] ideas of skepticism (as a general justification for freedom and pluralism),[79] ideas about majority rule[80] or the social contract as a basis for political community,[81] and studies of conceptual difficulties in the idea of the Halakhic State from an internal Jewish perspective.[82] One can also count here a general attempt to establish an idea that the

[78] *See, e.g.*, MOSHEH HALBERTAL, BETWEEN TORAH AND WISDOM: RABBI MENACHEMHA-MEIRI AND THE MAIMONIDEAN HALAKHISTS IN PROVENCE 80 (2000).

[79] *See*, *e.g.*, Menahem Fish, *LiShlot BaAher- HaEtgar HaHilchati BeHidush HaRibonut* [*Ruling the Other- The Halakhic Challenge in the Renovation of the Sovereignty*], *in* HA-AHER [THE OTHER] 225 (Haym Doytch & Menahem Ben Sasson eds., 2001).

[80] *See*, *e.g.*,Yedidia Z. Stern, *Ways for Halakhic Renovation Regarding Issues of Religion and State*, *in* THE QUEST FOR HALAKHA- INTERDISCIPLINARY PERSPECTIVES ON JEWISH LAW 438 (2003).

[81] *See*, *e.g.*, DANIEL J. ELAZAR, WORKSHOP IN THE COVENANT IDEA AND THE JEWISH POLITICAL TRADITION: THE IMPACT OF "THE 3 CROWNS" ON THE JEWISH POLITICAL THINKING AND ITS IMPACT ON THE STUDY OF THE HISTORY OF JEWISH LAW 14 (1982).

[82] *See*, *e.g.*, AVIEZER RAVITZKY, IS A HALAKHIC STATE POSSIBLE? THE PARADOX OF JEWISH THEOCRACY (2004).

Jewish religion is based on an ongoing dialogue between past and present, and that there is a religious justification for derivation from Jewish law in order to incorporate modern ideas.[83] An attempt to find connections between Judaism and human rights is also part of this group.[84]

This second group of studies, if honestly and seriously done, is very valuable.[85] Indeed, it is part of the cultural project mentioned previously to integrate Jewish and democratic cultures. However, it is a long term project and, in the short run, it only has a limited power to resist other, more ancient and accepted traditions, which contradict these ideas. Therefore, for the Israeli society, a different attempt, as described below, is necessary to establish a connection between Judaism and democracy regarding religion and state.

B. The Proposed Attempt to Establish a Connection between Jewish and Democratic Attitudes on Religion and State: A Comparison between Democratic Ideas and Medieval Jewish Political Theories

Although the main part of the Jewish tradition developed during a long period of exile, it did occupy itself with the character of the Jewish national state. This apparently surprising phenomenon came about for two main reasons. First, the Bible addresses some aspects of the issue, and therefore Talmudic Sages dealt with it while

[83] AVI SAGI, A CHALLENGE: RETURNING TO TRADITION 302, 308 (Avi Sagi & Yedidia Z. Stern eds., 2003).

[84] *See* S. DANIEL BRESLAUER, JUDAISM AND HUMAN RIGHTS IN CONTEMPORARY THOUGHT: A BIBLIOGRAPHICAL SURVEY (1993) (presenting a bibliographical survey of studies which attempted to find a connection between human rights and Judaism).

[85] *See infra* Part V.

engaging in interpretation of the Bible.[86] The Talmudic sources stimulated, in turn, post Talmudic scholars to discuss the issue. The second reason is the religious belief in establishment of a Jewish state in the "end of the days," and the hope that this time will come very soon.[87] The combination of past authoritative sources and future aspirations kept the idea of a Jewish state very alive in the minds of many generations. It inspired the creation of literature that discussed different aspects of the state, despite its non-practicality for daily life.

In the writings of some Jewish medieval scholars, the Bible's sporadic addressing of the Jewish state became much more inclusive descriptions of the character of such a state, sometimes as a part of a comprehensive political theory.[88] As a matter of fact, these old writings directly influence current dominant orthodox views about the required character of a Jewish state, and the Code of Maimonides seems to be the most influential among them.[89] For example, Maimonides seems to be the main origin for the idea that the ideal regime according to Judaism is monarchy, for the structural division between governmental branches and for other aspects of a state's

[86] The Bible addresses the character of the Jewish national state in an explicit manner, for instance through legal norms as those regarding the king or judges. *Deuteronomy* 16:18; 17:14 (New Oxford Annotated Bible with Apocrypha). The biblical addressing can also be implicit, for instance through stories about the ancient Israeli polity. 1 *Samuel* 8:7 (New Oxford Annotated Bible with Apocrypha). The Talmudic literature was engaged with both kinds of these staff.

[87] *See* DOV SCHWARTZ, MESSIANISM IN MEDIEVAL JEWISH THOUGHT (1997) (explaining different kinds of messianic aspirations in this time).

[88] *See* Melamed, *supra* note 65, at 415-49 (providing an overview of medieval Jewish political thought). *See generally* MEDIEVAL POLITICAL PHILOSOPHY: A SOURCEBOOK (Ralph Lerner & Muhsin Mahdi eds., Cornell Univ. Press 1972) (1963) (giving a concise overview of medieval religious political thought).

[89] *See infra* Part IV.A (discussing Maimonides' ideas).

character according to Jewish religion.[90] The common view that the Jewish religion promotes a union between religion and state seems also to derive from his theory.[91] Indeed, it might be surprising that medieval political ideas are perceived as authoritative nowadays when the political sphere looks very different; however, the Jewish religion perceives these issues as part of religion, and in Judaism there is a linear connection between the degree of chronological precedence and the authority of a scholar.[92]

Given the religious authoritativeness of medieval thinkers and scholars, and the goals established in Part I, it seems natural to explore some of these medieval political theories in light of their potential application to the issue of religion and state, and in light of the possibility of establishing common ground between them and democratic ideas.[93] Such an exploration deals directly with Jewish thought about the nature of a Jewish state, and does not borrow concepts from other contexts like the first-group studies described above.[94] Moreover, it deals with what was perceived as a desirable regime, not with an undesirable one. Furthermore, this approach relies on ideas about religion and state which gained imprimatur of traditional scholars. As such, it has the potential to gain

[90] For some current rabbis who rely on Maimonides political theory while discussing the character of the Jewish state see HERZOG, *supra* note 45, at 4.

[91] *Id.*

[92] *Cf.* BABYLONIAN TALMUD SHABATH 112b *in* 2 THE BABYLONIAN TALMUD SEDER MOED 549 (Rabbi Dr. I. Epstein ed., Rabbi Dr. H. Freedman trans., 1938) ("If the earlier [scholars] were sons of angels, we are sons of men; and if the earlier [scholars] were sons of men, we are like asses.").

[93] *See* AVIEZER RAVITZKY, RELIGION AND STATE IN JEWISH PHILOSOPHY: MODELS OF UNITY, DIVISION, COLLISION AND SUBORDINATION 21 (1998).

[94] *See supra* notes 72-78 and accompanying text.

authoritativeness much more than the second-group studies which rely on less deeply rooted ideas.[95]

An exploration into whether there is a potential overlap between both democratic and Jewish traditional views concerning the legitimate relationship between religion and state is the purpose of this article. While comparing medieval political thoughts to modern theories is problematic because of the huge difference in the character of the state, and, consequently, in the issues they discuss,[96] it is not impossible if generalizations are used. In the next section I will elaborate upon a methodology which involves such generalizations, and thus makes the comparison possible.

C. The Framework of Structural Models

1. The Framework

In 1996, W. Cole Durham published his "comparative model for analyzing religious liberty."[97] In this framework "for possible configurations of religious and state institutions" he analyzed possible structural relationships between religion and state.[98] Durham argues that these relationships could be divided into seven

[95] *See supra* notes 82-89 and accompanying text. This method may require some willingness to revive theories and attitudes that are not part of the mainstream of Jewish tradition, but it is less revolutionary and destabilizing, hence less frightening for adherents, than the attempts of the second kind which try to identify fundamental values in ancient Jewish sources and draw conclusions which undermine the mainstream Jewish tradition.

[96] For example, we can expect to find in medieval writings neither a discussion about financial aid to religious schools, nor an addressing of legislature's prayers, two important components of modern constitutional debate on religion and state.

[97] Durham, *supra* note 44.

[98] *Id.* at 12.

categories, depending on the degree of identification between the state and the religion.[99] On the one side there is an absolute theocracy, on the other there is a regime of hostility towards (and overt prosecution of) religion, and in the middle there are regimes of what he called establishment, endorsement, cooperation, accommodation, separation and inadvertent insensitivity.[100] Durham was primarily concerned with the relation between these models and religious freedom. His main argument was against the common view that there is a linear correlation between the degree of non-identification of religion and state and the degree of religious freedom; or more accurately, that the highest degree of religious freedom is achieved in a model of separation between religion and state.[101] Rather, he argued, the highest degree of freedom is achieved by the intermediate models of cooperation and accommodation.[102]

2. The Difficulties of the Framework

Some scholars adopted Durham's framework as a "theoretical framework for conceptualizing church-state issues."[103] However, it suffers from some basic difficulties. First, it does not include the category of state's "(formal) neutrality" toward religion, which is an intermediate category between "accommodation" and "separation." Second, the definitions of the structural categories are vague and the

[99] *Id*. at 19-25.
[100] *Id*.
[101] *Id*. at 16.
[102] Durham, *supra* note 44, at 24.
[103] Jason M. Waite, Book Note, *Religious Human Rights in Global Perspective: Legal Perspectives*, 1998 BYU L. REV. 681, 691 (1998); *see also* Fox & Sandler, *supra* note 58, at 576.

division between them seems to be quite arbitrary. For instance, in the "establishment" category, Durham includes a model with a state monopoly over religion together with a model that establishes one religion while equally treating other religions.[104] At the same time, the "endorsement" category includes models which "acknowledge that one particular church has a special place in the country's traditions," from de facto establishment to a regime that is "strictly limited to recognition that a particular religious tradition has played an important role in a country's history and culture."[105] But the difference between the categories of "establishment" and "endorsement" is vague: what is the exact distinction between a "State-Church" in the "establishment" category and "recognition in the particular place of one church" to a degree of "de facto establishment"? Moreover, even if there is an unambiguous analytical distinction between the categories, for instance a formal definition of "state religion" in the category of "establishment" which does not exist in the category of "endorsement," is it significant enough to justify the differentiation?[106]

Third, Durham apparently creates abstract analysis of possible relationships between religion and state, without addressing more specific arrangements.[107] However, he still uses some specific

[104] Durham, *supra* note 44, at 20.

[105] *Id*.

[106] In other words, why classify models of formal and de facto establishment into different categories ("establishment" and "endorsement," respectively) and at the same time include de facto establishment in the endorsement category along with "mere formal acknowledgement of the special place of religion in national tradition"? *Id*. at 20.

[107] *See* Durham, *supra* note 44, at 18 (presenting a chart with the general categories of "positive identification," some identification, separation and negative identification).

arrangements to distinguish between categories, and neglects to explain why these arrangements were chosen over others to justify distinction between categories.[108]

Fourth, Durham's arguments concerning the degree of religious freedom present in each model or category seem to be made in haste.[109] How can such a far reaching conclusion be inferred from an abstract framework which disregards many details of specific arrangements that might have a huge effect on the degree of religious freedom?[110] The arbitrariness of the division between the categories makes it even easier to show the unsoundness of a conclusion that two specific models achieve a better degree of religious freedom than all the others.[111]

[108] One example is the difference between "cooperation" and "accommodation." *Id*. at 20-21. Durham argues that these two categories basically bear the same degree of connection between religion and the state and the only difference is that under the category of cooperation there is a prohibition on financial aid to religion, which doesn't exist under the category of accommodation. *Id*. at 21. Nevertheless, it is unclear why this issue is more important than, e.g., the degree of tolerance toward other religions, which wasn't considered important enough to create a distinction between different kinds of establishment of religion.

[109] *See* Durham, *supra* note 44, at 12, 15-16, 19, 23-24, 35-36 (this is not a criticism of the analytical foundations of the framework).

[110] *See* Fox & Sandler, *supra* note 58, at 577-78 (arguing that Duhram's framework is too abstract and requires more specific breakdowns). Fox and Sandler suggested a more elaborated method to measure the degree of effect of a given religion on a given state (i.e. the relationship between church and state). They considered Durham's structural framework as one of few other factors, like the number of religions that exist in the state, the status of religious minorities, the degree of the regulation of the majority religion, and the degree of religiously effected legislation. *Id*. Fox and Sandler argued that every case could be accurately measured according to these factors, and that the grade would reflect the degree of religious effect on the state. *Id*. at 577. However, although their criterions are more elaborated, Fox and Sandler still make the same mistake that they attribute to Durham, i.e. the mistake of simplifying the issue. *See id*. Moreover, a numerical quantifying of the weight of each factor in advance, and the accurate grading of a each case in reality, are necessarily arbitrary. *See id*.

[111] Moreover, it seems that Durham had in mind a society with a religious majority and religious minorities, and therefore the "establishment" and the "endorsement" he speaks about are of a particular religion (the majority religion). It is not the only possibility, however, and there might be a society with two or more religious groups of equal size. In such a case, it is not clear that there is less freedom if both of the religions are endorsed than

Therefore, while Durham's attempt to create a framework for classifying the relationship between religion and state is valuable, his suggestion has some basic flaws.

3. Brugger's Framework

Winfried Brugger also made an attempt to create a structural classification of the relationship between religion and state.[112] Brugger created distinctions between six abstract categories of relationship: Animosity between State and Church, Strict Separation in Theory and Practice, Strict Separation in Theory with Practical Accommodation, Division along with Coordination and Cooperation, Formal Unification of Church and State, and Formal and Material Union of Church and State.[113] Although this framework is more abstract than Durham's and specific arrangements are not a basis for distinctions between categories, the categories are still vague and the distinctions between them are still arbitrary.[114] Thus, different classifications of Brugger and Durham only reaffirm the arbitrary nature of the two frameworks.

4. The Frameworks and Their Advantages

Despite their difficulties, both Durham and Brugger's

if the state cooperates with only one of them. Durham, *supra* note 44, at 18-21.

[112] *See* WINFRIED BRUGGER, FROM TOTAL SEPARATION TO SUBSTANTIVE UNION AND IN BETWEEN. MODELS OF STATE-CHURCH RELATIONSHIPS, IN RELIGIOUS SYMBOLS, CONSTITUTIONAL LAW, AND HUMAN RIGHTS (Winfried Brugger & Michael Karyanni eds., Springer Press forthcoming 2006). I would like to thank Professor Brugger for allowing me to use his manuscript.

[113] I will not deal specifically with the definition of each category. *See id.* (manuscript at chapter 3, on file with the author.)

[114] *Id*.

frameworks are valuable. Using frameworks of structural models which imagine the relationship between religion and state according to a degree of proximity suggests that there is a generalized way to define the relationship. The wide generalization in both frameworks enables evaluation of the whole picture; this, in turn, might illuminate details and contribute to deeper insights. Moreover, the focus on the general degree of proximity of religion and state may serve as an analytical means to compare two regimes or two theories from a very different social context, and this is what makes the framework most valuable for the purposes of this Article. Indeed, while a comparison between contemporary regimes or theories which are generated in the same context may be done through evaluation of specific arrangements, it is not the case when we try to compare theories or regimes from totally different times and social contexts—which is the situation when attempting to create a dialogue between Jewish traditional political thought and modern democratic political theories. In this situation, when specific arrangements are not comparable, the only choice is to make generalizations based on the details, find what the general models that each value system endorses are and then identify any overlap. Yet, a wide generalization creates a weakness because the wider the generalization is, the more ambiguous, inaccurate, and meaningless it becomes. Therefore, an absolute conclusion from such a generalization, disregarding the details of specific arrangements, should be made very cautiously and be checked by returning to the details.

One might argue that such a method is not very promising,

because it does not enable one to find common solutions for more specific controversial issues. This is a sound argument, but in light of the current situation in Israel it is not a problem at all. As previously explained, the Israeli discourse on this issue is stuck in the very beginning, and the reason is the common notion about the unbridgeable gaps between Jewish and democratic principles of "religion and state."[115] Individuals perceive the gap in concepts of structural models: "separation" v. "union."[116] Therefore, one must use the same level of generalization to illustrate that there are structural models which may be endorsed by both value systems. These common models may serve as the foundation for the next step of more elaborate discussion.[117]

However, in order to avoid the arbitrariness of the division between different categories to which I pointed in my discussion above, one should think about the framework more as a continuum, moving from full identification to hostile distinction, and the degree of the proximity will depend on the existing arrangements in a given regime as a whole.[118] The idea of a continuum also helps to understand that different models might be the result of different

[115] *See supra* Part I.

[116] *See supra* Part I.A.4.

[117] The discussion of the public council on religion and state also focused on general models rather than on specific arrangements. The range was from Religious State on the one side to separation between religion and state on the other. In the middle, however, instead of other structural models there were models which reflect general principles as "freedom of and freedom from religion." *See* 4th PUBLIC COUNCIL, *supra* note 32, at 28, 33.

[118] Durham himself speaks sometimes in his work about a continuum, although he sticks to the classifications he makes. Indeed, classifications of categories along the continuum are worth using and helpful, but should not be strictly embraced.

degrees of the same consideration.[119]

5. The Structural Framework of Religion and State and its Relation to McConnell's Methodology in Classifying Christian Sects

The approach pursued by Michael W. McConnell is worth noting as it applies similar components in a Christian context.[120] McConnell attempted to classify different ways in which Christian sects perceive "the relation between spiritual and temporal authorities" or between religion and the general culture.[121] He argued that each way should generate a different religion and state relationship model from a secular point of view, and therefore the law should not adopt a uniform model which is insensitive to those differences.[122]

McConnell's central aim differs from the aims of this Article because he did not attempt to find an overlap between religious and secular views on religion and state relationships. Instead, he attempted to find what secular response each of these religious conceptions should generate.[123] However, McConnell's main

[119] *See infra* Part III.

[120] Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992) [hereinafter McConnell].

[121] *Id*. at 192.

[122] For example, for a religion that perceives itself "apart from the culture," (i.e., seeks to separate itself from the wider society, culturally and sometimes even physically) the secular response should be a model of separation. *Id*. at 194. For a religion which perceives itself as "accommodated by the culture," (i.e., incorporates the ordinary values but either recognizes also a religious obligation to a higher standard or considers the religious values as inherently and inevitably in tension with the general culture) the secular response should be a model of accommodation. *Id*. at 209-10. If religion perceives itself as "aligned with the culture," the secular reaction should be ambivalent: on the one hand, the law should reflect the majority's culture, but on the other it should guarantee religious minorities' rights. *Id*. at 204-05.

[123] McConnell, *supra* note 120, at 192.

argument relates to the arguments of this Article because he asserts that the secular response, the desired model of relationship, should be adjusted to every religion according to its own characteristics.[124] Otherwise, he claims, the state takes a position on the intra-religious issue of the relationship to the general culture, and dictates the required position.[125] This Article tries to promote the same notion, i.e., the notion that there must be found an overlap between religious and secular models of religion and state and that the choice of a model should be done only from the overlapping models. Furthermore, and more importantly, both McConnell's article and this Article share a methodological connection and involve similar components. First, McConnell's describes religious attitudes toward the general culture, which is closely connected to the analysis of religious views concerning the desired model for a religion and state relationship that this article is engaged with.[126] Second, he uses generalizations like "separation" or "accommodation" in order to describe the models that should be adopted as a secular response to each religious conception, despite the inherent limitations of these generalities.[127] Thus, earlier versions of some components of the methodology presented in this Article can already be found in McConnell's article, but not the developed model.

[124] *Id*. at 221.

[125] *Id*. at 220.

[126] *Id*. at 198-99, 202. For example, it is only reasonable to assume that a sect which generally supports separation between religion and the culture would support a legal model of separation between religion and state.

[127] *Id*. at 191-221.

D. Intermediate Conclusion

Parts I and II explained that the discussion of the issue of religion and state is only possible if one frees the Israeli discourse from its general underlying assumption—that there is no way to bridge the divide between Jewish and democratic ideas on religion and state[128] To sever the assumption one must compare political theories of Jewish medieval thinkers, which are perceived as religiously authoritative, and modern democratic ideas about the issue.[129] Such a comparison must be done through generalization, using a framework of structural models, the generality of which will enable both a comparison and a refutation of the common notion about the inevitable conflict between "separation" and "union." This framework will help determine the general frames and concepts of a more comprehensive discussion about the particular issues to follow.

The next two parts will try to apply this methodology in the context of democratic and Jewish political and legal thought. Part III analyzes the main ideas and arguments that serve in the American discourse on the issue, and the range of structural models they might generate. The choice of the American discourse is not incidental as the Israeli idea of "separation between religion and state" is affected mainly by what is perceived to be an American prevailing notion. Moreover, the American discourse on the issue is very developed, and can serve as a paradigm of a democratic discussion. Given the Jewish inclination to require some degree of connection between the

[128] *See supra* Parts I-II.
[129] *See supra* Part II.B.

state and Judaism, the focus of the next part will be on the legitimacy of connections between the state and a particular religion (usually the religion of the majority), rather than on the legitimacy of connections between the state and religions in general. Undoubtedly, the former situation is more problematic than the latter one, because it is possible to argue that some potential negative effects of a too close connection between religion and the state are moderated when the issue is a connection between the state and religions in general, not a particular one.

Then, in Part IV, I will deal with religion and state aspects of the political theories of two medieval Jewish thinkers: Maimonides, the most prominent Jewish thinker, whose political thought seems to be the most influential in Judaism, and R. Nissim ben Reuben ("Ran"), a prominent medieval scholar whose political theory and its implications for the issue were largely neglected.

III. RELIGION AND STATE IN AMERICAN POLITICAL AND LEGAL THOUGHT

The American jurisprudence of the religion-clauses is described by many as suffering from deep incoherence.[130] Indeed, it is difficult (if not impossible) to reconcile the prohibition on invocation and benediction prayers as part of formal school

[130] *See* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 1 (1995); *see also* Brett G. Scharffs, *Foundation of Church Autonomy, The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1233 (2004). *But cf.* Derek H. Davis, *Separation, Integration, and Accommodation: Religion and State in America in a Nutshell*, 43 J. OF CHURCH AND STATE 5 (2001) (presenting an unsuccessful argument that coherency does exist).

graduation ceremonies[131] with the permissibility of opening legislature sessions with prayers.[132] It is hard to bring together the prohibition on posting the Ten Commandments in public school classrooms and the permissibility of decorating the United States Supreme Court chamber with a representation of Moses holding the Ten Commandments.[133] Critics too often only attribute the incoherence to an unsuccessful formation or incorrect interpretation of the Establishment Clause and Free Exercise Clause. This view, however, overlooks the main cause for the incoherence, which is found in a normative sphere. Certainly, a deep and inherent tension exists between the different ideas and arguments that are involved in the discourse of American legal and political thought on religion and state from the 18th century to present times.

Part III discusses the normative level of the American discussion on religion and state. This Part illustrates that while the discussion seems chaotic and unrelated at first, under the chaos a few fundamental ideas exist; it is different degrees of advocating for and balancing these fundamental ideas that generates the more specific arguments.[134] Only by seeing the forest for the trees will we be able

[131] Lee v. Weisman, 505 U.S. 577, 580, 599 (1992).

[132] Marsh v. Chambers, 463 U.S. 783, 784, 795 (1983).

[133] Stone v. Graham, 449 U.S. 39, 39-40, 42 (1980).

[134] *See generally* John J. Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment***,** 71 NOTRE DAME L. REV. 371 (1996) (analyzing the American discourse on religion and state in the 18th century in order to find the basic ideas (e.g., religious equality, pluralism, etc.) which played a role in the time of the framing of the first amendment, and arguing such ideas were common to all groups of the American society). Like Witte, I analyze the American discussion on the issue, but as opposed to him I do not pretend to argue that each of the ideas I identify are accepted by all of the participating political and ideological groups. Rather, I try to draw the contour of the discussion.

to draw the structural models of the religion and state relationship which fall within the boundaries of the American discourse.

Part III's discussion involves two sections. The first section explains the arguments involved in the modern American discussion on the issue of religion and state. This section opens with Locke's ideas, which influenced American political thought in general, and religion and state discussions in particular.[135] The following analysis of the modern discussion will be made in light of Lockean views, and this way of analyzing the discussion will contribute to the establishment of two basic arguments about this discussion. The first argument asserts that every argument involved in the discourse generates a wide range of legitimate structural models concerning the religion and state relationship, and any combination between them enlarges the range of possibilities, from models with a high degree of proximity ("establishment") to models with a low degree of proximity ("separation"). The second argument asserts that Protestant ideas extremely saturate modern American religion and state discussions.

The second section of Part III departs from the modern

[135] *See* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 27, 74, 105 (Alfred A. Knopf, Inc. 1958) (1942) ("Most Americans had absorbed Locke's works as a kind of political gospel; and the Declaration, in its form, in its phraseology, follows closely certain sentences in Locke's second treatise on government."). Stanley Fish observed that "[t]he modern contours of the debate concerning the relationship between church and state were established in 1689 by Locke in A LETTER CONCERNING TOLERATION, and discussion of the issue has not advanced one millimeter beyond Locke's treatment." Stanley Fish, *Mission Impossible: Setting the Just Bounds between Church and State*, 97 COLUM. L. REV. 2255, 2255 (1997). While the observation is radical, it is true that many of Locke's basic ideas still constitute the frames of the discussion and fill it with substance. Indeed, Locke's main contribution to the modern discussion on religion and state is an early version of the idea of "religious freedom," but his basic arguments may be and are used to justify other ideas about structuring the relationship between religion and state.

discussion focused on religion and state, and discusses the general idea of state neutrality regarding comprehensive doctrines. This idea, advocated mainly by John Rawls' concept of "political liberalism," is not unanimously accepted, and generated counter-movements which will be discussed as well. The second section also discusses the application of the new stage of the debate on the one concerning the religion and state relationship. Ultimately, Part III concludes that, although the range of applicable models that political liberalism endorses is narrower than what the first section of Part III describes, it is still quite varied.

A. Religion and State in Modern American Discourse

1. Locke and Lockean Arguments on Religion and State

a. General Background: Protestantism and State Involvement in Religion

In the era of a religious society, it was widely accepted that not only is religion a business of the state, but that the state may and should enforce it. As one scholar argues "it was assumed that religious truth required state implementation of religious beliefs and that political stability presupposed religious and cultural homogeneity."[136] This scholar did not emphasize the distinction between these two assumptions, but as Michael W. McConnell

[136] Durham, *supra* note 44, at 7.

asserted,[137] the first subordinates the political and the social sphere to religion as the truth, while the second subordinates religion to the political and social needs.[138] The significance of the distinction should not be overestimated,[139] but it is still valuable for identifying early religious versions of the current *secular* idea about the significance of religion to facilitate promotion of social and political goals. As we shall see, this version of the idea exists in the present American discourse.[140]

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[137] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 WM. & MARY L. REV. 2105, 2181 (2003) [hereinafter McConnell*, Establishment*].

[138] A radical formulation of this latter idea can be found in the writings of Machiavelli, who perceived religion as an institution essential to maintaining a civilized state and therefore urged rulers to "foster and encourage [religion] . . . even though they be convinced that it is quite fallacious." NICCOLO MACHIAVELLI, THE DISCOURSES 143 (Bernard Crick ed., Penguin Books 1970); *see also* THOMAS HOBBES, LEVIATHAN 293-94 (Everyman's Library 1987) (1919). Hobbes also expresses a similar view:

> [T]he Right of Judging what Doctrines are fit for Peace, and to be taught the Subjects, is in all Common-wealths [sic] inseparably annexed . . . to the Sovereign Power Civill [sic], whether it be in one Man, or in one Assembly of men. For it is evident to the meanest capacity, that mens [sic] actions are derived from the opinions they have of the Good, or Evill [sic], which from those actions redound unto themselves; and consequently, men that are once possessed of an opinion, that their obedience to the Sovereign Power will bee [sic] more hurtful to them than their disobedience, will disobey the Laws, and thereby overthrow the Common-wealth, and introduce confusion, and Civil war; for the avoiding whereof, all Civill [sic] Government was ordained. And therefore in all Common-wealths [sic] of the Heathen, the Sovereigns have had the name of Pastors of the People, because there was no Subject that could lawfully Teach the people, but by their permission and authority.

HOBBES, *supra* note 138, at 293-94.

[139] First, in a religious society the belief in the truth of a given religion is usually combined with the belief that it has positive consequences on reality. Enforcing religion as the truth is therefore, usually undistinguishable from enforcing it as a means to achieve political and social goals. The question of the "real purpose" becomes more theoretically than practically significant. Second, even if the "real purpose" of enforcing religion is to achieve social stability, as long as this stability is valuable from a religious point of view it is not a subordination of religion to secular needs. *See infra* Part IV (discussing such attitudes).

[140] *See infra* Part III.A.2.b.

Either way, the involvement of the state in religious matters, and the enforcement of religion by the state was the prevailing notion in these times, and this was true even in the Protestant world. The constitutional history of England in the 16th and 17th century demonstrates this notion very well,[141] and the most notable examples are the prohibitions of unauthorized religious meetings[142] and the penal acts which punished dissenters for prohibited religious worship.[143] But even Protestant doctrines which, as opposed to Anglican Protestantism, adopted the Lutheran and Calvinist idea of "two kingdoms" basically had the same views.[144] This old idea of separation between church and state was far from the modern idea, which hides behind the same concept. The church exercised its

[141] Numerous scholars discuss the religious struggle in England. *See, e.g.*, JOHN COFFEY, PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND, 1558-1689 (2000); DAVID R. COMO, BLOWN BY THE SPIRIT: PURITANISM AND THE EMERGENCE OF AN ANTINOMIAN UNDERGROUND IN PRE-CIVIL-WAR ENGLAND (2004); ALEXANDRA WALSHAM, CHURCH PAPISTS: CATHOLICISM, CONFORMITY, AND CONFESSIONAL POLEMIC IN EARLY MODERN ENGLAND (1993); *see* McConnell, *Establishment*, *supra* note 137, at 2112-15 (giving an elaborated description of English establishment in the 16th and 17th century).

[142] Act Against Papists, 1593, 35 Eliz., c. 2 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, 355-56 (Carl Stephenson & Frederick Marcham eds. & trans., 1937); *see also* Conventicles Act, 1664, 16 Car. 2, c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, 533; McConnell, *Establishment*, *supra* note 137, at 2113 (citing both laws in a detailed explanation of English establishment during the 16th and 17th centuries).

[143] *See, e.g.*, The Five-Mile Act, 1665, 17 Car. 2, c. 2 (Eng.), *reprinted* in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, 554-55; Act of Uniformity, 1662, 14 Car. 2, c. 4, (Eng.), *reprinted* in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, 543-46. Catholics and Puritans who were considered as special threat to existence of England were most severely restricted. *See, e.g.,* An Act to Prevent and Avoid Dangers Which May Grow By Popish Recusants, 1605-06, 3 Jam. 1, c. 5 (Eng.), *reprinted in* 4 STATUTES OF THE REALM pt. 2, 1077 (Dawsons 1963) (1810).

[144] *See* H. Wayne House, *A Tale of Two Kingdoms: Can There Be Peaceful Coexistence of Religion with the Secular State?*, 13 BYU J. PUB. L. 203, 242-43 (1999) (discussing the ancient Christian origins of this doctrine, as well as differences between different theologians); *see also* John Witte Jr., *Between Sanctity and Depravity: Law and Human Nature in Martin Luther's Two Kingdoms,* 48 VILL. L. REV. 727 (2003) (discussing the Lutheran version of the doctrine).

spiritual authority in the heavenly kingdom, and the civil magistrates exercised a temporal authority in the earthly kingdom protecting peace and order, but together they were considered as two arms of God, and like real two arms they had to assist each other. Therefore, even Calvin argued that one of the civil government's roles was to "prevent . . . . offenses against religion from arising and spreading among the people."[145] It is not surprising that in the Puritan New England of the 17th and 18th century, civil authorities required adherence to the creeds and canons of Puritan Calvinism,[146] and dissenters were subject to special restrictions.[147] Locke's ideas should be understood in this religious context.

b. Locke in Context

Living in England of the 17th century, which witnessed bitter religious struggles, Locke's *Letter Concerning Toleration* is a general attempt to resist what he saw as an awful evil: "all the bustles and wars, that have been . . . upon account of religion."[148] Locke claimed that these wars are contrary to the main ideas of Christianity,[149] and tried to advance the concept of toleration in order to prevent them.

[145] Jean Calvin 1509-1564, CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION (John T. McNeill, ed., Ford Lewis Battles trans., The Westminster Press 1960), *available at* http://research.yale.edu:8084/divdl/adhoc/text.jsp?objectid =3154&page=64. Luther had a different view. House, *supra* note 144, at 245.

[146] *See generally* WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE (Harvard University Press 1971).

[147] Witte, *supra* note 134; McConnell, *Establishment*, *supra* note 137, at 2121. It should be noted that some of the American colonies which were occupied by Evangelists were more tolerant. *See infra* Part III.A.2.b (explaining the idea of voluntarism); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1426 (1990) [hereinafter McConnell, *Free Exercise*].

[148] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 65, at 250.

[149] *Id*. at 216.

Scholars do not agree on the origins of Locke's ideas about religion and state: are they affected mainly by Christian traditions, or by the new ideas of Enlightenment and reason?[150] For this Article's purpose, the more important question is not the origins of Lockes ideas[151] but the related question of their character. Two relevant dimensions exist here: 1) whether Locke's ideas are limited to a religious or Protestant discourse, or apply also to a broader discourse; and 2) Locke's ideas potential consequences on the models of the religion and state relationship. Relating to these dimensions I will argue that some of Locke's arguments are still part of the American discussion, both in a religious-Protestant formulation, as well as in a broader formulation. I will also argue that most of his arguments potentially lead to different conclusions from his own *about religion and state*.

c. Locke on Religion and State

Apparently, Locke argues for a clear distinction between religion and state: "the whole jurisdiction of the magistrate reaches

[150] *See e.g.*, JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT ON THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT' 31 (1969); McConnell, *Free Exercise*, *supra* note 147, at 1431 (arguing that Locke's ideas were rationalist and Enlightenment rather than religious); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002) (arguing that Locke's ideas have religious origins). I will not elaborate here on the roots of Lockean political theory in general and on religion and state in particular, but I will generally say that as always when speaking about cultural effects, it seems that either of these sharp descriptions is mistakenly simplifying the picture. Indeed, historical perspective and examination of the ideas themselves make it easy to see that Locke's political theory has both intra-religious (Protestant) as well as outer-religious roots. Moreover, the attempt to harmonize religion and faith with reason was a conscious project of Locke, and this goal by itself attests to the bi-polar roots of his ideas. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1420 (2004).

[151] *See generally* Dunn, *supra* note 150; LOCKE'S MORAL, POLITICAL AND LEGAL

only to . . . civil concernments" and therefore "the care of souls is not committed to the civil magistrate[.]"[152] This apparently conclusive claim is assisted by three different arguments.

The first argument (which is his second in order) is based on two assumptions about the nature of religion. First, "[a]ll the life and power of true religion consist in the inward and full persuasion of the mind." Second, coercion cannot create a "full persuasion of mind."[153] Given these assumptions, there is no religious value in coercing religion by "outward force." However, this argument doesn't explain why lack of religious value becomes lack of state authority.

The second argument addresses this point, and is based on three primary sub-arguments. First, an Enlightenment idea providing that the only two possible sources for political authority are God or the consent of the people.[154] Second, God, although able to potentially grant an authority to coerce religion, did not do it.[155]

PHILOSOPHY (J.R Milton ed., 1999) (discussing Locke's political thought).

[152] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 65, at 218.

[153] *See infra* note 160. This assumption was the main subject of an opposing essay published by Locke's contemporary scholar named Jonas Proast, and Locke responded to this critique in his "Second Letter Concerning Toleration." Preacher John Cotton also provided a counter argument. Cotton argued that:

> Fundamentals are so cleare, that a man cannot but be convinced in Conscience of the Truth of them after two or three Admonitions: and that therefore such a Person as still continues obstinate, is condemned of himselfe: and if he then be punished, He is not punished for his Conscience, but for sinning against his owne Conscience.

See McConnell, *Free Exercise*, *supra* note 147, at 1422. According to Cotton, it is clear that coerced exposure to religion has the power to create true belief. For a discussion of this assumption, *see also* Jeremy Waldron, *Locke: Toleration and the Rationality of Persecution*, *in* JOHN LOCKE: A LETTER CONCERNING TOLERATION IN FOCUS 98, 115 (John Horton & Susan Mendus eds., 1991).

[154] *See* LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 65, at 218.

[155] Locke's formulation implies that this lack of authorization is incidental, but maybe the

Third, the people did not and were not allowed to grant such an authority.[156] This "duty of conscience" is the main reason that the state is not entitled with the authority to deal with religious matters.

Two different aspects of these arguments should be discussed. First, one must discuss their nature, whether they are religious or not; and second, their consequences on the degree of connection between religion and state. Regarding the first aspect, the arguments are religious in nature and derive from Locke's Protestant concept of Christianity. The significance that Locke attributed to free choice in religious matters is not because of the idea of individual liberty, but because it creates a flawed belief according to Christianity and its goals: "[w]hosoever will list himself under the banner of Christ, must, in the first place, and above all things, make war upon his own lusts and vices."[157] Religion is mainly a private issue, a matter of the intimate relationship between the believer and God, and therefore, a

reason is more substantial and connected to the idea that there is no religious value in such actions.

[156] To explain these latter sub-arguments, Locke uses the above mentioned assumptions that religion depends on full persuasion of the mind which coercion cannot create, and adds another two. First, that to grant authority for religious coercion is not only useless but also a sin of "hypocrisy." Second, it is not only prohibited as a sin but also void. In other words, the basic point that Locke relies upon is the religious idea of duty of conscience, which was developed already by former Christian theologians. *See* Feldman, *supra* note 150, at 354. *See* LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 65, at 242-43. Locke states:

> [I]t is easy to understand to what end the legislative power ought to be directed, and by what measures regulated, and that is the temporal good and outward prosperity of the society, which is the sole reason of men's entering into society, and the only thing they seek and aim at in it; and it is also evident what liberty remains to men in reference to their eternal salvation, and that is, that every one should do what he in his conscience is persuaded to be acceptable to the Almighty, on whose good pleasure and acceptance depends his eternal happiness; for obedience is due in the first place to God, and afterwards to the laws.

Id.

[157] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 65, at 215.

denial of individual self-responsibility is contrary to religion itself.[158]

The consequences of the arguments are also limited. Apparently, Locke's definition of the goals of Christianity, as limited to the private sphere, could generate a powerful religious argument for a separation between religion and state. Such separation would be consistent with his initial statement that "the care of souls is not committed to the civil magistrate."[159] However, the first two arguments conceptually undermine this conclusive statement. State involvement is not prohibited per-se because religion is a private matter, but rather because it might generate coercion and infringement of religious freedom. Thus stated, the arguments imply that the state's involvement with religion in a non-coercive way is allowed. Truly, one could still argue that every preference for one religion is either coercive or might create coercion in the future, so the difference between the rationales will not have practical consequences. Locke himself, however, thought that only very deep involvement with direct coercion inhibits free choice. On the continuum, he allowed a close connection between religion and state, arguing that a state may encourage a specific religion,[160] and did not

[158] *See id*. at 243-44 (presenting Locke's argument concerning the permissible intolerance toward believers of Roman Catholic Church and Atheists). The Protestant nature of the idea of religious freedom may also explain why Locke didn't see any problem with a coercion which derives not from religious but from secular reasons. The infringement of an individual's religious liberty is not a problem by itself, but only when it pretends to achieve religious goals. *Id*.

[159] *Id*. at 218.

[160] *See id*. at 219-20. According to Locke:

> It may indeed be alleged that the magistrate may make use of arguments, and thereby draw the heterodox into the way of truth, and procure their salvation. I grant it; but this is common to him with other men. In teaching, instructing, and redressing the erroneous by reason, he may certainly do what becomes any good man to do. Magistracy does not

condemn its establishment, including a compelled church tax.[161]

Locke's third argument established the idea of the state's limited jurisdiction on religious matters upon a different assumption. Locke argues that even if it was possible to achieve genuine belief by coercion, it was not desirable because it would make the possibility of achieving salvation depend upon religion that "either ignorance, ambition, or superstition had chanced to establish."[162] The skepticism in the ability of a state to achieve the true religion is, therefore, another relevant argument for its limited role in this area.

Similar to the first two arguments, the third argument is religious in nature. It accepts the concept of one religious truth and

> oblige him to put off either humanity or Christianity. But it is one thing to persuade, another to command; one thing to press with arguments, another with penalties. This the civil power alone has a right to do; to the other, good-will is authority enough. Every man has commission to admonish, exhort, convince another of error, and by reasoning, to draw him into truth: but to give laws, receive obedience, and compel with the sword, belongs to none but the magistrate. And upon this ground I affirm, that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent; because they are not proper to convince the mind. Neither the profession of any articles of faith, nor the conformity to any outward form of worship, as has been already said, can be available to the salvation of souls, unless the truth of the one, and the acceptableness of the other unto God, be thoroughly believed by those that so profess and practise. But penalties are no ways capable to produce such belief. It is only light and evidence that can work a change in men's opinions; and that light can in no manner proceed from corporal sufferings, or any other outward penalties.

Id. It is still unclear, however, what Locke perceived as permissible "non-coercive" actions. On the one hand, he compares the civil magistrate to "other men," implying that using any advantage of the governmental authority is prohibited. On the other hand, he sharply distinguishes between "press with arguments" and "with penalties," making it unclear whether intermediate means are allowed. *Id*.

[161] In the American discourse, however, this same Protestant idea of religious freedom and fear of coercion generated an argument for a much stronger distinction between religion and state, through wide interpretation of what "coercion" is. I will elaborate on it in a further stage. *See infra* Part III.A.2.

[162] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 65, at 220.

its very basis is the importance of achieving this truth, a clearly religious idea. Moreover, although it might sound as if based on skepticism regarding the true religion, Locke's argument accepts the truth of Anglican Protestantism, as his use of the word "toleration" implies.[163] It establishes the prohibition of its official enforcement not on the lack of confidence in its truth but, so it seems, on the consequences of such enforcement on the behavior of other states which do not hold the same true religion. The argument could be designed in a practical manner, the fear that other states which hold false religions will also enforce them, or in a moral manner, a kind of Kantian first categorical imperative (England should not enforce religion as long as others cannot do it also). However, although religiously based, this argument is still broader than the first two. It doesn't directly derive from a Protestant assumption on the essence of true religion, but rather from a realistic view on the incapability of the state to accomplish truth.

The consequences of the third argument seem to be both narrower and broader than those of the first two. They are narrower because the argument might entail intolerance toward secular doctrines that are not potential candidates to be the religious truth.[164]

[163] There are negative associations of this word with monism (and with establishment of religion). *See* THOMAS PAINE, *The Rights of Man,* (*part 1), in* THE COMPLETE WRITINGS OF THOMAS PAINE, 243, 291 (Philip S. Foner ed., The Citadel Press 1945) ("Toleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it.").

[164] This is opposed to the first two arguments which reject any coercion of religion and thus include also the idea of freedom from religion. Indeed, Locke himself permitted intolerance toward atheists. *See supra* note 158 and accompanying text. However, it was not the character of their beliefs that generated this exclusion, but rather Locke's conception (common in the religious era and then probably justified in some cases) that rejection of common religious values embodied rejection of social morality.

The consequences are apparently broader because skepticism in the competence of the state to promote the search for religious truth seems to more straightforwardly justify, even require, not only non-coercive models of the relationship between religion and state but also the state's total withdrawal from religious matters. It may condemn models in which the state creates a shift toward a specific religion, even if there is no coercion. Yet, both propositions are not conceptually necessary here, as Locke's assertions of a model of establishment of one religion make clear.[165]

Apart from the three arguments mentioned above, two indirect arguments in Locke's *Letter* emphasize the inconsistency in his approval of a model establishing one religion. The more famous argument is what seems to be Locke's main motive for advocating religious tolerance, i.e., the prevention of civil strife. This issue is discussed in the beginning of the *Letter*, where Locke focuses on the moral evils of religious wars caused by the combination of religion

[165] The claim for narrower consequences is not compelling, particularly in light of my explanation that the argument is based not on skepticism but on the potential consequences of enforcement of the true religion on the enforcement of other false doctrines. Thus formulated, the argument also justifies freedom from religion in order to prevent similar coercion by secular doctrines in times or places in which they govern. The claim for broader consequences is not compelling as well. The fact that there is no value in the involvement of the state with religious matters, as the state is unlikely to achieve religious truth, cannot explain a prohibition of such an involvement. The latter might be explained only by potential negative consequences of such an involvement. According to the third argument, those negative consequences seem to be the infringement of the individual's ability to choose independently and thus achieve religious truth. But if this is the problem, we return to the question of what is considered such an infringement (i.e., to the same question we pointed to in the discussion of the first two arguments regarding what counts as coercion). It is true that one could distinguish between what is regarded as coercion from the Protestant point of view and what is an undesirable effect on the individual's choice in his seeking of the religious truth. Locke himself, however, did not distinguish between the two and adopted a narrow view about what degree of state involvement is problematic. He approved even a model of establishment, as long as there is no direct coercion, and perceived it as coherent with both the Protestant idea of non-coercion as well as with the ability to achieve

and power.[166] A related but different argument seems to be given in the last part of the *Letter*, where Locke emphasizes the positive aspects of state withdrawal from religious matters, focusing on the social and political stability it would cause:

> [T]hose that are averse to the religion of the magistrate, will think themselves so much the more bound to maintain the peace of the commonwealth, as their condition is better in that place than elsewhere; and all the several separate congregations, like so many guardians of the public peace, will watch one another, that nothing may be innovated or changed in the form of the government: because they can hope for nothing better than what they already enjoy; that is, an equal condition with their fellow-subjects, under a just and moderate government . . . . how much greater will be the security of government, where all good subjects, of whatsoever they be, without any distinction upon account of religion, enjoying the same favour of the prince, and the same benefit of the laws, shall become the common support and guard of it; and where none will have any occasion to fear the severity of the laws . . . .[167]

Both of these arguments are the broadest that Locke generated in their nature: they are not based on Protestant or general religious assumptions, and as such, could be used also in a secular discourse without any adaptation. They also seem to be broader than the first three in their consequences: the argument for preventing religious wars is more likely to justify a wide distinction between religion and

truth.

[166] LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 65, at 216.

[167] *Id*. at 248.

state than the mere idea of avoiding coercion, and may even support a regime which is hostile toward religion, given the horrible experience of the mixture between religion and power (Locke, however, demonstrates that the argument could also be accepted in a moderate form, because some prevention of strife could be achieved in any model of relationship, as long as tolerance is kept).[168] The latter argument is also more coherent with a model of broader distinction between religion and state than the mere requirement of non-coercion, because citizens' notion that they are an integral part of the political community could be achieved by a model of general neutrality between religions, which enables a full identification with the government[169] (but here again Locke's views clarify that the argument could be adopted in a weaker form. Citizens might have some notion of identification with the state in any non-coercive model).[170] The latter argument may be broader in one additional aspect: as opposed to all of the previous arguments which are focused on religion (e.g., the religious value of religious freedom, or the dangers of combining religion with power), it may be directly applied to any other ideology. A better stability would be achieved by state neutrality toward ideology.[171]

[168] *See generally id.* (achieving this tolerance, indeed, was the main educational task of Locke's Letter).

[169] *See id.* at 249. It seems that even Locke's formulation leads to such a model rather than to a model of establishment.

[170] One may argue that this is particularly true when the situation is a relative improvement compared to a former condition, e.g., establishment with coercion of religion (as in Locke's times).

[171] *See infra* Part III.B.1 (discussing the embryonic version of the main idea of the political liberalism).

d. Locke: Conclusion

Locke himself advocated a model of establishment of one religion, along with religious freedom for the others. His first three arguments focus on the idea of free choice in religious matters, either as a religious value or as the best means to achieve the religious truth. However, even these arguments have a potential to require models with more distinction between religion and state. The religious argument for religious freedom may justify it either as a guarantee that there will be no coercion or by advocating a broader definition of what coercion is. The idea of free choice as a means to achieve religious truth has even more potential because one could argue that any state's involvement will affect the range of possibilities and make it more difficult to achieve truth. Those three arguments also have a broader potential as they can be formulated in a secular, religiously neutral, mode. Two other ideas that Locke embraces in the *Letter*, which are already not limited to a religious discourse, seem to be more coherent with structural models that better distinguish between religion and state than with the establishment supported by Locke. The argument for prevention of religious wars may justify even special treatment of religion as a dangerous phenomenon, and the argument for identification of the civilians with the state may justify general neutrality toward ideologies. Locke demonstrates, however, that these arguments could be accepted also in a moderate form.

Analyzing Locke's theory on religion and state is the best way to highlight the current American discussion on the issue. As already noted, his theory is one of the main intellectual origins of the current

American debate, and to a large extent still affects its contours.[172] Let us move, therefore, to the analysis of the ideas and arguments that are involved in this debate.

2. The Modern American Discussion on Religion and State

With the rise of the secular era and particularly through the 20th century, a secular discourse has become more and more dominant. However, the modern American discussion on religion and state is still largely saturated with religious and Protestant ideas. Both the secular and religious modes are engaged with arguments and ideas from earlier times. These subsections explain the basic ideas and arguments that frame the contours of the modern American discussion, their connections to Locke's ideas, and their consequences for the structural models of the relationship between religion and state.[173]

a. Arguments in the Religious Mode

The arguments:

The Lockean idea that free choice in religious matters has a religious value is accepted in the modern Protestant world including, of course, the United States. Both of its aspects, the entitlement to

[172] This discussion will be focused on the intellectual connections between the basic contours of the modern discussion and Lockean ideas. The question of whether a specific argument held by a specific person in a specific time originated from his acquaintance with Locke's writing will not be discussed.

[173] To make the analysis clearer, I will separate the arguments which are part of a religious mode of discourse and those which are part of a secular mode of discourse. The separation is of course artificial, and in reality all of the arguments are used together, only reaffirming the Protestant effect on the discourse as a whole.

religious freedom, and the religious duty of one to follow his conscience, were quite accepted already in the America of the 18th century as relevant arguments for structuring the relationships between religion and state. A sharp formulation of the latter idea of duty of conscience can be found in the Virginian Memorial and Remonstrance against Religious Assessments, one of the masterpieces of that era: "This right [of conscience] is in its nature an unalienable right . . . . because what is here a right towards men, is a duty towards the Creator . . . . This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[174]

However, the consequences of the Protestant idea of religious freedom on the relationship between religion and state were not unanimously agreed upon. Some were satisfied with a model of non-coercive establishment, as was Locke. [175] Others claimed that it should lead to a radical distinction between religion and state.[176] Post Great Awakening American evangelism which was influenced by American religious thinkers like Roger Williams [177] and William Penn,[178] advanced a theological theory of strict voluntarism. This theory emphasized (even more than Locke's theory) the crucial role of freedom of conscience in Christianity, both of every individual and

[174] James Madison, Memorial and Remonstrance Against Religious Assessments, in 2 THE WRITINGS OF JAMES MADISON 183 (G. Hunt ed., 1901) [hereinafter Remonstrance], *available at* http://press-pubs.uchicago.edu /founders/documents/amendI_religions43.html.

[175] *See* McConnell, *Free Exercise*, *supra* note 147, at 1428-32, 1439-40.

[176] *See* McConnell, *Free Exercise*, *supra* note 147, at 1438-39.

[177] *See generally* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455 (1991) (explaining Roger Williams' contribution to American political thought on religion and state).

[178] *See* J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA 48 (1990) (discussing Penn's theology and impact on the religion and state issue in America).

of religious groups.[179] They believed, as one Baptist said, that "nothing can be true religion but a voluntary obedience unto [God's] revealed will . . . ."[180] Moreover, even benefits were considered as inhibiting the authenticity of the free choice.[181] The old Lutheran and Calvinist idea of "two kingdoms" was reinterpreted as a total prohibition on the state's involvement in religious matters:

> Every religious body was likewise to be free from state control of their assembly and worship, state regulations of their property and polity, state incorporation of their society and clergy, state interference in their discipline and government. Every religious body was also to be free from state emoluments like tax exemptions, civil immunities, property donations, and other forms of state support for the church, that were readily countenanced by Puritan and other leaders.[182]

The aspiration for religious authenticity that underlies the requirement for totally free choice in religious matters generated another religious argument for a sharp distinction between religion and state. This is the fear that a connection between religion and state will cause corruption of religion. The fear, which was not emphasized by Locke's more moderate version of the argument of

[179] *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 134 (1986).

[180] ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789, 487-89 (William G. McLoughlin ed., 1968).

[181] *Id*. The question of the required degree of a state's withdrawal from religious matters in order to achieve religious voluntarism is similar to the debate on what is the required degree of a state's withdrawal from religious matters in order to respectfully fulfill the liberal idea of autonomy. *See infra* Part III.

[182] Witte, *supra* note 134, at 382.

religious freedom, was a very powerful ideological force behind the evangelists' idea of a sharp distinction between religion and state. First, it was argued that without a distinction, the state could use religion for its own secular goals: "if . . . the State provides a Support for Preachers of the Gospel . . . . it has a Right to *regulate* and *dictate to*; it may judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach."[183] Another and related fear was the fear from "pride and indolence in the Clergy," which might derive from a close connection to the state.[184]

These early American religion and state arguments are still widely heard in current American discussion, even in legal discourse. This is certainly true at the positivist level, given a strong originalist trend in the interpretation of the Constitution, which seems to have a special force in religion and state matters,[185] but it is no less true at the normative level as well. For instance, regarding the religious justification of religious freedom, one scholar argued that "there may

[183] Declaration of the Virginia Association of Baptists (Dec. 25, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON 660, 661 (Julian P. Boyd ed., Princeton University Press 1950) (emphasis in original). This fear is exactly from the use of religion by the state, promoted by Machiavelli and Hobbes, *see supra* note 138.

[184] Remonstrance, *supra* note 174.

[185] *See generally* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32 (1993) (discussing the originalist trend in interpreting the Constitution). There are many Supreme Court decisions on religion and state that intensively deal with the framers' intentions, and a whole school of scholars (Michael W. McConnell is one of the most prominent) have attempted to explore what were the ideas at that time in order to prove the "true" interpretation of the First Amendment. *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2865-66 (2005) (discussing the Framers' understanding of the Establishment Clause); Locke v. Davey, 540 U.S. 712, 727-28 (2004) (Scalia, J., dissenting) (analyzing the Framers' hostility for allowing public funds to fund the clergy); Bd. of Educ. v. Grumet, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring) (discussing the Framers' view of accommodations to the Free Exercise Clause and acknowledging Michael W. McConnell's written work on the origin of the Free Exercise clause).

be little or no disconnection and distance between the people of the founding era and our generation on this question . . . . the religious justification still resonates with many, if not most, Americans."[186] The call of another scholar to "take the believer's viewpoint rather than the agnostic's viewpoint in thinking about religious freedom" is another example of this argument.[187] As for the argument against corruption of religion, Michael J. Perry argued that the "nonestablishment norm protects . . . religion itself. One way for government to corrupt religion—to co-opt it, to drain it of its prophetic potential, is to seduce religion to get in bed with government . . . ."[188] Another scholar said that in a close relationship between religion and state "religion becomes a tool . . . a means merely to achieve political ends. In the end, religion is the loser. True religion, genuine faith, is defamed, desecrated and trivialized."[189]

A version of Locke's third argument for a distinction between religion and state, such as the importance of religious freedom to achieve religious truth, also finds its place in the current American debate, as one scholar declared, "freedom to acquire and spread religious knowledge leads us to the truth."[190]

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[186] Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45, 62 (1998).

[187] John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 289 (1996). *See also,* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149 (1991).

[188] MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 18 (1997).

[189] Derek H. Davis, *Assessing the Proposed Religious Equality Amendment*, 37 J. CHURCH & STATE 493, 508 (1995); *see also* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 380 (1992).

[190] Garvey, *supra* note 187, at 285.

The consequences of the arguments on the legitimate models:

These three religious arguments—religious freedom, fear from corruption of religion, and the aspiration to achieve religious truth—are basically derived from the same roots as those of Locke's ideas, emphasizing religious authenticity as a religious value and as a means to reach truth. Nevertheless, it seems that the range of legitimate models has been shifted, compared to the wide range described above regarding Locke's arguments. The radical views of early American evangelism, even if not consensual, appear to create a widely accepted American notion that protestantism condemns a model of establishment of a particular religion. This model is perceived to endanger religious authenticity—it jeopardizes religious freedom, either because the choice will not be authentic or because it might lead to a direct coercion by the state; it also endangers the purity of religion, either because of its subordination to the state or because of the material and political power which religion gains.

However, although the model of establishment is excluded, there is still wide latitude for moving between other models: how strict should the distinction be in order to achieve authenticity? If the state only adopts a specific religion with no deep institutional connection to this religion (like in some models of endorsement), it may moderate the fear of corruption, but will it still affect the authenticity of the choice in religious matters? And if so, what degree of disconnection is required in order to avoid such effect—is neutrality toward religions enough, or maybe only a strict separation

between religion and state is required? Undoubtedly, authenticity could be best achieved by inhibiting free choice, but what is the border line which will stop us before this absurdum? The religious arguments discussed above obviously do not clearly answer these questions.

b. Arguments in the Secular Mode

The progress of Enlightenment as well as the rise of secularism with its varied cultural and political dimensions[191] stimulated a secular public discourse in general and on religion and state in particular. However, even in this mode, Lockean ideas still have a wide effect and draw some of the contours of the discussion.

Freedom of and freedom from religion: secular rationales:

The Protestant idea of freedom (and duty) of conscience was transformed by the liberalism school of thought into a secular idea of religious freedom (freedom of and from religion), one component of the general idea of liberty (and dignity) that each individual is entitled to.[192] However, the liberal justification for the freedom raises doubts about whether it deserves a special protection. Some argued, indeed, that without the religious dimension there is no justification

[191] *See* SMITH, *supra* note 23, at 8 (arguing for four dimensions of consequences of this progress: institutional separation of religion and the polity, the expansion of the polity into areas that previously were under religious concern (e.g., education), secularization of the general culture, and secularization of the political process (e.g., decline in the influence of religious leaders)).

[192] *See infra* Part III.B (discussing the structural implication of liberalism). The liberal idea of religious freedom is discussed here, although structural implications of liberalism are discussed later, because this idea is accepted today far beyond this school of thought.

for special protection of free choice in religious matters.[193] The direct consequence of this argument is that the state can inhibit religious free choice when there is a justification to interfere with the individual's liberty in general.[194] Moreover, the state's engagement with religion should not be different from its engagement with any other ideology; as long as the state is permitted to endorse a particular ideology it is allowed to endorse religion, probably even to establish it. Possible applications to religious freedom should not matter more than possible consequences of any other endorsement of ideology on the general liberty of the individual.

Yet, contemporary scholars attempt to diffuse the above argument by establishing the idea of religious freedom on secular grounds. An initial attempt is through invocation of the long history of coercion and suffering because of religious beliefs. This painful background, it is argued, justifies special protection on religious freedom.[195] One should note that this rationale does not support a

[193] Garvey, *supra* note 187, at 276-77*; see also* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 729-30 (1986) (discussing the confusion about the special protection of religious freedom).

[194] This may be the underlying view of the Supreme Court's free exercise doctrine adopted in Employment Div. v. Smith, 494 U.S. 872, 878-80 (1990). Numerous scholars discussed the impact of *Smith*. *See* Frederick Mark Gedicks, *Oliver Wendell Holmes Lecture: The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1236 (1997); McConnell, *supra* note 120, at 198. Gedicks and McConnell both argue that the Smith doctrine as well as other establishment clause decisions were the natural outcomes of a conception that does not attribute any special status to religion in general and to religious freedom in particular. Gedicks, *supra* note 194, at 1236; McConnell, *supra* note 120, at 198. However, they disagree about the deeper roots of this view. Gedicks argues that it derives from a concept of religion as a private phenomenon, which is not different from any other private decision and doesn't deserve more or less protection. Gedicks, *supra* note 194, at 1239-45. McConnell argues that religion is perceived as part of the public sphere and therefore similar to any other public agenda. McConnell, *supra* note 120, at 198-99.

[195] *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316-17 (1996).

protection of religious freedom which is substantially broader than a protection of any other private choice, although it might support a special concern about it. As a result, it may justify structuring the model of the relationship between religion and state in a particular way, different from the relationship with other doctrines, such as by creating a special degree of distinction in order to prevent abuse of state power.[196]

A different secular rationale for a special protection of religious freedom is the lack of importance of religious issues to the state. Douglas Laycock sharply stated, "[B]eliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government. Failure to achieve religious uniformity had not led to failure of the state."[197] This second rationale relies on the idea that the state should not interfere in any individual's activity when it is not required—and claims that intervention in religious issues is, by definition, not required. Like the first secular argument, this attempt does not establish a substantially greater protection of religious freedom compared to protections of any other activity. Moreover, it only clarifies that religious activity is not included in those activities that a state is allowed to regulate under the general standard for state intervention in individual liberties.[198]

[196] This issue is connected to the idea of prevention of civil strife, which I will address later.

[197] Laycock, *supra* note 195, at 317.

[198] The assumption that underlies this argument about the irrelevance of religious matters to the state might lead to a further argument about the relationship between religion and state. If a state should deal only with issues that are relevant to the society, and religion is not such an issue, a requirement for total withdrawal of state from involvement with

Notably, the argument is based on a specific image of what religion is, similar to the Lockean (Protestant) idea that the main concern of religion is the intimate relationship between each individual and God.[199] Yet, this Protestant view of religion does not apply to many other religions, Judaism and Islam included. Moreover, the conclusive argument that religious matters are "of little importance to the civil state" is not very plausible even regarding Protestant Christianity. Not surprisingly, the examples that Laycock gives are of beliefs about theology, liturgy and church governance,[200] but Protestant Christianity also has a moral agenda which is not reluctant to address political issues such as war, abortions, and the curriculum of schools, issues with which the state must deal. The argument seems, therefore, at least only narrowly applicable, if not totally wrong.[201]

religious matters is the natural outcome. This formulation of the argument rejects at least models of establishment and endorsement of a particular religion, but it could further lead to a requirement of neutrality toward religion.

[199] *See supra* note 153 and accompanying text. However, as opposed to Locke, who regarded this religious idea as authoritative, the secular argument regards it an empiric fact concerning the nature of "religion" as a social phenomenon. This fact, combined with the secular normative idea of respecting liberty at least where there is no justification to inhibit it, leads to the normative conclusion of religious freedom.

[200] Thomas Jefferson stated: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour [sic] to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 117 (Raleigh, N.C. Alex Catalogue, n.d.), *available at* http://press-pubs.uchicago.edu/founders/print_documents/amendI_religions40.html.

[201] One could still argue that mere beliefs about political issues are irrelevant for the state, but then the argument is based on the difference between beliefs and behavior, not on the special nature of religion, and it undermines the justification for religious freedom as an independent concept. Moreover, it would not justify a protection of religious conduct when it involves issues that are under state concern. Indeed, relying on this assumption, Thomas Jefferson argued in the 18th century that religious freedom should be limited to beliefs only. "[T]he legislative powers of government reach actions only, and not opinions . . . . Man . . . has no natural right in opposition to his social duties." Thomas Jefferson, *Letter to a Committee of the Danbury Baptist Association* (Jan. 1, 1820), *in* 16 THE WRITINGS OF

Additionally, a third secular rationale for religious freedom exists. This rationale accepts that religious activity substantially differs in character from other activities, but the difference is not in its higher objective importance.[202] Rather, it is in the subjective significance of religion to the individual. People usually perceive their religion as something that is worth suffering and even dying for, and this extraordinary subjective importance of religion may justify a special protection of the individual's liberty to fulfill what he perceives as his religion's requirements.[203] However, this sound rationale applies to both religious and some non-religious doctrines. It is difficult to justify any distinction between the significance that individuals attribute to their religious beliefs and the significance they attribute to their deep secularly based moral beliefs, especially if freedom *from* religion is also included in religious freedom.[204]

THOMAS JEFFERSON 281-82 (Andrew A. Lipscomb ed., Thomas Jefferson Memorial Association 1903).

[202] This kind of argument would be part of the religious discourse. *See supra* note 193.

[203] Laycock, *supra* note 195, at 317; *see also* David Robertson, *Neutrality Between Religions or Neutrality Between Religion and Non-religion, in* LAW AND RELIGION IN CONTEMPORARY SOCIETY: COMMUNITIES, INDIVIDUALISM AND THE STATE 31, 33-34 (Peter W. Edge & Graham Harvey eds., 2000).

[204] This notion is the underlying reason for the Supreme Court's former attempts to define "religion" to include a "meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God . . ." United States v. Seeger, 380 U.S. 163, 176 (1965). Art. 4 of the German Basic Law also reflects this idea by guaranteeing "freedom to profess a religious or philosophical creed." GRUNDGESZETZ [GG] [Constitution] art. 4 (F.R.G.). It is worth noting, however, that art. 4(2) still guarantees special protection for religious practice. Moreover, the judgment of the European Courts for Human Rights in Kokkinakis v. Greece, 17 Eur. Ct. H.R. (1994), *available at* http://www.echr.coe.int/eng moderately reflects a recognition in the special place of religious beliefs, as opposed to other beliefs:

> [F]reedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics [sic] and the unconcerned.

Id. (Paragraph 31 of the judgment, at page 397).

It is not clear what models of relationships between religion and state this latter rationale enables. Here again one must question, what is an inhibition of free choice, or of the individual's ability to engage in his religious belief? It is clear that direct coercion is such an inhibition, and it is not difficult to agree that penalties on religious exercise also infringe upon this freedom. We may assume that direct discrimination on a religious basis inhibits this freedom either because it is a non-direct coercion and might affect choice, or because it reflects disrespect for the autonomy of the individual to choose, the most important characteristic according to the liberal idea. But is it the same regarding a general preference for a specific religion (e.g., by its endorsement or even establishment)? Locke thought that the situations were different. But maybe they are not different, especially if we take into account the huge cultural effect of the modern state.[205] And from the other side of the continuum, is a model of separation between religion and state which puts special limitations on the state's involvement with religion (compared to its involvement with other doctrines) consistent with this freedom? Might some argue that even formal neutrality toward religion does not recognize the special role of religion in the life of the believer as opposed to other beliefs? These are only a few initial directions to which we may take this argument.

Religion's negative effects:

I discussed three secular arguments for religious freedom and

[205] I will touch upon this issue later.

their possible consequences on the structural relationship of religion and state. Different arguments not concerned with the idea of religious freedom, but with the negative effects of religion on the social and political sphere do exist. Relying on an empirical or a conceptual basis, one argument explains that a close connection between religion and state might lead to civil strife.[206] The empirical basis relates to the long history of religious wars, similar to Locke's view, and the conceptual basis relies on the claim that religion pretends to be the absolute and ultimate truth and therefore has a limited ability to tolerate different views.[207] Some current scholars reject these fears and argue that today's religions are more tolerant,[208] but in light of the rise of religious conflicts in recent years, this rejection is unconvincing.[209]

Another argument does not emphasize the fear of religion's abuse of power, but rather the fear of religion itself. Religion, so it is argued, is an irrational and anti-autonomous phenomenon,[210] and as such it jeopardizes liberal ideas and democratic progress:

> [T]he project of constitutional democracy, . . . depends upon a citizenry capable of exercising independent

[206] *See* Gidon Sapir, *Religion and State- A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 592 (1999); CARTER, *supra* note 62, at 80.

[207] Sapir, *supra* note 206, at 593-94.

[208] *Id*. at 594; *see also* CARTER, *supra* note 62, at 84.

[209] *See supra* Part I.4.

[210] Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 597 (1991). In the 18th century, this fear still had, paradoxically, a religious formulation. Thus, Jefferson's hostility toward the existing religions was formulated as a concern with the "genuine doctrine": "I rejoice that in this blessed country of free inquiry and belief, which has surrendered its creed and conscience to neither kings nor priests, the genuine doctrine of one only God is reviving . . . ." Thomas Jefferson, Letter to Dr. Benjamin Waterhouse (June 26, 1822), *in* 12 THE WORKS OF THOMAS JEFFERSON 241, 242 (P. Ford ed., 1905), *available at* http://oll.libertyfund.org/Home3/HTML.php?recordID=0054.12#hd_lf054-12_head_094.

> and critical judgment concerning policies and leaders . . . Religious institutions . . . frequently claim divine inspiration of their principles and leaders as a basis of power and legitimacy. Such claims discourage skepticism and make intense demands for obedience by adherents.[211]

Both of these arguments call for a distinction between religion and state, independently from a concern for the sake of religious freedom. What are the potential consequences of each assertion on the models of relationship between religion and state? Here also, there is a wide range of possibilities, depending on the degree to which one perceives the danger. Regarding the danger of civil strife, Locke thought that it is enough to prohibit coercion of religion. In the United States, however, it seems widely accepted that this requirement is not enough. But great latitude exists, and the answer depends upon the circumstances of each society. The hostility to religion as a phenomenon conceptually leads to a broader distinction between religion and state. It definitely leads to avoidance of any support of religion by the state, and thus rejects any model which is more supportive than a model of neutrality. But it may lead even further to models which discourage religion by discriminating against it, as long as there is no infringement of religious freedom. Here we return again to the familiar question of what is regarded as such an

[211] Lupu, *supra* note 210, at 597. Hostility toward religion might be the reason for the weird formulation of art. 10 of the 1789 French Declaration of the Rights of Man and of Citizens, which states that "[n]o one shall be disquieted on account of his opinions, including his religious views." DECLARATION OF THE RIGHTS OF MAN, art. 10 (Fr. 1789), *available at* http://www.yale.edu/lawweb/avalon/rightsof.htm.

infringement.[212]

Religion's positive effects:

Interestingly, an opposite argument also exists in the discussion, the reflection of the ancient belief that religion has very positive social effects. This idea underlies any religious discourse on the issue and was a background assumption behind Locke's arguments,[213] but it is compatible to serve also in a secular mode of discourse. In 18th century America it was held mainly by civil republicans who emphasized the need for "public virtue" and perceived religion as one of the main means to achieve it:[214] "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion."[215] Today one of the main American proponents of this idea is Stephen Carter, who claims that religion is essential to civil society in two aspects.[216] First, as an origin and a means for socialization of essential moral values; and second, as a mediator "between the citizen and the

[212] Interestingly, this question arises now in the opposite side of the continuum, i.e., in a situation with a remote connection between the religion and the state, and not in a situation of a close connection between them which might infringe religious freedom of minorities or even of the majority if it prevents full authenticity.

[213] For a clear formulation of this idea see MASS. CONST of 1780 art. III: "[T]he happiness of a people, and the good order and preservation of civil government, essentially depend on piety, religion, and morality." *See supra* Part III.A.1.

[214] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 427 (2d ed. 1972) (1969). The evangelists didn't reject this idea, but it was overridden by their fear from any effect on religious choice and their fear from corruption. *See* McConnell, *Free Exercise*, *supra* note 147, at 1442.

[215] John Adams, Letter to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (1798), *in* 9 LIFE AND WORKS OF JOHN ADAMS 229 (1854), *available at* http://www.wallbuilders.com/resources/search/detail.php?ResourceID=21; *see also* DE TOCQUEVILLE, *supra* note 54, at 292.

[216] CARTER, *supra* note 62, at 36-37.

apparatus of the government, providing an independent moral voice."[217] It is quite obvious that there is an inherent tension between Carter's two main ideas, and that there might be difference in their potential consequences. While the first perceives religion as serving the political need and call for connection, the second requires that the connection will not be strong. The former may lead to a model of establishment as a primary means for socialization, while the latter rejects this very idea.

3. Religion and State in the American Discourse: Intermediate Conclusion

Not too many basic themes underlie the American discussion on religion and state. These themes, the "building blocks" of the more detailed arguments, include the idea of free choice in a secular or religious formulation, with different rationales; the religious idea of authenticity, with its prongs of voluntarism and prevention of corruption; the negative effects of religions, including intolerance (leading to civil strife or the inhibition of religious freedom) and the irrationality and hierarchy of the religious phenomenon; and their positive effects—infusing morality and virtue, creating social stability, and balancing governmental power. All of the themes together create the contours of the American discourse on the issue.

[217] *Id. See also* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 740 (1992). Carter's last idea seems to combine two distinguished aspects of the balance which religion creates for state power. The first emphasizes the institutional aspect (religion is an intermediate institution, or source of power, like parties) and depends on the image of religion as having a strong element of association. The second emphasizes the substantial aspects (religion as an independent source of moral values) which may enable an independent normative position to criticize the state.

Two main points are worthy of note. First, it is clear that each of the generalized arguments involved in the discussion may generate various models of relationships between religion and state. The idea of free choice could support a very wide range of models, from establishment without direct coercion to the state's total withdrawal from religious issues, depending on the general view about what coercion is and on the rationale for protecting it. The evangelist idea of authenticity shifts us to the second side of the continuum, but it also may generate a wide range of models depending mainly on how strictly it is invoked. The idea of the positive consequences has its internal tensions, requiring the state both to embrace religion and to maintain its independence. The fear of the negative effect of religious intolerance (e.g., civil strife) depends on a specific context and circumstances, but Locke demonstrates that it conceptually fits in with models of close connections between religion and state. The idea of the negative consequences of religion per se seems to be the one which most clearly leads to the far edge of the continuum, and supports even a kind of belligerence toward religion. Clearly enough, if the consequences of each of these arguments are inconclusive, the tensions between them complicate the picture and intensify the variety of possible models of relationships which may be normatively legitimate and falling within the frames of the American discourse.

A second insight is the deep effect of Protestant and evangelist ideas on the American discourse. Indeed, the effect is mostly visible in the developed and maintained religious mode of thinking on the issue which takes place even in the academic legal

discussions. But this effect is deeper, and the connection between the secular arguments of the modern discussion and Lockean ideas which are infused with Protestant beliefs demonstrates it very well.

B. State Neutrality Toward Comprehensive Doctrines

The previous section focused on the arguments involved in the discussion of the relationships between the state and the religion of the majority. This section is focused on the broader discussion about the relationship between the state and any comprehensive doctrine.

1. Rawls' Political Liberalism and State Neutrality

John Rawls' political philosophy led to the emergence of a new school of thought within the liberal tradition, known today as "political liberalism"—a stream embracing the requirement of state neutrality toward any comprehensive doctrine.[218] Rawls' initial assumption is that the existing pluralism in society is an "inevitable outcome of free human reason," and unity could be achieved only by "the oppressive use of state power."[219] Assuming the illegitimacy of coercion, the main project of political liberalism is to find "how it is possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious,

[218] *See* JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. This book is a reformulation and modification of Rawls' earlier ideas in JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) (1971) [hereinafter RAWLS, THEORY of JUSTICE].

[219] RAWLS, POLITICAL LIBERALISM, *supra* note 218, at 37.

philosophical and moral doctrines."[220]

In order to achieve this goal, Rawls creates a distinction between a "comprehensive doctrine" which deals with questions of the general moral truth, and the concept of "political justice," which only deals with "procedures of operation" of the political community.[221] According to Rawls, these procedures should be determined in a process that assures the freedom and equality of all participants, and in order to achieve it he imagines a hypothetical ("original") position in which the participants are behind a "veil of ignorance." [222] This ignorance compels the participants to disregard all of what Rawls perceived as their irrelevant characteristics, or any specific belief about the good life, remaining only with their "political identity."[223] Rawls argued that the set of principles of political justice achieved by this hypothetical process is value-neutral, because the participants, who do not know what doctrines they adhere to in the real world, make decisions without being committed to any specific doctrine.[224] Those neutral principles are eventually accepted by all of the reasonable comprehensive doctrines, what Rawls named as a situation of an "overlapping consensus." In

[220] *Id*. at XXV. It should be noted that Rawls' idea of state neutrality is not based on relativism, skepticism, or even the Lockean line of argument about the incapability of state to achieve the truth. Rather, the reason for avoiding addressing the issue of moral truth is practical. *See also id*. at XX; ("which moral judgments are true . . . is not a matter for political liberalism, as it approaches all questions from within its own limited point of view.").

[221] *Id*. at 11.

[222] *Id*. at 23. One of the problems in Rawls' line of argument is that these requirements are not only threshold procedural conditions, but also preliminary requirements for the political justice arrangements, the aim of which is to enable a stable and *just* society of "free and equal persons." *Id.* The argument is, therefore, circular.

[223] *Id*. at 22-28.

[224] RAWLS, POLITICAL LIBERALISM, *supra* note 218, at 24.

this condition, "the reasonable doctrines endorse the political conception [of justice], each from its own point of view," and this paves the way for practical co-existence.[225]

One of the principles that Rawls argues should be included in the concept of "political justice" is the idea of freedom of conscience. Rawls, relying on an assumption that the rational participants will choose the arrangement that is the least risky for them, inferred that participants will prefer a regime enabling them to act according to their conscience as a minority, rather than a regime enabling them to force others to act according to their moral views as a majority.[226] But the main contribution of Rawls' theory is not the pretension to establish political principles like freedom of conscience on a value-neutral basis. Rather, it is the idea of state neutrality. According to the principles of "political justice," the state should not advance any comprehensive perception of the good life, and if it is so, the answer to the question of the required relationship between religion and state is apparently simple: the state should be neutral toward religion, as it

[225] *Id*. at 134. One of the applications of Rawls' idea is the requirement for "public reason." *Id*. at 212. While different groups may use their own modes of arguments in their internal discourse, the reasoning in the public sphere should usually be in a mode that is common to all. It should include "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial." *Id*. at 224. However, there are exceptions for this idea. *Id*. at 240, 247. Numerous scholars have elaborated on the issue of public reason. *See, e.g*., Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763 (1993); Lawrence B. Solum, *Symposium: The Role of Religion in Public Debate in a Liberal Society Constructing an ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993).

[226] Participants:

> [C]annot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting . . . that it is more probable than not that one will turn out to belong to the majority . . . to gamble in this way would show that one didn't take ones religious or moral convictions seriously . . . .

should be neutral toward any other comprehensive doctrine.[227] However, as we shall later see, even if the principle of state neutrality is accepted it does not clearly point to a specific model of relationship between religion and state.[228]

2. Critiques of Rawls

Rawls' political liberalism faced critiques since its very beginning. In the following section, I will discuss the main kinds of attacks on the fundamental components of this theory,[229] and neglect more specific difficulties in Rawls' line of argument.[230]

a. Political Liberalism as a Non-Neutral Doctrine

Some critics attacked Rawls' pretense to generate a value-neutral doctrine. Actually, critics argued, political liberalism is "just a sectarian view on the same level as . . . other views that it purports to be neutral about and to tolerate."[231] Indeed, even if it "does not

RAWLS, THEORY OF JUSTICE, *supra* note 218, at 181.

[227] *See, e.g.*, Robert Audi, *Liberal Democracy and the Place of Religion in Politics*, *in* RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE 5 (1997). *See also supra* note 194 (discussing the Supreme Court's neutralization of religion). One would not be mistaken to recall the last argument that Locke generated to justify his idea of the limited state involvement in religious matters, as a means to advance social stability by the stronger identification of all religious groups with the state.

[228] *See infra* Part III.B.4.

[229] *See also infra* Part III.B.4 (discussing a third kind of attack regarding the practical possibility of state neutrality).

[230] A more specific criticism, for example, is the unjustifiably obvious assumption about the caution of the rational representatives. Another is the possibility that the "veil of ignorance" is superfluous given the initial requirements for the eventual arrangements to reflect freedom and equality. Indeed, Thomas M. Scanlon drew the original position without invoking the veil of ignorance. *See* THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 245 (1998).

[231] Alexander, *supra* note 225, at 764. *See also* Patrick Neal, *A Liberal Theory of the Good?*, 17 CAN. J. OF PHIL. 567 (1987); Robert P. George, *Public Reason and Political*

discriminate between competing conceptions of what is good. . . . this neutralist assumption . . . does privilege the consumer model itself."[232] Undeniably, Rawls does not explain why the original position should be equal, free, and therefore neutral, if there is no previous assumption about the most valuable components of human nature. His mere justification is that "[s]ince we start within the tradition of democratic thought, we also think of citizens as free and equal persons," but this assertion does not clarify why it must be adopted from a value-neutral point of view.[233]

Despite the strong attacks on Rawls' pretension of the neutral establishment of his theory, Robert B. Thigpen and Lyle A. Downing tried to somehow save the idea in the context of religion and state.[234] While admitting that Rawls based his conception on a comprehensive liberal doctrine emphasizing the human capacity to choose, they argue that this notion, at least regarding decisions about religious matters, is shared by all of the participants in the relevant hypothetical discussion, including "the theocrat."[235] Thus, their argument continues, even if Rawls' theory is not absolutely neutrally justified, in the religion and state context it is justified in a way in which all of the relevant participants may agree on. In other words,

Conflict: Abortion and Homosexuality, 106 YALE L.J. 2475 (1997)*;* Heidi M. Hurd, *The Levitation of Liberalism*, 105 YALE L.J. 795 (1995).

[232] RONALD BEINER, WHAT'S THE MATTER WITH LIBERALISM 8 (1992), *available at* http://ark.cdlib.org/ark:/13030/ft4w10063f/.

[233] In other words, Rawls does not explicate how political justice can be separated from a general conception of the good. RAWLS, POLITICAL LIBERALISM*, supra* note 218, at 18.

[234] Robert B. Thigpen & Lyle A. Downing, *Rawls and the Challenge of Theocracy to Freedom*, 40 JOURNAL OF CHURCH AND STATE 757 (1998).

[235] That is to say that even the theocrat accepts the idea that the ability to choose is the most important feature of the individual, and that religion should be left to his free choice. *See id*.

even if the Rawlsian idea of "original position" is not neutral, in the context of religion and state, the consensus among the comprehensive doctrines on the human capacity to choose leads to a consensus on the idea of original position itself, and, consequently, on the idea of state neutrality.

There are few problems with the attempt to preserve a "relatively" neutral justification for state neutrality, but the most obvious one is that it assumes the Protestant concept of the significance of free choice in religious matters. So deep is the assumption, that Thigpen and Downing think it does not need any discussion or proof. However, it is quite clear that not all of the "theocrats" would accept the significance of free choice in religious matters, and therefore the "overlapping consensus" about Rawls' liberal assumptions does not exist even in the area of religion and state. Furthermore, even if this notion was accepted, it would not necessarily entail the idea of state neutrality and might still enable involvement of the state in religious matters.[236] It seems, therefore, that Rawls' pretense for neutral or even relatively accepted justification of the idea of state neutrality does not survive the critiques it faces.

b. State's Goals and Communitarism, Republicanism, and Perfectionist Liberalism

The former kind of critique deals with the pretense of Rawls'

[236] Whether liberalism as a comprehensive doctrine conceptually requires state neutrality is unclear. *See infra* Part III.B.2.b (discussing perfectionist liberalism).

theory to be value neutral. The second kind of critique opposes the merits of the theory itself. These normative attacks on political liberalism came from two opposite sides: republicanism[237] and communitarism on the one hand, and perfectionist liberalism on the other.[238] Both of these groups argue that the preservation of a stable society through state neutrality is a shallow ideal, and that the ends of the state should be more comprehensive; they sharply differ, however, in what those goals are. The first group criticizes the liberal image of the individual as an autonomous entity which is bound only by the values that he chooses for himself, and argues for an obligation to fulfill also "ends given by nature or God, for example, or by our identities as members of families, peoples, cultures, or traditions."[239] If so, neutrality is a betrayal of the state's role to promote the fulfillment of those obligations. The second kind of critique argues that political liberalism's goal to preserve a just and stable society betrays the basic values of liberalism itself.[240] While political liberalism only responds to an existing pluralism and tries to accommodate it, the commitment to autonomy should lead to a celebration and intensification of this pluralism: "autonomy requires that many morally acceptable options be available to a person."[241]

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[237] Numerous scholars discuss the relevance of old republicanism today. *See*, *e.g.*, Frank I. Michelman, *Laws Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

[238] Two works that belong to this group are: JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); and WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991).

[239] Michael J. Sandel, *Political Liberalism,* 107 HARV. L. REV. 1765, 1768 (1994) (book review).

[240] I.e., the commitment to human's autonomy and capability to reason and to choose.

[241] RAZ, *supra* note 238, at 378; *see also* Stephen A. Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 389 (1996).

What are the consequences of the commitment to pluralism for the position that the state should adopt towards certain comprehensive doctrines? One might argue that promotion of pluralism requires the state to be neutral toward any comprehensive doctrine, because state involvement affects the individual's choice and reduces his or her autonomy.[242] According to this view, while republicanism and communitarism condemn the idea of state neutrality, the difference between perfectionist and political liberalism is only in the reasons to embrace state neutrality, not in the embracement itself. Others who perceive themselves as perfectionist liberals hold a different view. They argue that the commitment to the liberal idea of an individual's autonomy may go along with, not only preference, but even adoption of a specific comprehensive doctrine by the state. The argument is basically that an individual does not live in isolation, and state adoption of a comprehensive doctrine no more affects the individual than any other social factor (as long as there is no coercion). Therefore, if the idea of autonomy "survives" these effects, it should survive also state involvement with a particular doctrine.[243] However, this latter view seems incoherent with the main ideas of perfectionist liberalism. Indeed, it is true that modern liberalism no longer imagines individuals as an isolated entity, potentially unaffected by any outer forces. But the main idea of liberalism is that the potential to be autonomous is the most valuable characteristic of the human being, and therefore even if pure

[242] Gardbaum, *supra* note 241, at 400.

[243] *Compare* Sapir, *supra* note 206, at 609 *and* GEORGE SHER, BEYOND NEUTRALITY 64 (1997).

autonomy is unachievable, a state should help the individual to get as close as possible toward this destination,[244] or at least not deliberately add obstacles in the way to achieve it. Moreover, state involvement in the marketplace of ideas has very wide social, economical and cultural influence, and this is particularly true when speaking about a welfare regulatory state. State endorsement of a specific doctrine, therefore, tilts the cultural discourse in the long run, and drastically limits the range of choices from which an individual can choose from (i.e., limits his autonomy). It seems incomparable to any other influence, and inconsistent with the basic ideas of perfectionist liberalism.

Between these two notions, the notion that perfectionist liberalism requires state neutrality and withdrawal from the marketplace of comprehensive doctrines, and the notion that it enables endorsement of a specific doctrine, there might be a third one. Perfectionist liberalism might *require* involvement but not allow endorsement of one doctrine. First, if refraining from involvement creates a risk to the autonomy and self fulfillment of some, the state might be obligated to act.[245] Moreover, there is an inherent tension between the commitment to state general neutrality by inaction and the idea of advancing pluralism. The latter may

[244] *See* Gardbaum, *supra* note 241, at 395.

[245] A conventional example is the requirement to advance minorities' cultures, which are under the risk of assimilation. *Cf.* JOSEPH RAZ, *Multiculturalism: a Liberal Perspective, in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 170 (2001).

require the state to act in order to guarantee pluralism if it is under risk, and even to widen the range of views. Indeed, involvement raises, in turn, the same problem of tilting the range of choices because the state cannot advance all lawful moral views to enhance pluralism.[246] Nevertheless, it is still different from a situation of endorsement both in the goals of the preference and in the degree of the effect on autonomy.

3. Skepticism

Another justification for the state's commitment to pluralism is not the idea of individual autonomy, but a commitment to achieve the truth. Philosopher of science Karl Popper argued that pluralism is indispensable to achieve *scientific* truth,[247] but the same idea applies in the moral sphere.[248] Indeed, that a pluralist society will better achieve truth was a fundamental idea in the thought of some American pragmatists at the beginning of the 20th century, serving to justify freedom of speech.[249] This non-liberal pluralism may have broader meaning than the liberal one because it might justify neutrality toward views that the liberal schools would exclude. Here again, however, the applications of the pluralistic commitment on state involvement in the marketplace of ideas are not clear: should

[246] *See* RAZ, *supra* note 238, at 418.

[247] KARL P. POPPER, *Toleration and Intellectual Responsibility, in* IN SEARCH OF A BETTER WORLD: LECTURES AND ESSAYS FROM THIRTY YEARS 188 (Laura J. Bennet trans., 1992).

[248] *See* JOHN STUART MILL, ON LIBERTY 56-57 (1986).

[249] *See* MARK GRABER, TRANSFORMING FREE SPEECH 76-77 (1991); *see also* Abrams v. United States, 250 U.S. 616, 628-30 (1919) (Holmes, J., dissenting).

the state refrain from any involvement in order not to affect the discourse or should it be involved in order to assure and promote pluralism?

Applying the idea of skepticism to the moral sphere is not obvious; it requires acceptance of the concept of "moral truth" which relativists would reject. Applying it to the religious sphere is even less evident because it requires acceptance of the idea of religious truth, not necessarily popular in a secular era. However, although a relativist approach cannot hold the argument as it was articulated above, it may generate another argument for state neutrality. Indeed, if there is no significance to the outcome, there is no point for the state to be involved in the marketplace of ideas. Relativism, though, is a two-edged sword, and the same notion might lead also to the opposite direction: if there is no moral or religious truth, the state could act in this sphere however it wants.

4. The Application of the Debate on the Models of Relationship between Religion and State

The connection between the debate on state involvement with comprehensive doctrines and the issue of religion and state is obvious, as religion is such a doctrine. But what are the particular consequences on the legitimate models of relationship between religion and state?

According to the non liberal democratic theories, there is no conceptual difficulty with the state's adoption of comprehensive

doctrines, including religion.[250] Therefore, the discussion returns to considerations connected to characteristics of religion as a particular doctrine, the same kind of which were discussed in a previous section of this part. The situation is different, however, regarding the liberal and the skeptic theories.

What does the idea of state neutrality held by the political-liberalist mean? Just to show a little bit of the options, one may ask whether we speak about "substantial neutrality" (neutrality of effects), or "formal neutrality" (neutrality of reasons).[251] The former is "an extraordinarily demanding ideal, because almost every governmental action is going to have some impact on the prospects for various lifestyles and some impact on the moral environment."[252] So if we assume that the required neutrality is a neutrality of reasons, it seems to rule out any model of relationship that reflects a preference for religion over other doctrines. It definitely rules out models of "establishment" or "endorsement," but maybe a model of "accommodation" as well, if there is no equivalent accommodation of other doctrines. At the same time, the principle of neutrality seems to rule out a model of "separation" between religion and state which also singles out religion from other doctrines.[253] So, the simplest outcome of the idea of neutrality of reasons is a model in which the

[250] *See, e.g.*, CARTER, *supra* note 62, at 91; Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution*?, 32 LOY. L.A. L. REV. 27 (1998) (arguing for state support in non-denominational religion).

[251] *See* Jeremy Waldron, *Legislation and Moral Neutrality, in* LIBERAL NEUTRALITY (Robert E. Goodin & Andrew Reeve eds., 1989).

[252] Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1135 (1989).

[253] *See* Michael M. McConnell, *Religious Freedom at a Crossroads,* 59 U. CHI. L. REV. 115, 131-32 (1992).

state relates to religion as it relates to any other comprehensive doctrine. However, this proposition is not necessary at all. For example, it might be argued that accommodation of religion is not its preference, but rather derives from acknowledgement of the special role of religion in the life of the individual.[254] A model of "separation" also does not necessarily violate the idea of neutrality, as Rawls speaks about neutrality toward "reasonable doctrines," while at least some religions might be considered as unreasonable because of their negative social effects.

The situation is even more ambiguous regarding the commitment to pluralism of perfectionist liberalism. Arguably, if the state should protect endangered doctrines, religion deserves state promotion, in order to preserve the autonomy and well being of adherents in a secular era. Moreover, given the unique role of religion as a phenomenon, the state might be required to assure its ongoing existence and even development in order to advance pluralism. Indeed, one scholar argued that: "[A] state policy of accommodation and even positive support for religious groups within the public realm. . . . promote[s] broader democratic goals of choice, participation, and pluralism."[255] Conversely, one may argue that the absolutism of religion undermines pluralism and requires having special concerns about it.

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[254] *See supra* Part III.A.2.b; *see also* Steven G. Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 77 (1990); McConnell, *supra* note 217, at 740; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

[255] George Moyser, *The Challenge of Pluralism: Church and State in Five Democracies*, 41 J. CHURCH AND STATE 145, 145-46 (1999) (book review).

It is true that both the idea of neutrality and the idea of commitment to pluralism seem to rule out models like "establishment" or "endorsement" of religion on the one hand, and "hostility toward religion" on the other. Both seem to lead to those models which are around the center of the continuum that I described above. However, they only narrow the range of the legitimate models, but do not lead to a certain model. Moreover, these ideas are not unanimously accepted in American political thought.

C. Religion and State in the American Discourse: Conclusion

This Article's goal is to undermine the Israeli assumption that there is no common denominator between democratic and Jewish attitudes toward religion and state. Part III focused on the first component of the assumption—the notion that democracy must separate religion from the state. This notion mainly derives from what is perceived to be the mainstream view in the theoretical, political, and legal discourse of "the ultimate democracy," the United States.

Analyzing the basic ideas that play a role in this discourse, Part III refutes this notion, and shows that the range of models which fall within the boundaries of this discourse is quite wide. The non-liberal theories do not conceptually preclude the state's involvement with a particular doctrine, and thus widely open the door for arguments about the relationship between religion and state in particular. Those arguments are heavily affected by Protestant

conceptions, and for the purposes of this Article we may disregard at least the arguments that are conceptually Protestant. The remaining arguments support a very wide range of models, from non-coercive establishment of a particular religion to a separation and maybe even moderate hostility toward religion. The theory of political liberalism basically leads to a model of state neutrality toward religion, although special characteristics of religion might lead to the adoption of other models such as "separation" or "accommodation." The theory of perfectionist liberalism also seems coherent with a similar range of models from its own reasons, and this is also the situation regarding the idea of skepticism.

Indeed, the analysis of the American debate on religion and state demonstrates that many models which are believed to be ruled out in a democracy are actually legitimate. Given the complexity of the issue, it is not surprising that the discussion in the United States has found no rest during the last century. Although the Establishment Clause seems to rule out models with a lot of proximity between religion and the state, it does not necessarily require the normative ideas which underlie the theoretical discourse. The Supreme Court's rulings to uphold official practices that are religious by nature (like legislature's prayers or display of Ten Commandments), unconvincingly denying any "endorsement" of religion, best demonstrate the gap between the normative and the positive level.[256]

[256] While American positive law reaffirms the argument that democracy may adopt models that tend toward distinction between religion and state, the positive law of other democracies may reaffirm the argument that democracy may adopt models from the opposite side of the continuum. *See* Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88

Concluding that a state may be a democracy and adopt a variety of models to regulate the relationship between religion and state, we may turn now to the other component of the Israeli assumptions—the notion that Judaism requires a union between

MARQ. L. REV. 867 (2005) (providing a wide survey on countries with state-church models). In England, for instance, the establishment of the Anglican Church creates both deep involvement of the church with state matters as well as the state's involvement with church matters. *See* Peter Cumper, *Religious Liberty in the United Kingdom, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 44, at 214. A symbolic involvement of church with state matters is created, e.g., by the requirement that official ceremonies be Anglican and that bishops be part of the House of Lords. More than symbolic involvement is created by an act that requires officially funded schools to ensure that all children attend a daily worship, which in county schools must be Christian. *See* The Education Reform Act, 1988, c. 40, §§ 6-9, (Eng), *available at* http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880040_en_2.htm#mdiv7 (Cumper clarifies that if a majority of the pupils belong to other religions, the head teacher may apply for permission to have alternative daily worship and that secular parents have a de facto right for exemption of their children from worship, but application is required). State involvement with church matters is also prominent, e.g. the king is the head of the church, the state is required to approve church laws as well as the book of prayers, and bishops are appointed by the British Crown on the advice of the Prime Minister. The involvement is not only symbolic, and in 1981 the Prime-minister ruled out the first nominee of the church recommended list, and chose the second one. *See* Peter Cumper, *Religious Liberty in the United Kingdom, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, *supra* note 44, at 218.

In Greece "the prevailing religion . . . is that of the Eastern Orthodox Church of Christ." *See* KEVIN BOYLE & JULIET SHEEN, FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 333 (Kevin Boyle & Juliet Sheen eds., 1997) [hereinafter FREEDOM OF RELIGION AND BELIEF]; *see also* 1975 Syntagma [SYN] [Constitution] art. 3.1 (Greece), *available at* http://www.hri.org/MFA/syntagma/artcl25.html. The president must be Christian and in order to establish or operate a place of worship, a special permission issued by "competent Ecclesiastical authorities" is required. Religious instruction is compulsory unless parents declare that they are not adherents of the Orthodox Church, and in general there are "[b]onds between the state and the Orthodox Church, privileging the church over all other 'known' religions . . . ." *See* FREEDOM OF RELIGION AND BELIEF, at 334; *see also* Kokkinakis v. Greece, 17 Eur. H.R. Rep. 397 (1994) (upholding the general prohibition of proselytizing). The Greek regime seriously challenges the idea of religious freedom even in its narrow interpretation, but demonstrates the width of the range that a democracy can reach. Unsurprisingly, there is no prohibition on establishing an official religion in the international law. *See* Natan Lerner, *Religious Human Rights Under the United Nations, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVE, *supra* note 44, at 97; *see also* David Little, *Studying "Religious Human Rights": Methodological Foundations*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVE, *supra* note 44, at 59. Numerous authorities describe the various religion and state arrangements in western countries. *See* STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES (1997); *see also* FREEDOM OF RELIGION AND BELIEF.

religion and state.

IV. RELIGION AND STATE IN JEWISH POLITICAL AND LEGAL THOUGHT

Part IV explores some aspects of the political theories of two prominent Jewish scholars: Maimonides, whose political theory is the dominant stream of Jewish political thought,[257] and Rabenu Nissim ben Reuben Gerondi ("Ran"). This Part argues for a similarity between the theories in their view on the relationship between religion and politics in the broad meaning of the concept; they both perceive politics as an unavoidable part of human nature; and therefore consider political order as essential to, but not totally part of, religion. Despite this resemblance between the theories, their conclusions about the character of civil authority and the relationship between religion and state are largely different from each other. On the continuum, while Maimonides embraces a model of total subordination of the civil authority to religion, the theory of Ran may endorse many other models, and conceptually even separation between the two. Thus, Part IV concludes that Judaism's notion that there must be a union between religion and state is far from being accurate; even if subordination of the state to religion is the mainstream of classical Jewish thought, it is definitely not unanimously accepted.

[257] *See supra* Part II.B.

A. Maimonides

1. Maimonides in Context

Maimonides, said to be the most prominent Jewish scholar in the Middle Ages, was born in Cordova, Spain in the year 1138 CE.[258] At the age of 10, his family was exiled and eventually settled in Fes, Morocco, where Maimonides acquired most of his secular knowledge in Philosophy, Astronomy, and Medicine. As an adult, he settled in Fostat, Egypt, where he lived from 1170 to his death in 1204.

Maimonides personified a rare combination of philosopher and legal scholar. In the Guide of the Perplexed[259] he tried to create a comprehensive doctrine of Jewish thought (largely affected by Greco-Islamic philosophy)[260] while in The Code of Maimonides ("*Mishneh Torah*") he was the first to create a full codex of Jewish law.[261] Maimonides' political theory and his ideas on religion and

[258] *See* JACOB S. MINKIN, THE TEACHINGS OF MAIMONIDES (1957) (providing biographical details of Maimonides' life and works). There is some doubt regarding the exact year in which Maimonides was born, and while some argue it is 1135, the more accepted year is 1138. *See* 24 HAENCYCLOPDIA HAIVRIT [THE HEBREW ENCYCLOPEDIA] 535 (1977). The literature on Maimonides, the person, is endless. *See, e.g.*, HERBERT A DAVIDSON, MOSES MAIMONIDES: THE MAN AND HIS WORKS (2005); SHERWIN B. NULAND, MAIMONIDES (2005); OLIVER LEAMAN, MOSES MAIMONIDES (1990).

[259] THE GUIDE, which was written originally in Arabic, was translated to English by several scholars. The most accurate translation is that of Shlomo Pines. *See* MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED (Shlomo Pines trans., 1963). However, due to limited availability, I mainly used the translation of Michael Friedländer. *See* MAIMONIDES, THE GUIDE OF THE PERPLEXED OF MAIMONIDES (Michael Friedländer trans. 2nd ed. rev., Routledge & Kegan Ltd., 1904) (1881) [hereinafter THE GUIDE], *available at* http://www.sacred-texts.com/jud/gfp/gfp000.htm.

[260] *See* ALFRED L. IVRI, *Islamic and Greek influences on Maimonides' Philosophy, in* MAIMONIDES AND PHILOSOPHY 139 (Shlomo Pines & Yirmiyahu Yovel eds., 1986) (discussing the Greco-Arabic philosophical effect on Maimonides); *see also* MARVIN FOX, INTERPRETING MAIMONIDES 93 (1990).

[261] While there were other codes following this project, none included so wide a range of subjects. Maimonides' work contained not only valid parts of Jewish law, but also those parts that were thought to be suspended until the far distant future, when the Jewish polity

state appear in both of these masterpieces and contain theoretical with legal aspects. Analyzing Maimonidian views, the subsequent subsections argue for continuity between these two aspects.[262]

2. Philosophical Roots[263]

a. Religion and Politics: The Nature of Divine Law

According to Maimonides, each individual has four kinds of perfections to achieve:[264]

> The first kind, the lowest . . . is perfection as regards property; . . . The second kind is . . . of the shape, constitution, and-form of mans body . . . . The third . . . includes moral perfection . . . . The fourth kind of perfection is the true perfection of man: the possession

would be founded. *See* ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES (MISHNEH TORAH) (Yale Univ. Press, 1982); *see also* Haim. Cohen, *Maimonides on Theory of Codification*, 1 JEWISH L. ANN. 15 (1978).

[262] *See* Warren Zev Harvey, *The Mishneh Torah as a Key to the Secrets of the Guide, in* MEAH SHE`ARIM; STUDIES IN MEDIEVAL JEWISH SPIRITUAL LIFE, IN MEMORY OF ISADORE TWERSKY 11 (Ezra Fleischer et al. eds., 2001) (arguing for a connection between the Guide and the Code in general). However, there are also cases where there is tension, and even contradictions between the two. *See* DAVID HARTMAN, MAIMONIDES: TORAH AND PHILOSOPHICAL QUEST 28 (1976).

[263] In this limited frame, one cannot elaborate upon the outer sources that Maimonides' ideas reflect, but only to indicate possible connections to the political thought of Aristotle, Plato and others. There are works on the political philosophy of Maimonides in general, some of them also deal with this issue. *See, e.g.*, Leo Strauss, *Maimonides Statement on Political Science*, 22 PROC. OF THE AM. ACAD. FOR JEWISH RES 115 (1953); R. LENER, *Moses Maimonides, in* HISTORY OF POLITICAL PHILOSOPHY 203 (Leo Strauss & Joseph Cropsey eds., 3rd ed., 1987) (1963). Some studies deal particularly with Maimonides' views on religion and state. *See* MENACHEM LORBERBAUM, POLITICS AND THE LIMITS OF LAW: SECULARIZING THE POLITICAL IN MEDIEVAL JEWISH THOUGHT 18 (2001); IZHAK ENGLARD, Yahasei *Dat Umedina BeYisrael- HaReka HaHistory VeHaRaayoni* [Religion and State in Israel- the Historical- Theoretical Background], *in* MEDINA YEHUDIT VEDEMOCRATIT [JEWISH AND DEMOCRATIC STATE] 291 (Dafna Barak Erez ed., 1996).

[264] *See* ALEXANDER ALTMAN, *Maimonides's "Four Perfections," in* ESSAYS IN JEWISH INTELLECTUAL HISTORY 65 (1981) (describing the roots of the four-perfection idea in Greco-Islamic philosophy).

> of the highest, intellectual faculties; the possession of such notions which lead to true metaphysical opinions as regards God. With this perfection man has obtained his final object; it gives him true human perfection . . . .[265]

Maimonides further describes the last and the "[only] true perfection" as both abstract and individualistic: "the last kind of perfection is exclusively yours; no one else owns any part of it."[266] However, despite the apparent similarity between this description and Locke's view about religion, Maimonides is far from the conception of Locke that religion is concentrated in the intimate relationship between the individual and God. In another chapter he emphasizes that the fourth perfection, "the possession of such notions which lead to true metaphysical opinions as regards God" is not left totally for the individual, but is controlled through divine law and the truths it contains.[267] Moreover, not only is religion not totally individualistic, it is not confined to the theological sphere of the fourth perfection. Indeed, the "well being of the body," (as Maimonides sometimes calls the first three perceptions)[268] is "only a preparation for another perfection" and has no independent religious significance,[269] but this

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[265] 3 THE GUIDE, *supra* note 259, pt. III, ch. LIV.

[266] *Id*.

[267] *Id*. pt. III, ch. XXVIII; *see also* SHLOMO PINES, BEIN MAHASHEVET YIŚRAEL LEMAHASHEVET HAAMIM: MEHKARIM BETOLDOT HAPHILOSOFYAH HAYEHUDIT. [STUDIES IN THE HISTORY OF JEWISH PHILOSOPHY- THE TRANSMISSION OF TEXTS AND IDEAS] 131 (1977) (discussing the roots of this idea in Greco-Islamic philosophy); *see also* STEVEN HARVEY, *Maimonides in the Sultans Palace, in* PERSPECTIVE ON MAIMONIDES 47 (J.L. Krammer ed., 1991).

[268] 3 THE GUIDE, *supra* note 259, ch. XXVII.

[269] *Id*. ch. LIV. *But see id*. pt. III, ch. XXVII (providing a more moderate formulation); *see also* LORBERBAUM, *supra* note 263, at 30.

well being is also under religion's concern, because of its essentiality for obtaining the final religious perfection.

What does religion's concern with the perfections of property, body and morality indicate about the connection between religion and politics? To answer this question, we should become familiar with Maimonides' view on the essentiality of political order. Maimonides believed that "man is naturally a social being, that by virtue of his nature he seeks to form communities . . . ."[270] But at the same time that the human being needs society to exist, innate differences between individuals make it difficult to peacefully live together and, consequently, to achieve the three perfections in a society. In order to resolve this apparent paradox Maimonides uses the concept of political ordering—ordering is a condition for the achievement of the material, physical, and moral perfections in a society, hence also for the achievement of the religious perfection.[271] The essentiality of political ordering to religion is so deeply entrenched that, according to Maimonides, religious law cannot be satisfied with out-sourcing of this non-religious function to any other normative system and must be concerned with it *in detail*.[272] Moreover, Maimonides argues that the main difference between human law and divine law is that the

[270] 2 THE GUIDE, *supra* note 259, pt. II, ch. XL. This idea stands in deep tension with the individualistic aspects of his thought.

[271] *Id*. The notion that political order is important only because it is essential for the achievement of the religious perfection leads to the notion that political order has no religious value when it does not lead to religion (e.g., in a secular society). One could further argue that it has a negative value and anarchy would be better because anarchy at least might lead to adopt another regime which would support religion. *See* Warren Zev Harvey, *Bein Philosophya LeHalacha BeMishnat HaRambam* [Political Philosophy and Halakhah in Maimonides Theory], 29 IYYUN: A HEBREW PHILOSOPHICAL QUARTERLY 198 (1980).

[272] *See infra* Part IV.B.3 (discussing a different direction in Rans theory).

former is concerned only with "well being of the body" while the latter is concerned with both, the "well being of the body" and the "well being of the soul."[273]

> [If you find a law the whole end of which] is to establish the good order of the state and its affairs, to free it from all mischief and wrong: [and if] these laws do not deal with philosophic problems, contain no teaching for the perfecting of our logical faculties, and are not concerned about the existence of sound or unsound opinions. . . . These laws are political. . . . [If, on the other hand you find] laws which, in all their rules, aim, as the law just mentioned, at the improvement of the material interests of the people: but, besides, tend to improve the state of the faith of man, to create first correct notions of God, and of angels, and to lead then the people, by instruction and education, to an accurate knowledge of the Universe: this education comes from God; these laws are divine.[274]

Interestingly enough, Maimonides defines divine law not only according to its origin (God), but also according to its goals. Furthermore, the way to identify divine law is by examination of the goals of each legal system. Indeed, when he speaks about the four perfections as the destiny of the individual, Maimonides does not rely on any Jewish sources. Not only are his statements universally articulated, he explicitly declares that the origins of his ideas are

[273] *See* Miriam Galston, *The Purpose of the Law According to Maimonides,* 69 JEWISH Q. REV. 27 (1978); *see also* Rosenthal, *supra* note 68, at 431 (discussing similar Islamic views).

[274] 2 THE GUIDE, *supra* note 259, at 234. The sentences in brackets are taken from Pines' edition of THE GUIDE, *supra* note 259, at 383-84, because the other translation is clearly inaccurate.

"[t]he ancient and the modern philosophers."[275] It is these preliminary non-Jewish assumptions about the destiny and the nature of the human being that generate the conception of the goals that the divine law should achieve. This conception, in turn, is what enables one to answer if a certain law may claim divine origin or not.

The notion that philosophy is the source for the divinity and religious validity of law is quite radical for a Jewish thinker. It demonstrates an intensive philosophical influence, but also clarifies the depth of the idea that religion is engaged with politics: it is not dictated by religion, but rather dictates what religion should be. Paradoxically, the subordination of religion to philosophy eventually generates subordination of the whole political sphere to religion. Nevertheless, although Greco-Islamic philosophy is the origin of Maimonides' conception about the scope of divine law, he did not perceive it as being contradicted by Jewish sources, but reaffirmed and strengthened by them. His detailed description of the required political regime according to Jewish law reflects this notion, but before discussing that issue, we should address one intermediate point: why, according to Maimonides, is Jewish law divine?

b. Jewish Law as the Divine Law

> The true Law, which as we said is one, and beside which there is no other Law, viz., the Law of our teacher Moses, has for its purpose to give us the twofold perfection. It aims first at the establishment of good mutual relations among men by removing injustice and creating the noblest feelings. In this way

[275] 3 THE GUIDE, *supra* note 259, at 394.

> the people in every land are enabled to stay and continue in one condition, and every one can acquire his first perfection. Secondly, it seeks to train us in faith, and to impart correct and true opinions when the intellect is sufficiently developed.[276]

But how did Maimonides know that these are the two aims of Jewish law? Astonishingly, he had no real proof.[277] Moreover, while the elaborate discussions of legal issues in Jewish religious sources may bolster the assertion that it was aimed to achieve political order, it has a much less elaborate system of true beliefs.[278] Indeed, Maimonides himself admits that "most of the precepts aim at producing this [third] perfection."[279] He also admits that:

> Scripture only teaches the chief points of those true principles which lead to the true perfection of man, and only demands in general terms faith in them . . . . There are other truths in reference to the whole of the Universe . . . [b]ut Scripture does not so distinctly prescribe the belief in them as it does in the first case . . . .[280]

Being aware of this absence, it is not surprising that Maimonides opens his Codex with "Laws of Fundamental Principles of the Torah," in which he elaborates the cosmological and metaphysical

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[276] *Id*. at 313.

[277] The mere proof that he does give is a biblical passage which says, "[t]he Lord commanded us to all these statutes . . . for our good always, that he might preserve us alive, as it is this day." *Deuteronomy* 6:24. Relying on an interpretation of the Sages to a similar phrase he argues that "good always" means the [eternal] well being of the soul, and "preserve us alive, as it is this day" means the [temporal] well being of the body. This meaning, however, is far from being the simple meaning of the text.

[278] *See supra* Parts I.C, II.B.

[279] 3 THE GUIDE, *supra* note 259, at 395.

[280] *Id*.

beliefs of his time, beliefs which he perceived to be the most important part of religion.[281]

So according to Maimonides, a necessary condition to the conclusion that Jewish law is divine law is its aspiration to facilitate achieving both the "well being of the body" by ordering politics, and the "well being of the soul" by promoting the true beliefs. We may move now to discuss some aspects of Maimonides' view about the particular way in which Judaism orders politics, and its consequences on the character of the Jewish state.

3. Religion and State: The Civil Authority and Religion

a. Methodological Remark

The deep connection that Maimonides creates between religion and politics is reflected in his general view of the Jewish regime and of specific constitutional arrangements, but before analyzing these arrangements an important methodological note should be made. While trying to explore Maimonidian ideas on religion and state, we should be aware of the not-always-easy-to-draw distinction between his original ideas and previous Jewish ideas that he merely reasserts.[282] Indeed, ancient Jewish sources contain specific "constitutional-like" norms and therefore not every legal

[281] *See* Harvey, *supra* note 271 (arguing that Maimonides perceived himself, as well as every Jewish scholar who used his *logos*- the ultimate way to achieve these truths- as a successor of Moses).

[282] *See* LORBERBAUM, *supra* note 263, at 43 (making the same methodological point). *Cf.* Haym Soloveitchick, *Rabad of Posquieres: A Programmatic Essay, in* STUDIES IN THE HISTORY OF JEWISH SOCIETY 30 (Emanuel Etkes ed., 1980).

arrangement which Maimonides includes is his contribution. For example, Maimonides requires the civil authority (the king) to write a Torah scroll of his own, and this requirement could have led to far-reaching conclusions about how he perceived the civil authority and its relationship to religion. However, this law is already found in the Bible, so its *mere inclusion* in the Code cannot teach us something about *Maimonides'* own political ideas on religion and state.[283] To analyze *his* views, we should look for ideas and norms that Maimonides generated by non-evident interpretations of previous materials. Usually, of course, the distinction will not be sharp,[284] but fortunately regarding religion and state, Maimonides' contribution is very prominent, so it will not be difficult to identify his own views.[285]

b. Civil Authority?

According to Maimonides, the role of the civil authority (the king) is very clear. "But whatever he does should be done by him for the sake of Heaven. His sole aim and thought should be to uplift the true religion, to fill the world with righteousness, to break the arm of the wicked, and to fight the battles of the Lord."[286]

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[283] *See Deuteronomy* 17:18-19.

[284] Even deeply rooted norms may be illuminated in a different way in becoming part of a comprehensive theory.

[285] *See* GERALD J. BLIDSTEIN, POLITICAL CONCEPTS IN MAIMONIDEAN HALAKHA (2d ed., 2001) (1983) (discussing Maimonidean kingship). I was not concerned with this methodological issue regarding the more theoretical part of Maimonides' ideas for two reasons. The first one is that Maimonides explicitly establishes his fundamental conceptions about religion's involvement with politics on universal principles and not on existing and binding Jewish tradition. The second reason is that Jewish ancient sources are fragmentary and sometimes contradictory, so there is very broad flexibility in integrating them into a comprehensive and abstract theory. Hence, to a large extent, any such theory could be seen as an original creation. It is less true speaking about more specific arrangements.

[286] MAINMONIDES, THE CODE OF MAIMONIDES, Book 14: The Book of Judges, Laws

The civil authority is perceived as an indistinguishable arm of religion. It is not surprising that the above mentioned ancient law which requires the king to write a special Torah Scroll for himself is celebrated by Maimonides, who attributes to him special importance:

> As soon as the king ascends the throne, he must write a scroll of the Law for himself, in addition to the one which his ancestors have left him. . . . If his father left him no scroll or it was lost, he must write two copies; one, the writing of which is obligatory upon every Jew, he shall place in his treasure-house, and the other is to be with him all the time, except when he enters the privy or bathhouse or any other place where it is improper to read it. When he goes forth to war, it shall be with him; . . . when he sits in judgment, it shall be with him; when he sits down to eat, it shall be before him . . . .[287]

The deep concern of every true religion, and hence of the Jewish religion, about politics is achieved by the total subjection of the civil ruler to religion. Indeed, Maimonides emphasizes:

> Whoever disobeys a royal decree because he is engaged in the performance of a religious command, even if it be a light command, is not liable because . . . between the edict of the Master . . . and the edict of the servant . . . the former takes precedence of the latter. It goes without saying that if the king issues an order annulling a religious precept, no heed is paid to it.[288]

This last assertion in its extreme formulation definitely does

Concerning Kings and Wars, 4:10, at 216 (Julian Obermann, Louis Ginzberg & Harry A. Wolfson eds., Abraham M. Hershman trans., 1949) [hereinafter Laws Concerning Kings].

[287] *Id.* 3:1, at 212.

[288] *Id*. 3:9, at 214.

not "go without saying," as we shall see while discussing Ran's theory. Maimonides simply creates this total subordination as part of his general political theory.[289]

With this picture of the civil authority, it is not surprising that Maimonides asserts that appointment of a king is a command and an essential means to achieve the eternal religious goal.[290] This assertion is not obvious because many Jewish scholars were very fearful about the appointment of a king. Such an appointment creates a potential tension between the civil and the religious authorities,[291] and a singular ruler might particularly become a threat to the idea of God as the only king.[292] Maimonides is much less bothered by these problems, because of the clear and total subordination of the king to religion. Therefore, he turns upside down the meaning of the Biblical text which most sharply displays the fear from a monarch—God's response to Samuel the prophet after Israel asks for a king "[i]t is not

[289] *See* BLIDSTEIN, *supra* note 285, at 205 (relating to possible ancient Jewish origins of this view). However, even he admits that Maimonides certainly attributed much more importance to this idea than any former source, and his reasoning is much deeper. *See id*. at 208. It should be noted that even Maimonides recognized some extra-Halakhic powers of the civil ruler (e.g., death penalty not according to the religious law in order to achieve political order. *See* Laws Concerning Kings, *supra* note 286, 3:10, at 214). However, this recognition was required by former Talmudic sources and Maimonides interpreted this authority to be quite narrow. Moreover, in another part of the Code, Maimonides grants parallel if not broader authority to court (which applies Jewish law), thus expressing that the authority is indistinguishable from religious law itself. *See* MAINMONIDES, THE CODE OF MAIMONIDES, BOOK 11: The Book of Torts, The Law of Murder and Preservation of Life 2:4-5 at 199 (Hyman Klein trans., Yale University Press 1949). The Code also provides general limitations on the power of the civil authority. *See* THE CODE OF MAIMONIDES, BOOK 11: The Book of Torts, The Law of Robbery and Lost Property 5:14.

[290] Laws Concerning Kings, *supra* note 286, 1:2.

[291] *See* David Polish, *Rabbinic Views on Kingship- a Study in Jewish Sovereignty*, *in* 3 JEWISH POL. STUD. REV. 67 (1991).

[292] *See* 1 SALO W. BARON, A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS 91 (2nd ed., rev. and enlarged 1952) (1937).

you they reject, they are rejecting me as their king."[293] Maimonides explains: "[W]hy did the Holy One, blessed be He, look with disfavor upon the request . . . for a king? Because they asked it in a querulous spirit. Their request was prompted not by a desire to fulfill the commandment but by a desire to rid themselves of Samuel the prophet."[294] The prophet and the king are *both* an essential part of the religious authorities; willingness to dispense with one is a sin.[295]

c. The King Messiah

The most radical expression of politics' subordination to religion and of the view that both civil and religious authorities are actually religious is found in Maimonides' image of the Messiah. The Messiah, according to Maimonides, is not "gentle and riding on a donkey";[296] rather, he is a king. The "King Messiah," as Maimonides calls him, is both a civil as well as a religious leader:

> If there arises a king . . . who mediates on the Torah, occupies himself with the commandments, . . . prevails upon Israel to walk in the way of the Torah and to repair its breaches, and fights the battles of the Lord . . . . If he does these things and succeeds, rebuilds the sanctuary on its site, and gathers the dispersed of Israel, he is beyond all doubt the Messiah.[297]

The King Messiah is also a kind of prophet.[298] Indeed, this ideal

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[293] 1 *Samuel* 8:7.

[294] Laws Concerning Kings, *supra* note 286, 1:2.

[295] *See* BLIDSTEIN, *supra* note 285, at 68 (stating religious elements in the ritual of anointing the king).

[296] *Zechariah* 9:9.

[297] Laws Concerning Kings, *supra* note 286, 11:4, at 240.

[298] *See id*. 12:3, at 241; *see also* RAVITZKI, *supra* note 93, at 24 (stating an interesting observation about the other side of the connection between politics and prophesy, i.e. about some political aspects of Maimonidean prophecy).

character is the personification of the idea that politics is an undistinguished part of religion, and hence both the sacred and the civil authorities are religious. While during regular times these are two related but different authorities, in the far distant days they will be combined in one person. However, even this ideal ruler is subordinated to Jewish law.[299]

4. Maimonides: Conclusion

a. Union and Subordination

Aviezer Ravitzki describes Maimonides' view about religion and state as "a mutual symbiosis, irrevocable in nature."[300] Ravitzki is right, that according to Maimonides, there is a deep harmony between the two. It is also true that the civil authority is an indistinguishable part of religion and of the religious project. However, "symbiosis" seems to be an inaccurate definition for the relationship, and a more accurate one would be total "inclusion" and "subordination" of politics in general, and of state authorities in particular, to religion. The subordination starts already from the philosophical definition of the "well being of the body" only as an essential means to the religious goal, and not as an independent goal; it continues through the religious concern about these matters and the detailed ordering of political issues by religious law; and is eventually expressed in the religious status of the civil authority itself

[299] *See* Laws Concerning Kings, *supra* note 286, 11:3, at 239.

[300] RAVITZKI, *supra* note 93, at 27. Quotations from this source in this footnote and all subsequent footnotes have been translated from Hebrew by the author.

which is totally subordinated to religious law. Indeed, given this subordination, it is not surprising that Maimonides maintains that the first king should be nominated by the hardcore religious authorities, the prophet and the *Sanhedrin*.[301]

b. Maimonides' Theory as a Tradition in Jewish Law

Maimonides' structural model for the relationship between religion and state, which became the most common view in the Jewish tradition, is located far on the edge of the framework and definitely cannot be a basis for any dialogue between Judaism and democratic thought about religion and state. Yet, if Maimonides consciously did not rely on Jewish sources when he established his fundamental idea about religion and its deep concern with politics, it might be argued to have no validity as a positivist Jewish law or Jewish political theory.

Although this assertion, which enables one to disregard Maimonides' extreme view, is very tempting, it has some deep difficulties. First, there is a strong basis for a positivist theory of Judaism, according to which a Jewish scholar such as Maimonides, by the very declaration of his ideas, integrated them into Judaism. Moreover, Maimonides interpreted Jewish sources to reaffirm this idea, and if this step is not considered integration into Judaism it would challenge every idea that did not "totally" originate in Judaism (i.e., most parts of Jewish law given the inevitable cultural effect on

[301] *See* Laws Concerning Kings, *supra* note 286, 1:3.

every Jewish thinker who interprets Jewish sources).[302] Furthermore, a theological Jewish argument which was made in a different context might imply that the long time acceptance of Maimonides' theory by itself integrated it into the Jewish tradition, regardless of its original status.[303] And above all, even if one is convinced that Maimonides' theory cannot be valid from an intra-Jewish perspective, this view would definitely not be accepted by most of the observant Jews. For the purposes of this Article, it is a sufficient reason to give up this direction and look for a different way to enable a dialogue between Jewish and democratic models of religion and state. A potential direction we can find in the theory of Ran.

B. R. Nissim Ben Reuben Gerondi ("Ran")

1. Ran in Context

Spain of the 14th century was the geographical and the cultural environment of the activity of one of the best-known Jewish Scholars of that time: R. Nissim Ben Reuben Gerondi ("Ran"). Born in 1315 CE, he lived most of his life in Barcelona, where he was a leader of a *Yeshiva* (Jewish law academy) and the in-practice rabbi of

[302] Indeed, one could distinguish between the regular situation in which the outer-effect is unconscious or at least indistinct from the intra-effect, and a situation in which the outer-effect is logically preceding to the intra-effect as in this case. But to argue that only in the latter case the ideas cannot be regarded as Jewish ideas is a weaker assertion than the original one.

[303] *See* Mordehai Broyer, *Emuna UMada BeNosah HaMikra* [Belief and Science Regarding the Biblical Text], 47 DEOT 102 (1978) (providing this kind of argument and its theological basis regarding changes in the text of the Bible which occurred during the time and were accepted by tradition).

the city.[304] As opposed to Maimonides, Ran was not a follower of Greco-Islamic philosophy and its rationalistic tradition; moreover, he conceived this tradition as a threat toward Judaism. However, he did not join the opposite intellectual group that emerged in Spain of the 12th century–the mystic movement of Kabala. Rather, he was what Bernard Septimus called an "urbane traditionalist": one who advocated broad learning, exoteric spirituality, and reluctance to enthrone mere theoretical knowledge.[305] Unsurprisingly Ran composed neither pure theoretical work as The Guide, nor a detailed code like The Code of Maimonides. His main works are commentaries on the Talmud, Responsa, and commentaries on the Scripture.

One of Ran's most important works is "The Book of Sermons," which includes thirteen sermons on various issues, each based on a different chapter in scripture.[306] The 11th sermon, which is based on a chapter about the appointment of judges, is the main place where Ran expresses his political theory.[307] The sermon is a composition of explicit and implicit theoretical ideas as well as some legal details. Although it is much less comprehensive than Maimonides' theory in both aspects, the following subsections

[304] 9 THE JEWISH ENCYCLOPEDIA 317 (1905); DERASHOT HARAN HASHALEM [THE COMPLETE SERMONS OF RAN] 14 (Leon A. Feldman ed., 2003) [hereinafter SERMONS]. Quotations from the SERMONS in any subsequent text and footnotes have been translated from Hebrew by the author.

[305] BERNARD SEPTIMUS, HISPANO JEWISH CULTURE IN TRANSITION: THE CAREER AND CONTROVERSIES OF RAMAH 114-15 (Isadore Twersky ed., Harvard Univ. Press 1982) (using the phrase "urbane traditionalist" to describe another Jewish scholar in Spain, Ramah); *see also* LORBERBAUM, *supra* note 263, at 125 (quoting SEPTIMUS).

[306] *See* SERMONS, *supra* note 304.

[307] The Translation of the Sermon is taken from RAVITZKI, *supra* note 93, at 68-79 [hereinafter 11th SERMON].

attempt to reveal Ran's abstract conception of the connection between religion and politics, as well as his ideas about the relationship between religion and state.

2. Ran on Religion and State: The Core Ideas

a. The Launch of the Theory: A Biblical Difficulty

Ran's starting point is, apparently, a difficulty in the Bible.[308] The portion about the judicial branch opens, "You shall appoint Magistrates and officials for your tribes . . . and they shall govern the people with due justice. You [the magistrate] shall not judge unfairly: you shall show no partiality; you shall not take bribes . . . ."[309] Based on a common rabbinic assumption that each word in the scripture is indispensable, Ran wonders why the general command, "they shall govern the people with due justice" is needed, if it is elaborated afterwards with specific prohibitions to assure "due justice," like the prohibitions on unfair, partial or corrupted judging.[310] This question bothered former biblical commentators and Ran indeed refers to a couple of earlier answers, but eventually he argues for an answer of his own. According to Ran, the clause on "due justice" is not a command toward the judges, but a general

[308] Unsurprisingly, Ran chooses to raise his political ideas only as an explanation for a biblical difficulty and not through an abstract philosophical study like Maimonides did. It clearly demonstrates his non-enthusiasm for philosophy, and his view of Jewish sources as the ultimate foundation of authority.

[309] *Deuteronomy* 16:18-19.

[310] *See* SERMONS, *supra* note 304, at 412.

definition of the role of the judiciary.[311] That is to say, Judges are appointed to "govern the people" by applying "law of due justice," which is different from another optional kind of law, law which enhances political order ("*Tikun HaSeder HaMedini*"). In order to understand this key distinction, one must address Ran's basic assumptions about human nature and, consequently, politics.

b. Religion and Politics

Ran's account of the need for ordering politics is basically this:

> It is known that the human species need a magistrate to adjudicate among individuals, for otherwise "men would eat each other alive," and humanity would be destroyed. Every nation needs some sort of political organization for this purpose since, as the wise man put it even "a gang of thieves will subscribe to justice among themselves." [312] Israel, like any other nation need[s] this as well.[313]

Ran refers to life in society as a given reality, and this reality, combined with the Hobbesian character of human beings he advocates, makes political order indispensable for him. This view of Ran about the need for ordering is very similar to that of Maimonides, but despite the similarity he does not follow Maimonides' conception about the scope of divine law. As opposed

[311] 11th SERMON, *supra* note 307, at 68.

[312] *Id*. (quoting PLATO THE REPUBLIC 39 (Benjamin Jowett trans., Airmont Books 1968) (1888)).

[313] *Id.*

to the latter, Ran argues for a kind of "out sourcing" of the function of ordering politics, and here it is where he uses the distinction between two kinds of law: the true just law, which is the religious one ("the law of due justice"), and a different law, which is aimed at assuring political order.

What is the real meaning of this double track system? How sweeping is this "out-sourcing"? Some scholars argue for a narrow interpretation of the concept of "law of political order." For example, Aaron Kirschenbaum, a contemporary professor of Jewish law, argues that this concept is best understood as a limited legal means to handle crises, and that Ran does agree that usually Jewish (religious) law orders all aspects of human life.[314] It seems, however, that this narrow interpretation is misrepresentation of Ran's main idea and a broader interpretation is more accurate. Few arguments support this claim.[315] First, Ran makes parallelization between two kinds of laws: the religious law ("law of due justice") and the law to enhance political order. Such parallelization demonstrates that Ran perceives the two systems as somehow equal. Second, the Hebrew term "*Tikun Ha-Seder Hamedini*" (enhancement of political order) had a very broad meaning during Ran's times and encompassed much more than legal means to handle situations of crises.[316] Moreover, in his commentaries on the Talmud, Ran adds that the law of ordering politics contains some universal principles, thus emphasizing its

[314] Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought*, 9 JEWISH LAW ANNUAL 123 (1991).

[315] *Cf.* Gerald Jacob Blidstein, *On Political Structures: Four Medieval Comments*, 22 JJS 47 (1980).

[316] *See* LORBERBAUM, *supra* note 263, at 130.

stable and independent status.[317] Third, Ran's comments regarding the necessity of having this kind of law make it clear that he conceived it as a permanent and considerable component of the Jewish legal system. Indeed, Ran speaks about the inherent incompetence of Jewish religious law to order political life, and as an example he gives the fundamental traced-to-the-Bible law of warning. This law prohibits punishing a criminal for a crime unless he was notified in a certain way that he would be punished right before committing it, and Ran sharply asserts:

> Punishing criminals in this way alone would completely undermine political order. Murderers will multiply, having no fear of punishment. That is why god ordered the appointment of a king, for the sake of civilization . . . the king may impose a sentence as he deems necessary for political association even when no warning has been given.[318]

The law of warning is only one example of a more general argument about Jewish law, but even this example makes it clear that the ineffectiveness of the religious law is inherent, not temporary; it is not a result of specific social circumstances but of the basic character of human society.[319]

c. Religion and State

Ran admits that politics fall under the concern of religion because it is an essential means to the full accomplishment of

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[317] *See* 4 HIDUSHEI HARAN 211 (Abraham Sopher ed., 1963).
[318] 11th SERMON, *supra* note 307, at 69.
[319] *See also infra* note 333 and accompanying text.

religious goals, but he attributes the function of ordering politics to a distinct kind of law. Ran further continues the idea of distinction between religious law and law of ordering politics, by arguing that each kind of law is implemented by a different institution:

> God, May He be blessed, set these two issues apart, delegating them each to a separate agency: he commanded that magistrate be appointed to judge according to the truly just law . . . but since political order cannot be fully established by these means alone God provided further for its establishment by . . . a king.[320]

This institutional distinction is the reason for the biblical statement that judges will govern "due justice law": not as opposed to corrupted or evil law, but as opposed to the law of political order, which is under the responsibility of civil authority.

Given the essential role of civil authority in ordering politics, it is not surprising that Ran, like Maimonides, perceives the appointment of a king as a religious commandment.[321] However, as opposed to the kingdom that Maimonides imagines, Ran's kingdom is a secular institution, essential to religion but sharply distinct. The secular nature of the kingdom is revealed not only by the different kind of law which it is responsible of, but also by Ran's image of the king as a regular person who was nominated for a certain position. "[T]he kingdom is not inherent to the king, but an external quality given for the benefit of all."[322] It is a very different description

[320] 11th SERMON, *supra* note 307, at 68.
[321] *Id.* at 73.
[322] SERMONS, *supra* note 304.

compared to the idealization that Maimonides makes of the king, particularly the King-messiah who is the human being with both the highest spiritual and secular qualities.[323]

3. Ran's Political Ideas in Theoretical Context

The idea that ordering politics is not achieved by Jewish religious law but by a distinct legal system does not fit well to the elaborate nature of Jewish law,[324] which appears to be very concerned about the details of political ordering.[325] If not the nature of Jewish law, what are the possible origins for this surprising idea?

The Sermon reveals that Ran was bothered by the incapability of Jewish law to order politics, and this concern might be rooted in contemporary events.[326] During the 1330's, an apostate named Avner of Borgus wrote a book which severely criticized Judaism, arguing it was impractical, and Ran's ideas might be seen as an apologetic response to this attack.[327] According to this account, Ran's theory is an example of an attempt to reconcile a view of religious law as timeless, with the need for a legal change and adaptation.[328] The development of this response to the need for adaptation might have been facilitated by the substantial emergence of the idea of

[323] While Maimonides relieved the traditional Jewish fear from the civil authority by a total subordination of the king to religion, Ran's conception of kingdom should intensively raise this fear. Surprisingly, it seems that Ran is not much bothered with this issue.

[324] *Cf.* Sapir, *supra* note 70, at 98.

[325] *See supra* Parts I.C, II.B.

[326] *See* Blidstein, *supra* note 315.

[327] *See* RAVITZKI, *supra* note 93, at 62.

[328] *See* Horwitz, *supra* note 185 (providing theoretical observations, particularly in the modern era, relating to the attempt to reconcile timeless law with the need for adaptation).

"community enactments" in Jewish Spain of the 12th century.[329] This latter idea paved the way to the notion that Jewish law should inherently be assisted by some outer legal norms aimed to answer contemporary needs.[330]

The emergence of Ran's ideas cannot be explained, however, just in relation to a theoretical and political context, as this overlooks the continuity in his theory between the idea of a two-track system and the fundamental assumption about the connection between religion and politics (which is common also to Maimonides). If, as I argued, both Ran and Maimonides perceive politics as bearing no religious value, isn't it simpler to conclude, as Ran did, that religion need not too intensively deal with politics? In other words, if the political sphere by itself is not under the concern of religion, (i.e., if religion is exclusively interested in the accomplishment of political order but much less in the ways to achieve this result), it seems natural for religious law to refrain from determining particular political arrangements. It seems more reasonable for religion to

[329] *See* LORBERBAUM, *supra* note 263, at 93. "Community enactments" is the paradigm for religious recognition of the authority of a Jewish community to enact laws for ordering life, which to some degree are independent from Jewish law. *Id*.

[330] An even broader idea was developed by Nahmanides, the most important Jewish scholar in Spain of that time. Nahmanides responded to a difficulty which arose from the biblical description of some leaders (like Moses or Joshua) as legislators: What laws could they enact before the Torah was given, and what additional laws were needed after its giving? Some commentators interpreted this legislative activity as enactment of norms of Jewish law itself. Nahmanides, however, has a totally different interpretation: "Moses established customs for them concerning how to regulate their lives and affairs . . . [Joshua set down] customs and ways of civilized society . . . and other such similar regulations." RABBI MOSHE BEN NACHMAN, RAMBAM (Nachmanides), COMMENTARY ON THE TORAH 209-10 (Rabbi Dr. Charles Chavel trans., 1974). Although he doesn't speak about a wholly parallel normative system, Nahmanides does recognize the validity of legal norms which are not part of the religious law and argues that these norms were needed even right after the Torah was given. It more widely opens the door for the idea that some outer legal norms are always needed to "regulate [l]ives and affairs," and therefore might be conceived as the

declare that achieving political order is a general aim, but to leave the particular ways for a different and flexible system to determine. The creation of an elaborate and somehow fixed religious legal system is not only superfluous; it might be destructive, because in certain cases it prevents ordering.[331]

Understanding Ran's ideas in this light, they fit to a deeply rooted Jewish assumption on the secularity of politics, and might be conceived less radical than they had been in the first place. However, even if coherent with this basic assumption, the idea is still incoherent with the elaborate regulation of politics by Jewish law. During Ran's attempts to relieve this incoherence, the tensions within his apparently clear-cut theory are revealed.

4. The Role of Jewish Law: Ran's Withdrawal

Maimonides' theory, as previously discussed, presents a case in which a thinker, who subordinates Jewish religion to an external source like philosophy, eventually concludes that it is this religion which is the ultimate source of ordering life. Here, the case seems to be the opposite one: Ran accepts the superiority of Judaism, but its actual role in the political sphere is marginal. Indeed, religious law is the source for the validity of the law of political order, but its legal parts has no further practical significance. So why do Jewish criminal law, civil law, and constitutional law, all comprise

theoretical ancestor of Ran's theory.

[331] By saying that, I do not mean to argue that Maimonides' conclusion is inconsistent with his fundamental assumption about religion and politics. Indeed, the vitality of political order might lead religion to become deeply involved in the ways for its accomplishment. What I do argue, however, is that Ran's ideas are a simpler result of the fundamental notion

significant parts of Halkhah, exist?

One potential approach to address this difficulty invokes mystification of the religious law. This solution is found in the writings of Rabbi Mattathias Ha-Yitzhari, a Jewish scholar who lived two generations after Ran: "Lest we entertain the thought that there are laws among the nations which more properly order society than the laws of Israel . . . our laws are from the mouth of the Holy One. They too have a supernatural effect on created beings."[332]

Ran himself seems to take a slightly different direction. Indeed, he agrees that Jewish law is a means to achieve divine supernatural effect. This, and not ordering politics, might even be its principal aim:

> While the *Hukkim* [the ritual part of Halkhah] are not relevant at all to the establishment of the political association, but are both the proximate and the intrinsic cause for the decent of the divine outpouring upon us, the *Mishpatim* [Jewish law] are in fact crucial to this association. It is as if they serve both to bring down the divine outpouring and to perfect our public affairs. But perhaps these [latter] laws are [also] addressed primarily to the more sublime matters rather than to the perfection of society since our appointed king will conclude this task. The purpose of the magistrate and the Sanhedrin, by contrast, was to judge the people in accordance with true and intrinsically just law, which will effect the cleaving of the divine unto us, whether or not the ordering of the multitude's affairs has been perfected. That is why some of the laws and procedures of the nations may be

about politics' secularity.

[332] *See* RAVITZKI, *supra* note 93, at 63.

> more effective in enhancing political order than some of the Torah laws this however, does not leave us deficient . . . .[333]

It is important to note, however, that although Ran agrees to the view of *Ha-Yitzhari* about the main goal of Jewish law, there is a significant difference between them. According to Ran the "cleaving of the divine" is not achieved because of some mystic qualities of Jewish law, but rather because it is the "true and intrinsically just law." In other words, Jewish law is the absolute morality, and by implementing it, the nation becomes closer to God. This idea is more explicit where Ran speaks about the impractical law of warning mentioned above: "There can be no doubt that this is required by just law, for why should a man be put to death unless he was aware that he was committing a capital offence and transgressed? . . . [T]his is the law, intrinsically and truly just, that is entrusted to the judges."[334]

Jewish law is, therefore, an elaborate and absolute moral doctrine: it includes not only values and general principles, but also very specific laws all aimed to "cleave the divine." But here it is where Ran starts to implicitly undermine his former ideas, and he does it in several dimensions. First, he implicitly says that religion is concerned with theological as well as moral and social matters. If so, political matters become not only essential to religion but immanently religious; applying morality in political life is the way to become closer to god, the ultimate religious goal. Second, and

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[333] 11th SERMON, *supra* note 307, at 70.
[334] *Id*. at 69.

consequently, if religious law is the absolutely just order of politics, why does its inadequacy to order politics "not leave us deficient"? What is the meaning of a normative system which is aimed to be the ultimate way to order society, but is inherently less successful than other systems?[335] A possible way to approach this difficulty is to invoke an idea of the inevitable gap between ideal and real society, but then isn't it expected to try and make the real society as much as possible resemble the ideal one? Moreover, is it not expected to implement Jewish law as much as possible and use the law of political order only when there is no other choice? Indeed, in another part of the sermon, Ran seems to hold exactly this view. Explaining Israel's sin in asking for a king, Ran says:

> They wanted adjudication to be the charge of the monarchy, rather than of the Torah Judges. . . . They preferred to enhance their natural affairs rather than to bring the divine outpouring down upon themselves. . . . For this Samuel reproved them afterwards . . . know that you have erred in choosing something which, although it appears to you to be correct, the order of natural things, is not truly so. For one who cleaves for the divine can alter natural things at will. . . therefore it is more fitting for you to prefer that which induces the divine largesse among you namely adjudication of the magistrates . . . by just law . . .. over adjudication by the monarch wherein he decides according to his own will.[336]

Like Maimonides, Ran argues that Israel transgressed by

[335] *See* LORBERBAUM, *supra* note 263, at 144.
[336] 11th SERMON, *supra* note 307, at 74.

preferring only a king, instead of both civil and religious authorities. However, he emphasizes the superiority of Jewish law, and its ability to create change in reality through the effect of the divine. If it is so, the law of politics should be implemented only if there is no choice (recall the above mentioned interpretation of Kirshenbaum to Ran's theory). Indeed, the idea that the incapability of religious law to order society is due to the gap between the real and ideal society, which stands in deep tension with the easy acceptance of this incapability. Ran's political theory is deemed to remain within this tension.

5. Ran: Conclusion

a. Incorporating Change into a Timeless Normative System

The core of Ran's theory is the "two track" view of Jewish law: the invention of the concept of "law of political order," and the narrow role which is attributed to Jewish law in this context. According to one interpretation, underlying this idea is an attempt to address the problem that law which is believed to be the ultimate moral truth is no longer capable of achieving its own aims. In other words, the theory is an example of an effort to incorporate change into a "permanent and eternal" law.[337] Yet, another interpretation may exist, which is conceptual if not historical. According to this

[337] The incorporation is achieved by embracing all of the following consecutive statements: (a) the general legal commandment of Judaism is that political order must be achieved; (b) Jewish detailed law is aimed to order only an ideal society; and (c) any real society should be ordered by a flexible legal system adaptable to changing circumstances.

interpretation, the concept of "law of political order" is not a response to a difficulty, but rather a conceptual result of the fundamental assumptions about the secular nature of politics. This assumption supports out sourcing of the function of ordering politics.

Whether the possibility to adapt timeless law into changing circumstances is the reason for embracing the "two track" view of Jewish law or not, it is definitely a consequence of this view. The determination of a very general religious requirement (accomplishment of political order) which confers legitimacy on different legal means all aimed to its achievement, enables one to reconcile flexibility with the belief in permanent fundamental truth.[338] How far could this flexibility reach?[339] It seems that Ran himself had changes in mind in factual circumstances which might require changes in the ways to achieve political order. For example, if there are more violent crimes, it might require greater punishments. But the idea may have much broader implications, and changes in the perception of reality such as a new scientific or moral belief might also justify changes in law.[340] Bringing changing views about reality into account might have, however, two different meanings. The weak one is that the acceptance of a new view is by itself a change in

[338] This general legal principle has in Ran's theory the same function that Morton Horwitz attributes to the idea of "democracy" in the American constitutional culture of the last half century. *See* Horwitz, *supra* note 185, at 57 (discussing the theories of constitutional change in modernist America, and identifying different theoretical means to incorporate such a change to a system which invokes the idea of absolute truth and fundamentality).

[339] *Cf. id.* at 41 (discussing different views about the flexibility of the American constitution).

[340] *Cf. id*. at 91 (discussing what is considered "factual change" which justifies change in American constitutional law, and advocating for bringing into account change in moral beliefs as well).

the "factual circumstances" which should be considered regardless of the merits of this view. For example, if it is believed that physical punishment is immoral, it might justify deviation from a former law permitting whipping only because public acquiescence is crucial for legitimacy of the law. According to the stronger meaning, changes in views challenge the basic assumptions about the truth of the former law and justify its replacement. Taken seriously, it might undermine even the fundamental legitimizing concepts, leading to general relativism.

The degree of flexibility which Ran's theory integrates to Jewish law—bringing in account only changes in factual circumstances, or changes in scientific views and maybe even in moral vies as well (in the weak or in the strong meaning mentioned above)—is very relevant to the question of what potential models of the relationship between religion and state it may support. This question will be discussed now.

b. Ran's Theory and the Legitimate Structural Models

Ran used the initial assumption about the secularity of politics to justify a distinction between religious law and politics. Nevertheless, as a political thought which relies on Jewish sources, Ran's theory does not and maybe cannot totally separate politics and the civil authority from religion. The connection between the two has two aspects. The first aspect is that the general aim of the civil authority when it orders politics should be enabling the achieving of

religious goals.[341] This connection is not very limiting, though, because it is relevant only theoretically and does not entail any specific requirement for degree of involvement. For instance, radical evangelism might call for strict separation between religion and state to assure religious authenticity, so the state refrains from engaging with religion in order to fulfill religious requirements.

The second aspect of the connection is more significant. As mentioned, Ran's theory perceives the religious law as the law of absolute justice, and thus naturally aspires to further implement it as long as political order is maintained. Moreover, it aspires to create circumstances in which such implementation will not undermine political order. In other words, Ran's theory seeks a closer connection between religion and the political sphere if such connection is possible. On the continuum of the framework, it is reasonable to assume that Ran would tend to the side that supports some connection between religion and state, e.g., "establishment," or a kind of "endorsement," in order to promote this goal. It less plausibly supports models of "neutrality" or "separation," which disconnect any special relationship between Jewish religion and the

[341] *See* 11th SERMON, *supra* note 307, at 74.

> If the king annuls any commandment for the sake of addressing [the needs of] his time, he will have no intention of transgressing against the words of the Torah nor in any way of removing the yoke of the fear of God. Rather his intention should be to observe faithfully every word of this teaching as well as these laws. Anything he adds or takes away must be done with the intention of furthering the observance of the Torah and its commandments.

Id. Ran further states: "Moreover, Israel need [the civil magistrate] for another reason: to uphold the laws of the Torah . . . even if their transgression in no way undermines political order." *Id*. at 68.

state.[342]

However, even this aspect of connection is not necessary, and the theory might conceptually lead also to those latter models. The key is the idea of flexibility and adaptation to changing circumstances so central in Ran's theory. For instance, if in certain factual circumstances political order is best achieved by a kind of separation between religion and state, Ran's theory would approve it (flexibility due to factual change). Moreover, if the common view favors such a model, Ran might approve it in order to assure the legitimacy of the constitutional arrangements (flexibility due to changing views in its weak form). Furthermore, it might be argued that the theory could conceptually waive its aspiration for further application of religious law in the first place. This is possible if religious law is perceived as so ideal that it is not relevant to any real society— quite a radical conception, one should admit.

Ran's conception of the Jewish religious law as the "absolute justice" entails one real cost of adopting his ideas, a cost which will be particularly felt by the liberal part of the orthodox Jewish population, (i.e., those who would be the most enthusiastic to adopt these ideas). A by-effect of Ran's theory is a detachment of the moral value of religious law from the real consequences of this law. If religious law causes unwanted or immoral results, it does not entail that this law is not moral; actually the law is the ultimate morality,

[342] *See generally* Steven F. Friedell, *Jewish Tort Law Remedies not Based on Torah Law: An Approach Based on the Ran and the Rivash,* 10 JEWISH POLITICAL STUDIES REVIEW 47 (1998) (discussing a specific implication of Ran's ideas on the authority of rabbinic courts in Israel); Warren Zev Harvey, *Liberal Democratic Themes in Nissim of Girona,* 3 STUDIES IN MEDIEVAL JEWISH HISTORY AND LITERATURE 197 (2000) (discussing possible applications of

and the problem is with the imperfect reality. This view undermines any theological justification for a reformation in religious law itself because of immoral results it might have. Indeed, practical problems could be solved according to this theory by the law of political order, but not the problem of what is perceived as the ideal norm. Moreover, in the ritual areas of Halakhah, there is no such practical mechanism to "correct defects." Those who would advocate Ran's ideas to enable incorporation of liberal values in the legal realm would find it difficult to call for (e.g., egalitarian worship, if they remain loyal to the same ideas).

V. CONCLUSION

A. An Overlap between Structural Models

The purpose of this Article was to challenge a very common Israeli assumption about an unbridgeable gap which exists between Jewish and democratic thought on religion and state even in the basic ideas about how to structure the relationship. It is usually believed that Judaism requires a union between religion and state while democratic thought requires separation between the two. Yet, both parts of this assumption are inaccurate; on a continuum with a union between religion and state on one side and hostility on the other, both doctrines can support quite a wide range of models.

Discussing democratic ideas on religion and state, I referred to the American debate as a typological democratic discourse and as

other political ideas of Ran, beyond the issue of religion and state).

the main origin for the Israeli image about what the place of religion in a democracy should be. However, the analysis showed that this discourse is not religiously neutral, and is largely affected by Protestant and evangelist ideas which might not fit into a different religious context. Moreover, it was clear from the analysis that the basic ideas which comprise the American debate do not lead to a specific solution, but to a wide range of structural models: an establishment of a particular religion on the one hand, and moderate hostility toward religion on the other. At the end of the day the question is a question of degree, and different degrees of advocating each idea and each argument may lead to surprisingly varied models. Even liberal doctrines which generated the general debate on state and comprehensive doctrines and which are more coherent with a model of neutrality, are at least reconciled with, if not entail other models around the center of the continuum (like separation or accommodation). It is needless to say that doctrines which are not liberal in this manner may require other models.

The other side of the assumption, that Judaism promotes a union between religion and state, was also challenged in this Article. Indeed, Maimonides, whose political theory is the most accepted in Judaism, supports a kind of such union, and the theoretical roots of his view precede Judaism. However, it is not the only Jewish view, and there is at least one alternative theory of a traditional Jewish scholar, Ran, which might endorse different relationship models. First, Ran's idea that the secular authority has an independent role in ordering politics enables us to cut the Gordian tie between Jewish law

and the state. Moreover, Ran's theory also includes the idea that accomplishment of political order may require adaptation of law to changing circumstances, and this idea might have further consequences. Indeed, although Ran still preserves some connection between religion and state, his theory might promote models of neutrality and separation if political order so requires.

The understanding that most of the structural models of the religion and state relationship along the continuum could be accepted by both Judaism and democracy is significant in all three aspects I mentioned in Part II of the Article. In the first aspect, it will facilitate the establishment of a serious and honest Israeli debate on religion and state, which currently narrowly exists, by relieving the fear of inevitable conflict. Moreover, it might facilitate the acceptance of existing compromises, like the proposal in the "Gavison-Medan Covenant." In a second aspect, the argument will facilitate the cultural integration between Jewish and democratic values, both by proving that there is an area in which such integration is possible and by relieving the fear of an unsolvable conflict. In a third aspect it might stimulate identifying similar directions in Islam, which like Judaism is believed to anonymously support exclusive jurisdiction of religion and religious law over politics.

This first step of analyzing theories of medieval Jewish thinkers along the continuum should provide an incentive to look for other Jewish political thinkers who might hold views that are different from the mainstream view on religion and state. Modern thinkers, although less authoritative, should be part of this project;

they are especially valuable when discussing more elaborate arrangements, unique to the modern context. Moses Mendelssohn and his attempt to promote the idea of voluntarism in Judaism is an example of such a thinker.[343]

B. Reflection and Broader Implications

One might think that this Article simply finds a Rawlsian "overlapping consensus" between Jewish religion and democratic political thought. Indeed, a consensus is what the Article tried to achieve, and therefore considerable parts of it apparently describes and analyzes existing ideas within each of these two comprehensive doctrines. However, the consensus I tried to achieve differs from the Rawlsian consensus in a few important aspects.

First, as opposed to Rawls, my aim is not only to guarantee stable and just existence of the political community, but also, as noted, to facilitate a cultural project of integrating two cultural origins—a project which is necessary to the ongoing existence of the Jewish nation as a nation which is related to its old cultural heritage but incorporates modern values. Second, and related, the Article does not focus on *practical* arrangements that each of the comprehensive doctrines might *tolerate*, but rather on more *fundamental ideas* that each doctrine might endorse *in the first place*. For example, the Jewish legal concept of "*Dina Demalchuta Dina*" which might practically allow (from a religious point of view) the undesirable existence of a Jewish unreligious state is not enough for

[343] MOSES MENDELSSOHN, JERUSALEM: A TREATISE ON ECCLESIASTICAL AUTHORITY AND

my purposes, because it will not enable a real integrative cultural progress between Jewish and democratic ideas. [344]

How is it possible to find a deep common basis between apparently such different systems? Isn't it an attempt to square the circle? I believe it is not. As broad, inclusive systems, both Judaism and democracy incorporate diverse notions, both provide a variety of potential rather than absolute answers to complex dilemmas, and acknowledge inevitable tensions between values and ideas. Consideration of specific issues may expose spheres where these seemingly incongruent systems have common grounds not only in the practical outcome but also in the designing considerations. The compromise should start already within each doctrine, by looking for those attitudes and directions that might be reconciled with those of the other doctrine. Indeed, such a strategy may require the adoption of non-mainstream views within each of the two rival systems, but at the same time it enables us to create a richer and deeper cultural background.

This cultural progress with its potential legal implications is not an easy one. There are some who prefer avoiding such a progress in first place, and promote only practical compromises. There are a few others who prefer to pretend as if they promote such a progress,

JUDAISM (Daniel Dahlstrom ed., Cambridge Univ. Press 1997) (1838).

[344] Moreover, the use of the concept "*Dina Demalchuta Dina*" might prevent moving from temporary legal arrangements, which it may validate, to *practical constitutional* arrangements, because no side will be willing to accept a constitution in which he admits in a long term compromise about the character of the state of Israel, a fulfillment of a very old dream according to Zionist narrative. Paradoxically, the decline in the Zionist commitment and in social solidarity that the Israeli society has deeply experienced in recent decades might promote the adoption of a constitution not only as means to prevent social fragmentation but also because of reluctance regarding the character of the state.

but actually avoid it by exclusively shaping one cultural source according to the other.[345] This kind of attempt besides from being intellectually dishonest, is also less promising in both cultural and practical aspects: it does not create any inter-fertilization,[346] and it undermines the possibility to create consensus on practical arrangements, because those who honestly believe in the competing doctrine will not accept such picturing of their doctrine, and will continue to struggle. Indeed, only sincere attempts have the chance to accomplish the integration. Sincerity requires deep study, and willingness to admit the costs each side might pay. It also requires admitting that there are cases where the attempt does not succeed in the short run. However, those cases, we should hope, are not too many.

[345] An example of such an attitude is the argument that Jewish tradition is of morality and humanity and therefore actually there is almost full identification between Jewish and democratic ideas. *See*, *e.g.,* Aharon Barak, *HaMahapecha HaHukatit: Zhuyot Adam Muganot* [The Constitutional Revolution: Protected Human Rights], 1 MISHPAT UMIMSHAL [LAW AND GOVERNMENT] 29 (1992). This argument draws Judaism in a way some might have wanted it to be, but not in the way it is. It ignores very prominent components of the Jewish tradition which do not fit to modern values.

[346] *Cf.* David Novak, *Forming Religious Human Rights in Judaica Texts, in* HUMAN RIGHTS IN JUDAISM- CULTURAL RELIGIOUS AND POLITICAL PERSPECTIVE 4 (Michael J. Broyde & John Witte Jr. eds., 1998).