

DAVID SEHAT. *The Myth of American Religious Freedom*. New York: Oxford University Press. 2011. Pp. viii, 356. \$29.95.

The nature and extent of Americans' commitment to religious freedom has become both a popular historical subject and the source of a very contentious historiography noteworthy for its considerable variation in quality. Thankfully, three publications in recent months have significantly improved the level of academic discourse on this important topic while adding to our historical understandings. Together they form an excellent basis for a synthesis of our current thinking about law and religion.

The first of these, Sarah Barringer Gordon's *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (2010), highlights the contrasting views of law—popular and technical—held, respectively, by spiritual activists and legal professionals and describes how, over the last seventy years, they intersected sufficiently to form the confusing accommodationist position taken by the Supreme Court since the 1980s. Published shortly thereafter, Derek H. Davis's edited collection, *The Oxford Handbook of Church and State in the United States* (2010), contains twenty-one interpretive and analytical essays establishing the current state of our historical understanding on a variety of subjects relevant to the relationship between law and religion. David Sehat's book offers another intelligent and even-handed analysis of this troubling historical issue, providing a new interpretation of the tension between American liberal and Christian worldviews and the institutions formed to express them.

Sehat argues that even if the U.S. Constitution was intended to separate church and state it cannot be understood as ever having done so. Two factors limited this prescriptive role: the states were not prohibited by the religion clauses of the First Amendment from using their police powers to enforce morality and popular desires for using Christian morality as a basis for law

strongly influenced the development of policy and law at both the state and national levels. As a result, by the mid-nineteenth century Americans created a moral establishment that enforced a Protestant Christian conception of how people should behave in society. This moral establishment shares many qualities with the "non-sectarian" moral religion persuasively presented by Noah Feldman in *Divided by God: America's Church-State Problem—and What We Should Do about It* (2005) and also with earlier conceptions of a "civil religion," a "religion of the republic," or a "public Protestantism" described by Robert N. Bellah, Sidney E. Mead, and Catherine L. Albanese, respectively. Yet, Sehat rejects any comparison of his analytical term to the others, legitimately denying both the universality of belief that, at least Bellah asserts, forms the basis of the civil religion and the adaptability of "moral establishment" to the political purposes that religious conservatives, such as Richard John Neuhaus, have made from the "civil religion." Sehat's introduction of the term "moral establishment" is particularly helpful as an interpretive tool in synthesizing earlier understandings while distinguishing this study from earlier works.

Sehat briefly describes, in a reassertion of Mead's thesis, a temporary alliance between Jeffersonian-Madisonian liberals and evangelical Christians (Mead's "pietists") that created a constitutional protection of religious freedom. However, not only did the evangelicals reject the separation of church and state as a means of securing this protection, but they further rejected religious freedom as protecting a right to "freedom of conscience" over matters "purely speculative," in James Madison's words, or prohibiting government from recognizing the revealed truth of the Christian faith, at least to the extent necessary to conform the laws to Christian morality. While Mead contends that

the ideological differences between the tentative allies quickly became apparent by 1800 and led to extensive debate over the goals of American society, Sehat argues that an overwhelming majority of Americans succeeded, during the nineteenth century, in framing state and national laws with Christian precepts.

Sehat implicitly views the years of revolution and nation-building as a humanistic aberration in the four-hundred-year history of Christian society in what started as English America. He insightfully writes that "it is anachronistic to understand the moral establishment as an expression of religious politics growing out of voluntary association in civil society. Quite the opposite. It was resistance to the moral establishment that provided the historical context for the emergence of liberal democratic theory" (p. 285). A radical minority conceived of the American Revolution and the new nation in secular humanist terms and converted its idealism into law. Throughout his book, Sehat looks to dissenters from the dominant Christian worldview to identify the parameters of freedom and finds those limits to be consistently narrow since the founding era.

By no means does Sehat understate the profound liberal secularism of Jefferson and his allies; instead, he argues for an early defeat of their position, evident not in the text of federal and state laws but judicial and popular interpretations of them. The first defeat came with Madison's failure in Philadelphia to secure a national veto over state legislation that intruded upon individual rights. Yet more significantly, the federal courts also adhered to a policy of deferral to state authority. The federal deference to state police powers allowed statewide majorities to impose their conceptions of morality and the public good upon the citizens of those states without regard for their federally protected rights expressed both in the contract clause of the Constitution and the Bill of Rights. The tremendous growth of evangelical Christianity after 1800 transformed American religion and society; evangelicals used the legal wedge provided by deferral to create a pervasive moral establishment before the onset of the Civil War. They believed that recognizing individual freedoms would result in immorality and social decay and accordingly "sought to minimize the anarchic tendencies of individuals under democratic capitalism" (p. 55). Many evangelicals even wondered if mankind is capable of democratic self-government and free enterprise, believing "the kind of individual rights that Madison espoused . . . a dangerous fiction" (p. 57). Accepting that people need to be controlled—to be subordinate to institutional authorities within a social hierarchy—these evangelicals drafted a "[m]oral law . . . [as the] mechanism of religious control" (p. 69) and empowered government to enforce it. Sehat quite appropriately perceives the benevolent empire as both a product of evangelicals' needs to reform society and the engine of legal change necessary to accomplish that goal.

The author is to be commended for his insightful understanding of the divide within American society ex-

emplified by the evangelicals' fear of all things liberal: democracy, free-enterprise capitalism, and moral relativism rooted in freedom of conscience. Yet, just as significant as his appreciation of this often-ignored ideological divide is his realization that the Christian majority usurped the language of the founding era to support a policy of morality-based social control that was inherently at odds with the ideas that spawned the rights dialogue. Sehat notes that the "moral establishment . . . claim[ed] to support religious liberty while in fact promoting religious control" (p. 155). Religious liberty came to mean not a protection of "freedom of conscience"—the founders' words expressing an endorsement of intellectual freedom that perceived religion as merely a variant of belief—but, "the freedom of believers to bring their religion into public life to establish an ordered society" (p. 155).

Sehat finds that the religious perspectives endorsed by the moral establishment formed a consistent defense against various types of social change. The nascent women's rights movement of the antebellum years was frustrated by the moral establishment's prescribed roles for women and Christian conceptions of family structure, the same concerns that helped to defeat the Equal Rights Amendment in the 1970s. It also endorsed the racial segregation of the Jim Crow South on the basis that God intended the races to be separate, an argument used by Bob Jones University before the Supreme Court in 1983 to legitimize its policies of racial exclusion while seeking tax-exempt status from the government.

But the major battleground over the role of religion in American society has been the schools. Advocates of a moral establishment have seen the schools properly working "in tandem with the family and the church to strip individuals of their sinful and antisocial tendencies so that they were fit to live in a democratic society" (p. 156). This perception of the role of the schools provoked two controversies that form a significant basis for Sehat's argument: the effort to assimilate Catholics by eradicating characteristics of their religious practice that contradicted establishment values (and Catholic responses to those efforts) and the prescription of Bible-reading and prayer in the public schools. Throughout these and other controversies, including the public display of nativity scenes at Christmas or of the Ten Commandments in government buildings, advocates for the moral establishment can be understood as less interested in the right to practice their religion than in the power to impose it upon others. Sehat writes that "The determination of religious partisans to use law to enforce morality shows the extraordinary degree to which they were not committed solely to moral suasion" (p. 286).

Of course the major legal change in the relationship between law and religion came about in the 1930s and 1940s as the Supreme Court reconfigured rights and subsequently incorporated the religious clauses of the First Amendment into the Fourteenth Amendment. These legal changes provoked a huge increase in fed-

eral court cases interpreting the religion clauses of the First Amendment. In developing a liberal jurisprudence on the issue of church-state relations, the Court between 1950 and 1975 frequently looked to the intention of the founders, particularly Madison and Jefferson, encoded in their writings and found that the Constitution expressed their desire to separate church and state. Sehat finds this conclusion to be in error. It is not that he opposes separation, but he believes the doctrine to be a historical fiction.

Sehat may well underestimate the success of the Jeffersonians in transforming society to protect individual freedom from social controls rooted in religion during the early republic. In this period, Americans reconceived of religion as a private matter rather than a public truth. In state after state, until finally Massachusetts acted in 1833, religion was removed from the public sphere it once controlled and was placed instead in the private realm. The banning of test oaths, the securing of freedom of conscience, the restructuring of churches as private corporations, the removal of churches from their roles of providing poor relief, education, and record keeping, and the elimination of Christian teachings of doctrine and morals as the basis for law, education, and civic duty redesigned American society from a collection of Christian commonwealths in the early eighteenth century to a largely secular nation by the dawn of the age of Andrew Jackson.

But disagreement in conclusions drawn from considerable research and informed analysis should never form the sole basis for criticizing a book. In fact, the Supreme Court's change in perspective since 1980 indicates a greater receptivity to Sehat's perceptions of original intent concerning matters of religion. More significantly, Sehat, much like Gordon, though not to the extent of legal scholars such as Larry D. Kramer and Barry Friedman, argues that popular conceptions were, and are, far more important to understanding and applying law than what its drafters or legal philosophers intended.

Sehat is no apologist, any more than Gordon is, for the Religious Right. He finds that contemporary religious conservatives have been the major beneficiaries of the confusion over constitutional meanings. This confusion has allowed them to hide behind the "myth" of religious freedom while espousing policies that deny it. Ultimately harmful to the future of religion and to individual rights, the moral establishment has allowed religion to influence law as law has come to regulate religion. Both today's liberals and members of the Religious Right have valid bases for their arguments, yet neither of them, according to Sehat, understands or is willing to accept the complexity of the "full story."

Much of that complexity derives from the intellectual incompatibility of the secular humanist and Christian moralist worldviews. Sehat recognizes the tension inherent in the interaction between these philosophies and allows it to inform his text without ever dominating it. In this way, Sehat has written a wonderful intellectual history of the United States addressing a topic of perpetual concern to Americans since the founding. In his conclusion Sehat comes back to this intellectual tension, and in doing so reprises the argument of one of his leading predecessors, Richard Hofstadter, in asserting the anti-intellectual aspects of evangelicalism. Sehat's words are somewhat less critical but no less insightful: "At bottom, liberalism's affirmation of pluralism, reason, and freedom situated its proponents in conflict with the fundamental affirmation of the moral establishment: that God's decree set standards so that moral truths were equally applicable to all people across time and space and formed the proper and singular basis of U.S. law and society. The moral establishment featured a narrow appeal to transcendent religious ideals, which often led to the illiberal legal and political policies that characterized much of the American past" (p. 288). He might have added that the same ideals intrude upon the present as well.

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