

# Courting Disaster

*Stephen L. Carter*

**The Dissent of the Governed:**

**A Meditation on Law,**

**Religion and Loyalty**

*Harvard, 1998.*

*167 pages.*

*Reviewed by Nathan J. Diament*

America is becoming more secular by the day. Though Americans attend houses of worship and express their belief in God in high numbers, in the public square religion has become marginalized, and communities of faith have been increasingly alienated from a cultural mainstream in which distrust of religion is as much a fixture as religion itself once was. In particular, the concern is voiced that the widening “separation of church and state” amounts to little more than an institutionalized bias, framed in constitutional argument, against religious values and the integrity of religious communities, a bias against which normal democratic forms of redress, such as elections and

legislation, are hopelessly ineffectual. A typical example of this sentiment appeared about two years ago in the “theo-con” journal *First Things*, in a symposium entitled “The End of Democracy? The Judicial Usurpation of Politics.” The journal’s editor, Richard John Neuhaus, opened the symposium with the following broadside: “Law, as it is presently made by the judiciary, has declared its independence from morality . . . especially morality associated with religion. . . . What is happening now is a growing alienation of millions of Americans from a government they do not recognize as theirs . . . an erosion of moral adherence to this political system . . . the displacement of a constitutional order by a regime that does not have, will not obtain, and cannot command the consent of the people.”

How did things get to be this way? How did it happen that the Constitution, which from the Founding was understood to support and even nurture religious communal life, became its nemesis? Perhaps more importantly: Might the day come when religious

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communities, with their legal standing debased and their fate tied to a civilization careening toward what they see as moral dissolution, take up the cause of organized dissent? These are the questions driving Yale Law School professor Stephen L. Carter's *The Dissent of the Governed: A Meditation on Law, Religion and Loyalty*—a work at times less a “meditation” than a stern warning to a nation whose pretense to tolerance has become, in the eyes of many, a pretext for intolerance toward religious communal life.

**T**he core of the problem is what Carter calls the “project of liberal constitutionalism,” undertaken by the American legal establishment over the last half-century. Whereas once the Constitution was seen as limited, enshrining fundamental rights and obligations and sternly circumscribing government authority, the newer belief is that the Constitution ought to be the ultimate arbiter of communal values in America. The basic aim, Carter argues, is “to use the power of the federal government, and to interpret the Constitution, in a way that creates a single, nationwide community with shared values and shared, enforceable understandings of how local communities of all descriptions should be organized.” The Constitutional community, in effect, supersedes the diverse, mostly religious

value systems which previously governed communal life in America.

To further their vision, liberal jurists and constitutional theorists have accorded much greater power to the federal government, “abandon[ing] the understanding of the Enlightenment liberals that government authority itself posed a problem for the freedom of the individual, and that the sovereign therefore had to be constrained, its powers divided. The Founders certainly understood this point, as even a cursory reading of *The Federalist* makes clear. But nowadays that vision has collapsed.” Emboldened by the approach, the federal judiciary now routinely imposes its particular understanding of constitutional rights upon states and local communities, even in the face of state constitutional and legislative rulings to the contrary.

One of the many examples Carter uses to illustrate the transformation is the 1994 Supreme Court decision in *Board of Education of Kiryas Joel v. Grumet*, which required the dismantling of a public school district created by the State of New York in order to address the special needs of a town populated almost entirely by Satmar Hasidim. The purpose of this arrangement was to provide secular special education for the community's learning-disabled children whose needs were not being met

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by the area's other public school districts. By legislating a special accommodation for a particular religious group, the Court held, the State of New York had violated the First Amendment's prohibition of the establishment of religion.

Now, constitutional historians agree that the Establishment Clause in the First Amendment (taken together with the Free Exercise Clause) was intended to *accommodate* minority religious communities just like the Satmar Hasidim. Its purpose was to preserve the rights of states and communities—Catholics in Maryland, Congregationalists in Massachusetts, Presbyterians in Pennsylvania—to maintain their own religious practices without fear of a powerful federal government imposing a designated religion upon them all. Yet, beginning with its 1947 *Everson v. Board of Education* decision applying the Establishment Clause to the state level, the Supreme Court has consistently interpreted it as protecting the religious sentiments of *individuals* only, at the expense of the sentiments of religious communities and the will of state legislatures—even when no one would consider the law or policy at issue to be an act of “establishment.” (Carter relates that after the Court agreed to hear the *Kiryas Joel* case, one commentator mocked that “the Justices had foiled New York’s secret plot” to

establish Hasidism as the state’s official religion.)

The inevitable result is that religious communities are simply excluded from the legal sphere. Once the only concern is that of the individual, even a small effort on the part of a state to accommodate the concerns of a religious community invariably becomes an act of “discrimination” against anyone who is not part of that community. Not surprisingly, many religious Americans have come to see in their judiciary a body bent on destroying the religious community in America, pitting the Constitution inalterably against the needs of religious communities which together comprise a great portion, if not a majority, of American citizens. “Again and again in my travels,” Carter writes, “I run into people who complain that the deck is stacked against a family trying to teach what they often call ‘traditional values’ or ‘family values’... that the institutions of the government, far from reinforcing the values many people want their children to learn, actively frustrate them.”

**W**hat happens when a significant portion of the population feels impotent to influence government actions which directly affect their lives? Carter’s concern is not so much that religious Americans will resort to civil

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disobedience—something America has demonstrated it can handle and even benefit from—but that they will undertake a more profound “disallegiance” from the state as a whole. He brings as a model the kind of disaffection toward the British crown which drove the Founding Fathers to declare independence in 1776. Carter’s reading of the Declaration of Independence focuses not on the usual discussion of “rights” and the “consent of the governed,” but upon what the Founders cited as the Revolution’s real justification, as expressed in the Declaration itself:

In every stage of these oppressions we have petitioned for redress in the most humble terms: Our repeated petitions have been answered by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

The Revolution, it seems, was justified not so much by King George III’s failure to uphold his duties stemming from the colonists’ consent, as by his failure to recognize their “repeated petitions.” As Carter puts it, “the Declaration seems not to celebrate the notion of *consent*, but to celebrate the notion of *dissent*. . . . True, it is consent of the governed that delivers the initial legitimacy (the ‘just powers’) to the government. But it is the rebuffing of the ‘repeated petitions’ that dissolves

that legitimacy.” Bereft of hope that the ruler would ever undertake to resolve their most basic problems, the colonists felt no choice but to renounce their allegiance to the crown.

In America today, contends Carter, a large portion of society sees itself in a similar light, making “repeated petitions” that are answered only by “repeated injury.” Faced with the choice of allegiance to a system of law based on the liberal-constitutionalist worldview, and the survival of their own religious communities, many religious Americans would be hard-pressed to remain loyal to the former. Although Carter never goes so far as to encourage revolt—indeed, never even raises the prospect—this is nonetheless the cloud hanging over *The Dissent of the Governed*.

**H**ow to get out of this mess? Carter’s solution is to reject the basic liberal-constitutionalist worldview. The problems of today’s religious communities stem from the “tendency of even a liberal political sovereign to become totalizing. . . . I do not argue that in a contest of wills, the religious side must always win. I do believe that there is a scary, totalitarian aspect to the suggestion that it should usually lose.” What is needed, instead, is a constitutional approach which makes allowances for communities of faith, with the goal of “nurturing the

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ability of our many religious communities to project their perhaps quite different normative understandings across the generations.” This means, at a minimum, the devolution of some constitutional authority from the federal to the state and local levels—which, in any event, was at the heart of the Founders’ constitutional doctrine. Above all, it means that judges, so accustomed to seeing themselves as a check on sovereign authority, must realize that they are also a *part* of the sovereign, and must therefore embrace a more respectful attitude toward religion, lest their insensitivity to the “repeated petitions” of a large segment of the population lead to its total disaffection from American democracy.

Carter’s solution, while commendable, misses the point. Short of constitutional amendment, the only thing which can prevent the alienation of America’s religious communities is a change of heart throughout the legal establishment—a rather unlikely prospect at a time when America is thriving, powerful, confident and enjoying greater internal harmony than most other nations. Neither American secular society nor the legal system at its core is about to abandon its worldview for fear that court rulings “might ... contribute to the popular sense of a national sovereign that is out of control.” What is required, rather, is hard evidence that

the current system is *failing*—that the dissent Carter foresees is in the offing, and not just one of many possible results of religious citizens’ disaffection. Examples of such evidence could include studies on past and current levels of political involvement among religious citizens, the increased enrollment in parochial schools, or the degree to which state court systems are reasserting their authority on religious communal issues.

Despite its limitations, *The Dissent of the Governed* should give pause to those who believe that the legal establishment in America can forever ignore the religious community. The desire to form communities, and the expectation that government will recognize the integrity of those communities, is fundamental to most religions. If religious citizens are consistently made to feel that the institutional deck is stacked against them, and that normal means of democratic expression are useless in preserving the life and values of their religious communities, it should come as no surprise if the debate over religion in America should one day move beyond the bounds of civil discourse—and enter darker, more turbulent waters.

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