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On Liberty and Life in Babylon: A Pilgrim's Pragmatic Proposal

Richard F. Duncan

By the waters of Babylon, there we sat down and wept, when we remembered Zion.
On the willows there we hung up our lyres.
For there our captors required of us songs, and our tormentors, mirth, saying "Sing us one of the songs of Zion!"
How shall we sing the Lord's song in a foreign land?
—*Psalms 137:1–4 (RSV)*

My purpose here is not to present a grand theory of the role of Christians in society. Nor is my goal to convince you that Christians should embrace libertarianism as a political theory or Biblical principle for all times and all places. I am neither a theologian nor a political scientist. I write as a sinner who has accepted Christ as Savior and as Lord, as a husband of a Christian wife, as a father of five children, and as an academic lawyer who teaches and writes about constitutional law. Although this essay is addressed to fellow "pilgrims" wandering in contemporary America, I hope other readers—particularly readers with a strictly secular worldview—will find this conversation interesting.¹

1. Portions of this essay are adapted from Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. Rev. 569.

The reference to Babylon in the title of this essay is meant to convey my understanding of what it is like to live as a pilgrim in a postmodern secular state. Just as the Jewish people wandered in exile in ancient Babylon, Christians wander today in an America that has rejected our God—indeed, in an America that often seems to be waging war against our God.² I no longer take it for granted that America is a decent place in which children can grow and flourish. Like many others, I now realize that the motto “God and country” no longer rings true. Rather, I have reluctantly begun to accept that all too often today “the question is ‘God *or* country.’”³ That is an easy choice for me—I choose God. I struggle here not for grand theories but for pragmatic solutions to the many problems faced today by Christian parents as we struggle to raise godly children in an increasingly depraved and depraving culture.

Our society is deeply divided over the meaning of good and evil. We tell clashing stories about things that matter a great deal, things such as abortion, marriage and family, education, the role of religion in the public square, and the ethics of human sexuality. The sociologist James Davison Hunter has observed that this culture war is a struggle between starkly polarized moral communities and that it represents “a strain upon the course of democratic practice.”⁴ If the functions of government were, as Richard Epstein has suggested, “limited to preserving order, protecting property rights and enforcing contracts, as was the Founding Fathers’ intention,” people on both sides of the culture war could live in peace in the ample demilitarized zone of private life.⁵ Of course, each side would be free to try to persuade the other about the meaning of the good life, but neither could employ the coercive power of government to impose its values on the private lives and enterprises of the other. However, we live in an era of Big Government, an age in which the state—with its carrots and sticks—exercises great control over our lives and families.

My “pragmatic proposal” for pilgrims in Babylon suggests that we recognize that Babylonian law will typically reflect the morality and values of Babylon,

2. In 597 BCE, King Nebuchadnezzar of Babylon captured the city of Jerusalem and “carried into exile all Jerusalem,” leaving behind “only the poorest people of the land.” 2 Kings 24:14 (NIV). See generally Paul Johnson, *A History of the Jews* 78–79 (1987); *The Works of Josephus* 272–76 (William Whiston trans., 1987). Psalm 137, the source of the epigraph, is a poignant poem about the grief of the Jewish exiles during the Babylonian captivity.

3. Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, First Things, Nov. 1996, at 20 (emphasis in original).

4. James Davison Hunter, *Culture Wars: The Struggle to Define America* 316 (1991).

5. Richard A. Epstein, *The Welfare State’s Threat to Religion*, Wall St. J., July 27, 1994, at A15.

not those of Jerusalem. Thus we need to reduce significantly the size of the state, particularly that part of the state that limits our ability to raise God-fearing children and to pursue happiness in a manner that is pleasing to God. My proposal does not ask Christians to accept libertarianism as the orthodox Biblical theory of government; I am merely suggesting that Christians living in contemporary America might do well to support policies that limit the power of government to control our lives and businesses. In other words, in spite of our different theological traditions, we ought to be able to agree that a small Babylonian government is better than a large Babylonian government.

SETTING FREE THE CAPTIVE AUDIENCE

The fear of the Lord is the beginning of knowledge, but fools despise wisdom and discipline.

—*Proverbs 1:7 (NIV)*

The selective funding of education in secular government schools guarantees religious inequality in our polity. It imposes on religious parents what even supporters of “common schools” call a “brutal bargain.”⁶ We must choose between declining the single largest benefit most families receive from local government and countenancing assimilation of our children into a dominant secular culture by means of a governmental institution that exists for the very purpose of inculcating “common” secular values. More than a century ago, John Stuart Mill warned about the danger of allowing government to direct the education of children. In his classic defense of individual freedom, *On Liberty*, Mill explained how government schools are inherently destructive of religious liberty and freedom of thought: “A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.”⁷ Instead of schools run by government, Mill supported what he called “diversity of education” and parental choice.

6. Peter Beinart, *Degree of Separation*, New Republic, Nov. 3, 1997, at 6 (quoting Norman Podhoretz).

7. John Stuart Mill, *On Liberty* 106 (1859) (Stefan Collini ed., Cambridge University Press 1989).

As Richard Baer puts it, “the basic structure of American education is *inherently* discriminatory and *unavoidably* involves serious forms of censorship. . . . Parents are forced to submit their children to a government-controlled school system that promotes a particular set of favored values.”⁸ Moreover, the legal rules governing public schools are weighted heavily against families with serious religious perspectives, because we are not permitted to use the political process to seek inclusion of our values and perspectives in the common curriculum. This is so because under prevailing Supreme Court interpretations of the Establishment Clause, public schools may not sponsor religious values or perspectives. Indeed, the Court has gone so far as to strike down a law requiring public schools to provide “balanced treatment” for creation-science and evolution. The Court held that the law, which merely required the teaching of “scientific evidences” for both creation and evolution, was enacted for the primary purpose of “endors[ing] a particular religious doctrine” and therefore was inconsistent with the Court’s understanding of the Establishment Clause.⁹

Kathleen Sullivan argues that a playing field slanted against religious citizens is a good thing and that the Constitution “entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes.” Thus “the war of all sects against all” is ended by a truce which privileges secular factions and relegates religious citizens to the margins of organized society. The public classroom may be used to advance secular ideologies and visions of the good and, concludes Sullivan, “protection for religious subcultures lies in exit rights. . . . The solution for those whose religion clashes with a Dick and Jane who appear nothing like Adam and Eve is to leave the public school.”¹⁰

There is abundant evidence that religion has been cleansed from the public school curriculum.¹¹ The leading study of textbook bias—conducted by Paul

8. Richard A. Baer, Jr., *Public Education as “Brutal Censorship,”* This World, Summer 1988, at 110 (emphasis in original).

9. *Edwards v. Aguillard*, 482 U.S. 578, 580–81, 594 (1987).

10. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 198, 214 (1992).

11. For a list of sources, see Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. Rev. 569, 578 n. 45. There is at least some evidence that “the study of religion has expanded in the last 10 years” in some textbooks and curricula. Gilbert T. Sewall, Religion and the Textbooks in *Curriculum, Religion, and Public Education* 79 (James T. Sears and James C. Carper eds., 1998). But even Sewall acknowledges that “a double standard now operates in society and culture, whereby media and courts, sympathetic to the claims of ethnicity, disability, or sexual orientation, for example, vigorously exclude tra-

Vitz, a professor of psychology at New York University, for the United States Department of Education—concluded that public school textbooks are seriously biased and that “the nature of the bias is clear: Religion, traditional family values, and conservative political and economic positions have been reliably excluded from children’s textbooks.” For example, Vitz’s study of social studies textbooks for grades one through four—books designed to introduce children to U.S. society—found that not one of the books contains even “one word referring to any religious activity in contemporary American life.” One particular social studies book contains thirty pages on the Pilgrims without even one word or image “that referred to religion as even a part of the Pilgrims’ life.” Remarkably, one sixth-grade reader went so far as to censor a story authored by the Nobel laureate Isaac Bashevis Singer, eliminating all references to God. As Vitz observes, this censorship “not only represent[s] a clear case of removing God from our textbooks, but [it] also transforms the story.” The author’s narrative of “small town Jewish life in Eastern Europe is . . . falsified,” and all of the students who are assigned this textbook are poorer as a result.¹²

Vitz also discovered that the textbooks present a biased view of family life in America. For example, social studies textbooks for grades one through four contain “countless references” to mothers and other women in professions and occupations in the workplace, but there is “not one citation indicating that the occupation of a mother or housewife represents an important job, one with integrity, one that provides real satisfactions.”¹³

Sullivan believes the establishment of a strictly secular civil order in public education will produce a lasting peace, a kind of Pax Secularis between otherwise hostile religious sects. But there is no peace. The public schools have become one of the primary battlegrounds in the culture war.¹⁴ The reason the Pax Secularis has failed in public education should be apparent. It is the reason described so eloquently more than fifty years ago by Justice Jackson in *West Virginia State Board of Education v. Barnette*:

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine

ditional religious thought from respectable discourse on public life and the education of the young.” *Id.* at 83.

12. Paul C. Vitz, *Censorship: Evidence of Bias In Our Children’s Textbooks* 1–4 (1986).

13. *Id.* at 38.

14. See generally Stephen Bates, *Battleground: One Mother’s Crusade, the Religious Right, and the Struggle for Control of Our Classrooms* (1993).

and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.¹⁵

Because public schools are “intentionally designed to influence the values, habits, and behavior of the rising generation,” and “since people do not agree on which values, habits, and behaviors should be encouraged,” public school curricula will always be controversial; and because the education of their children is one of the things that matters most to nearly everyone, the battle for control of the curriculum will often be very bitter and divisive.¹⁶

Christians are called to be fools for Christ, but we are not foolish. We understand that the “peace” we are offered in the public schools is Esau’s bargain; and we will not barter the hearts and minds of our children for a bowl of red potage.¹⁷ A secular education is neutral toward religion only in the sense that it marginalizes all religious perspectives about what is true, what is good, and what is beautiful. As Michael McConnell has put it so eloquently, “A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all.”¹⁸

In our struggle to protect and nurture the hearts and minds of our children here in Babylon, Christians must adopt a libertarian strategy. We must stop fighting symbolic wars over prayer in the public schools and concentrate our efforts on transforming the way our society structures educational benefits. The proper role of government in a pluralistic society is not to provide a one-size-fits-all secular education to a captive audience of impressionable children from many diverse religious and cultural backgrounds; rather, government should facilitate parents’ educational choices for their children by funding a quality education for each and every child.

15. 319 U.S. 624, 641 (1943).

16. Diane Ravitch, *The Great School Wars: New York City, 1805–1973: A History of the Public Schools as Battlefield of Social Change* 403–4 (1974).

17. See Genesis 25:29–34 (King James).

18. Michael W. McConnell, “*God Is Dead and We Have Killed Him!*”: *Freedom of Religion in the Post-modern Age*, 1993 *BYU L. Rev.* 163, 181.

Parents who wish to protect their children from being made part of a captive audience for the government's educative speech currently have a right under the Due Process Clause to exit from public schools. This is so because compulsory public schooling laws were declared unconstitutional in *Pierce v. Society of Sisters*. In *Pierce* the Supreme Court strongly condemned attempts by government "to standardize . . . children by forcing them to accept instruction from public teachers only" and used equally powerful prose in recognizing both the right and the duty of parents to "direct the upbringing and education" of their children.¹⁹

However, the Court persists in allowing the state to do indirectly that which it is forbidden to do directly; by withholding tax-supported funds from children who attend nongovernment schools, the state "exerts powerful—and highly questionable—financial pressure on dissenting parents to conform their educational choices to the majority's values by enrolling their children in public schools."²⁰ In other words, selective funding effectively coerces parents to allow government to do what *Pierce* forbids it to do—"standardize" children by forcing them to attend public schools.

As Stephen Gilles has argued, "Selective funding of public schools [also] raises profound free speech problems," because it is intended to, and in fact does, discriminate against parental educative speech on the basis of viewpoint. He reasons that "a person's freedom of speech includes the right to select and employ other persons to speak on his or her behalf." Political candidates, for example, often employ staff and public-relations firms to convey their message to voters, and persons wishing to influence public policy often hire experts, lawyers, and other representatives to present their views to public officials. Similarly, observes Gilles, parents may express educational messages to their children either directly, or indirectly through the schools of their choice. He argues that the government engages in viewpoint discrimination of parental educative speech when it subsidizes the educative speech of parents who share the values and beliefs taught in public schools while denying funding for the educative speech of dissenting parents. "The result is powerful, though indirect, governmental pressure on dissenting parents to conform their educative speech to the majority's preferred values."²¹

It is not my purpose here to present a rigorous analysis of the constitutional-

19. 268 U.S. 510, 534–35 (1925); see also *Meyer v. Nebraska*, 262 U.S. 390 (1923).

20. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 942 (1996).

21. *Id.* at 1018–25.

ity *vel non* of public schools. Rather, I hope merely to convince readers that the government school monopoly in education threatens basic notions of human liberty and justice. As Gilles points out, even the familiar notion of Rawlsian justice suggests that it is unreasonable for the majority to insist on an educational system in which “the children of dissenting parents are to be taught the state’s established wisdom concerning the human good” day in and day out for thirteen years of formal schooling. Picture the class of committed and loving parents, behind Rawls’s veil of ignorance, deciding between competing schemes for the education of children. Because these committed parents do not know whether their values and beliefs will be in the majority or the minority, which educational scheme will they most likely prefer? Gilles submits that there would be a “consensus in favor of exclusive parental authority,” because most of us care more about the educational interests of our own children than we do about controlling the education of other children. Thus we are likely to “care more about having the undisturbed authority to educate our children in accord with our conception of the good than we do about expanding that authority to encompass the formal schooling of children whose parents adhere to different conceptions of the good.”²²

In a free and just society, government has no business commandeering an audience of impressionable children for inculcation in the ideas, beliefs, perspectives, and attitudes of those who hold the reins of political power. The government is free to speak and celebrate whatever it chooses. But it suppresses the fundamental freedoms of thought and belief formation when it requires our children to show up and pay attention to its messages.

Moreover, the censorship of religion in public schools required by the Court’s modern Establishment Clause decrees stacks the deck against religious families by ensuring that our beliefs and perspectives cannot be taught in government schools. Selective funding of education guarantees religious inequality in two respects. Some religious families—the lucky ones who can afford to educate their children in private schools—suffer only an economic penalty by losing a large public benefit when they choose to exit from public schools. A larger class of religious families suffer a far worse fate—the “compulsory socialization” of their children in strictly secular government schools. As Stephen Arons puts it: “The present method of financing American education discriminates against the poor and the working class and even a large part of the middle class by conditioning the exercise of First Amendment rights of school

22. *Id.* at 969–70.

choice upon an ability to pay while simultaneously eroding the ability to pay through the regressive collection of taxes used exclusively for government schools.”²³

My pragmatic proposal to fellow pilgrims in post-Christian America is to demand that our government let our children go—without penalty. We pay taxes to finance education, and our children are entitled to their fair share of these benefits whether they attend public, private, or parochial schools. This proposal seeks nothing more than basic justice and equal regard for all citizens in a nation as culturally and religiously diverse as ours. Pluralism is not honored by a system of education that tries to fit all children into a one-size-fits-all secular mold. We should remove our children from government schools and withhold our support from any system of education that does not respect the right of every child to an appropriate elementary and secondary education.

Christians believe that God is real and that the “fear of the Lord is the beginning of knowledge.”²⁴ Therefore a secular education does not even begin to transmit true knowledge to students. Phillip Johnson has said it best: “If God really does exist, then to lead a rational life a person has to take account of God and his purposes. A person or a society that ignores the Creator is ignoring the most important part of reality, and to ignore reality is to be irrational.”²⁵ Johnson is right, and therefore America’s Godless public schools are irrational. It is time that we pilgrims begin to act accordingly.

THE LIBERTY TO MAKE LASTING MARRIAGE VOWS

“Haven’t you read,” he replied, “that at the beginning the Creator ‘made them male and female,’ and said, ‘For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh’? So they are no longer two, but one. Therefore what God has joined together, let man not separate.”

Matthew 19:4–6 (NIV)

Remember when the law viewed marriage as a lifetime relationship and served to hold us accountable to live up to the promises we made to our spouses and children? In the past half-century, we have witnessed a radical redefinition

23. Stephen Arons, *Compelling Belief: The Culture of American Schooling* 211 (1983).

24. Proverbs 1:7 (NKJV).

25. Phillip E. Johnson, *Reason in the Balance: The Case Against Naturalism in Science, Law, and Education* 7 (1995).

of marriage “from a relationship that could be legally terminated before the death of one of the spouses only for grave reasons, if at all, to one which is . . . terminable upon the request of one party.”²⁶ Indeed, the “apparent normative goal of modern divorce law” is not to help spouses keep their promises to one another and to their children but rather to ensure a “quick and easy” termination of marriages that are no longer satisfactory to at least one spouse.²⁷ In other words, the law has moved away from facilitating the continuation of marriages and instead treats marriage as “a contract terminable at will by either party.”²⁸

Professor Elizabeth Scott argues that this radical transformation of divorce law may reflect the preferences of unhappy couples desiring to end a marriage but probably does not embrace most people’s concept of marriage and family.²⁹ In particular, traditional Christians typically don’t view marriage as a relationship designed to last only so long as romantic love remains. We take lifetime vows seriously, and we expect the law to respect us enough to take our commitments seriously.

The quick and easy divorce laws of post-Christian America have codified a culture of divorce.³⁰ The norm of moral or religious duty that animated traditional marriage has been discarded and a new paradigm of self-realization and personal satisfaction has taken its place. The effects of this paradigm shift have been dramatic. Marriage in postmodern America has become something of an oxymoron—a “non-binding commitment” that “may begin with optimistic hopes that it will endure, but that survives only as long as each spouse’s needs are met.”³¹

I was born almost a half-century ago in an America that seems many eons and many galaxies removed from the America I live in today. In the world in which I was raised, children expected to grow up in an intact family. As I think back upon the friends and friendly acquaintances of my youth, I honestly cannot remember even one whose parents were divorced. In the modern throw-away culture of quick and easy divorce, however, children grow up with an ex-

26. Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* 64–65 (1987).

27. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990).

28. *Id.* at 17.

29. *Id.* at 22.

30. See Barbara Dafoe Whitehead, *The Divorce Culture* (1996).

31. See Scott, *supra* note 27, at 10.

pectation of separation. Our children live in a world in which “family love comes and goes. Daddies disappear. Mommies find new boyfriends. Mommies’ boyfriends leave. Grandparents go away. Even pets must be left behind.”³² In a society like ours in which divorce is commonplace, “family breakup becomes a defining event of . . . childhood itself.”³³ Moreover, the prevailing norm in family law takes as given that one dissatisfied spouse has a unilateral right to divorce without regard to the interests of the other spouse or of any possible detriment to his or her children.³⁴ There is no good reason why this sad story of what marriage has come to mean in Babylon should be imposed on those who wish to make a long-term investment in a marriage-for-life. The law must be changed to allow couples who wish to enter into marriages that are not easily broken an option to do so.

I am not arguing here for a repeal of “no-fault” divorce laws. I believe these laws have done a great deal of harm to families and especially to children, but, writing as a pragmatist, I recognize that so long as so many hearts are so hard, no-fault divorce is politically untouchable.

I suggest, rather, that marriage laws be amended to allow couples an *option* to enter into something like the “covenant marriages” that have been recognized in Louisiana. In other words, the law should allow couples to choose between a “no-fault” marriage-at-will model and a “covenant” marriage-for-life model. If a husband and wife are willing to be held accountable to a lifelong marital vow, the law should respect their commitment by holding them accountable to their freely chosen covenant. Under Louisiana law, for example, if a couple elects to enter into a covenant marriage, “divorce requires proof of fault in the nature of adultery, conviction of a felony and a sentence of imprisonment at hard labor or death, abandonment (for one year), physical or sexual abuse of a spouse or child of the parties, habitual intemperance or cruel treatment and a period of time living separate and apart thereafter.”³⁵

My proposal does not demand that the law impose my view of marriage on anyone else. It is a purely libertarian proposal that merely asks that the law respect the commitments of competent adults who wish to make lifelong mar-

32. Whitehead, *supra* note 30, at 11.

33. *Id.*

34. See Scott, *supra* note 27, at 27.

35. Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis And Legal Implications*, 59 La. L. Rev. 63, 107–8. (1998). In addition, “either spouse may obtain a divorce upon proof of living separate and apart for two years.” *Id.* at 108.

riage vows. Those who freely enter into covenant marriages are asking the state to leave their marriage alone unless certain serious grounds for divorce exist.

Divorce is state action of a particularly intrusive nature. Under no-fault divorce laws, one party can unilaterally declare a marriage broken and petition the state to issue coercive decrees intimately and profoundly affecting the other party and the couple's children. Perhaps no-fault divorce is what some people want, but there are others who wish to unite in marriages that cannot be broken so easily. Why shouldn't the law honor the choices of couples who wish to make lifelong commitments to each other and their children?

It is not my intention here to endorse any particular covenant-marriage law. I am simply suggesting that marriage laws be amended to allow a man and a woman to choose to make a binding marital commitment to each other and to their children. This legal option should require premarital counseling to ensure informed consent, establish that marriage is a lifetime commitment that can be broken only for certain specified reasons involving grave circumstances, and provide that each party must formally and solemnly declare his or her commitment to a lasting marriage. The Louisiana covenant-marriage law specifies a declaration that eloquently captures the essence of what I am proposing:

We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.³⁶

The covenant-marriage option permits us to choose to be legally accountable to our loved ones for the promises we make respecting the permanence of marriage. It permits a man and a woman to make a mutual commitment—for better or for worse, for richer or for poorer, in sickness and in health—to remain together in a lifetime marriage that is bigger and more important than the

36. La. Rev. Stat. Ann. § 9:273A(i) (West 2000).

personal satisfaction and self-realization of either spouse. This option allows a couple to build a life together on a secure foundation. It emphasizes responsibility, cooperation, and a commitment to success as the accepted norms for behavior in marriage.³⁷ It does not ask the state to help us keep our promises to our spouses; it merely allows a man and a woman to agree that the state may not terminate their marriage upon the unilateral petition of one spouse unless serious grounds for divorce are established.

The best gift we can give our children is the promise that their parents are together for life. A covenant-marriage option does not require anyone to make such a promise; it merely respects our decision to choose to marry for life. Pilgrims in a post-Christian society should seriously consider this countercultural (and libertarian) proposal.

RELIGIOUS FREEDOM IN THE WELFARE/ REGULATORY STATE

Samuel told all the words of the Lord to the people who were asking him for a king. He said, "This is what the king who will reign over you will do: He will take your sons and make them serve with his chariots and horses, and they will run in front of his chariots. Some he will assign to be commanders of thousands and commanders of fifties, and others to plow his ground and reap his harvest, and still others to make weapons of war and equipment for his chariots. He will take your daughters to be perfumers and cooks and bakers. He will take the best of your fields and vineyards and olive groves and give them to his attendants. He will take a tenth of your grain and of your vintage and give it to his officials and attendants. Your menservants and maidservants and the best of your cattle and donkeys he will take for his own use. He will take a tenth of your flocks, and you yourselves will become his slaves. When that day comes, you will cry out for relief from the king you have chosen, and the Lord will not answer you in that day."

1 Samuel 8:10–18 (NIV)

The "ever-expanding reach of government" in postmodern America poses a grave threat to Christians and other religious subgroups.³⁸ When the size of government is limited—as in the night watchman state, in which the role of government is confined for the most part to protecting citizens against the un-

37. See Scott, *supra* note 27, at 50.

38. Richard A. Epstein, *The Welfare State's Threat to Religion*, Wall St. J., July 27, 1994, at A15.

lawful use of force and fraud—religious citizens will only rarely come in conflict with the law. However, when the arm of government reaches into every corner of life with its carrots and its sticks—as in the modern welfare/regulatory state—there will often be conflicts between religious lifeways and the law.

Moreover, when you combine a large, activist state with a view of nonestablishment that requires religion to retreat as government advances, the state of religious freedom sinks even lower. A government that ignores property rights and other secular liberties is not likely to tread lightly on religious freedom. As Richard Epstein observes, “Many of the greatest threats to religious liberty stem from insufficient protection of individual liberty in economic affairs.”³⁹

Consider the case of Evelyn Smith, a devout Christian who was widowed when Paul Smith, her husband of thirty-two years, died in 1987. Mrs. Smith’s primary source of income is rent generated by four apartments left to her as a legacy by her husband. Mrs. Smith’s pilgrimage in that part of Babylon known as California took a turn for the worse when she refused to rent to an unmarried couple, who wished to cohabit in one of her apartments, because she “believes that sex outside of marriage is sinful, and that it is a sin for her to rent . . . to people who will engage in nonmarital sex on her property.” The unmarried couple filed a complaint against Smith with the California Fair Employment and Housing Commission, and after protracted litigation the California Supreme Court held that the state fair-housing laws protected unmarried cohabitants from discrimination and that Mrs. Smith was not entitled to a religious freedom exemption.⁴⁰

A full and complete analysis of the court’s decision in *Smith* is beyond the scope of this essay. I wish to focus on only one significant thread of the case: the court’s refusal to recognize that Smith’s religion was “substantially burdened” by the coercive impact of a law requiring her to do what her religious conscience condemned as a sin. The court held that Smith’s religious freedom was not substantially burdened because she had the option of “selling her units and redeploying the capital in other investments.” In other words, when people of faith choose to engage in commercial activities in California they waive their right to religious freedom. If the state’s restrictive commercial laws conflict with the exercise of religion, believers are free to go out of business or move to

39. *Id.*

40. See *Smith v. Fair Employment & Hous. Comm.*, 51 Cal. Rptr. 2d 700, 703–22 (1996), *cert. denied*, 521 U.S. 1129 (1997). Mrs. Smith’s story was reported at some length in *People* magazine. See Montgomery Brower, *Living in Sin? Not in Her Apartments, Vows Christian Landlady Evelyn Smith*, *People*, Dec. 11, 1989, at 113.

a more tolerant state. The “legal and dignity interests” of unmarried cohabitants were too important to yield, even a little, to the demands of God on Mrs. Smith’s business ethics.⁴¹ The world has indeed turned upside down, and good has become evil and evil good.

When we hear of a case in which a church is prohibited from expanding its building because it has been declared a historic landmark, or one in which a Christian landlord such as Mrs. Smith is treated as an outlaw because she could not in good conscience lease an apartment to an unmarried cohabiting couple, we shake our heads and express dismay that religious freedom is taken so lightly in our society.⁴² Although this insight about religious freedom is valid, it only scratches the surface of what is wrong with the state of our liberties. The root of the problem is not that religious liberty is slighted but that property rights and economic liberties are disrespected. The modern welfare/regulatory state routinely tramples on our inalienable right to the pursuit of happiness by regulating and taxing almost every aspect of our lives and businesses.

The path to religious freedom in our society lies in an explosion of privatization, in a radical shrinking of the role of government in the lives of its citizens. As government retreats, religion will be free to advance. As government programs are cut and resources are returned to private citizens, we will be free to educate our children as we believe is best, to support causes we believe are right and good, to live our lives in accordance with our understanding of the good life and based upon our own theories of justice.

Peter Berger, a well-known and respected sociologist, has observed that if India is the most religious nation in the world and Sweden the most irreligious, then America is best understood as “a nation of Indians ruled by Swedes.”⁴³ I think it is time we Indians take back control of our lives, our families, and our property from the Swedes who govern us. Although the night watchman state is unobtainable (and undesirable) in our complex modern society, if we Christians are to be free to live our lives and raise our families in a manner that is pleasing to God, we must make room for ourselves and our lifeways by reducing the power and ubiquitousness of the secular state.

41. *Smith*, 51 Cal. Rptr. 2d at 716.

42. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

43. See Phillip Johnson, *The Swedish Syndrome*, First Things, Dec. 1993, at 48.