

Religion, Land, and Rights

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The Occasional Papers of the School of Social Science are versions of talks given at the School's weekly Thursday Seminar. At these seminars, Members present work-in-progress and then take questions. There is often lively conversation and debate, some of which will be included with the papers. We have chosen papers we thought would be of interest to a broad audience. Our aim is to capture some part of the cross-disciplinary conversations that are the mark of the School's programs. While Members are drawn from specific disciplines of the social sciences—anthropology, economics, sociology and political science—as well as history, philosophy, literature and law, the School encourages new approaches that arise from exposure to different forms of interpretation. The papers in this series differ widely in their topics, methods, and disciplines. Yet they concur in a broadly humanistic attempt to understand how, and under what conditions, the concepts that order experience in different cultures and societies are produced, and how they change.

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Before Europeans came to Manhattan in the early seventeenth century, there was there no private property—or religion—or rights on the island—as we know them today. The Lenape Indians had long lived in the land bordering the Delaware River on the south and the Hudson River on the northeast. They were hunters and planters.¹ When Dutch traders arrived, the Lenape became part of an intensive trade in beaver pelts destined to be made into waterproof hats for Europeans.

In 1626 the directors of the Dutch West Indies Company, a merchant monopoly chartered by the Netherlands governments to promote trade in West Africa and the Americas, purchased land from the Lenape and established a settlement known as New Amsterdam. After years of skirmishes with the English and the restoration of the English monarchy in 1660, the colony was finally ceded to the English in 1674 and renamed New York after the second son of Charles II, later to become James II, the last Catholic king of England. Another century later and New York would be caught up in the Revolution that would eventuate in the new United States. Both legal and religious history were rewritten in the process.

I am trained as a lawyer and as an historian of religions. I have been concerned in my work to understand the detailed phenomenology of religion under the modern rule of law, particularly in the U.S. I am interested in the ways that the nature of U.S. law accounts for the peculiar configurations of religion that one finds in the U.S. today. While in many ways, all countries in the world today are in a similar legal predicament with respect to the multiplicity of religious ways of life in their midst, and one can usefully talk about these commonalities, the U.S. has developed a distinctive religious and legal culture; a vigorous political and theological commitment to religious freedom is combined with a deep uneasiness and instability about what counts as religion, an uneasiness and instability that arguably continually subverts that broader commitment.

In this essay I will consider two of the legal forms of religious life apparent in the controversy over the building of a Muslim community center two blocks from the former

¹ The Lenape, of course, had ways of life that would be recognized today as religious by most scholars of religion, but they were not then recognized as religious by most Europeans. Seventeenth century European legal theorists did worry about what kind of ownership Indians might have in the land they wanted, and worried about how to justify its taking. Among others, theories based in conquest and in their view that the Indians did not have settled civilized communities that cultivated land, were used to justify European title.

There is a remarkable online effort to reconstruct what Manhattan island looked like before the Dutch—as an exercise in reimagining the land as Lenape. You can type in a New York City address and see what that piece of property would have looked like in 1600: <http://welikia.org/explore/mannahatta-map/>

World Trade Center site in lower Manhattan. I came to this topic accidentally, and rather reluctantly at first, after a request from a colleague. I was not comfortable with the dominant terms of the conversation about these events and did not feel I could make a useful contribution. But as I have begun to work out a theory that I am going to try out in this essay, I have come to be fascinated with the long religious and legal history of this small piece of the planet.

I will suggest that we can see new things in this controversy if we think of it in terms of religious establishment rather than in terms of religious freedom—or tolerance. Indeed, paradoxically perhaps, it is, in many ways, the distinctiveness of U.S. religious establishment that accounts for U.S. exceptionalism in this area, rather than its view of freedom. U.S. First Amendment jurisprudence today, popular and academic, understands the two clauses, the free exercise clause and the non-establishment clause, to enable together a distinctively American form of free religion. The nature and continued presence of forms of religious establishment is less fully acknowledged. What I will argue here is that this free religion is also “established”.

The history and precise legal status of the religious transplants which travelled to the new world in the wake of European conquest are of endless fascination to American constitutional lawyers because of the first words of the Bill of Rights: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” We know that these transplanted religions were “establishments” of some sort back home—they mostly hierarchically tied people, place and politics—but what did they become when they came to the Americas? How were they transformed and in what ways did changes in law either force or enable such transformations?

Today, after the globalization of human rights, the dominant formulation of what are sometimes called religious human rights typically yokes a qualified right to freedom of religion and belief with the separation of church and state. U.S. law with respect to religion has been curiously provincialized by this global process. Our doctrine of legal sovereignty does not admit of the force of international law so our law about religion has developed in its own way. One of the distinctive aspects of that law is its preoccupation with “disestablishment.” American religion, formally speaking, is disestablished but not separated. In a sense it could not be separated because it is never admitted to have been joined. Hence the current vogue to insist that “separation of church and state” is not in the Constitution.

If you followed the Park51 controversy in the summer and fall 2010, you may have noticed a story in *The New York Times* reporting on remarkably similar protests that greeted the proposed building of a Catholic church a couple of blocks away two hundred and twenty-five years ago, in 1785. Fear of an immigrant religion, suspicion of foreign funding and control, and a demand on the part of those who opposed the church to move it away from the center of things, characterized those protests as well. Today, St. Peter’s Catholic Church, the oldest Catholic church in New York City, is an entirely

unexceptional part of the streetscape, and its parishioners accepted as patriots—even sometimes as Christians.

There is certainly a sense in which a pattern of initial skepticism and eventual assimilation is the long story of religious diversity in the United States. Perhaps no one has said it as well as Will Herberg in his 1955 book about immigrant religions, *Protestant Catholic Jew*, in which he described what he called the dominant religion in the U.S.—we might call it the established religion—as the religion of “the American way of life.” He saw that religion—in the middle of twentieth century—as coming in three flavors, but, in important ways, it was, *by that time*, for him, the same religion. There are other stories to be told of American religion to be sure but there is significant evidence, notwithstanding much current hostility toward Islam, elite and popular, that Herberg’s title could one day be updated to read *Protestant Catholic Jew Muslim* . . . and that such a possibility is one way of understanding the advent of Cordoba Center. While fear and loathing of Islam is much reported in the press, there are also a constant string of stories of the ways in which Islam is being normalized in the U.S. in the same ways as earlier immigrant religions have been normalized: inclusion in local interfaith community projects and prayer breakfasts; representation on presidential bioethics commissions; hiring of government chaplains; re-designing of interfaith chapel spaces; holiday stamps issued by the U.S. Postal Service; references to the faith of muslims and visits to mosques by politicians; school cultural events; the extension of Judaeo-Christian to “Abrahamic” . . . Many of these efforts are token or clumsy, but they are also real evidence of a certain kind of U.S. religious accommodation/establishment.

Among the speakers in support of the proposed center at Park51 was Mayor Bloomberg. He spoke passionately about U.S. commitment to religious liberty but he also framed the issue in terms of private property rights, as if the two were two sides of the same coin. He said: “The simple fact is this building is private property, and the owners have a right to use the building as a house of worship.” Soho Properties’ right to the free exercise of their religion, he was saying, is grounded in their rights as property owners. He went on to insist that their rights as property owners extended to the espousing of unpopular religion. Asked whether he would inquire into Imam Rauf’s religious and political views, he answered: “My job is not to vet clergy in this city.”

How did Park51 become private property? What does that mean? What is Mayor Bloomberg’s job? And what about the World Trade Center site? Is that private property? Is there also religious freedom at ground zero? What does it mean to own land in the U.S.? And why does that fact imply religious rights? In some times and places, owning land might be thought to create religious—and political and social—obligations, rather than rights.

Religious freedom as a legally protected right is usually talked about in the U.S. as inhering in individuals. The assumption is that the protected religious feeling or experience or conviction is portable. It follows the person around. Of course, law about churches and church property—and other buildings for worship—forms an important part

of the development of U.S. church-state law, but most American churches are also movable—and have been on the move since the beginning. It is less common in the U.S. to think of attaching a particular religious people and doctrine to a particular piece of land. With few exceptions, the land is not understood to be inhabited by gods—or not since the destruction of Indian communities. There is no Temple Mount or Stonehenge or Ram Janmabhoomi in the U.S. There are no geographically located parishes that tie the individual to the church and the state as in England.

But that does not mean that how we understand property is not centrally important to how we understand religion—or that ongoing legal battles about the place of religion in American public life don't connect intimately to other debates about the public/private distinctions that persist in the U.S.

One of the interesting things about the Park51 debate is the way in which a density of rights and history come together in a very small space. The origins over time of U.S. understandings of rights of property owners and rights to religious freedom converge in the crucible of the building and re-building of lower Manhattan. Both rights are often regarded as individual rights—but both have communal aspects too—which are asserted and expressed at various points. The conditions to those rights are not always spelled out; who can assert them, and when they can do so, is not always obvious. These limitations have been built into U.S. law over the last two hundred years through countless adjustments in law as the country's demographics, economy, and governments have changed. Notwithstanding the admitted political and rhetorical power of Mayor Bloomberg's remarks, then, private property owners do not have the right to do anything they want with their property. And religious persons do not have the right to do anything they want either. What are their rights and how did they come to be that way?

The future location of the proposed Muslim community center at 45-51 Park Place is now occupied by two buildings, one a former Burlington coat factory now owned by Soho Properties, and the other a building which Soho is leasing and has an option to buy. The two buildings are internally open to one another. On September 11, 2001, after hijacked Flight 175 penetrated through a tower of the World Trade Center, part of the plane's landing gear and fuselage came out the north side of the tower and crashed through the roof and two of the floors of the Burlington Coat Factory. The plane parts destroyed three floor beams, and severely compromised the building's internal structure.

Soho Properties and their partners, Imam Feisal Abdul Rauf and his wife, Daisy Kahn, plan to replace these two buildings with a new building to serve as a community center. Rauf and his wife have told the press that they saw the intimate connection between these buildings and the events of 9/11 as a primary selling point for them. As Imam Rauf explained, the planned center "sends the opposite statement to what happened on 9/11" . . . "We want to push back against the extremists."

Soho Properties does not, of course, have an unrestricted right to do whatever they want with their land as Bloomberg seemed to suggest. It is not even yet entirely theirs. The hearing last spring that precipitated the protests was before the Landmarks

Commission of New York to determine whether the Burlington coat factory had such architectural merit that it should be added to the 7000 buildings already protected by landmark status in New York. The Commission found it not suitable for such protection. Before Soho Properties can exercise its right to purchase the other building, now owned by Con Ed, the sale must be approved by the Public Service Commission, because it will be the sale of a property owned by a public utility and New York law protects ratepayers in this way. New York real estate owners must comply with a dense thicket of zoning restrictions, municipal building codes, common law rights of neighbors, landmark laws and laws governing public utilities and, while there are both constitutional provisions and other laws protecting their religious freedom, the religion they practice on their property must be acceptable to the government. They cannot do whatever they want there.

And yet Bloomberg's words and the absolutism of the rights they imply resonate powerfully with Americans. Bloomberg's words also echo those of Justice O'Connor in the *Lyng* case, the Supreme Court case that denied a constitutional free exercise claim by Native Americans protesting a proposed logging road in California that would destroy high country sacred to Indians. "Whatever rights the Indians may have to use of such areas," Justice O'Connor said, "those rights do not divest the Government of the right to use what is, after all, its land." *It's land*. She too seemed to imply that property owners can do what they want with their land. That is bedrock in the United States. Private property is sacred. So it is perhaps not surprising that religious claims follow the property owner for both Mayor Bloomberg and for Justice O'Connor.

What about the former World Trade Center site? Whose land is that? And what rights do they have?

The site was acquired by eminent domain and the World Trade Center built by the Port Authority of New York and New Jersey, an entity created through a compact between the states of New York and New Jersey. It was completed in 1973. In July 2001, just months before 9/11, management of the buildings was privatized in a lease to Silverstein Properties, who, since the destruction of the buildings, have been compensated for their loss, and the property returned to the Port Authority.

The former World Trade Center site today is awash in religious imagery, crosses made of I-beams, invocations of sacrifice, talk of martyrs and miracles. It is spoken of as "hallowed ground." So holy is it, in fact, that it is seen as offensive by some to locate a Muslim center two blocks away.

Some who would speak about ground zero seem to propose to extinguish all property rights at the former World Trade Center, in favor of a permanent public memorial to those who died there on September 11, 2001. In this place, the right to define the religious meaning of property is understood to inhere not in the owners, the Port Authority, but in the self-appointed keepers of the American flame. Suddenly it is not about private property or religious freedom. But about a single narrative that

transcends the owners of the title altogether, a popular sovereignty founded, as law professor Paul Kahn suggests, in a political theology of sacrifice, not of contract:

Modern political theory begins with the idea of contract ~ the social contract. The American political imagination begins with sacrifice. The community arises out of and is sustained by sacrifice . . . Already as a young man, Lincoln had identified the unique character of the American political-theological project, when he called for a "reverence for the Constitution and laws" to step into the fading place of the scarred body of the revolutionary soldier who literally carried the stigmata of his faith. Lincoln himself becomes the iconic figure of sacrifice, linking law to death.

In order to understand how rights to define the religious meaning of land in the U.S. came to be understood sometimes to reside in the owner of that land, on the one hand, and sometimes in the people, on the other, a little history is in order.

Both of these pieces of property, Park51 and the former World Trade Center site, sit on property once owned by Trinity Church, the Episcopal church that famously dominates Wall Street. Trinity Church is today, and long has been, one of the largest landowners in Manhattan. It is certainly one of the wealthiest churches in the country. Its parish website has a hotlink titled *Trinity Real Estate*.

The story of Trinity, and its disciplining by New York law over the last three hundred years, is intimately tied to the story of religion and property rights in the U.S. While most of the reporting about Park51 has spoken of its proximity to the former World Trade Center site, from the perspective of historians of New York City, both sites are readily identifiable as located within the original Trinity Church land grant from Queen Anne in 1705. Indeed, the Burlington Coat Factory sits on a piece of land that Trinity gave to found Columbia College (then a Church of England college called King's College) in 1754. It was sold by Columbia when it moved uptown in 1857—which is when the present building was constructed. According to historian Sarah Barringer Gordon, Trinity still owns part of the World Trade Center site. This land has a long history as a part of the political and religious establishment in New York.

With both the Dutch and the English settlers in the new world came their churches. These first churches were not the white clapboard congregational ones that dot the New England countryside. The first churches in what is now New York City were outposts—extensions—of European religious establishments, establishments that had geographical and administrative ties to hierarchical church-state bodies that governed religion in England and the Netherlands. Both the Dutch and the English brought ecclesiastical institutions that linked a particular politics with a particular religion, top-down forms of religious governance that joined the state and church and forms of property ownership in a tight logic that was intended to sanctify the social order, ensure

social control and provide for the welfare of the people through a concentration of wealth and power and worship.

Over time, the imported church forms adapted to their new contexts, and, as they adapted, they negotiated new religio-political arrangements, particularly after the Revolution. Old world hierarchical church “establishments” competed with dissenting evangelical forms, some of which also had old world roots in the radical reformation and in the complex fragmentation of the English reformation that was going on during the colonization of the Americas and which profoundly affected religious and legal developments there. These “dissenting” forms also appealed to emerging democratic sensibilities in the new world. Both former established churches and dissenting ones interacted with and responded to immigrant religions as they arrived. Homegrown religious communities were also created. Thus, an array of church governance forms, or ecclesiologies, coexisted in the colonies—so many, indeed, that it is not inaccurate to say that the failure to establish a national church in the U.S. is better understood as the result of a practical impossibility of agreement rather than as the result of a coalescence around an ideological commitment to religious freedom as we would understand it today.

While each colony was different in important ways, then, in comparative religions terms, and at some risk of oversimplification, there came to be in the new world a competition between a “locative” religion/politics which tied religion and state in a formal, albeit disestablished, geographically based partnership, and a “utopian” religion/politics that was more portable and more fluid, one that would turn out to be ideal for the western expansion of both church and state. (I borrow these religious types from historian of religions Jonathan Z. Smith.) In property terms, one sees, on the one hand, a hierarchical religious and property ownership model in which authority and title ultimately derived from crown grants and charters, on the one hand, and various forms of religious governance and property ownership that reflected local democratic aspirations, in which authority and title depended on community-based decisions. Both forms survived the Revolution and continue today, in new garb.

Title to property in colonial N.Y. in this early period was legally asserted as based in a complex combination of Indian title deeds, claims derived from the British crown and the Dutch West Indies Company, and usage—that is, under common law forms of property ownership, you were usually obliged to cultivate your land in order to have any right to it. Some kind of community benefit was implied in ownership in each form of claim to title—for example, the king had a right to use your trees to build his navy, otherwise it might revert to the crown to be re-granted. In English law your real property was protected from creditors by laws of succession that aimed at preserving large landed estates intact as a foundation for the social order. The transformation of these various “corporate” property arrangements is one of the grand stories of American law.

Trinity Church was the first Anglican (Church of England) church established in the New York colony. (The present church building is the third built on the site—built in 1846.) Trinity received a corporate charter from King William in 1697 establishing it as a

parish under the jurisdiction of the Church of England. It also received a series of large land grants, glebe land it is called. Glebe land is income-producing land intended to support a particular church. The practice of attaching income-producing land to property intended for church building became part of westward expansion and extended well into the nineteenth century in the U.S.

The Church of England, because of its close ties to the British monarchy, had a somewhat fraught relationship with the colonials, and increasingly so as the Revolution approached. It seemed to some to embody what Americans most disliked about religious governance in the old world. Members of the Church of England were often believed to have royalist sympathies. There were no Anglican bishops in colonial North America. Anglican churches were administered from England. It was only after the Revolution that American Episcopalian bishops were created for the newly independent church in the U.S. Trinity was locally suspect because of the value of its property holdings and the politics of its influential members.

As with other large property owners in New York, as the eighteenth century progressed and as the Revolution approached, Trinity's form of governance and its title thus became vulnerable because of local politics, because of its tie to the crown, and because of new property ideologies that emerged in the American colonies and in the new United States. This is a long and complex story, but as legal historian Elizabeth Mensch tells it, the story of Trinity Church and its real estate holdings is at the heart of a remarkable eighteenth century legal transformation that at least on one reading can be seen to have enabled the rich and powerful to create new understandings of private property that avoided both the overlordship of the King and the democratic demands of the rabble.

In response to a series of challenges to its title to its property, as well as to accusations of corporate corruption and mismanagement, lawyers for Trinity, and other large landowners, deftly invented an absolutist and abstract right to property, successfully resisting claims of larger communal needs, whether those needs were to be found in royal reservations or local need for farmland. Trinity also participated in the long struggle to define corporate ownership and governance in the U.S., whether of the City Corporation of New York or of church property. When Mayor Bloomberg speaks of Park51's rights and his job, he speaks out of an understanding of property and government forged in these battles over competing republican and liberal understandings of property and competing understandings of the rights and obligations of religion.

I will mention just four moments in Trinity's amazingly byzantine legal history.

During the Revolution, the first Trinity Church was burned and most of its Tory members fled. After the Treaty of Paris, all property titles were potentially up for grabs, large Tory estates in particular. Corporate legal structures such as the one that governed Trinity were under suspicion as constituting a form of private undemocratic government. Nevertheless, Trinity successfully petitioned the provisional council in 1784 for a revised

charter, overcoming challenges on several grounds, including the disestablishment clause of the New York Constitution. An act was passed incorporating Trinity and confirming its title to all of its real property. The church was rebuilt. Trinity was rescued from expropriation by converting it from crown property to the private property of a new American elite, political and economic, who also controlled the church through their membership on the vestry. While church and state were understood to be formally separated by the separation from England, this new elite constructed new legal instruments that bound land, religion, and rights.

Several decades later another challenge was made to Trinity's title from within the Episcopal Church, by those who argued that its very valuable property belonged to all the Episcopalians of New York City, not just to Trinity. After lengthy hearings in the New York legislature, an Act to alter the name of the corporation of Trinity Church was passed in January 1814 once again confirming its rights over its property and restricting voting rights to an inner circle of trinity wardens and vestrymen.

During the 1840's and 1850's the management of Trinity was again investigated by the New York State legislature, this time on the instigation of a group of dissident Episcopalians who sought to force Trinity to share its wealth to address the growing poverty of lower Manhattan. The detailed inquiry and accounting revealed decision-making to rest in a few hands and a very low rate of charitable gifts, in spite of Trinity's public claims to act in the public interest. While arguing that the separation of church and state and the rights of private property owners prevented such intrusion into the private corporate affairs of Trinity, Trinity launched an extensive set of charitable good works in response to the hearings. Col. John Dix, Trinity vestryman, U.S. senator, Secretary of the Treasury, Governor of New York, and President of the Erie and Union Pacific railroads, testified at the hearing about Trinity's proper role as a property owner:

What shall be our social condition if, in a large portion of the city, destitution and spiritual neglect shall combine with cupidity, to arm the hand of violence and stimulate it to still grosser outrage. What higher office can Trinity Church fulfill, what higher benefit can she confer on the classes which have the deepest stake in the security of property and life, than by devoting herself, as she is now doing, to make the lessons of religious and social duty familiar to those who, under the pressure of their physical wants, have the strongest temptation to forget them?

In the course of defending these legal challenges, then lawyers for Trinity and the Whig landowners who ran it made claims to the public value of their wealth, first of the need for the accumulation of the capital needed to fund industrialization—but also, as Trinity did in later in the nineteenth century—through new commitments to serve the immigrant poor who had come to live in lower Manhattan.

Finally, in 1894 Trinity was investigated for its abysmal record as a slum landlord. Again Trinity argued that the “financial affairs of Trinity Corporation were no more concern of the general public than were the transactions of a private business corporation.” Again, although victorious in court, Trinity successfully reinvented itself as a progressive church devoted to the improvement of immigrant workers.

Both property ownership and the nature of religion were re-imagined and re-invented in these title and corporate governance battles. Neither were to be controlled by the king or by the people, but by a new aristocracy of wealth linked to a latitudinarian and paternalistic moderate theology.

This is necessarily a broad-brush picture. There is much more work to be done filling in the pieces of this history. Religious and legal debates about the nature of the new society that was being created in the early republican period was a complex and subtle one, not to be entirely reduced to the materialist picture I have drawn. Legal historians of the nineteenth century have detailed a long negotiation over property rights, rights that were deeply marked by the evolving law of slavery and shifting federal/state divisions of labor. The religious history of the nineteenth century reveals a deep transformation of religion in the U.S. as well. Presbyterians and Congregationalists, the largest churches before the Revolution, were supplanted by Baptists and Methodists, evangelizers of the West and creators of a range of moral campaigns of reform—and by Catholic and Jewish immigration. Many religious communal experiments were started, the longest lasting and most successful being the Church of Jesus Christ of Latter-day Saints. The century ends with the publication of *The Fundamentals*, a restatement of Christian theology in pamphlet form that addressed perceived accommodation of modern science by liberal Christians. Liberal theories of politics competed with republican and other collective political theories for dominance.

But let us look briefly at the role of one of Trinity’s successors-in-interest.

I mean no disrespect when I say that there is a sense in which the proposed community center fits in the Trinity tradition—one that addresses fear of social unrest at home and fear of control from abroad, through assertions of private rights by powerful and wealthy individuals who get to define what good religion is. Good religion today is irenic, multi-faith, tolerant, and free. Imam Rauf has said repeatedly that he wishes the new center to serve a community purpose similar to that of the YMCA and the JCC, centers of family and cultural events, as well as a place for interfaith dialogue and Muslim worship. Just as Trinity’s ownership was conditioned on its willingness to comply with evolving social needs, so Soho’s ownership is conditioned on its use of its property for an acknowledged public purpose. The public purpose Soho properties serves is recognizable as an expansion of the one Trinity was asked to serve in the nineteenth century, one that now addresses global publics well beyond the tenements of lower Manhattan, but one that also still serves a very U.S. politics.

What about the former World Trade Center site?

As I said, parts of the World Trade Center site are also on the land that formed the original grant to Trinity Church in 1705. (Some of the World Trade Center site was actually under the Hudson River at the time Trinity was created.) But . . . in contrast to the strong link between private property and tolerant/charitable religion wrested from the wealthy Episcopalians who have run Trinity Church—and from their Muslim successors—the invocations of religious rights associated with the former World Trade Center site rest on a different U.S. tradition.

When speakers refer to a swath of lower Manhattan as “hallowed ground,” they are invoking a particularly American form of sacred property, one attached to places where Americans died, most specifically perhaps, as Paul Kahn says, the religious authority of Abraham Lincoln and the Gettysburg address. On that November afternoon, he said of the battlefield where he stood,

We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But, in a larger sense, we cannot dedicate, we can not consecrate, we can not hallow this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract . . . we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

How did the former World Trade Center site come to be seen as equivalent to Gettysburg? How did those who died there—singled out among the many many who have died in the transformation of Manhattan Island into New York City—become posthumous conscripts in a war on terror?

A free-floating language of the sacred—one that celebrates the innocent and the patriotic—seems to have descended on the site, transforming a ruined office building and victims of mass murder into something holy. We are a long way from the sordid history of Trinity church and its American oligarchs.

This is a wilder kind of religion and a wilder kind of property regime. One might see this as a form of revolutionary apocalyptic appropriation by the people, a momentary triumph by the same rabble who has tried to take back Trinity over the centuries. As my colleague Mateo Taussig-Rubbo discusses in a forthcoming article, the World Trade Center site was sacralized—nationalized, if you like—transformed from an icon of consumer capitalism into a place of sacrifice—in a kind of suspension of the normal regime of private property. Now—even if perhaps only briefly—the community’s interests, the republican ideology evident in the early battles over Trinity’s titles, trumped rights to private property.

But not just anyone can exercise this kind of popular eminent domain. Native Americans have been almost entirely unsuccessful in asserting that their sacred places, also arguably hallowed by sacrifice, even though formally owned by others, deserve constitutional protection under the First Amendment. As the quote from Justice O'Connor that I began with suggests, in those cases, the regime of private property has trumped their claims of sacrality.

What is wrong with the Indian claims to sacrality?

I suggest that the two forms of American property on display in lower Manhattan are intimately related and interdependent—and not just because they were both once owned by Trinity Wall Street—although that history is significant.

Looking a little more closely, one might say that the asserted sacrality of the former World Trade Center site and the kind of religious freedom asserted by Soho Properties are both distinct forms of American religious [dis]establishment, new forms of religio-political partnership and new ideas of property invented in a new land.

The tension between the locative and the utopian has arguably been an enduring and productive way of maintaining what Herberg called the American way of life. Catholics and Jews, and later immigrants, have learned to adapt their theologies and their ecclesiologies to this new property regime, as innumerable ordinances, statutes, and judicial opinions attest. An easy shifting back and forth between the rights of property and claims based in irruptive forms of the sacred pervade this legal history, set free as it was from old world hierarchies at the time of the Revolution.

In the old world hierarchies it would indeed have been Mayor Bloomberg's job to vet the clergy. It still is in many countries. Now, as historians of the corporation in the U.S. have argued, private property and public purpose have been separated and both Mayor Bloomberg and Soho Properties are confirmed in their roles by a Constitution that is understood to protect their right to property and their limited rights to religious freedom—until the Revolution returns.

It is worth noting that no one is suggesting returning any portion of lower Manhattan to the Indians or to the King of England—or distributing it to the poor. That was settled in the seventeenth and eighteenth century.

In some ways this is a story very particular to lower Manhattan—to the interesting and distinctive configurations of public and private in city governance, property ownership, and religion that have been specific to that time and place since colonial times. But seeing the controversy at Park51 in the context of a larger American story—as a conflict between versions of established religion rather than versions of religious tolerance, allows us to begin to see both the peculiarities of American arrangements with respect to religion as well as the continuities with larger global challenges in religious governance today. Separation of church and state is neither written in the words of the U.S. Constitution nor is it possible. Always there is some form of establishment.

ENDNOTES

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