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Five Views of Church-State Relations in Contemporary American Thought

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I. INTRODUCTION

Views concerning the appropriate relationship between church and state are rapidly becoming almost as numerous as America's religious sects. The Constitution's treatment of religious liberty, thought by many to be a matter long settled,[1] has now erupted into a many-sided debate. Not only lawyers, judges and legal commentators are involved; historians and sociologists, theologians and ecclesiastics, political theorists and statesmen also participate in the debate.[2] It is part of a much larger struggle over a redefinition, or for some a reclamation, of the role of religion in American public life. At times this debate focuses on discrete environments, such as public schools and the matter of prayer. At other times it deals with broader questions such as religion's influence on fiscal policy, the morality of nuclear weaponry, or the direction to be taken by our foreign policy in fostering or opposing political movements in third-world nations.

The debate is as confused as it is many-sided. To the uninitiated it seems that the issue is clearly defined as a choice between two camps: religious groups on one hand and proponents of a wholly secularized society on the other, with perhaps more

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1. *See* Miller, *The American Theory of Religious Liberty*, in FREEDOM OF RELIGION IN AMERICA 137 (H. Clark II ed. 1982).

2. For just a sampling of the abundance of recent materials, see the following compilations of papers by scholars from several disciplines: CHURCH, STATE, AND POLITICS (J. Hensel ed. 1981); FREEDOM AND FAITH: THE IMPACT OF LAW ON RELIGIOUS LIBERTY (L. Buzzard ed. 1982); FREEDOM OF RELIGION IN AMERICA (H. Clark II ed. 1982); GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS (D. Kelley ed. 1982); RELIGION AND POLITICS (J. Wood ed. 1983); RELIGION AND THE STATE (J. Wood ed. 1985); THE WALL BETWEEN CHURCH AND STATE (D. Oaks ed. 1963); *Church-State Relations Born Again*, TRANSACTION: SOC. SCI. & MODERN SOC'Y, May-June 1984, at 3; *Religion*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 1;

moderate positions existing along a line running between these two polar extremes. However, perplexities defy this linear model. For instance, some religious adherents have long made common cause with dedicated secularists in opposing many evidences of religion in public life. So many voices are heard, so many confident but diverse assertions about how state and church should interact are made, so many lawsuits are raising novel issues,[3] and so many seemingly conflicting court decisions are reported, that bewilderment and uncertainty beset scholars and laymen alike.

This essay sets forth the five common positions defining the problem of relations between church and state. Its purpose is to contribute to mutual understanding among variant and often contending groups. One of the tools of academia is to classify and thereby reduce that which is complex to terms that are manageable for further study. This alone would justify the typology attempted here, but the burden of this essay is more ambitious. This American debate needs a vocabulary that is not "preloaded" or pejorative so that competing groups might address one another with intelligence, fairness and respect. At present the discourse is mired in discord. It is far too easy to lose one's way in the vilification, exaggeration, and other rhetorical devices now common, and thereby perpetuate the already high degree of misunderstanding and mistrust.

To be sure, polemics have their place. The issue of church-state relations is emotionally charged. But there must be a time for peaceful coming together, and at present no vocabulary exists to encourage needed opportunities for respite. Moreover,

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3. *See, e.g.*, Stark v. St. Cloud State Univ., 802 F.2d 1046 (8th Cir. 1986) (state university policy of placing student teachers in local parochial schools violates establishment clause); Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985) (church may discriminate on basis of sex in hiring for pastoral position), *cert. denied*, 106 S. Ct. 3333 (1986); Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) (Army's chaplaincy program does not on its face violate establishment clause); Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311 (8th Cir.) (upholding use of Christmas music and religious symbols in public school), *cert. denied*, 449 U.S. 987 (1980); May v. Evansville-Vanderburg School Corp., 787 F.2d 1105 (7th Cir. 1986) (public school may bar small voluntary group prayer meeting of teachers held on school grounds prior to commencement of school day); Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985) (public school may not rent facilities before or after regular school hours to community organization for purpose of conducting voluntary religion classes); Gay Rights Coalition v. Georgetown Univ., 496 A.2d 567, (1985) (considering issue of whether church-related university may deny recognition to a gay student organization because homosexuality is inimical to religious doctrine), *vacated*, 496 A.2d 587 (D.C. 1985).

without a common language enabling communication, it is difficult to know when religious liberty is truly threatened. The current alarms from all quarters (many in the company of fund-raising letters) that religious liberty is in imminent danger are little more than crisis-mongering. Such alarmism, like that of the fabled child who "cried wolf", is rendering Americans tone deaf to the more subtle signals that portend genuine loss of liberty.

When these generalizations about church-state relations are reduced to only five types, it is inevitable that some refinements are lost and that the imposed classification is, in a sense, artificial. Moreover, the effort here is not that of a historian or a comparative theologian; it is the limited effort of a systematician taking a snapshot of the present. A social taxonomy is always something of a construct. When one moves from the rigidity of a logical system to the rich complexity of individuals and events, it becomes evident that many persons and groups will identify with positions held by two or even three of the following prototypes but will not feel completely at home in any. Individuals or organizations may evidence beliefs or traits so varied that protests will issue that they are being placed into molds that are too purist for comfort. This is partially because the apparent features that enable categorization of an individual are what he publicly emphasizes, rather than beliefs deeply but privately held. Others may resist being classified because they have some agenda that prompt them to avow greater flexibility than this typology permits. Still others will genuinely evidence traits that appear idiosyncratic. Nevertheless, this classification has the advantage of calling attention to the salient points of continuity and contention held by the major players that comprise this American debate. Hence, it may also help us to gain orientation as we are pressed with the immediate question of where America and, in particular, its judges and lawmakers go from here.

II. The Typology

The distinctions drawn here require a temporary retreat from the intricate doctrinal analysis that is the forte of legal commentators. Definitions of sociopolitical consequence cannot be found merely by tinkering with the tripartite test of *Lemon v. Kurtzman*[4] or by fine-tuning free exercise clause analysis.[5]

4. 403 U.S. 602 (1971). The Supreme Court's current test when applying the estab-

These "black-letter" tests promulgated by the Supreme Court are simply the end product of deeper promptings. Thus, as a first step, analysis must reach down through the doctrinal facade lying on the surface of Supreme Court opinions concerning the religion clauses and begin to lay bare the foundation principles that undergird this debate.

Presuppositionally, a person's view of the appropriate relationship between church and state begins with one's ecclesiology (i.e., what is the origin and purpose of the church?) and with one's philosophy of the state (i.e., what is the purpose of civil government and the scope of its authority?). In the present context, exploration of one of these questions cannot be performed divorced of the other. No concept of the state is value free[6] when we must address questions like: What people and what overarching public philosophy control the power of the state? The inquiry is compounded because religion in the Western world has historically had a great deal to say about the values to be incorporated into society's concept of the state. A search, then, for neutral principles of law detached from all religious systems that will consistently yield results faithful to the first amendment's embodiment of religious liberty is vanity. There are no such neutral principles, only juridical constructs that align more with one presuppositional system than with others.[7]

History also has some claim on the first amendment in the present inquiry. America's story of emerging religious liberty can

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lishment clause is: (a) the law must have a secular purpose; (b) the principal or primary effect of the law must be one that neither advances nor inhibits religion; and (c) the law must not foster excessive governmental entanglement with religion. *Id.* at 612-13.

5. There are four steps in every claim brought under the free exercise clause. First, the claimant must show that his religious belief is sincerely held. Second, the claimant must show that the government's action burdens his religious belief, i.e., coercion of conscience is present to a degree that cannot be fairly said to be insignificant. Once the sincerity and coercion elements are demonstrated, the burden of producing evidence shifts to the government. At this point the free exercise claimant prevails unless the state can prove two elements: first, that the societal interests at stake are compelling and second, that the state cannot achieve its purpose by means less restrictive to conscience. *See* Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

6. Myers, *Preface* to *Religion and the State: The Struggle for Legitimacy and Power*, 483 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 10 (1986).

7. This is why Professor Philip Kurland's RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT (1962), proposing a "religion blind" state that is indifferent to whether its actions help or hinder religion, was widely criticized and failed to interest the courts. *See* McDaniel v. Paty, 435 U.S. 618, 638-39 (1978) (Brennan, J., concurring); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting); P. KAUPER, RELIGION AND THE CONSTITUTION 15-19 (1964); Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389 (1963).

be a guiding factor,[8] but it is not controlling unless we choose to make it so. It can hardly be surprising that legal solutions adopted in a time when America was overwhelmingly Protestant are today not enthusiastically embraced by Roman Catholics, Jews, agnostics and non-Western ethnics. History has much to teach us, particularly about mistakes that cannot be repeated without great cost.[9] Yet history is not demonstrably normative. The fundamental question for Americans today is not whether the courts have correctly construed the language of the first amendment as it was drafted by the First Congress assembled in New York City in 1789.[10] Nor is it what Thomas Jefferson, James Madison or other prominent statesmen thought about church-state arrangements. Nor is it a question of whether America was a "Christian nation" in origin. At its root, one's view of church-state relations is dependent on one's theological or philosophical worldview. Historical events are generally cited, if at all, as makeweight in support of a position held for other reasons. Only when this is admitted can we start being honest about why American views on the appropriate relationship of church and state are as varied as our religious and philosophical allegiances.

Five views, broadly drawn and yet distinct, can be discerned as dominating the American debate. In this article, they will be called *strict separationist, pluralistic separationist, institu-*

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8. Of the many historical accounts of the emergence of religious liberty in America, including the separation of church and state, some of the more responsible ones are S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902); T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); W. GEWEHR, THE GREAT AWAKENING IN VIRGINIA, 1740-1790 (1930); E. GREENE, RELIGION AND THE STATE: THE MAKING AND TESTING OF AN AMERICAN TRADITION (1941); R. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES (2d ed. 1984); F. LITTELL, FROM STATE CHURCH TO PLURALISM (1962); W. MARNELL, THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA (1964); C. MAXSON, THE GREAT AWAKENING IN THE MIDDLE COLONIES (1920); S. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA (1963); M. NOLL, N. HATCH & G. MARSDEN, THE SEARCH FOR CHRISTIAN AMERICA (1983); 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES (1950); W. SWEET, RELIGION IN COLONIAL AMERICA (1942).

9. *See generally* R. BAINTON, THE TRAVAIL OF RELIGIOUS LIBERTY (1951) (biographical studies on religious persecutions); R. DUNN, THE AGE OF RELIGIOUS WARS, 1559-1689 (1970); H. LEA, A HISTORY OF THE INQUISITION (1888) (in 3 volumes).

10. For volumes that devote considerable attention to these debates in the First Congress, see C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 123-42 (1964); R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 3-15 (1982); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978).

tional separationist, nonpreferentialist, and *restorationist.* The names for these types were selected in part because they carry little or no baggage from prior use. They succinctly describe a position without either being opprobrious or giving rhetorical advantage.

Identifying the elements that define what Americans mean when they discuss religious liberty is a second prerequisite to beginning this five-part typology. No universal definition of the term religious liberty exists. Thus, in this essay, religious liberty will be subdivided into three elemental questions:

1. How should government protect the freedom of religious expression and attendant associational rights? This issue is presently addressed in the courts under the first amendment's speech,[11] press,[12] assembly[13] ane petition clauses, and the im-

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11. For cases concerning religious liberty as an aspect of the rights protected by the free speech clause, see Widmar v. Vincent, 454 U.S. 263, 269 (1981) (state university cannot, consistent with the "rights of speech and association," deny student religious groups access to facilities provided to all other recognized student groups); Kunz v. New York, 340 U.S. 290, 295 (1951) (reversing conviction of Baptist minister who gave inflammatory sermon on public street after being denied permit to hold a meeting, as a prior restraint on the right to speak); Saia v. New York, 334 U.S. 558, 559-60 (1948) (holding unconstitutional as a "previous restraint on the right of free speech" an ordinance used to deny use of loud-speaker in park by Jehovah's Witness); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (reversing conviction of Jehovah's Witness for breach of the peace and failure to have permit to solicit money and sell literature as contrary to free exercise of religion and "freedom to communicate information and opinion"); *cf.* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding restrictions on the sale, exhibition and distribution of printed material at state fair as reasonable time, place, and manner restrictions on the right to communicate); Chaplinsky v. New Hampshire, 315 U.S. 568, 573-74 (1942) (holding that conviction of Jehovah's Witness for violating law against using "fighting words" did not reasonably impinge upon the "privilege of free speech").

12. For cases concerning religious liberty as an aspect of the rights protected by the free press clause, see Tucker v. Texas, 326 U.S. 517, 520 (1946) (consistent with "freedom of press and religion," state cannot punish Jehovah's Witness engaged in distribution of literature in village owned by United States); Marsh v. Alabama, 326 U.S. 501, 505 (1946) (trespass conviction of Jehovah's Witness for distribution of literature in company-owned town reversed because of "freedom of press and religion"); Follett v. Town of McCormick, 321 U.S. 573, 576 (1944) (license tax on sales of literature imposed on resident minister selling religious books contrary to the "[f]reedom of religion"); Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (reversing conviction of Jehovah's Witness who violated a city ordinance concerning door-to-door solicitation and distribution of handbills as invalid denial of "freedom of speech and press"); Murdock v. Pennsylvania, 319 U.S. 105, 114-15 (1943) (striking down license fee required by solicitation ordinance when applied to Jehovah's Witness selling religious literature door-to-door as contrary to the "[f]reedom of press, freedom of speech, freedom of religion"); Largent v. Texas, 318 U.S. 418, 422 (1943) (reversing conviction of Jehovah's Witness under ordinance forbidding distribution of religious publications without permit as abridging "freedom of reli-

and petition clauses, and the implied freedom of thought.[14]

2. How should government protect religious-based conscience?[15] This issue is presently addressed in the courts under the first amendment's free exercise clause.[16]

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gion, of the press and of speech"); Jamison v. Texas, 318 U.S. 413, 414 (1943) (ordinance restricting distribution on city street of handbills bearing religious message as restraint on "freedom of press and religion"); Schneider v. State, 308 U.S. 147, 164 (1939) (conviction of Jehovah's Witness for canvassing without a permit as abridging "freedom of speech and press"); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (municipal ordinance prohibiting distribution of handbills without permit was restraint on "freedom of the press" of Jehovah's Witness).

13. For cases concerning religious liberty as an aspect of the rights protected by the freedom of assembly clause, see Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (discriminatory denial of permit to Jehovah's Witness to hold services in public park is preferring one religious group over others); Niemotko v. Maryland, 340 U.S. 268, 272 (1951) (discriminatory denial of permit to Jehovah's Witnesses to use city park for public gathering denied "equal protection of the laws, in the exercise of . . . freedoms of speech and religion"); *cf.* Poulos v. New Hampshire, 345 U.S. 395 (1953) (sustaining conviction of Jehovah's Witness for conducting a religious meeting in part without a license); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding conviction of group of Jehovah's Witnesses who paraded without required permit because law was found to be a fairly enforced and precisely drawn time, place, and manner regulation).

14. For cases concerning religious liberty as an aspect of the implied first amendment guarantee of freedom of thought, see Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (sustaining claim by Jehovah's Witness that motor vehicle license plate bearing the motto "Live Free or Die" violates freedom of thought guarantee which includes the "right to refrain from speaking at all"); Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (religious test for public office invades "freedom of belief and religion"); United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is based in a society of free men."); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compulsory flag salute and pledge of allegiance "invades the sphere of intellect and spirit").

15. One of the elements of a free exercise clause claim (*see supra* note 5) is that a religious claimant must show coercion of conscience. Although this can be difficult for the claimant to prove, the Supreme Court has held that coercion is not restricted solely to situations involving state prohibitions of religious conduct or state requirements of conduct that are contrary to faith. Burdens that only indirectly require a claimant to make a "cruel choice" between religious faith and obedience to government will suffice. Chief Justice Burger, writing for the Court in Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981), stated the coercion of conscience element in this way:

> Where the state [a.] conditions receipt of an important benefit upon conduct proscribed by a religious faith, or [b.] where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

As used in this article, coercion of conscience is to be understood in the sense of the "cruel choice" test set forth in *Thomas*.

16. The free exercise clause secures religious liberty for each individual by prohibiting the invasion of conscience by civil authority. Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (no free exercise clause violation in the absence of a claim that statute in question coerced individuals in the practice of their religion); School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (unlike establishment clause claim, "it is necessary in a free

3. What is the appropriate relationship of government with religious organizations and religious practices? This issue is presently addressed in the courts under the first amendment's establishment clause.[17]

Utilizing this breakdown of religious liberty, the views generally held by each of the five types discussed in this essay will be compared and contrasted along the following grid:

a. the purpose and jurisdiction of government, and the nature of religion;
b. the juridical protection accorded religious speech;
c. the degree of autonomy accorded a church or other religious organization;
d. discrimination by the state in the distribution of goods and opportunities, among religious groups and between the religious and those professing no religion; and
e. the juridical protection accorded religious-based conscience.

A detailed comparison follows, but the chief differences between the five types are easily summarized. Strict separationists are alone in regarding religion as a private and individual phenomenon that should little influence public affairs and matters of state. Strict separationism is the only model unwilling to recognize ontological status in the law for churches and other religious organizations. To the extent that religious societies have

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exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion"); *see also* Harris v. McRae, 448 U.S. 297, 320-21 (1980) (women's association lacked standing to assert free exercise claim that Hyde Amendment violated its religious-based conscientious belief that abortion was necessary because association's members admitted being divided over the imperative to have abortions); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."); McGowan v. Maryland, 366 U.S. 420, 429-31 (1961) (different standing requirements for two religion clauses because establishment clause goes beyond insuring an individual's free exercise of religion).

17. Unlike the other rights guaranteed by the first amendment that protect individual liberties (*see supra* notes 11-14), including the free exercise clause (*see supra* note 16), the establishment clause focuses on a structural concern, namely, mediating the relationship between church and state. R. LEE, A LAWYER LOOKS AT THE CONSTITUTION 129-38 (1981); *see* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 94 (1980). This point is further developed in Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 ST. LOUIS PUB. L.F. 325 (1985); Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984) [hereinafter *Establishment Clause Limits*].

legal defenses against interference by the state, these defenses are merely the sum of individual rights derived from the organization's members.

Pluralistic separationists reject the notion that the state is subject to and beneficiary of any "higher law," regarding such talk as civil religion, that is, a tendency toward self-righteous nationalism fueled by nativist religion. They view the modern nation-state as strictly a human invention, rather than an entity divinely instituted.

Institutional separationists maintain that an ultimate worldview transcends and unifies the state, and thus limits the state by holding it accountable to this "higher law." This overarching public philosophy is deemed properly theistic and is heavily influenced by Judeo-Christian thought, as is the history and tradition of all Western nations.

Nonpreferentialists would permit government to favor religion on a basis that does not prefer one religion over another. Thus, unlike the three separationist models, nonpreferentialists would allow the state to aid religion in general while not aiding those professing no religious belief.

Restorationists, finally, are the only type that would bind the state to a particular confession of faith and would assign civic officials limited duties in defense of the dominant religion.

III. Strict Separationists

Strict separationists desire a secular state. By "secular" they mean a state that is decidedly nonreligious, but not necessarily hostile to religion. They urge that great care be taken to insulate government and public affairs from the influence of traditional religion.[18] As a slogan, strict separationists cite the

18. A hermetic seal between civil affairs and religion is, of course, not presently possible in America. Strict separationists readily acknowledge this; nevertheless, they advocate such absolutism as an aspirational goal:

> Those defending the strict separationist interpretation of the First Amendment's Establishment Clause recognize that the absolute separation of church and state is not possible, but what does that prove? Does the reality that no person is immortal mean that the medical and pharmaceutical profession should be abolished? Realistic separationists recognize that the absolute separation of church and state cannot be achieved, else what's a secularist heaven for? Nevertheless, that is the direction they would have constitutional law relating to the Religion Clause take, fully aware that perfection will never be reached.

L. Pfeffer, Religion, State and the Burger Court xi (1984).

Jeffersonian metaphor of a high and impregnable wall between church and state.

Because they aspire to a government unalloyed by even vestiges of religion from bygone days,[19] strict separationists are working out the logical implications of a distinction between church and state that matches the distinction between religious and secular. Thus, they argue not only for a separation of church and state, but also for a separation of traditional religion from all civic matters.[20]

Strict separationists themselves may be active members of a church or synagogue and devoted to a particular faith, or they may profess no religious persuasion. Many are ethnic and religious minorities who genuinely fear discrimination and other forms of intolerance should conservative Christian majorities be positioned to influence in any serious way matters of public law. Although others often accuse strict separationists of being anti-religious or irreligious, this charge does not apply to all or even to many strict separationists. However, being both religious and committed to strict separationism does have theological consequences. Strict separationists who hold religious beliefs are in-

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19. The following lawsuits demonstrate the strict separationist position: Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir.) (en banc), *rev'g* 781 F.2d 786 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 2890 (1986) (suit to enjoin official county seal, which had symbols representing historic role of Spain and the Roman Catholic Church in settlement of Southwest and which had been used for many years); Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) (suit to declare chaplaincy program of Army in violation of establishment clause); Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (suit to remove words "In God We Trust" from U.S. currency); Calvary Bible Presbyterian Church v. Board of Regents, 72 Wash. 2d 912, 436 P.2d 189, *cert. denied*, 393 U.S. 960 (1968) (suit to enjoin state college English course dealing with literary features of the Bible). See also Lewis v. Allen, 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80, *cert. denied*, 379 U.S. 923 (1964), in which the New York Court of Appeals affirmed without opinion a decision of the Appellate Division, 11 A.D.2d 447, 207 N.Y.S.2d 862 (1960), sustaining a trial court's dismissal of an action to enjoin regulation inserting phrase "under God" in the Pledge of Allegiance recommended for recitation by public school children.

20. *See* M. HARRINGTON, THE POLITICS AT GOD'S FUNERAL (1983). For a jeremiad against strict separationism by a well-known political conservative, see Sobran, *Pensees: Notes for the Reactionary Tomorrow*, NAT'L REV., Dec. 3, 1985, at 23, 47-50.

It was this strict separationist line of thought that prompted one of the plaintiff's arguments in Harris v. McRae, 448 U.S. 297 (1980). A sharply divided Court in *Harris* upheld the Hyde Amendment, which barred federally funded abortions in most instances. Plaintiffs asserted that the establishment clause was violated, basing their arguments upon evidence that the Hyde Amendment was consistent with the religious tenets of the Roman Catholic Church. The Court disagreed. *Id.* at 319-20. *See also* Abortion Rights Mobilization v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986) (action to remove tax exempt status of Roman Catholic Church for allegedly intervening in electoral process to support anti-abortion and oppose pro-abortion candidates).

clined to be dualistic in mind.[21] When an individual determinedly strives to keep his public life secular, his religious life becomes increasingly consigned to that which is private. Such persons internalize the axiom that the place for religion is family, home, and church. Religion survives—indeed, for some it thrives—but as a privatized phenomenon.[22]

An additional related consequence of religious dualism is that religion is regarded as a highly individualistic matter.[23] Religion is thereby left vulnerable to marginalization by those unsympathetic to it. For example, those professing little or no religious faith patronize it: they acknowledge religion to be of therapeutic value as one way of "coping with" the complexities of modern life, but view it as embarrassing or even publicly offensive when believers "foist" their religion on others. They view a church as little more than an individual's "support group."

In the public sphere, civic issues and affairs of state are to be debated and resolved in a wholly secularized medium, since religious views are effectually leached of any serious public consequence. Education,[24] law,[25] economics or military defense are declared to be secular and are to be publicly debated in such terms. For persons whose religions counsel the integration of faith with the totality of life, tensions necessarily result from imposition of such a dualistic motif.

In contrast to the other four types, strict separationists generally hold that no universal, transcendent point of reference or ethical system exists or is required for judging the state. Although ethical constructs can be helpful, strict separationists hold that ultimately matters of politics and statecraft are relative. "Relative" does not mean value-free, but that one's choice of values is not judged right or wrong by reference to an external and immutable natural law. Strict separationists view higher

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21. R. MACAULAY & J. BARRS, BEING HUMAN: THE NATURE OF SPIRITUAL EXPERIENCE 53-55 (1978) (warning against such a secular-sacred dichotomy).

22. *See* Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275 (1986) (warning against such a privatization).

23. *Cf.* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 219-49 (1985).

24. Henry, *The Crisis of Modern Learning: God in the University Classroom*, IMPRIMIS, Feb. 1984, at 2. One can see this idea at work by examining textbooks widely used in primary and secondary public schools. Textbooks have been almost entirely denuded of any reference to religion generally, and of Christianity in particular. P. VITZ, RELIGION & TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY (1985).

25. *See generally Symposium: The Secularization of the Law*, 31 MERCER L. REV. 401 (1980).

law, if it exists at all, as indeterminate in any event. Liberal political theory[26] and pragmatic instrumentalism[27] direct their thinking.

Strict separationists protect religious expression under the first amendment, for as a general proposition they oppose content-based distinctions on speech.[28] Nonetheless, a few recent cases suggest that strict separationists may place a lesser value on religious speech in the marketplace of ideas.[29] Religious speech is not an equal player with, for example, political, philosophical or artistic expression. Strict separationists believe that little harm will occur if religious speech is not given unimpeded access to the public marketplace, and that some good may result. They reason that traditional religions properly have a diminished influence on public policy in our highly rational and technological modern age. Religious strife and even wars, past and present, evidence the danger of division along religious lines within the civil polity.[30] In their minds, this warrants modest ad-

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26. See W. SULLIVAN, RECONSTRUCTING PUBLIC PHILOSOPHY (1982), for a critique of the amoral instrumentalism of liberal political theory by an author on the political left.

27. Pragmatic instrumentalism is presently the dominant legal theory in American law. It is an amalgamation of utilitarianism, sociology, and certain ideas inherited from legal realism. The principal elements of pragmatic instrumentalism postulate as follows: law should seek to maximize the satisfaction of the wants and interests of citizens; forms of law are essentially instruments that serve goals external to law; lawmakers ought to turn mainly to social science and democratic processes in fashioning law's means and goals; valid law is whatever has been enacted or promulgated; law ultimately is reduced to predictions of official behavior; law and morals are sharply separable; forms of law should be interpreted and applied in light of social policy rather than formalistically; law accomplishes its objectives mainly through coercive force; and the use of law is to be judged mainly by its effects. *See* R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).

28. *See supra* notes 11-14.

29. This line of thought is evident among those who would bar speech of a religious nature from a limited public forum as violative of the establishment clause. *See, e.g.*, Board of Trustees v. McCreary, 471 U.S. 83 (1985) (per curiam), *aff'g by an equally divided Court*, McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984) (community use of public park for Christmas holiday display); Widmar v. Vincent, 454 U.S. 263 (1981) (state university student-activity meeting rooms); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (school district allowed to bar non-denominational student prayer group from meeting during high school student-activity period), *vacated on other grounds*, 106 S. Ct. 1326 (1986); Abortion Rights Mobilization v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986) (action to remove tax exempt status of Roman Catholic Church for allegedly intervening in electoral process to support anti-abortion and oppose pro-abortion candidates).

30. For example, in Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947), the Court noted:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, gen-

ditional restrictions on religious expression in highly fragile environments, such as public schools,[31] so as to prevent any misperception that government and religion are not totally separate.

Strict separationists view churches and other religious organizations as having no institutional rights other than the derivative legal rights of their members. That is, a church *qua* church has no defense to governmental interference in its affairs apart from the free exercise rights of individual church members. This view is based on the jurisprudential theory, dominant among strict separationists, that only individuals hold legal rights. It follows that the state properly refuses to grant religious societies ontological status and standing as rights holders apart from their members.[32]

> erated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Prostestant sects had persecuted other Prostestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.

See also Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971) (political divisiveness along religious lines as impermissible entanglement); Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) ("What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.").

31. *See* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (school district allowed to bar non-denominational student prayer club from meeting during high school activity period), *vacated on other grounds*, 106 S. Ct. 1326 (1986); May v. Evansville-Vanderburg School Corp., 615 F. Supp. 761 (S.D. Ind. 1985) (public school may bar small, voluntary group prayer meeting of teachers held on school grounds prior to commencement of school day) *aff'd*, 787 F.2d 1105 (7th Cir. 1986). Consider also the views of those who opposed the Equal Access Act, Pub. L. No. 98-377, Title VIII, 98 Stat. 1267, 1302-04 (1984), codified at 20 U.S.C. §§ 4071-74, found in S. REP. No. 357, 98th Cong., 2d Sess. (1984) and H.R. REP. No. 710, 98th Cong., 2d Sess. (1984).

32. A good example of the clash of views concerning the ontological nature of churches is found in Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), *rev'd on other grounds*, 106 S. Ct. 2718 (1986). *Dayton Christian* involved a charge of sex discrimination by a teacher who was dismissed for religious reasons from a church-related primary school.

So long as the members of a religious organization are united in their claim for protection from governmental interference, it is not necessary to determine whether religious liberty extends to the church *qua* church or, on the other hand, whether it extends to the church as a mere vehicle for the collective expression of individual rights. However, when, as in *Dayton Christian*, members of a church are divided and one individual's right to equality in employment is pitted against a church's claim of autonomy from state intervention, it becomes crucial to determine whether the law recognizes ontological status in the church. The idea that religious societies have independent constitutional value is fundamentally a denial of the proposition that rights can ultimately reside only in individuals and associations therefore have no such rights. This point is explored further in *Establishment Clause Limits*, *supra* note 17, at 369-74 (1984).

For strict separationists, conscience informed by religious belief is to be vigorously protected from coercive state action.[33] They are on the forefront of litigation on behalf of discrete religious minorities, for such groups are often the first to suffer intolerance by means of legislation adopted by the larger political community. Moreover, there is a tendency among some strict separationists to broaden this free exercise clause protection to all conscientious objectors, religious and otherwise.[34] This is done by defining "religion" broadly for free exercise clause purposes (although not for establishment clause purposes) so as to protect any philosophically based conscience, rather than just beliefs arising from traditional religion.[35]

When conscience is discussed, the commentary occasionally implies a state duty to not "offend" minority religions, as in causing a member of the political community to feel like an outsider.[36] Strict separationists concede, albeit reluctantly, that to

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33. Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973).

34. Under present Supreme Court case law, only religiously based freedom of conscience is protected by the free exercise clause. Dissent or acts of civil disobedience, however sincere or motivated by deeply-held concerns, that are not grounded in one's religion are simply not addressed by the clause and would not demand a constitutionally required exemption from the law. Thomas v. Review Bd., 450 U.S. 707, 713 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). Compare Justice Douglas' dissent in Gillette v. United States, 401 U.S. 437, 465-66 (1971), in which he argues that the first amendment implies a right of conscience whether or not religion gave rise to the deeply held belief.

35. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 826-33 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). For an excellent discussion of the problem of defining religion for purposes of the first amendment, and a rejection of the two-definition thesis, see Malnak v. Yogi, 592 F.2d 197, 200 (3d Cir. 1979) (Adams, J., concurring).

36. See Richard John Neuhaus' excellent essay on the "duty not to give offense" argument occasionally heard from strict separationists:

> [I]f the rule is that we must give no offense, the American people must be silent in public about who they are and what they believe . . . .
>
> . . . What we cannot do . . . is to ask the law to muzzle others in the community because we are offended by what they are saying about what they believe.
>
> There is, of course, the danger of a tyrannical majoritarianism. That is why we have democracy with its institutional protections of minorities. But the minority cannot be protected, and should not want to be protected, from the public evidence that it is in fact a minority. The attempt to do that leads to what might be called tyrannical minoritarianism. That is what Prof. Tribe seems to be proposing when he argues that we should "refuse to surround public institutions with symbols of sanctity." At the same time, he wants us to be "a country in which all the divergent streams of conscience, belief, and dissent can unite in a powerful current, one that will move us forward together, with many religious faiths but as one people." But how is this noble vision of "one

not "give offense" (even when "offense" is measured by some objective standard) embraces considerably more than a duty to refrain from state action coercive to conscience.[37]

IV. Pluralistic Separationists

Pluralistic separationists desire a neutral state. By "neutral" they mean a state that doggedly avoids taking sides for or against religion and religious organizations. The phrase "a free church in a free state" captures their position. Each, within its own jurisdiction, is to remain independent of the other.[38]

Like strict separationists, this second type draws a dichotomy between secular and religious. By confining its attention to the secular realm, government maintains the desired neutrality. But the dichotomy drawn by pluralistic separationists is not as sharp or absolute as that of the strict separationists. Rather, the division is often phrased in terms of "public" and "private" realms.[39] Religious values may influence government policy if the policy concerns a "public" matter. Many pluralistic separationists have a history of political involvement in the prevention of vice and the regulation of personal morality. Their religious views have had a civic impact in matters such as regulation of

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people" to be publicly asserted if we exclude the language, stories and symbols that are derived from the streams of conscience, belief and religious faith affirmed by the people who are that "one people"?

Neuhaus, *Exclusions Racial and Religious*, 3 Religion & Soc'y Rep., Feb. 1986, at 2-3.

37. *See supra* note 15 for an explanation of the term "coercion of conscience" as used in this article.

38. For materials representative of the pluralistic separationist position, see Dunn, *Reflections*, Rep. from Capital, Oct. 1985, at 15; Gaustad, *Toward a Baptist Identity in the Twenty-First Century*, Rep. from Capital, June 1985, at 4-7; Grenz, *Isaac Backus and His Vision of Church-State Relationships: "Sweet Harmony,"* Rep. from Capital, Mar. 1985, at 4; Linder, *Christianity, Politics, and Secular Government in the United States*, 26 Sw. J. Theology, Spring 1984, at 46; Maring, *Baptists, Religious Liberty and a Democratic State*, Rep. from Capital, Feb. 1986, at 4; Miller, *The Principle of Religious Liberty*, 6 J. Church & St. 85 (1964); Tanenbaum, *Religious Liberty in America: Lessons of the Past, Implications for the Future*, Church & St. Abroad, Aug. 1984, at 3; Tate, *The Faith of Our Fathers*, Rep. from Capital, March 1984, at 4-5. *See generally* Dissent in Church and State (J. Baker ed. 1970).

39. *See* Kennedy, *A Plea for Respect*, Religion & Pub. Educ., Winter-Spring 1984, at 26, 28-29 (speech by Senator Edward Kennedy at Liberty Baptist College, in which he takes the position that nuclear freeze and political violence in Central America are public matters proper for religious persuasion, but that abortion, the existence of a Department of Education and a balanced budget constitutional amendment were not proper subjects for "heavenly appeals"); Krauthammer, *The Church-State Debate*, New Republic, Sept. 17 & 24, 1984, at 15 (critiquing the public-private dichotomy); *see also* Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 B.Y.U. L. Rev. 245.

gambling, pornography, and alcohol. Others have historically concentrated on peace issues.[40] Still others have focused on labor and social welfare legislation. The point is that the forays of pluralistic separationists into public affairs have often been selective or partial. Many from a Pietistic (spiritual-temporal dichotomy) or Anabaptist (faithful-worldly dichotomy)[41] background have had this sporadic political involvement, because their separationist theology has told them that "politics is dirty" and is thus to be avoided on a sustained and comprehensive basis.

More important, among pluralistic separationists there is near universal emphasis on civic tolerance as the proper way to deal with America's religious pluralism.[42] Pluralism is a fact in America[43] which none in our five-part typology would deny. However, pluralistic separationists regard religious pluralism as not only a fact that must be acknowledged, but as the proper state of affairs. Pluralistic separationists view with favor the "rival sects" theory of how religious liberty is maintained.[44] This concept, often attributed to James Madison,[45] suggests that religious liberty is achieved when diverse religious sects freely compete, but with none dominating. The model assumes that if one or even a few sects should become dominant, the ambition of

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40. *See, e.g.*, Wallis, *Without a Vision the People Perish*, 9 SOJOURNERS 3 (1980).

41. For helpful background into the origins and beliefs of European Anabaptists and their influence on current American denominations, see W. ESTEP, THE ANABAPTIST STORY (2d ed. 1975).

42. *See, e.g.*, Kennedy, *supra* note 39.

43. There are more than 600 "unconventional alternative religious bodies" and nearly 800 major Christian denominations in America. J. MELTON & R. MOORE, THE CULT EXPERIENCE: RESPONDING TO THE NEW RELIGIOUS PLURALISM 7 (1982). YEARBOOK OF AMERICAN AND CANADIAN CHURCHES 1986, at 234-41 (1986) lists 219 denominations, consisting of 344,410 churches with membership of over 142 million, representing about 60% of the United States population. B. QUINN, H. ANDERSON, M. BRADLEY, P. GOETTING & P. SHRIVER, CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES 1980, at 1-3 (1982), lists 111 denominations, consisting of 231,708 churches with membership of over 112.5 million, representing 49.7% of the population.

44. *See, e.g.*, Tate, *supra* note 38.

45. "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . . ." THE FEDERALIST No. 51, at 324 (J. Madison) (Signet ed. 1961). *See* W. MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 114-17 (1985); Hunt, *James Madison and Religious Liberty*, 1901 AM. HIST. ASS'N ANN. REP. 165 (1902); L. TRIBE, *supra* note 35, at 816-18 (1978). *See generally* Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427 (1983).

clerics to promote their own church would eventually lead to loss of civil liberties for all others.

Although pluralistic separationists accept that religion may influence issues of civic government, they shun any religiously generated cultural mandate to employ the offices of government to achieve religious ends. Pluralistic separationists often prefer to posture themselves in the prophetic role. They are the ones outside the chambers of power, critiquing the state and calling it back to its true course. A prophet's role as dissenter is in contradistinction to the priestly function of a religious insider[46] who, through self-interest, lapses into conserving and securing the existing social and political order. Pluralistic separationists view tension between church and state as desirable, because it is a sign of a church which is vital and has not succumbed to the allure of political power.[47] Their literature counsels one to be a sojourner in this world, rather than to be of this world.

Pluralistic separationists do not believe that a universal, transcendent point of reference or ethical system for judging the state is required. Admittedly, individual persons have worldviews, many religious in nature, that they believe transcend and thus limit the state. But the modern nation-state is not legally "bound" to any particular worldview or public theology. The state can and should be neutral toward these various religious subscriptions,[48] since the state is not competent to determine which of these competing worldviews might be correct.[49] Moreover, an overarching public theology is to be avoided as ap-

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46. *See* Marty, *Two Kinds of Two Kinds of Civil Religion*, in AMERICAN CIVIL RELIGION 139 (R. Richey & D. Jones eds. 1974).

47. The role of dissenter in their story is venerated. *See, e.g.*, DISSENT IN CHURCH AND STATE (J. Baker ed. 1970); Gaustad, *supra* note 38.

48. *See, e.g.*, Clancy, *Religion as a Source of Tension*, in RELIGION AND THE FREE SOCIETY 23, 30 (1985):

> The problems . . . for a pluralist society are obvious. The democratic society as such is committed to no theology or ideology . . . it is simply a civil community; its unity is purely political, consisting in "agreement on the good of man at the level of performance without the necessity of agreement on ultimates." Democracy has properly been described as a forum in which ultimates compete; but the competition must not become internecine; if it does the democratic community itself is shattered.

49. For a critique of the pluralistic separationist's apparent assumption that societal pluralism can be boundless without adverse consequences, see Canavan, *The Pluralist Game*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 23; Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS., Spring 1981, at 3.

proaching civil religion.[50] Civil religion, a term with many connotations,[51] is used by pluralistic separationists in the pejorative sense of dominant religious sentiments being used to sanctify political expediencies. Where there is civil religion, the church has been prostituted to serve those holding civil power.

The modern state is democratic and instrumental. Pluralistic separationists view it as being of human invention, rather than ordained by God. The state is not "one nation, under God," in any sense of a particularized omnipresence legally obligating the state. Rather, through popular sovereignty (majority rule), the state is to respond with equality and tolerance to all citizens, both those from the plurality of faiths and those without religious belief.

Religious speech and press receive juridical protection on a parity with, for example, expressions of political, philosophical or artistic content, for religious faith may speak to civil affairs.[52] However, religious believers properly influence the state "from the ground up," beginning with their own spiritual regeneration, not through an appeal to a superceding religious "higher law" or worldview imposed from the top down.

In contrast to strict separationists, plural separationists maintain that religious organizations have distinct institutional rights, not merely the derivative free exercise rights of individual members.[53] They reason that religious societies have a sphere in which they operate unhindered in accordance with their understanding of their own divine origin and mission. Roger Williams' oft-repeated biblical allusion to "the garden and the wilderness"[54] illustrates the state's lack of competence in church matters. State involvement only tramples the garden.

Pluralistic separationists would prohibit official discrimina-

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50. R. LINDER & R. PIERARD, TWILIGHT OF THE SAINTS: BIBLICAL CHRISTIANITY & CIVIL RELIGION IN AMERICA 135-86 (1978).

51. On the matter of civil religion generally, see AMERICAN CIVIL RELIGION (R. Richey & D. Jones eds. 1974); THE RELIGION OF THE REPUBLIC (E. Smith ed. 1971); Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967); Linder, *Civil Religion in Historical Perspective: The Reality that Underlies the Concept*, 17 J. CHURCH & ST. 399 (1975).

52. Tate, *supra* note 38, at 4-5.

53. *See* Linder, *supra* note 38, at 62 (1984); J. WOOD, GOVERNMENT INTRUSION INTO RELIGIOUS AFFAIRS (1980); Wamble, *Figment or Fidelity*, REP. FROM CAPITAL, Jan. 1985, at 7 (quoting from a confession of faith adopted by Southern Baptist Conventions in 1925 stating, inter alia, "[t]he state owes to the church protection and full freedom in the pursuit of its spiritual ends").

54. *See* M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 5-6 (1965).

tion among religious groups and, like all three separationist types, would disallow discrimination favoring religion over non-religion.[55]

Finally, pluralistic separationists vigorously protect religious-based conscience. Only upon a showing of some truly exigent threat to public health, safety, or public order would pluralistic separationists allow the state to override conscience. More than any other type, pluralistic separationists have suffered official intolerance, which often accompanied their historic role as dissenters defying the established order.[56] Thus, this second type is particularly vigilant in safeguarding conscience. Those who have suffered intolerance in America for their beliefs, such as Seventh-day Adventists, Christian Scientists and Jehovah's Witnesses, are often pluralistic separationists, as are those in the historic Baptist tradition and the present-day descendants of Anabaptists and Pietists, such as Mennonites, Amish, Brethren and the Friends (Quakers).

V. Institutional Separationists

Institutional separationists envision a theocentric state, in which the state's neutrality is deemed "benevolent"[57] or "wholesome."[58] The institutional separation of church and state is a model wherein both institutions are of divine ordination and are subject to the will and rule of God, who is sovereign over all things. Each institution is distinct and is designed to perform different tasks in the created order. Neither is to dominate the other, nor are they to be mutually dependent. But a functional

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55. *Cf.* Everson v. Board of Educ., 330 U.S. 1, 15 (1947): "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions,* or prefer one religion over another." (emphasis added). This dictum by Justice Black prohibiting even nonpreferential aid to all religions continues to carry a large majority on the Supreme Court. *Compare* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985) (requiring government to "maintain a course of neutrality among religions, and between religion and non-religion") *with* Wallace v. Jaffree, 105 S. Ct. 2479, 2508 (1985) (Rehnquist, J., dissenting) (purpose of establishment clause is to forbid preference of one religion over another).

56. *See, e.g.,* W. Estep, *supra* note 41; Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-1789 (W. McLoughlin ed. 1968); 1 & 2 W. McLoughlin, New England Dissent, 1630-1833: Baptists and the Separation of Church and State (1971).

57. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

58. *See* School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

interaction between church and state is inevitable and desirable as each pursues its own proper objectives.[59]

Although institutional separationists may at first appear to tend toward theocracy, that is not the case. The nature of this God-in-Common is purposely left ambiguous. When God is mentioned in a public setting, it is only by generalizations such as "Supreme Being," the "Creator of us all," "Nature's God" or in the national motto, "In God We Trust."[60] Nevertheless, He is not an all-purpose, generic god. Rather, this God accords gener-

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59. A concise statement of this position is found in CHURCH AND STATE: A LUTHERAN PERSPECTIVE 1-2, adopted by the Lutheran Church in America (Division for Mission in North America, Lutheran Church in America June 1966):

> [T]he Lutheran Church in America affirms both institutional separation and functional interaction as the proper relationship between church and state. We hold that both church and state in their varied organized expressions, are subject to the will and rule of God, who is sovereign over all things. By "institutional separation" we mean that church and state must each be free to perform its essential task under God. Thus we reject those theories of relationship which seek the dominance either of church over state or of state over church.
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> . . . The church militant is both a divine organism related to Christ and a human organization related to society. Its distinctive mission as an ecclesiastical institution is to proclaim the Word of God in preaching and sacraments, worship and evangelism, Christian education and social ministry.
>
> "Civil authority," according to the New Testament, is divinely ordained. This does not imply that every particular government or governor enjoys God's approval; it means rather that "civil authority" which is manifested in the state is to be respected and obeyed as an expression of the sovereign will of the Creator.
>
> This forbids any state from deifying itself, for its power is not inherent but is delegated to it by God to be employed responsibly for the attainment of beneficial secular goals. A government is accountable to God for the way in which it uses, abuses, or neglects to use its powerful civil "sword." The constant need of the state, therefore, is not for the church's uncritical loyalty and unquestioning obedience but for the prophetic guidance and judgment of the law of God, which the church is commanded to proclaim, in order to be reminded of both its secular limits and potentialities. The distinctive mission of the state is to establish civil justice through the maintenance of law and order, the protection of constitutional rights, and the promotion of the general welfare of the total citizenry.
>
> "Functional interaction" describes a process which takes place in areas in which church and state, each in pursuit of its own proper objectives, are both legitimately engaged. We believe that such interaction is appropriate so long as institutional separation is preserved and neither church nor state seeks to use its type of involvement to dominate the other. We, therefore, reject theories of absolute separation of church and state which would deny practical expressions of functional interaction.

60. The most frequently quoted attribution to God is from Zorach v. Clauson, 343 U.S. 306, 313 (1952) (Douglas, J.): "We are a religious people whose institutions presuppose a Supreme Being."

ally—if vaguely—with the personal, historical deity of Judeo-Christianity and the monotheism prevalent in the western world.

Institutional separationists hold that a universal, transcendent point of reference or ethical system for the state exists and is required in order to secure human rights and maintain a republican structure of government.[61] Western nations, particularly the United States, are influenced by and indebted to the personal and historical concept of God within Judeo-Christianity.[62] History is witness, maintains this third type, that of all sociopolitical constructs only the cultural ethos derived from Judeo-Christianity has successfully (if not consistently) served as a hedge against totalitarianism.[63]

Institutional separationists admit that the United States is not "bound" to a theocentric public theology, in the sense of a particularized positive law superior to the Constitution. Nonetheless, this overarching worldview is precedent to be followed. One must distinguish between law and the source of law. Thus, America's abandonment of Judeo-Christianity as the source of law would imperil the legitimacy of democratic institutions and undermine the "higher law" rationale for human rights.[64] Under this view, if there is no notion of the transcendent, the state has no limits to hold it in check. If there is no higher appeal, one cannot truthfully say, "No state is above the law." It is no answer, according to institutional separationists, to argue that the higher appeal is to "the people."[65] Absent firm moorings in God,

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61. The necessity of a socio-religious consensus undergirding and stabilizing the state's political power has been advanced by a number of writers. *See, e.g.*, C. DAWSON, RELIGION AND THE MODERN STATE (1940); J. MURRAY, WE HOLD THESE TRUTHS 80-85 (1960); R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 60, 138 (1984); A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 340-60 (1985); Bellah, *Cultural Pluralism and Religious Particularism*, in FREEDOM OF RELIGION IN AMERICA 33 (H. Clark II ed. 1981); Nussbaum, *A Garment for the Naked Public Square: Nurturing American Public Theology*, 16 CUMB. L. REV. 53 (1985).

62. *See* Stackhouse, *Democracy and the World's Religions*, THIS WORLD, Winter/Spring 1982, at 108.

63. Littell, *The Basis of Religious Liberty in Christian Belief*, 6 J. CHURCH & ST. 132, 138-41 (1964); *see* M. STACKHOUSE, CREEDS, SOCIETY, AND HUMAN RIGHTS: A STUDY IN THREE CULTURES (1984) (comparative study of basis of human rights in United States, India and Marxist East Germany).

64. Kirk, *We Cannot Separate Christian Morals and The Rule of Law*, IMPRIMIS, April 1983, *reprinted in* 4 CHRISTIAN LEGAL SOC'Y Q., 1983 no. 4, at 21.

65. A. STORKEY, A CHRISTIAN SOCIAL PERSPECTIVE 312-13 (1979). In contrast, pluralistic separationists place reliance in the democratic expression of "the people." Tate, *supra* note 38.

they see a danger that rule by "the people," because of their fallen state, become tyranny by the majority.[66]

Institutional separationists view religious speech and press as deserving juridical protection equal to that given political, philosophical or artistic expression. A rule against content-based discrimination applies to all expression, because institutional separationists hold that religious values not only *may*, but *must* influence public policy.[67] Their position, in short, is that a church separated from the state need not, indeed, must not be a silent church. Individuals of this third type believe that part of one's religious duty is preserving the good in culture and reforming the bad. They unashamedly teach a cultural mandate that arises out of their religion. Moreover, this mandate is not limited to interest-group politics or single-issue moral crusades. Rather, the commission is to work for the well-being of all citizens.[68]

Although they agree with pluralistic separationists that civil religion (in the pejorative sense of that term) is harmful, institutional separationists believe that the threat of civil religion in America is presently exaggerated.[69] Admittedly, history has shown that religious people have difficulty loving both God and country without confusing the two. However, institutional separationists believe that it is still possible to avoid both denial of religious liberty to minority groups and churches' succumbing

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66. For an excellent essay sketching seven principal themes which comprise a public philosophy, at least in the West, see Stackhouse, *An Ecumenist's Plea for a Public Theology*, THIS WORLD, Spring/Summer 1984, at 47, 58-68. The themes are as follows: nature is not the product of chance but is created by a God, who is behind and beyond nature and is more important than nature itself; men must care for the well-being of the poor and the oppressed; each human is placed in the world for a purpose, which we call vocation; humans are called into communities of responsibility, e.g., familial, political and economic communities, which set forth terms and limits for our lives together; there is a transcendent and universally valid moral law; things are not as they should be in the world because of human failing and evil; and there must be religious freedom in both the voluntariness of faith and the institutional separation of church and states. The Stackhouse paper is followed by responses from five prominent and diverse students of religion, making the discourse particularly rich. *See generally* J. GUSTAFSON, ETHICS FROM A THEOCENTRIC PERSPECTIVE (1981); M. MARTY, THE PUBLIC CHURCH (1981); THE RELIGION OF THE REPUBLIC (E. Smith ed. 1971); J. WILSON, PUBLIC RELIGION IN AMERICAN CULTURE (1979).

67. *See* Cox, *Our Politics Needs Religion*, 39 REP. FROM CAPITAL, Oct. 1984, at 4.

68. A. STORKEY, *supra* note 65, at 308; *see generally* S. MONSMA, PURSUING JUSTICE IN A SINFUL WORLD (1984).

69. *See* Neuhaus, *America in American Religious Thought*, RELIGION & SOC'Y REP., Nov. 1985, at 1-6.

to the allure of nation worship.[70] They view privatization of faith and the rising tides of secularism and radical individualism as more imminent threats.[71]

Institutional separationists agree with pluralistic separationists that civil tolerance in public discourse is important and that one should exercise restraint in the use of religiously motivated speech directed at the general polis.[72] However, such prudence in speech must be balanced against the imperative of culture-forming religion as foundational to civil liberties, social justice, and republican virtues. Religion speaks to the totality of life; there should be no dualisms. Accordingly, institutional separationists argue that religious people must not stand mute in the face of wrongdoing that seriously threatens community order. And since their view of religion is that faith is to be integrated with all of life, they feel that there is no subject the church may not properly address, even when others regard its views as intermeddling and socially intolerant and the issue at hand as a private matter. This does not mean a politicized church: institutional separationists insist that there is a balance between proclaiming eternal values and addressing the present in a practical and humble manner. Thus, they remain solidly in the separationist camp. Although faith and life are fully integrated at the individual level, church and state maintain distinct responsibilities that should be honored as each institution fulfills its proper role.

This third type, like the second, maintains that churches and other religious organizations have ontological standing in law, rather than merely the civil rights derived from individual members.[73] These two types also join in a vigorous protection of religious-based conscience from acts of civic intolerance.

Finally, like all separationist models, institutional separationists maintain that the state may not discriminate among religious groups or prefer religion in general over individuals pro-

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70. Kantzer, *American Civil Religion*, CHRISTIANITY TODAY, July 13, 1984, at 14.

71. *The Subversive Society*, 7 PASTORAL RENEWAL 55 (1983)

72. R. NEUHAUS, *supra* note 61, at 55, 114-15, 125.

73. A. STORKEY, *supra* note 65, at 309; Richardson, *Civil Religion in Theological Perspective*, in AMERICAN CIVIL RELIGION, at 161, 178-80 (R. Richey & D. Jones eds. 1974); *see* Neuhaus, *That Extraordinary Synod: A Report From Rome*, RELIGION & SOC'Y REP., Mar. 1986 special report, at B1 (problems can be traced to the idea "that the church is viewed as simply a human institution to be understood in sociological terms," as opposed to the view that the church "is divinely constituted and divinely guided on its pilgrimage toward a kingdom that is not of our manufacture").

fessing no religious belief. Thus, institutional separationists differ from nonpreferentialists in their strong feeling that religious people must not ask for governmental favor or aid which is not available to all other citizens.[74]

VI. NONPREFERENTIALISTS

Nonpreferentialists desire a nonsectarian state. Unlike the secular state characterization of the strict separationists, nonsectarianism is akin to nondenominationalism.

Nonpreferentialists argue that religion in general is crucial in the formation of good morals such as honesty, industry, thrift, charity, and sobriety. Therefore, the state has a strong interest in preserving and fostering religious faith. This fourth type is convinced that traditional religion is the basis for morality, that morality is vital to achieving that critical mass of persons who are disciplined and self-governing, and that a self-regulating citizenry makes possible the open society characteristic of Western democracy. Thus, concludes the syllogism, religion is essential to the state's very self-preservation.[75]

In sum, this means that the state may aid religion because the public interest in a stable, democratic government is thereby served. Nonpreferentialists agree with the institutional and pluralistic separationists that the state is not competent to choose among religions. Unlike the separationists, however, who because of this incompetence deny aid to all religions, nonpreferentialists would extend governmental aid to religious organizations on a nonpreferential basis.[76]

This view of church-state relations bears directly upon one of the major legal debates involving the establishment clause: state aid to parochial schools. Because nonpreferentialists view such aid as constitutional, it comes as little surprise that many Roman Catholics, Protestant Evangelicals and Orthodox Jews[77]

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74. A. STORKEY, *supra* note 65, at 311.

75. *See, e.g.*, Hatch, *Civic Virtue: Wellspring of Liberty*, NAT'L FORUM: PHI KAPPA PHI J., Fall 1984, at 34; Sirico, *The Secular Contribution of Religion to the Political Process: The First Amendment and School Aid*, 50 MO. L. REV. 321 (1985).

76. Justice Rehnquist, in his dissenting opinion in Wallace v. Jaffree, 105 S. Ct. 2479, 2508 (1985), espouses a nonpreferentialist view. *See generally* R. CORD, *supra* note 10; P. FERRARA, RELIGION AND THE CONSTITUTION: A REINTERPRETATION (1983); G. GOLDBERG, RECONSECRATING AMERICA (1984); M. MALBIN, *supra* note 10; Hatch, *supra* note 75, at 37.

77. *On the Uses of Fear*, RELIGION & SOC'Y REP., Dec. 1985, at 7-8 (letter from Rabbi Davis Samuel).

who operate their own schools are quite sympathetic to the nonpreferentialist model. Political conservatives, even if not themselves deeply religious, are often nonpreferentialists as well.[78]

Nonpreferentialists are quick to point out two additional public benefits of a thriving religious sector. First, religious groups give citizens a source of community in an often impersonal world. Next to the family, religious organizations are the foremost institution in society interposed between the individual and the power of the state.[79] Religious societies are a rich source of stability and meaning in life and continuity with the past. Second, religious groups operate many worthy educational and charitable organizations. These services are delivered at less cost to the public treasury than governmental programs, and often with a quality and personal touch not achieved by governmental bureaucracy. Moreover, the availability of church-related schools affords students and parents a greater variety of choices, thus enriching culture and acting as a hedge against state monopolization of the education of impressionable children.[80] Nonpreferentialists take the buzz words of the separationists, such as freedom, choice and pluralism, and turn them to their own service by arguing that "educational freedom," "parental choice" and "pluralism in learning experiences" support aid to parochial schools.[81]

To a large extent, nonpreferentialists echo the institutional separationist's concern that the state be limited and capable of

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78. *See* Dannhauser, *Religion and the Conservatives,* COMMENTARY, Dec. 1985, at 51. Dannhauser makes an insightful point: conservatives who favor religion for the masses, although their own religious belief is weak or nonexistent, have embraced religion for its social utility, as distinguished from the larger question of its claims of truth. *Id.* at 55. Accordingly, their thought is in a sense Erastian, for it justifies a publicly supported religion because of its usefulness to the state. Unlike Puritans who came to America to set up a government that would guard the "true religion," these political conservatives hope to use religion to protect and sustain good government. This is the very thing pluralistic separationists warn against. *See* Littell, *supra* note 63, at 135-38 (1964).

79. P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 27-28 (1977).

80. *See* R. BAER, CENSORSHIP AND THE PUBLIC SCHOOLS (1985); R. MCCARTHY, J. SKILLEN & W. HARPER, DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR AMERICAN SCHOOLS (1982); *see generally* FREEDOM & EDUCATION: PIERCE V. SOCIETY OF SISTERS RECONSIDERED (D. Kommers & M. Wahoske eds. 1978).

81. *See* J. CATTERALL, TUITION TAX CREDITS: FACT AND FICTION (1983); J. COONS & S. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978); Davis, *Educational Vouchers: Bloom or Blunder?,* 47 EDUC. F. 161 (1983); Herndon, *Tuition Tax Credits and Educational Vouchers,* in RELIGIOUS SCHOOLING IN AMERICA 207 (J. Carper & T. Hunt eds. 1984); Puckett, *Educational Vouchers: Rhetoric and Reality,* 48 EDUC. F. 7 (1983).

being judged in light of a transcendent point of reference, so as to check statism and make possible human rights. They also agree that the state should not discriminate among religious organizations or among individuals on the basis of differing religious beliefs.[82] However, nonpreferentialists break with all three separationist types by permitting the state to aid or favor religion in general over those professing no religious belief. They argue that, although the first amendment prevents the establishment of a national church, the founding fathers never contemplated prohibiting government aid to religion on a nondiscriminatory basis.[83]

Nonpreferentialists join with the second and third types in vigorously protecting religious speech and press on an equal basis with political, philosophical or artistic expression. These same three types also agree in their view of churches as legally autonomous within their own sphere of operation.[84] The state, therefore, must abstain from interfering with the inner precincts of religious organizations. Unlike the second and third types, however, nonpreferentialists are persuaded that the receipt of state aid will not lead to government entanglement which would compromise the religious mission and internal governance of churches.[85]

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82. This is not a change from current Supreme Court case law. A statute which is facially neutral and has no provisions which have a disparate impact on members of different denominations is constitutional when such distinctions result from the application of secular criteria. *Compare* Gillette v. United States, 401 U.S. 437 (1971) (upholding a classification that differentiated on the basis of religious belief, not by denominational or sect membership) *with* Larson v. Valente, 456 U.S. 228 (1982) (charitable contributions tax deduction statute unlawfully discriminates against new religious movements).

83. Meese, *The Battle for the Constitution: The Attorney General Replies to His Critics*, POL'Y REV., Winter 1985, at 32. *See also* authorities cited, *supra* note 76.

84. For example, consider the opposition by Senator Orrin Hatch and the United States Catholic Conference to various legislative proposals to overturn Grove City College v. Bell, 465 U.S. 555 (1984). In *Grove City* the Court held that title IX of the 1972 educational amendments, 20 U.S.C. YY 1681-86 (1982), prohibited sex discrimination only in any educational program or activity receiving federal financial assistance, not the entire educational institution. 465 U.S. at 570-74.

Critics of the various proposals to overturn *Grove City* have opposed these bills in part because of their potential for intrusion into the employment practices of church-operated schools and related ministries such as colleges and hospitals. 130 CONG. REC. S12146, S12155 (daily ed. Sept. 27, 1984) (exhibit introduced by Senator Hatch); 43 CONG. Q. WEEKLY REP. 999-1001, 1441-42, 1950, 2745 (1985) (concerns of U.S. Catholic Conference).

85. For a discussion of this issue in the context of state aid to religious schools, see Capps & Esbeck, *The Use of Government Funding and Taxing Power to Regulate Reli-*

Religious-based conscience is to be juridically protected, absent some truly exigent threat to health, safety, or public order. Nonpreferentialists are divided, however, when confronted with a claim of conscientious exemption from otherwise generally applicable and facially neutral legislation. Consider, for example, the free exercise clause claim for exemption upheld in *Thomas v. Review Board.*[86] Because of a sincere religious belief that he could not work on military armaments, a factory worker was discharged by his employer. The state, taking the view that the loss of employment was voluntary, denied the worker unemployment compensation. The Supreme Court held that this denial violated the worker's free exercise clause rights to follow the dictates of religious belief without suffering a substantial burden at the hand of the state.

Some nonpreferentialists, agreeing with institutional and pluralistic separationists, follow the Court's view in *Thomas.* Other nonpreferentialists disagree, believing that the free exercise clause should relieve a religious claimant only of unavoidable burdens on conscience.[87] These nonpreferentialists give greater deference to the operation of state police power. In their view, conscience is violated only when the state, without providing an alternative, prohibits an act that religious faith mandates, or commands an act that faith enjoins.[88]

VII. RESTORATIONISTS

Restorationists desire a confessional state. Many of this fifth type believe that America was founded as a Christian nation,[89] and they seek to restore Christianity to the status it enjoyed during the colonial and early national periods.[90]

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gious Schools, 14 J. L. & EDUC. 553 (1985).

86. 450 U.S. 707 (1981).

87. *See, e.g.,* M. MALBIN, RELIGION AND POLITICS: THE INTENTION OF THE AUTHORS OF THE FIRST AMENDMENT 36-40 (1978).

88. *See* Thomas v. Review Bd., 450 U.S. 707, 722-23 (1981) (Rehnquist, J., dissenting) (urging a narrower scope for the free exercise clause, as set forth in Braunfeld v. Brown, 366 U.S. 599 (1961)); *see also* United States v. Lee, 455 U.S. 252, 261-63 (1982) (Stevens, J., concurring opinion) (urging a similar retreat from the *Thomas* free exercise clause analysis).

89. The idea has persisted in America that the United States is fundamentally a Christian republic, and that the role of the church is to build toward the time when American civilization would be fully Christian and Christian principles would triumph. For an introduction to the study of this American idea, see R. HANDY, *supra* note 8; E. TUVESON, REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE (1968).

90. One of the first books to forcefully advance the restorationist's position of a

Restorationists argue that there is no easy dualism between the secular and the religious, that a neutral state is not only a myth, but an impossibility. The state cannot avoid being committed to some ultimate principles, and these animating principles, broadly defined, constitute the "religion" of the state. Thus, for restorationists, the only relevant question is whether the state's guiding reality is the true one. Restorationist literature is replete with warnings that the guiding reality of many of America's governmental institutions is increasingly the false religion of "secular humanism."

According to restorationists, a universal, transcendent point of reference for the state not only exists but is unavoidable. In the restorationist model, church and state are divinely ordained and are intended to reinforce each other in a symbiotic relationship. Although this mutual dependence between church and state is inevitable, each has a distinct role and is not to invade the jurisdiction assigned to the other within the created order. Hence, this model does not contemplate a radical theocracy, in the sense of a complete merger of church and state. Nor is the restorationist view Constantinian, which would entail a single benevolent head for both church and state.

Restorationists envision a government possessing primarily protectionist duties such as law enforcement, military defense, conduct of foreign relations, and assuring public health and safety. They thus seek a minimalist state, one whose domestic authority is for the most part limited to containing the excesses

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"Christian America" was R. WALTON, ONE NATION UNDER GOD (1975); later came others such as THE CHRISTIAN HISTORY OF THE AMERICAN REVOLUTION (V. Hall ed. 1976); J. MONTGOMERY, THE SHAPING OF AMERICA (1976). Perhaps more widely read is F. SHAEFFER, HOW SHOULD WE THEN LIVE (1976) (covering more than simply America's founding, but claiming an early Christian base for the nation, which Shaeffer believes is presently lost and is in need of restoration). These were followed by books such as H. BROWN, THE RECONSTRUCTION OF THE REPUBLIC (1977); 2 THE CHRISTIAN HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (V. Hall ed. 1979); P. MARSHALL & D. MANUEL, THE LIGHT AND THE GLORY (1977); R. SLATER, TEACHING AND LEARNING AMERICA'S CHRISTIAN HISTORY (1980); J. WHITEHEAD, THE SEPARATION ILLUSION: A LAWYER EXAMINES THE FIRST AMENDMENT (1977). More recent books include J. FALWELL, LISTEN, AMERICA (1980); F. SHAEFFER, A CHRISTIAN MANIFESTO (1981); W. STANMEYER, CLEAR AND PRESENT DANGER: CHURCH AND STATE IN POST-CHRISTIAN AMERICA (1983); J. WHITEHEAD, THE SECOND AMERICAN REVOLUTION (1982).

For restorationist views that are hyper-Calvinist, or what the authors themselves term "Christian reconstructionist," see G. BAHNSEN, BY THIS STANDARD: THE AUTHORITY OF GOD'S LAW TODAY (1985); R. RUSHDOONY, THIS INDEPENDENT REPUBLIC (1964). Although the tone and content of the Christian reconstructionist perspective borders on triumphalism, the view appears to be to the right of most within our restorationist type.

of immorality. Clearly such a view excludes direct state authority over the affairs of the church. Instead, the state is to provide a social environment where religious claims are more plausible and conversion therefore more likely. Ideally, the state is to be a magisterial government that serves as "nursing father"[91] to the church.

Restorationists believe that the United States is a Christian nation[92] or was originally intended as one, and they often argue for a restoration of the nation's high view of Christianity as it existed in the founding period.[93] Not only is the public theology of the state explicitly Christian in its creed, but much of restorationism has a decidedly Puritan or at least a "chosen people" cast to it. Prayers frequently invoke God's judgment or blessing upon not only individuals, but the entire nation.[94]

Because they assign the state a duty—albeit a mild duty

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91. *See* T. CURRY, *supra* note 8, at 17.

92. See *supra* notes 89-90. For contrary views, see M. NOLL, N. HATCH & G. MARSDEN, *supra* note 8; Noll, *From the Great Awakening to the War for Independence: Christian Values in the American Revolution*, 12 CHRISTIAN SCHOLAR'S REV. 99 (1983).

93. For insight into the contending sides in this debate, consider AMERICA, CHRISTIAN OR SECULAR? (J. Herbert ed. 1984):

> We can see that the proponents and critics of a Christian America emphasize different things. The critics look at America's public philosophy and are hard pressed to find anything distinctly Christian. The proponents look at the rhetoric of the founders and the courts, see the connections between America's early legal tradition and English common law, and find much that is Christian.
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> . . . .
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> . . . Both sides of the Christian America debate recognize the connection between how Christians perceive the founding of America and how they will act in American public life today. On the one side are Christians who perceive America's traditional consensus as being basically Christian. They would hope, of course, that America's public consensus (civil religion) might be as purely Christian as possible. But however mixed it might remain, they urge Christians to revitalize American society by working politically and legally to renew, perfect, and sustain the "Christian base" that was part of America's traditional civil religion.
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> On the other side are Christians who perceive America's traditional civil religion to be a synthesis of Christian and non-Christian influences. They believe that there is a fundamental difference between biblical norms and values and the received norms and values of Western culture, particularly as they were given expression by the Enlightenment. They believe mixing such norms and values, as is done in American civil religion, subverts truly Christian (biblical) public action. They urge Christians to acknowledge the fundamental difference between biblical norms and the pervasive public philosophy of America's founding, and to work toward truly biblically based public and political service.

Id. at 22, 25-26 (footnotes omitted).

94. *See, e.g.*, W. STANMEYER, *supra* note 90, at 51.

that is in practice largely passive—to protect and defend the Christian faith, the restorationist position on freedom of expression, church autonomy and official discrimination on religious bases is different from the four other types. Restorationists would generally protect the religious speech and press of all persuasions. However, they would restrain speech which slanders Christianity in particularly egregious circumstances, as in prosecution for blasphemy. Under their model, government, when it exercises its considerable powers of expression, would show benevolence toward the Christian faith. For example, the prayers of a legislative chaplain might well be overtly Christian in content. Official endorsement of the majority faith might also occur through enforcement of the Sabbath and government holidays coinciding with Christian holy days.

Churches and other religious organizations obviously would have institutional rights under the restorationist view. Restorationists regard official favor of Christianity as a very different matter from governmental interference in church affairs. They insist that churches govern themselves and control their own internal affairs. It is true that symbiosis between the state and Christianity would lead to numerous interactions between the state and Christian churches, and that such interaction would lead to some entanglement. Indeed, occasional friction is inevitable. Restorationists believe, however, that such friction can be held to a tolerable level.

Because restorationists envision a minimalist state, they do not contemplate a state that discriminates among religions in dispensing state aid, tax benefits or other governmental favors. Restorationists do not believe that government has an affirmative role in domestic matters such as social welfare.[95] Thus, discrimination in state aid would ordinarily not arise as an issue.

Finally, restorationists join all other groups in protecting to a high degree religious-based conscience, albeit out of a different rationale. Those who are not Christian are regarded as minority religions or dissenters. Dissenters would have full rights of conscience under the free exercise clause, even though there would

95. Consider H. TITUS, EDUCATION—CAESAR'S OR GOD'S: A CONSTITUTIONAL QUESTION OF JURISDICTION (1985), advancing the thesis that education is not within the jurisdiction of the state and thus "public education and other government regulations of education constitute clear violations of the First Amendment." *Id.* at 7. Rather, Titus believes, when we separate church from state as the establishment clause requires, education belongs exclusively "to the family, the church, and God." *Id.* at 6.

be no separation of church and state under the establishment clause as contemplated by the three separationist types. Thus, utilizing the three elements of our definition of religious liberty,[96] restorationists would grant to everyone full juridical rights for religious-based conscience. At the same time, restorationists would have the relationship between church and state be a *de jure* approbation of Christianity. Surely, they point out, there can be full rights of conscience even when there is one established religion, as in England,[97] Scotland, and Scandinavia. That being so, restorationists contend that their model is even less radical than that which exists elsewhere in the West. They urge no established national church; only official, if passive, benevolence toward the Christian faith.[98]

Although the separationist types often accuse them of intolerance, restorationists have no intention of engaging in religious persecution in the sense of coercion of conscience. They recognize that conversion to Christianity, if it is to be sincere, must be wholly voluntary. Accordingly, the state should prefer the Christian faith, which they believe would subtly encourage conversion, while refraining from acts of intolerance toward dissenters.

VIII. Conclusion

Each model in this five-part typology has a different theoretical conception of what the state ought to be, ranging from wholly secular to unabashedly confessional of historic Christianity. In the area of ecclesiology, however, the five types are in greater accord. Only strict separationists regard the church as a voluntarily association having no religious liberty apart from the free exercise rights of individual members. Predictably, this latter two-way split in church-state theory is the source of considerable litigation today, as proponents of these various types carry the struggle concerning church autonomy into the courts.

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96. *See supra* text accompanying notes 11-17.

97. For an interesting account of the present status of the established church in England, see Barker, *The British Right to Discriminate,* Transaction: Soc. Sci. & Modern Soc'y, May/June 1984, at 35.

98. One author refers to America's established religion of an earlier era as "pan-Protestant Christianity." W. Stanmeyer, *supra* note 90, at 1. Another speaks of a lost "Christian Reformation base." F. Shaeffer, *supra* note 90, at 110, 249. Still another hinges the nation's founding on a "Judeo-Christian base." J. Whitehead, *supra* note 90, at 32.

The docket of cases litigating the question of governmental interference in religious affairs is continuously growing.[99]

It remains to be noted which theory in our social typology accords most nearly with the present state of first amendment doctrine in the courts. If one measures by results rather than rationale, since the seminal case of *Everson v. Board of Educa-*

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99. Kelley, *Frontier Issues of Religious Liberty*, REP. FROM CAPITAL, May 1985, at 10-11, lists fifteen different types of cases involving governmental interference in church-related ministries:

1. In intradenominational disputes, courts effectively treating hierarchical and connectional denominations as if their polity was congregational, resulting in local congregations breaking away and taking church real estate with them.

2. The Internal Revenue Service defining the "integrated auxiliaries" of a church in such a way as to exclude church-related colleges and children's homes as not being "exclusively religious," even if the church considers them integral to its mission.

3. Designation of church buildings as "historic landmarks" so as to impose duties of maintenance without regard to the church's mission or financial ability to pay for repairs.

4. Imposition of liability on the larger denomination for torts of a local congregation despite absence of right to control actions of the local body.

5. Refusal to honor the claims of testimonial privilege that arises in the course of pastoral counseling.

6. Charitable solicitation regulations that do not exempt religious organizations.

7. Requirements that churches register as lobbyists and report their activities and expenditures to the state legislature.

8. Regulation of church-related day schools, in some instances going beyond legitimate health and safety concerns.

9. Siding with dissident church members by placing a church into receivership pending investigation of charges by dissidents that church assets were being misspent.

10. A court's refusal to dismiss suit by a private organization to remove the tax-exempt status of the Roman Catholic Church for opposing pro-abortion candidates for political office.

11. A court's refusal to dismiss suit by nuns who sued their bishop for discharging them from teaching positions in a parochial school.

12. A court's refusal to dismiss suit by a former church member who sued the church and its bishop for ordering discipline for infraction of church rules.

13. A court's refusal to dismiss suit by church members who sued their bishop for relocating the altar as directed by the liturgical reforms of the Vatican Council.

14. The courts' refusal to dismiss suits by past members of new religious movements ("cults") for a variety of alleged torts, including fraud, outrageous conduct and intentional infliction of emotional distress.

15. A court's refusal to order dismissal of suit by parents of young man against church and its pastor for alleged clergy malpractice in counseling their son, who committed suicide.

For collections of papers presented at two conferences on this general topic of church autonomy, see GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS II (D. Kelley ed. 1986); GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS (D. Kelley ed. 1982).

tion,[100] the Supreme Court's direction generally follows the views of pluralistic separationists: church and state are separate, but not hostile; religious speech is protected on a parity with other speech; and religious-based conscience is substantially accommodated. To be sure, some cases, such as *Mueller v. Allen,*[101] *Lynch v. Donnelly*[102] and *Marsh v. Chambers,*[103] are notable exceptions to the views of our second type. But these cases are just that: exceptions to prevailing Supreme Court doctrine. Moreover, since the choice of any one of the five types to the exclusion of the other four implicates both one's theology and one's political theory, it should come as no surprise that those most critical of the Supreme Court stand outside the pluralistic separationist tradition.

Given these two complex realities, church and state, a continuous dialogue must proceed to enable adjustments in their interrelationship, in order to cope with changing realities. The dialectic is often disharmonious and consists of denials and affirmations, charges and recriminations, reconstructions and compromises. Neither church nor state will achieve a final resting place that does not provoke a new rejoinder. Yet it is possible to discern some order in this multiplicity: to stop the dialogue, as it were, and name and describe the major players at the present, and to do so with subtlety and fairness. Such has been the motivation of this essay, combined with the hope that a fresh vocabulary will channel the future dialogue in ways that are constructive without being overly confining. Moreover, as we begin to understand others, we will understand better the presuppositions that we ourselves bring to the debate.

Overconfident assertions concerning sensitive and complicated matters are dangerous, especially when they concern as ancient a problem as church-state relations. No doubt some will feel slighted because their views are omitted. Others will be disturbed, believing their position is not accurately portrayed. They are invited to join this endeavor and propose needed adjust-

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100. 330 U.S. 1 (1947). This case is often cited as the beginning of the Supreme Court's modern jurisprudence concerning the first amendment and religious liberty. Prior to *Everson* the Court had passed on only a handful of matters touching religion.

101. 463 U.S. 388 (1983) (upholding Minnesota tax deduction for tuition paid by parents of parochial school children).

102. 465 U.S. 668, (1984) (upholding annual display in city park of Christmas creche or nativity scene).

103. 463 U.S. 783 (1983) (upholding Nebraska legislature's practice of beginning each day with a prayer by a government-paid chaplain).

ments. We need only agree at the outset that a vocabulary is required so that citizens who care deeply about religion in America are equipped to talk with one another with less heat and more light.