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Religion and a Neutral State: Imperative or Impossibility?

Carl H. Esbeck
University of Missouri School of Law, esbeckc@missouri.edu

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CARL H. ESBECK†

The proper relationship between church and state has long been a vexing problem. Tension between the two is indigenous in the very nature of these institutions: the state making powerful claims on its citizens and the church asking uncompromised loyalty of the same individuals who are religious adherents. This dual citizenship suggests that there is an area of overlapping jurisdiction by church and state. The church has a sphere of influence in which it is autonomous and operates unhindered by the state. The state, too, has a sphere of responsibility in which it attends to its temporal or secular duties in a manner impartial toward the many competing religions. To complete the illustration, the two spheres interlock signifying an area of shared jurisdiction over certain matters within society, although they differ in their role regarding the shaping and enforcing of society's choices in the area of overlap.[1]

Apportionment between these three areas—the autonomous church, the secular state, and the area of concurrent jurisdiction—is one of the enduring issues of public debate. Recently there has been the claim, originating from a theological base, that the state can be neither neutral nor neglectful about values of first order, such as the nature of mankind and the purpose of life. The argument begins with the premise that God is sovereign over all of life. To those who acknowledge this sovereignty, it is asserted that there can be no separation between man's religion and the other areas of life, including political and legal matters. A person's religious presuppositions travel with him wherever he is whatever he is doing in life. This total unity, it is said, exists not only within each individual but also at corporate levels, including government institutions. Government cannot

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† Associate Professor of Law, University of Missouri-Columbia; B.S., 1971, Iowa State University; J.D., 1974, Cornell University.

[1] Abraham Kuyper's doctrine of sphere sovereignty uses a similar illustration to explain the authority of the state, church, family, and other institutions. A. KUYPER, LECTURERS ON CALVINISM 78-109 (1931).

be dualistic, for it too holds a *Weltanschauung* or worldview. The deduction follows that state neutrality is not only impossible and thus a myth, but worse, it is a ploy calculated to use the state as an instrument for advancing philosophies that are antithetical to Christianity. In short, the argument concludes, either the state favors Christianity or it favors an opposing philosophy. There is no neutral ground.

This myth-of-neutrality assertion requires examination, for if its proponents are correct there can be no separation of church and state as it presently exists in America. Rather, in this view the state can only cling to the existing orthodoxy or reject it and embrace a new world view. The current cultural pluralism is cited as evidence of the American state in the very throes of such a transition.

The thesis of this Article is that the myth-of-neutrality argument is partially right and partially wrong. For reasons of religious liberty, the state can and should avoid any involvement with matters of religious worship, and the propagation or inculcation of matters that comprise the very heart of one's belief concerning the nature and destiny of mankind. Conversely, the state cannot retreat from the regulation of certain conduct which is arguably immoral and still claim its neutrality concerning the rightness of the conduct. The very decision by the state to withdraw its regulation, leaving the morality of the conduct up to each individual, is a value-ladened choice. In sum, the state cannot be neutral on moral issues, but it can and should be neutral on questions central to religious faith.

RELIGIOUS LIBERTY AND THE FIRST AMENDMENT

Having framed the particular issue that is the subject of this paper, the myth-of-neutrality argument is best discussed in an expanded context. The larger task of this Article is to define the proper juridical relationship between church and state. In short, the charge is to postulate what the law "ought to be," or perhaps what was intended at certain formative moments in American history. It is useful to approach this task by beginning with what the law "is," and then to discern points, if any, where the reality of what "is" and what "ought to be" are at variance.

The current case law of the federal courts concerning religion and the first amendment can usefully be classified into three areas:

(1) Freedom of religious expression and association, presently addressed in the courts under the speech, press, assembly and petition clauses.
(2) Government's respect for religiously based conscience (herein of the right to religious toleration and conscientious objection), presently addressed in the courts under the free exercise clause.
(3) The appropriate relationship between church and state (popularly known as the separation of church and state), presently addressed in the courts under the establishment clause. The word "church" is understood to embrace all parachurch and other religious organizations.

These three—freedom of religious expression, respect for conscience, and separation of church and state—in sum comprise religious liberty, at least liberty from oppressive government as distinct from wholly private offenses.

FREEDOM OF RELIGIOUS EXPRESSION

A frequently forgotten aspect of any analytical task is to identify areas which are not part of the controversy. At the juridical level, two of the three subdividions of first amendment religious liberty, namely, freedom of religious expression and respect for conscience, are not in serious disarray in American law. Freedom of religious expression, indeed, all speech and press regardless of its content, is protected constitutionally to a very high degree. So long as religious expression is protected at the same high level as is expression of philosophical, political, economic or artistic content, there need be no fear for the legal rights of religious adherents of all persuasions to believe,[2] speak,[3] pub-

[2] For cases concerning the freedom of religious belief, see Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (sustaining suit by Jehovah's Witness challenging requirement that motor vehicle license plate bear motto "Live Free or Die" as freedom of thought including "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 basic in a society of free men."); Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compulsory flag salute and pledge of allegiance invades the "sphere of intellect and spirit").

[3] For cases concerning the freedom of religious speech, see Widmar v. Vincent, 454 U.S. 263 (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 loudspeaker in park by Jehovah's Witness);

lish,[4] assemble,[5] and associate relative to matters of faith.

This is not to suggest that the current law of religious expression is perfectly as it ought to be.[6] The fact that three federal

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 of opinion"). *Cf.* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (upholding restrictions on the selling, exhibiting, and distributing 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, 572 (1942) (conviction of Jehovah's Witness upheld for violating law against "fighting words" which did not unreasonably impinge upon the "privilege of free speech").

[4] For cases concerning the freedom of religious press, see Marsh v. Alabama, 326 U.S. 501, 509 (1946) (trespass conviction of Jehovah's Witness for distribution of literature in company-owned town reversed because of "freedom of press and religion"); 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 under national defense power); 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 "freedom of religion"); Murdock v. Pennsylvania, 319 U.S. 105, 115 (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 "freedom of press, freedom of speech, freedom of religion"); Martin v. Struthers, 319 U.S. 141, 149 (1943) (reversing conviction of Jehovah's Witness who violated city ordinance concerning door-to-door solicitation and distribution of handbills as invalid denial of "freedom of speech and press"); 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 religion, of the press and of speech"); Jamison v. Texas, 318 U.S. 413, 414 (1943) (ordinance restricting distribution of handbills bearing religious message on city street is restraint on "freedom of press and of 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).

[5] For cases concerning the freedom of religious assembly, see Fowler v. Rhode Island, 345 U.S. 67 (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 park without a license; petitioner had failed to pursue remedy through local court action); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (upholding conviction of group of Jehovah's Witnesses who paraded without required permit because the law regulated the "time, place and manner of parade so as to conserve the public convenience").

[6] The Supreme Court has said that the establishment clause was designed to avoid situations which caused political division along religious lines. *See* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). Since Widmar v. Vincent, 454 U.S. 263 (1981), accorded full protection of the free speech clause to religious speech, surely it is only a matter of time before the Court acknowledges this error and never again confuses separation with silencing religious expression. *See also* Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (political divisiveness alone cannot invalidate otherwise permissible church-state contact). In *Lynch*, Justice O'Connor, concurring, stated that "the constitutional inquiry should focus ulti-

circuit courts have denied student-initiated high school groups authority to voluntarily meet in classrooms to discuss religious matters before or after school hours[7] is shamefully discriminatory when science or literary student clubs are permitted. Governmental discrimination against religious expression remains isolated, however, and there is cause to hope that this invidious treatment will be corrected in the courts and by the Equal Access Act recently passed by Congress.[8]

When it is said that religious expression is not controversial, one must be certain to distinguish between the juridical and the prudential. Here we speak juridically only. Although the first amendment amply insures religious speech and association, that does not mean that every use of the legal right is prudent. For example, one may think it unwise for a minister, acting in his personal capacity, to endorse a candidate during a partisan election, even though it is a cleric's legal right to do so.[9]

One of the interesting developments in the religious landscape is that many churches which earlier separated themselves from American public life have now awakened to a call to be stewards of culture, science, environment, education, law, and even politics and government. A single-minded concern for private virtue has been supplanted by an increasing penetration into matters of civic virtue and the struggle for a more just world. Many churches are no longer willing to silence themselves. This shedding of extreme pietistic beliefs which caused privatization of faith and withdrawal from culture has been politically controversial. But emphatically it is not unconstitutional. A church separated from the state need not be a silent church.

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mately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." *See generally* McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866-67; Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court is Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

[7] *See* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3406 (U.S. Nov. 27, 1984) (No. 84-773); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 680 F.2d 424 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983); Brandon v. Guilderland Cent. School Dist., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). *Accord* Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).

[8] The Equal Access Act was enacted as an amendment to the Education for Economic Security Act, Pub. L. 98-377, 98 Stat. 1267 (1984).

[9] Professor George M. Marsden has some helpful suggestions on how religious adherents may prudently carry their faith into the political arena. M. NOLL, N. HATCH & G. MARSDEN, THE SEARCH FOR CHRISTIAN AMERICA 134-40 (1983).

FREEDOM OF CONSCIENCE

Likewise, governmental respect for individual conscience grounded in religious belief is accorded high protection under the free exercise clause. When a religious belief is sincerely held[10] and places an individual in the "cruel choice" of either obeying his religious convictions or the state's mandates in positive law,[11] the courts have held that the law must give way and exempt the religious devotee. Only when the government's interests are compelling may the state subordinate human conscience.[12]

To be sure, the constitutional protection of conscience under the free exercise clause is not all it ought to be either. In a few recent cases, the United States Supreme Court has been seemingly guided more by expedience than principle in discovering reasons of state which are deemed of such exigency as to push aside conscience.[13] Here too, however, one does not see in America evidence of a widespread intolerance to religious practices being sanctioned by the courts (licensing of fundamentalist schools in a few states and home education by parents excepted).

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[10] Some evidence of sincerity is required lest a claim of religious free exercise become a ready excuse for avoiding many unwanted obligations to the state. Nevertheless, the sincerity requirement involves a necessarily truncated inquiry because of the injunction against a civil court testing one's faith. United States v. Ballard, 322 U.S. 78 (1944). Read literally, the Supreme Court has said that only claims which are "so bizarre, so clearly nonreligious in motivation" should not be given credence under the free exercise clause. Thomas v. Review Bd., 450 U.S. 707, 714-15 (1981). Stated differently, sincerity is not so much a test of what the claimant believes, but whether he really believes it—a "fervency test."

[11] As a threshold inquiry in every free exercise case, the claimant must show that there is an infringement or burden on his religiously motivated activities—the coercion requirement. Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (a free exercise claim must be predicated on coercion whereas the establishment clause has no such requirement). The Supreme Court's coercion or "cruel choice" test is as follows:

> Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or 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.

Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981).

[12] The governmental interest must arise from some substantial threat to public health, safety, peace, or order. *See* Wisconsin v. Yoder, 406 U.S. 205, 221-29, 235-36 (1972); Gillette v. United States, 401 U.S. 437, 462 (1971).

[13] *See* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (upholding loss of tax exemption for racially discriminatory religious schools); United States v. Lee, 455 U.S. 252 (1982) (upholding social security payments required of Amish employer).

TWO COMMON MISCONCEPTIONS

The third subdivision of first amendment religious liberty is the establishment clause which embraces the concept of the separation of church and state. Here the controversy is full-blown at the juridical level, and there is little common ground even among churches on what the law ought to be. The matter should be approached by first clearing away the underbrush of widely held misconceptions. The first misconception is the simplistic idea that the free exercise clause is pro-religion and the establishment clause is anti-religion. To follow this notion would in effect cause these two clauses to be at war with one another in every first amendment case. The judicial task, then, would be to determine if the establishment clause eclipses free exercise, in which case the anti-religious forces prevail; or, to determine if the free exercise clause prevails over establishment theory producing a win for religion. This line of reasoning is flawed, for it presumes that the first Congress, which drafted the first amendment in 1789, placed two phrases side by side, each contradicting the other. It would be as if the same statesmen had written, "Congress shall make no law . . . abridging the freedom of the press, but Congress may censor all newspapers for reasons it deems sufficient." The proposition of an intentional, built-in contradiction is so preposterous as to suggest its improbability.[14]

The manner of reconciling the free exercise and establishment clauses is clear. Both clauses advance religious liberty. The free exercise clause protects the religiously informed conscience. Concomitantly, the establishment clause mediates the relationship between the two institutions of church and state. The nature of that relationship is for the mutual benefit of both. That is, religious liberty is served when the establishment clause protects civil government from overreaching by dominant religious organizations that seek to use the offices of state to advance their religious causes. Reciprocally, the establishment clause protects churches from intermeddling by the state and undue entanglement with its army of administrators and their battery of regulations.[15]

Refreshingly, the Supreme Court has not been confused

[14] *See infra* note 48 (additional discussion of why the two religion clauses are not contradictory).

[15] This point is more fully developed in Esbeck, *Establishment Clause Limits On Governmental Interference With Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984).

about this matter, for the second and third parts of the establishment clause test require that government action not have the effect of advancing or inhibiting religion (note the reciprocity), and that such action must not lead to excessive entanglement between the two. In short, some separation of church and state, properly understood, is protective of churches as well as the state, and thus advances the liberty of believer and nonbeliever alike.

The second misconception concerning the establishment clause, one of the enduring fictions of first amendment law and American historical lore, is that the matter of separation of church and state was settled at the time the Constitution was adopted and the first amendment ratified (1789-1791). Hence, there are repeated appeals to the intent of the Framers or the Founding Fathers. That notion may have a vestige of credence if one is referring to religious liberty vis-à-vis the federal government. The first amendment, however, was not applicable to state and local governments until the mid-twentieth century. The Bill of Rights initially applied only to the national government.[16] It was not until the 1940s and 1950s, through the Warren Court's selective incorporation of the Bill of Rights, that the first amendment was made applicable to state and local governments.[17]

Since the first amendment had little to do with the separation of church and state until this century, it should be asked just when and why America embarked upon this unique experiment. It was indeed an experiment, for the American colonies were the first to separate church and state. The development took place differently in each of the colonies and spanned a hundred year period. Rhode Island, Delaware, Pennsylvania, and New Jersey never had established churches, although certain religions were favored in their laws. In a well-known struggle, Virginia disestablished the Anglican Church in 1786, but the Old Dominion had been preceded by disestablishments in North Carolina (1776), New York (1777), and Vermont (1779). The Puritan's Congregational Church was not affected by the Revolutionary War and did not yield to disestablishment until

[16] Permoli v. First Municipality, 44 U.S. (3 How.) 589, 590 (1844); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[17] The free exercise clause was incorporated into the due process clause of the fourteenth amendment and made applicable to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940), and the establishment clause was made applicable to the states in Everson v. Board of Educ., 330 U.S. 1 (1947).

1818 in Connecticut, and finally in 1833 in Massachusetts.[18]

For present purposes, it is sufficient to note that the separation of church and state was a state law development resulting from changing local attitudes. It was not a juridical development from the top down as would have been the case if the first amendment had required it of the entire nation beginning in 1791.[19] Thus, until *Everson v. Board of Education*[20] in 1947, the separation of church and state was almost entirely a matter of state constitutional law.

This is pointed out not to suggest unhappiness with the liberties taken with judicial review by the Warren Court. Rather, the effort is to be wholly candid about what the courts and lawyers are doing—namely, reading substantive values into the establishment clause which were not placed there by its authors in the First Congress.[21]

THREE VIEWS ON SEPARATION

Returning to the myth-of-neutrality assertion, it is a helpful generalization to classify those active in church-state litigation into three schools of thought. First, there are those who argue

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[18] A. STOKES, CHURCH AND STATE IN THE UNITED STATES 151-69, 358-446 (1950). *See* S. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 16-54 (1963). *See generally* R. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES (2d ed. 1984); W. SWEET, RELIGION IN COLONIAL AMERICA (1942); S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902).

[19] E.F. HUMPHREY, NATIONALISM AND RELIGION IN AMERICA 1774-1789, at 361, 489-99 (1965).

[20] 330 U.S. 1 (1947) (5-4 decision upholding the reimbursement to parents of fares paid for transportation of their children to parochial schools).

[21] In 1789 the First Congress debated several amendments to the Constitution introduced by James Madison. Twelve numbered articles were eventually passed and proposed to the states for ratification. The first two proposed articles failed, but the remaining ten were ratified by 1791, including the third article, now renumbered as the first amendment with its establishment and free exercise clauses. R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 at 200-17 (1955).

The dominant view in the First Congress, which emerges from the debates and conferences, is that the establishment clause was to accomplish two purposes. First, the clause worked to prevent the national government from establishing any one church or providing aid or preferential treatment to a particular denomination. Second, the clause was to account for the concerns of federalism so dominant during this period by reserving to the states the authority to deal with established churches and the matter of religion as they saw fit. This resolution was expedient because the thorny matter of religion was left to each state to resolve on its own. Moreover, the national government as conceived was to be quite limited in its powers to act in such domestic matters. *See* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 15 (1982); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 16 (1978).

for the increased privatization of religious beliefs, harboring a conviction that theistic religion is largely irrelevant, even dysfunctional, in matters of public discourse. Out of reasons of conscience, of course, the religious beliefs of individuals should be tolerated so long as those beliefs are not brought to bear in any serious way on public policy and matters of state. This group shall be referred to as "secularists."

A second group is made up of "institutional-separationists"[22] who for the most part desire a benign or benevolent separation of church and state. Although a few adjustments in rhetoric, rationale, and result would be made, institutional-separationists generally subscribe to the position of the United States Supreme Court from *Everson v. Board of Education*[23] in 1947 to *Larkin v. Grendel's Den*[24] decided in 1982. Churches descendant of Anabaptists are most often institutional-separationists today, and the mainline Protestant churches generally have been persuaded to this view. The historical position of Baptists is institutional-separatistic.

Finally, a third group argues for a closer, organic relationship between church and state, wherein the government has a proper role in preserving the unity and integrity of the Christian faith. Like the secularists and institutional-separationists, this third group would stop short of utilizing the coercive power of the state to deny rights of conscience to religious dissenters and nonbelievers. Short of coercion, however, this third group envisions a state that would side with and foster "true religion." No doubt, it is implicit within this school of thought that the state is wise enough to select this group's particular religion as the "true religion."[25] Adherents of conservative Calvinism populate this third group, as well as many holding the classical Ro-

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[22] The term institutional-separationists is used here only to describe commonality on the desired relationship between church and state. Within this broad category are varying beliefs concerning the appropriateness of separation from all of modern society. Some institutional-separationists are quite monastic, while others aggresively engage culture and seek to reform society.

[23] 330 U.S. 1 (1947).

[24] 103 S. Ct. 505 (1982) (statute vesting in churches the power to prevent issuance of liquor license for premises within 500 feet violates establishment clause).

[25] Many in this third group would argue that the state has already selected historic Christianity as the "true religion." America's origin as a "Christian nation" or "Covenant nation" is advanced by them as a prior appropriation by Christianity on the American government. Accordingly, the state need not be competent to repeatedly select Christianity as the "true religion." Rather, in their view, the task is to return the state back to its Christian roots. Of course, the origin of America as a Christian nation is sharply debated by historians. *See infra* note 35 and accompanying text.

man Catholic position.[26] The literature has left this final group unnamed, at least in any satisfactory manner. Because this group believes that a state, to be legitimate, must acknowledge that its authority to govern is from God, this third category shall be designated the "theocentric" position.[27] Theocentrists are not theocratic, which would be a complete melding of church and state. Nevertheless, theocentrists do charge the state with certain covenant obligations to God which for them supersede the republic's contract to follow the will of the majority.

Under severe financial pressures to fund their ministries, particularly schools, a moderate strain of theocentrists has proposed that the state support all religions impartially, Christian and otherwise. This not only affords a more attractive package for presentation in the political arena, but it keeps the state out of the thorny business of choosing among competing faiths for the one "true religion." Still, the state advances religion over nonbelief and remains theocentric in that it is accountable to an ambigious God-in-general, an all-purpose generic god.

The myth-of-neutrality argument appears most prominently in the literature of the theocentrists, both the moderate strain and those unabashedly pro-Christian. Moreover, the efforts of the theocentrists in the courts and legislatures on church-state issues are often opposed by the combined efforts of the institutional-separationists, for theological reasons, and by the secularists, because of their view on the disutility of theistic religion.

The issue to be determined is whether the concept of a neutral state is realizable and imperative for reasons of religious liberty, or is it an impossibility and a subterfuge promulgated by some secularists to further their own ideology and social

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[26] John Courtney Murray states the traditional Roman Catholic view in conciliatory tones. Father Murray says that Catholics accede to the separation of church and state as a practical solution to the problem put by the American plurality of conflicting religions within one body politic. However, Catholics do not assent to the deeper theological principles imputed to the no-establishement provision by institutional-separationists. J. MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 55-77 (1964). Accordingly, in the Catholic view a change in circumstances may call for a corresponding adjustment in church-state relations.

The Vatican II Council's approval of the "Declaration of Religious Liberty" portends a significant shift from the traditional Roman Catholic position. *See* A. CARRILLO DE ALBORNOZ, RELIGIOUS LIBERTY (1967).

[27] These three groupings—secularists, institutional-separationists, and theocentrists—like all helpful classifications are generalities which necessarily obscure subtle differences. The many varied beliefs held by Americans would comprise not three distinct groups but a spectrum advancing unbroken through all three of these classifications.

agenda. That ought to prompt the more pointed inquiry concerning exactly what the state is to be neutral about. The secularists, institutional-separationists, and theocentrists have responded quite differently to that inquiry depending on whether the subject matter was (1) personal virtue and morality, or (2) religious worship, propagation, and inculcation. The secularists would insist on state neutrality as to both matters,[28] while theocentrists claim the impossibility of neutrality as to either. The institutional-separationists, however, argue for state neutrality only concerning religious worship, propagation, and inculcation.[29] On matters of virtue and morality, many institutional-separationists have long been active in urging state prohibition of vices, thus non-neutrality, such as gambling, alcoholism, drug abuse, prostitution, pornography, and the like. (A few institutional-separatist groups, notably the "peace churches," have even resisted use of the coercive power of law to prohibit immoral behavior damaging to community.)

Is the institutional-separationists' position defensible in any principled way? Can a line be drawn which insists on state neutrality as to religious worship, propagation, and inculcation, while seeking to use the force of civil law to encourage and compel, if need be, their understanding of proper moral behavior? The institutional-separationists have responded "yes" to this challenge, and their apologia appears formidable.

RESPONSE TO THE SECULARISTS

The institutional-separationists reject the secularists' position that Christian moral claims (and those of other religions) should be a matter for one's personal conduct only, not that of the political community. A state may and often does legislate concerning morality, whether it be against graft, racism, child abuse, incest, or stewardship of the environment. Freedom of choice to do what is morally wrong cannot be justified in the same way as freedom to do what is morally right. The secularists have adopted the Enlightenment's mistaken view concerning the freedom of conscience. From the agreed upon premise

[28] Many secularists do emphasize some program of political or social ethics, including order in relations between nations. However, they all assail state involvement in personal morality, typically under the headings of "privacy" and "freedom of choice."

[29] Institutional-separationists do not confine their theological concept of religion to worship, propagation, and inculcation of the faith. Rather, their point is that for purposes of the establishment clause the word religion should be understood as applying only to this narrow range of activities. *See infra* note 47.

that all people have equal dignity, many secularists have erroneously reasoned that all persons' ethical views are of equal validity. This misunderstanding is due to a one-sided view of humanity which enthrones free will in human action. The new moral norm becomes, simply, to do your own thing and try to hurt as few people as possible in the course of doing so. Secularists have often ignored the ill effects that individual action may have on the entire society. The notion that what consenting adults do in private has no detrimental social effect is a fiction, for when enough consenting adults harm themselves the result is a social problem regardless of whether consent was involved. When it comes to personal conduct, many secularists have doubted the validity of truth or the possibility of perceiving it and have embraced a situational morality.[30] Once truth is denied, these secularists are without fixed standards to make judgments concerning the acts of others. Where there are no sure norms, there can be no law. Thus, the secularists argue, the state must be morally neutral. In contrast, traditional religions hold that truth exists, is knowable, and does not change. Therefore, the acts of people can be judged morally wrong.

The implementation of religiously based morality through positive law may be sought by believers and churches through persuasion and consensus with others. If legislation is desirable, it is to be pursued by ample use of the legally protected rights of religious expression and association. It makes little sense for the secularists to concede to religious adherents the freedom of speech, and then to argue that the separation of church and state is violated when religious adherents win the debate by the enactment of moral codes consistent with their religious views. Separation of church and state does not disqualify the government from legislating against immorality simply because the moral principles concerned were derived from religious presuppositions.[31] If the hope is to defeat legislation based on traditional religious values, the secularists will have to proceed by the same means: speech, persuasion, and consensus. There need be no neutral state on matters of virtue and morality by reason of the establishment clause. The clause separates church and

[30] Hartman, *The Principles on which 'Religionsfreiheit' is Based in Catholic Theology*, 13 ECUMENICAL REV. 429 (1961).

[31] If there could be any doubt concerning the matter, the Supreme Court in Harris v. McRae, 448 U.S. 297, 319-20 (1980) (upholding the Hyde Amendment), held that the principle of church-state separation was not violated when legislation was adopted which was consistent with the doctrine of some churches.

state, not the religious believer from the state. The latter is possible only by death or exile.[32]

To be sure, not all morality should be codified into positive law. Any political effort must avoid a new moralism backed up by a coercive legalism. In addition to fundamental rights other than religious liberty, there are limits on what legal processes can accomplish, and the civil and criminal law should be called upon only to restrain acts when harmful or disorderly consequences emerge in the community.[33]

A THEOCENTRIC STATE OR A SECULAR STATE?

What credence must be afforded the theocentric position that it is impossible for the state to be neutral on matters of religious worship, propagation, or inculcation? This is the crux of the matter dividing the religious community. The choice is between a theocentric state or a secular state. Many institutional-separationists and theocentrists alike desire to live God-centered lives and to dwell in and work for a theocentric society, but it is quite another matter to insist on a theocentric state. For reasons of religious liberty, institutional-separationists desire a secular state, meaning that the government's authority to rule comes in the first instance from the people holding citizenship, not from God.

The institutional-separationists' arguments, which commend state neutrality on core religious matters, entail both pragmatic considerations and reasons of principle. At the practical level, America is at present a religiously diverse nation.[34] Given our republican form of government, federal, state, and most local governments cannot hope to represent the desires of their multi-religious and non-religious citizens and still openly favor Chris-

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[32] *See* F. Canavan, *The Pluralist Game*, 44 LAW & CONTEMP. PROB. 23 (1981).

[33] For discussions concerning the limits on what law can accomplish, see Mooney, *Public Morality and Law*, 1 J. LAW & RELIGION 45 (1983); Boyle, *A Catholic Perspective on Morality and the Law*, 1 J. OF LAW & RELIGION 227 (1983); Esbeck, *The Limits on Law in Fostering Values and Directing Moral Choice*, 4 C.L.S. Q. 26 (1983). *See generally* J. ANDERSON, MORALITY, LAW AND GRACE (1972); P. DEVLIN, THE ENFORCEMENT OF MORALS (1970).

[34] There are "more than 600 unconventional alternative religious bodies" and nearly 800 major Christian denominations competing for the allegiance of Americans. J. MILTON & R. MOORE, THE CULT EXPERIENCE: RESPONDING TO THE NEW RELIGIOUS PLURALISM 7 (1982). The Yearbook of American and Canadian Churches (1983), lists 339,053 denominations with membership of over 138 million representing 59.7% of the United States population. Churches and Church Membership in the United States (Nat'l Council of Churches of Christ, 1980), lists 231,208 denominations with membership of over 112 million representing 49.7% of the population.

tianity, even least-common-denominator Christianity. Whatever one's interpretation of history concerning the "Christian America" debate,[35] the stark reality of the present is that only a slim majority of Americans polled are among those on church membership rolls. The polls also show that not all those who are "churched" are Christian and even those that identify with Christanity cannot agree on the theological implications of the scriptures. Of necessity, the state must be neutral concerning confessional and creedal differences.

"All of that is not true," say some in the theocentric group, or, if it is for the present, the situation can be turned around, perhaps with the aid of a state more supportive of Christianity. However, even if a theocentric state became possible at some future time, the pragmatic objection is secondary. At the very foundation of the disagreement between institutional-separationists and theocentrists concerning the proper role of the state are differences in theological presuppositions. Not only do these groups disagree on their theology of the state, they also view differently the nature and role of the church. Accordingly, they necessarily differ on how church and state should relate to one another.

PERSUASION NOT PRIVILEGE

The institutional-separationists' arguments from theology which counter the myth-of-neutrality assertion are fourfold. First, beginning with the Reformation there has slowly evolved a definition of religion which presupposes voluntary adherence, not coercion, with a zone of personal spiritual autonomy withdrawn from the reach of any civil authority. In Christian theology, mankind is given free will concerning the claims of God on individual lives, including the possibility of choosing unbelief and disobedience. Deity is understood to be a personal God desiring fellowship and communion with people.[36] If God forced that relationship rather than drawing individuals to Himself, the objects of His favor would be changed into a kind of impersonal machinery, mere automatons.[37] By the very nature of religion, churches are left to attract members by force of

[35] *Compare* M. NOLL, N. HATCH & G. MARSDEN, THE SEARCH FOR CHRISTIAN AMERICA (1983) *with* J. WHITEHEAD, THE SECOND AMERICAN REVOLUTION (1982).

[36] *See* A. CARRILLO DE ALBORNOZ, THE BASIS OF RELIGIOUS LIBERTY 74 (1963); Wilder, *Eleuthoria in the New Testament and Religious Liberty*, 13 ECUMENICAL REV. 411-14 (1961).

[37] Søe, *The Theological Basis of Religious Liberty*, 10 ECUMENICAL REV. 40-41 (1958).

persuasion and the appeal of their doctrine, not by privilege and the imprimatur of state. Most certainly, then, the state cannot become the agent for achieving sectarian preservation and propagation.

The Danish theologian, Niels H. Søe draws this illustration from his country's folklore. It is told that a man won a lady's love by means of a magic charm. In winning her she was changed and was no longer what the man loved. Hence the winning was a bitter disappointment, for the man had possession of his lady's body but not her heart. As Søe concludes: "Love is inseparable from respect of the other's personality. Divine love, strange as it may seem, is not different in this sense. God wants communion with man. And therefore wills that man remain man, a personal, responsible being."[38]

THE LIMITED STATE

A second, correlative principle is that religious liberty is not a gift of the state. The state is limited in its authority, having no jurisdiction over the confessional beliefs which comprise the very heart of religion. The natural consequence of religion being voluntaristic is that government has no competence in the matter, nor is the state equipped to determine any one system of belief as religious truth or to be the judge of orthodoxy. In Reformation theology, all things are fallen or imperfect, including the state. To suggest that the state is competent in matters at the core of a given faith is to uncritically exalt the state in contravention to the very doctrinal position of an imperfect state.[39]

CIVIL RELIGION

A third reason of principle militating for state neutrality concerning religious worship, propagation, and inculcation is the danger of cultural religion. Cultural religion is the elevating of certain ceremonies, holidays, and other traditions of a nation to the level of the sacred. In its extreme form it is referred to as "civil religion," which comes about when predominate religious groups have identified so closely with government and the politics of the country that patriotism and nationalism go hand-in-hand with spirituality. Civil religion can deprecate the integrity, vitality, and independence of churches, that, by their com-

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[38] *Id.* at 42.

[39] J.E. WOOD, JR., RELIGIOUS LIBERTY AND THE BILL OF RIGHTS 11-15 (1972).

mission, have duties transcending present-day society, politics, and national boundaries. The role of the church is global; it is not a department of state to be seen and utilized as a tool to serve the aims of state. Additionally, civil religion is dysfunctional when it anesthetizes individuals from confronting the choices to be made between the ways of the world and the teachings of their church.[40] Culture cannot convert people to Christianity. Indeed, American civil religion can be more than ceremony and ritual; it can be an alternative and competing religion.[41]

THE CAPTIVE CHURCH

Fourth, and finally, when churches have become unduly involved with the agencies of government, they risk being subverted in that their ministries become redirected to meet ends chosen by government. Having lost their independence by allying with government, churches become compromised in their efforts to act in accord with their higher calling. State aid to religious programs, conditioned on conformity to the proverbial bureaucratic "strings," can slowly sap all spiritual content from a ministry. In the extreme, a church may be so hobbled that its mission is altogether thwarted. Moreover, when a church believes it is called to speak prophetically and criticize the state, its expression is rendered tepid under the chill of real or apparent threats from government. When a religious organization is influenced in this way, its spontaneity is dulled and the fervor and allegiance of its members wane.

In summary, the state can and in many cases should enact laws which both positively and negatively serve a peoples' need for moral order and virtue. However, respect for the transcendent character of human responsibility and the need to safeguard the integrity of churches will inevitably carry with it neutrality by the state concerning religious confessional differences.[42]

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[40] *See generally* R. LINDER & R. PIERARD, TWILIGHT OF THE SAINTS: BIBLICAL CHRISTIANITY & CIVIL RELIGION IN AMERICA (1978); R. RICHEY & D. JONES, AMERICAN CIVIL RELIGION (1974). There is an aspect of civil religion which is beneficial, however, it is not the aspect described in the text. A helpful type of civil religion occurs when individuals in a society recognize that human rights are derived from an authority higher than the state, thus inviting self-criticism of the state and rendering totalitarianism illegitimate. This places moral restraints on the use of political power.

[41] R. MCCARTHY, CONFESSING CHRIST AND DOING POLITICS 63-87 (1982).

[42] A Roman Catholic scholar draws this same line between moral-based legislation and religion, but draws it for pragmatic reasons rather than out of principle. J. MURRAY, WE

SUSTAINING DEMOCRACY

The most serious challenge by the theocentrists to the neutral-state position of the institutional-separationists is the contention that there is no easy duality between religion and moral obligations. If the state is bound to enforce a moral duty by positive law, it is difficult to insist that it ought to do so severed from the religious faith which gives rise to that moral obligation.[43]

The rejoinder is this: admittedly at the individual level human nature is not dualistic. It is not able to separate virtue from its religious presuppositions. This does not, however, hold true at the corporate level. Given that people hold a world and life view which does not separate the secular from universal transcendent beliefs, the error is to generalize from this precept and uncritically apply it at the corporate level of government. The modern nation-state does not require an official religious dogma to supply a dominant and unifying world view to govern effectively. Indeed, in the West today nations rule by consensus politics drawn from a mix of competing interests, only some of which have traditional religious bases. True, a pluralistic democratic state cannot long survive without some integrating beliefs which operate at the political and social level and define the commonweal. For example, society should recognize that law has origins which transcend the state, thus affording a higher point of reference for judging the state and placing restraints on its power.

The requisite social glue, however, need not be a state-sanctioned mode of worship and religious creed. The democratic state can be sustained if churches measure up to the calling to

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HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 80 (1963). Father Murray states:

> For a century and a half the United States has displayed to the world the fact that political unity and stability are not necessarily dependent on the common sharing of one religious faith.
>
> The reach of this demonstration is, of course, limited. Granted that the unity of the commonwealth can be achieved in the absence of a consensus with regard to the theological truths that govern the total life and destiny of man, it does not follow that this necessary civic unity can endure in the absence of a consensus more narrow in its scope, operative on the level of political life, with regard to the rational truths and moral precepts that govern the structure of the constitutional state, specify the substance of the commonwealth, and determine the ends of public policy.

Id. For Protestant statements acceding to the same division of morality and core religious practices, see authorities cited at Esbeck, *supra* note 15, at 376 n.175.

[43] This position is fairly stated in ALBORNOZ, *supra* note 36, at 128-34.

reach their people with a faith which among other things teaches a responsibility to preserve and nurture society, including political institutions. The path to securing a state that abides by ethical behavior is through a voluntarily righteous people. Such a people as citizens—citizens with the religious vitality and discipline to use their free will responsibly—will comprise the needed social cement for America or any republic. Alternatively, experience has shown that state endorsement of and aid to a common religion risks a compromising and theologically sterile church.

For theocentrists to raise the specter of a republic collapsing into totalitarianism if the state does not favor Christianity is to misplace the role and priorities of the church. The church does not exist to sustain political order. To be sure, the political benefits of the work of the church are great. But a virtuous people with the discipline to be self-governing is derivative of the church's task, not its foremost purpose.[44]

VERBAL MAPS

What does this mean for the United States Supreme Court's tripartite test presently used in establishment clause cases? The three-part test announced in *Lemon v. Kurtzman*[45] has not proved sufficiently durable to reach results consistent with the principles of church-state separation discussed above.[46] One is tempted to propose no substitute, for the bald language of black-letter law cannot be divorced from its underlying principles. Still, the Supreme Court's verbal map can be improved upon, for one cannot expect every judge and lawyer to have an in depth appreciation of the foundational principles underpinning church-state relations which maximize religious liberty. Simple formulations can be helpful.

A formulation which folds the three parts of the *Lemon* test into two elements and which chooses better terminology is as

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[44] Littell, *The Basis of Religious Liberty in Christian Belief*, 6 J. CHURCH & STATE 132, 135-38 (1964).

[45] 403 U.S. 602, 612-13 (1971). The current three-part test of the establishment clause is: (a) the law must have a secular legislative 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 government entanglement with religion.

[46] For recent commentary pointing out variances between the *Lemon* test and the results in recent cases, see Choper, *Supreme Court Review and Constitutional Law Symposium*, 52 U.S.L.W. 2228-29 (1983); Devins, *Inconsistent Standard of Review in Last Term's Establishment Cases*, Nat'l L.J., Oct. 3, 1983, at 22-24, col. 1.

follows:[47]

> First, the establishment clause requires that government be neutral toward religion, but not indifferent and never hostile. Second, the establishment clause prohibits government action which compromises the independence or integrity of a religious organization, absent some truly exigent threat to public health, safety, peace or order.

Recall that coercion of conscience is already protected by the companion free exercise clause. Further, the free speech clause protects religious organizations which engage in social action, even when it causes political division along religious lines. The same clause insures access for religious speech to a public forum. The establishment clause addresses quite a different problem when both church and state are to be shielded from improper involvement with each other. As with the *Lemon* test, under this proposed formulation both the motive of the government and the consequences of its actions are scrutinized. If a consequence of government action is to foster excessive entanglement with churches, that would violate the independence of the church. Discrimination among denominations would be prohibited as contrary to neutrality, for such unequal treatment would advance the interests of some while inhibiting others. Moreover, religious groups could not be favored over those who claim no

[47] In this proposed formulation religion is to be narrowly understood. The word "religion" appears only once in the first amendment and grammatically must receive the same definition for both the establishment and free exercise clauses. However, the danger which the establishment clause seeks to avoid is not any and all state interaction with religion and religious organizations. That would lead to a radically secular state. Rather, the clause is to prevent only state involvement with religion (with each faith defining "religion" in accord with its own understandings) that *may lead to an establishment* of religion. That level of interaction happens when the state involves itself in the core religious matters of worship and the propagation or inculcation of the sort of matters that comprise confessional statements or creeds. Whereas the juridical definition of religion can remain broad and indeterminate, the necessity of a clear and fixed structure in church-state relations requires a single legal standard in drawing the line of separation. The line is this: while it is impermissible for the state to be involved in worship and in the propagation or inculcation of the type of matters which comprise confessional or creedal statements, the establishment clause is not violated when a government's laws or actions merely reflect moral judgments which arise from religious beliefs concerning conduct thought harmful to society.

This understanding of religion is only for purposes of the first amendment. It is not proposed as an adequate or universal theological definition of religion, only a definition which fulfills jurisprudential functions. An excellent discussion on the problem of defining religion for first amendment purposes appears in Malnak v. Yogi, 592 F.2d 197, 200 (3d Cir. 1979) (Adams, J., concurring in result).

religious relief.[48]

In practice, this proposal would yield results not substantially different from the existing three-part test of *Lemon v. Kurtzman*, but with a good deal more logical consistency to the exact language of the test. For example, state regulation of religious schools would be permitted only to the extent of health and safety standards, and to verify, through attendance records and achievement tests, that children are receiving an adequate education. Any additional regulation would compromise the independence and integrity of religious schools. Prayer in public schools,[49] city-endorsed Christmas nativity scenes on public property,[50] and legislative chaplains[51] would not be constitutional. Admittedly, there is some historical and cultural tie to these forms of religious expression, but matters such as prayer and the nativity of Jesus are profoundly worship. It borders on desecration and is a step toward civil religion to strip these symbols of their central religious content and palm them off as a mere slice of Americana drained of religious significance. Finally, many recent attempts at government regulation of religious organizations by the Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission, and Internal Revenue Service would be rebuffed by this proposed test. Absent some truly substantial threat to public health, safety, peace, or order, regulation of the internal operation of religious organizations compromises their integrity.

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[48] The free exercise clause is not to the contrary when it requires the exemption of conscientious objectors from general legislation. To avoid coercion of conscience the free exercise clause requires exemption on a case-by-case basis where belief is shown to be sincerely held. This is not a blanket exemption based on membership in a particular denomination and thus discrimination in favor of the denomination. Rather, the free exercise exemption is based on each person's belief when faced with the "cruel choice" of obedience to law and obedience to their faith. *See supra* note 11. A respect for sincerely held belief where coercion would otherwise result can hardly be said to advance a particular denomination over another by making that denomination more attractive. Any conversion of convenience to obtain a legal exemption would not be sincere and thus of no avail to the claimant. The Supreme Court's caselaw is consistent on this distinction between respect for conscience and denominational discrimination. *See* Larson v. Valente, 456 U.S. 228, 246 n.23 (1982); Gillette v. United States, 401 U.S. 437, 450 (1971).

[49] *See* Engle v. Vitale, 370 U.S. 421 (1962) (teacher-led prayer in public schools prohibited).

[50] *Contra* Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (5-4 decision upholding city display of nativity scene).

[51] *Contra* Marsh v. Chambers, 103 S. Ct. 3330 (1983) (6-3 decision upholding state-sponsored prayer by legislative chaplain).

A POST-SECULAR AMERICA?

Initially, it must be perplexing—devout institutional-separationists making common-cause with the exponents of a secularized society, together urging separation of church from state. As must now be apparent, however, their motives for doing so are widely divergent: the secularists want to make private traditional religions so that they will not influence affairs of state, whereas the institutional-separationists desire to protect the integrity and vitality of their churches. Moreover, this old alliance, which brought separation of church and state from theory into political reality for the first time on American soil, has its limits. As institutional-separationists and theocentrists increasingly emerge from their self-imposed cloister and bring their religious beliefs to bear on public policy in matters as divergent as nuclear weapons, the environment, and economic policy, the secularists, although hardly overwhelmed, will have to fight hard to maintain their ground.

There is danger in overconfident assertions concerning subtle and complicated matters, especially concerning as ancient a problem as church-state relations. So it is with the solution suggested in this Article to adhere to a separation of church and state in which the church is independent, voluntaristic, and not silent, and the state is neutral and secular. One observation can be made with safety. The oft-lamented tensions between church and state are not all bad. Rather, the presence of tension is symptomatic of something healthy. Each "power" is sharpening and offsetting the other. For those who would defend the free church, this tension is evidence that the churches are neither so worldly as to be indistinguishable from the aims of state nor so withdrawn from the world as to be irrelevant to it.