Toward a General Theory of Church-State Relations and the First Amendment

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ARTICLES

TOWARD A GENERAL THEORY OF CHURCH-STATE RELATIONS AND THE FIRST AMENDMENT*†

CARL H. ESBECK**

I. INTRODUCTION

Although government intervention in religious affairs is a new and understandably worrisome experience for many American churches, history instructs us that the confrontation is not novel. We can find some comfort in the fact that this double wrestle of state with church and state with individual believers is a perennial match. After all, it has been nearly sixty years since a brutish measure in Oregon making parochial school education unlawful had to be sidelined by the United States Supreme Court in Pierce v. Society of Sisters.1 Over forty-five years ago the Supreme Court decided Lovell v. City of Griffin,2 snuffing out a practice by which municipalities were using ordinances prohibiting the distribution of handbills without a permit to run off proselytizing Jehovah’s Witnesses.

From a review of the last decade’s cases, what does appear to be new is that for the first time the instances of government intervention affect the mainstream Protestant establishment. No longer does the state struggle only with Roman Catholics, the separatistic Anabaptists, Jehovah’s Witnesses, Mormons, and others who at times found themselves in the role of “minority sect.” The line of confrontation has shifted and the antagonists

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1. 268 U.S. 510 (1925).
2. 303 U.S. 444 (1938).
have regrouped along a broader front. It is no longer sect versus state. Now all religious groups including traditional denominations are finding a state increasingly uninformed, indeed, insensitive, to the unique nature and role of church and parachurch ministries.

A. The Old Alliance

This state of affairs has come about because an old alliance is crumbling. For many years, those who have sought to use the state to advance ecclesiastical goals have been successfully opposed in the courts by two groups. First, there are those who argue for the increased privatization of religion, harboring a conviction that religion is largely irrelevant and often divisive in matters of government. The fissures opened within the body politic by sectarian quarrels and even wars, past and present, are cited as proof that religion is dysfunctional in the public square and, therefore, must be shunted to the privacy and relative obscurity of home and family. Members of this first group, which shall be referred to as “secularists,” are the descendants of rationalists and deists, which numbered among some of America’s prominent Founding Fathers. Today the secularists’ ranks are swollen by certain ethnic and religious minorities who genuinely fear discrimination and other forms of intolerance should Christian majorities bear in any serious way on public policy and matters of state.

The second partner in this old alliance posits its support four-square on a biblical theology that commands not only freedom for religiously based conscience but also the separation of church and state. These religionists desire a benevolent separation of the institutions of church and state, but not one characterized by hostility or even indifference between the two. They shall be termed “institutional-separationists.”

Secularists view the utility of religion as strictly personal. They fear religion as a potential threat to domestic peace and civil government. Institutional-separationists, on the other hand, are

characterized by a desire to protect the independence of churches and the voluntary nature of religious conversion and practice by shunning any interdependence of church and state. Volunteerism is mandated by their very understanding of true religion. To be a voluntaristic church and to be a church free of both government’s help and hindrance is, they argue, a unitary concept. Each implies the other, and both are made possible by the structural disentangling of church and state.

In the eighteenth century, American rationalists—students of the Enlightenment in its milder form—and religious enthusiasts, whose numbers were greatly increased by the revivals of the First Great Awakening (1730’s—1750’s), combined forces on the practical outworkings of religious liberty against the older established churches. This alliance between rationalists and religious enthusiasts (principally Baptists, “new side” Presbyterians, “new light” Congregationalists, Dutch Reformed, and Anglicans later identified with Methodism) was possible because both sought the same end result, namely independent churches in a nonsectarian state. Their reasons for seeking this arrangement, however, were quite different. The religionists sought religious liberty. To them this meant deposing the established churches that, in their linkage to the state, had become cold and formalistic. The rationalists acted on a different purpose. Some were anti-clerical, but nearly all were pro-religion. To rationalists, religion served the utilitarian function of infusing society with the necessary morality to make self-government possible. Nevertheless, disestablishment was sought by these rationalists to avoid sectarian strife and promote domestic peace.

So why is this old coalition that held for years and stood against those who threatened religious liberty now breaking up? Their common cause held so long as the debate in the courts focused

6. Historical accounts of the emergence of religious liberty including the separation of church and state are found in S. Cobb, The Rise of Religious Liberty in America (1902); 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); 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); I A. Stokes, Church and State in the United States (1950); W. Sweet, Religion in Colonial America (1942).
on keeping ecclesiastical interests from capturing the instruments and power of state. Now that the intensity of first amendment litigation has shifted to include issues of keeping the state from interfering with religious affairs, secularists and institutional-separationists find themselves on opposite sides of the courtroom.

Institutional-separationists have always held to the reciprocal nature of church-state separation: the church did not capture the state and concomitantly the state did not entangle itself in the affairs of the church. It is the secularists who have changed. Unlike the rationalists in the eighteenth century, secularists of modern bent devalue the utility of traditional religion for instilling the moral base and common vision necessary to hold a free society together. Indeed, some secularists view religion as a reactionary force retarding the moral evolution that they deem desirable.\(^7\)

Today, confronted with the claim that the state is interfering with church affairs, secularists demur. Indeed, they label as "favoritism" any claim by religious groups for exemption from government regulation. Secularists simply do not share the institutional-separationists' concern for the integrity and vitality of the church. At its root, secularists view a church as nothing more than a collection of individuals having no greater rights than the aggregate liberties of its individual members. In sharp contrast, institutional-separationists hold to a theological concept of the church as a spiritual body founded and commissioned by God. The church is understood as the New Society through which a living God advances certain purposes and channels His redemptive grace. Consequently, the church cannot be treated sociologically as merely another voluntary association.\(^8\)

The issue which divides, then, is that secularists do not give assent to the divine origin and nature of the church. As the secularists' thinking has worked its way into the policies of the state—and it undeniably has to a marked degree—the state through its offices and laws has come to regard churches sociologically rather than spiritually. Thus, today when churches venture out beyond the hallowed building under the steeple, they are dealt the same governmental treatment as their so-called "secular counterparts." Any request for exemption from general legislation is greeted with incredulity as if the church is proposing an

\(^7\) Dunphy, supra note 3.

\(^8\) Richardson, *Civil Religion in Theological Perspective*, in *American Civil Religion*, 161, 178-80 (Richey & Jones, ed. 1974).
unchokable and novel privilege. On occasion, exemption from regulation is rejected on the basis that it would constitute an establishment of religion contrary to the first amendment. Thus, separation of church and state, which began in part to protect the church, ironically is turned on its head and becomes a tool for confining the church.

B. Two Fundamentals

This ought to rivet home something very basic: one's view of the appropriate relationship between church and state begins with one's ecclesiology (What is the church?) and one's philosophy or theology of the state (What is the purpose and jurisdiction of government?). Fundamentally, the initial question is not whether we have correctly construed the language of the first amendment as it was drafted by Congress in 1789. Nor is it what Thomas Jefferson, James Madison or other prominent statesmen thought about church-state arrangements. Nor is the question whether America was a "Christian Nation" in origin. At its root one's opinion of church-state relations is dependent on one's theological or philosophical world view. 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 we are pluralistic (one might also say "as we are confused") in our religious and philosophical allegiances.

This point could be a spoiler. After all, our civil courts will never arrive at a satisfactory consensus concerning church and state if first they must delve into such questions as the nature and role of the church. However, a second fundamental shows the way out of this seeming dilemma: the Constitution is to be read to avoid these questions altogether. People frequently make the mistake of equating what is constitutional with what is prudent.

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9. See, e.g., Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230 (4th Cir. 1984) (holding a Virginia child-care center licensing statute which exempts centers operated by religious groups overbroad and violative of Establishment Clause). See also infra note 49 and accompanying text.

or wise in their own judgment. This misconceives the nature of a constitution in a republic. Within the body politic, the Constitution orders a few important relationships in a few important respects. The separation of powers doctrine is the best known example. The Constitution does not profess to be a document which resolves all questions of political and social ethics for all time. The document leaves most issues of public ethics for resolution in the marketplace of ideas, while preserving minority interests and inalienable rights in the decision-making process.

The Constitution deals with the church-state issue through this structural relationship and thereby avoids having civil courts become ensnared in defining the church, the appropriate purview of its ministry, its allocation or utilization of resources, and other inherently theological questions. Whatever ministry a particular church should define for itself, the Constitution limits the nature and scope of the government's interaction with that ministry. Therefore, the task of the civil courts is not that of moral philosopher or theologian, but the vastly simpler job of a referee preventing any excessive entanglements between church and state. The goal of church-state separation is for each to give the other sufficient breathing space. The Constitution, then, specifies particular spheres of authority. Both church and state have limited competence to act in that sphere reserved for the other.  

C. Thesis

The first amendment contains two clauses dealing expressly with religion: the Establishment Clause and the Free Exercise Clause. It is the thesis of this paper that the guarantees of these two clauses are quite different. The Free Exercise Clause functions like other provisions in the Constitution that protect individual liberties. Its purpose is to stand against governmental abuse of an individual's inalienable rights. Like other preferred freedoms, free will in religious matters is highly prized. Therefore, in the balance of societal versus individual interests, the scale is weighted in favor of individual choice in matters of religious belief.

The Establishment Clause has a very different thrust. Unlike


12. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. Const. amend. 1.
the other provisions of the first amendment which protect individual liberties, the Establishment Clause focuses on a structural concern, namely, governing the church-state relationship. The state must be nonsectarian or neutral. Government must not favor any particular church or creedal teaching over another; nor may it favor the religious over those who profess no religious beliefs. The Establishment Clause regiments the nature and degree of involvement between government and religious organizations. When this involvement is unmarked by institutional dependency, the courts need not concern themselves with divergent views on ecclesiology and the appropriate scope of church ministry. The nature and scope of church activities will be defined by each religious body according to its own light. By acknowledging a limitation on any mutual dependence between church and state, the unique nature of religious entities is recognized and preserved by the Establishment Clause. This uniqueness prohibits churches from being treated like other voluntary associations that may enjoy government’s largess and incur its regulation.

II. A GENERAL THEORY OF RELIGIOUS LIBERTY

A complete theory of religious liberty includes more than ordering church-state relations and protecting religious-based conscience. There must also be freedom of expression and assembly for both the individual believer and religious organizations. The current case law of the federal courts embracing all of these concerns can usefully be organized into three doctrinal subparts:

1. The necessity for government to respect religiously based conscience (often stated in the negative as religious toleration and the allowance for civil disobedience), presently addressed in the courts under the Free Exercise Clause;

2. The appropriate relationship between church and state (popularly termed the separation of church and state), presently addressed in the courts under the Establishment Clause; and


These three—respect for conscience, institutional separation of church and state, and freedom of religious expression—in sum comprise a general theory of religious liberty rooted in the first amendment, at least liberty from abusive government as distinct from wholly private offenses.
A. The Free Exercise Clause

Governmental respect for individual conscience grounded in religious belief is required by the Free Exercise Clause.\(^1\) There are three steps in every cause of action brought under this clause. First, a claimant must show that his or her religious belief is sincerely held.\(^4\) The sincerity requirement, however, involves an attenuated inquiry because of the injunction against civil courts conducting inquests concerning an individual’s faith.\(^5\) Thus, the Supreme Court has said that religious claims must border on the "bizarre" before they can be refused credence by the courts.\(^6\) Stated differently, the sincerity requirement is not concerned with the reasonableness of what a claimant believes, but whether he or she really believes it—a "fervency test."

Second, a free exercise claimant must show coercion of conscience,\(^17\) a difficult requirement. Nevertheless, the Supreme Court has held that coercion is present in more instances than just the situations involving state prohibitions of religious conduct or state requirements of conduct that are contrary to faith. Burdens which only indirectly require the claimant to make a "cruel choice" between faith and obedience to government will suffice:

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13. 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, which 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 Board, 450 U.S. 707, 713 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972); but see Gillette v. United States, 401 U.S. 437, 465-66 (1971) (Douglas, J., dissenting) (arguing that the first amendment implies a right of conscience whatever the motivation).


16. Thomas v. Review Board, 450 U.S. at 714-15. Until Thomas it was thought that the Court also required a claimant to show that the belief was central to his or her faith. See, e.g., Wisconsin v. Yoder, 406 U.S. at 218; Sherbert v. Verner, 374 U.S. 398, 406 (1963). It is now clear, however, that centrality—the importance a particular denomination places on the given activity—is not required. Thomas v. Review Board, 450 U.S. at 715-16; United States v. Lee, 455 U.S. 252, 257 (1982).

17. Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963); see Harris v. McRae, 448 U.S. 297, 320-21 (1980). Moreover, it is no defense for the state to claim that the burden on free exercise is "indirect" or "incidental." Wisconsin v. Yoder, 406 U.S. at 220-21; Sherbert v. Verner, 374 U.S. at 404.
Where the state conditions receipt of an important benefit upon conduct proscribed by a 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.  

Finally, once the sincerity and coercion elements are shown, the burden of proof shifts to the state. At this point, the free exercise claimant prevails except in those rare instances in which the state can demonstrate that the societal interests at stake are compelling and cannot be achieved by other means which would be less restrictive to conscience.  

When the facts permitted it to do so, the Supreme Court has decided cases concerning the free exercise of religion on the alternative first amendment guarantees of free expression and association. For example, the guarantees of freedom of speech and press afford the same degree of protection to the distribution of a religious tract as a political pamphlet. Preventing the distribution of religious material also violates the Free Exercise Clause, but often the Court has chosen not to reach this question. Thus, individual religious liberty is often subsumed under the more broadly applicable expressional rights. This has had the practical effect of confining the operation of the Free Exercise Clause to the protection of religious diversity through the toleration of minority religious practices. All of the Supreme Court’s recent free exercise cases arise in the context of a religious claimant’s desired exemption from the application of general legislation, the legislation being religiously neutral “on its face.” Accordingly,

20. For example, religious belief has been protected as an aspect of the general guarantee of freedom of thought, see Wooley v. Maynard, 430 U.S. 705, 714-15 (1977) (sustaining claim by Jehovah’s Witness that state requirement that motor vehicle license plate bear 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. at 86 (“Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.”); West Va. 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”).
21. See infra notes 63-65 and accompanying text.
the Court's few opinions based wholly on the Free Exercise Clause have been concerned with such discrete religious minorities as Sabbatarians,22 pacifists,23 and the Old Order Amish.24

Currently there is no disagreement between secularists and institutional-separationists concerning the Supreme Court's level of protection for an individual's free exercise of religion, although again their premises are different. Secularists defend individual rights on the basis of a self-contained, inherent dignity of persons, with reason and conscience as defining characteristics. Institutional-separationists attribute individual rights to the human status as creatures touched by the *imago Dei*.25 In short, the secularist is anthropocentric and enthrones individual conscience, while the institutional-separationist is theocentric and derives individual rights from the relationship of humans to God the creator. There is no quarrel over the desired result: substantial protection for the religiously informed conscience. However, when the issue concerns government interference with religious organizations, the differences between secularists and institutional-separationists are full-blown.

**B. Reconciling the Establishment and Free Exercise Clauses**

The element of coercion provides a useful opening to distinguish the Free Exercise and Establishment Clauses. In *Abington School District v. Schempp*, the Court stated:

> [The] purpose [of the Free Exercise Clause] is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.26

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The requirement that a claim be predicated on coercion prevents the Free Exercise Clause from becoming a ready excuse for a citizen to avoid many unwanted obligations that he or she owes to the state.

If a successful free exercise claim did not require a clear showing of coercion of conscience, contending claimants could paralyze government. Consider the problem that would result if a pacifist could successfully enjoin a government’s defense buildup because it violates his or her views on war. If a pacifist has a valid claim that defense spending must be halted because it violates his or her religious-based conscience, then likewise a fundamentalist Christian has a free exercise right to demand more defense spending in accord with his or her religious beliefs in a “strong America.” The government’s power to act would be frozen between these contending religious dogmas, and all because the Free Exercise Clause is not limited to instances of personal coercion. From this example, it is apparent that there can be no free exercise right to compel a government to always act in accord with one’s conscience. The most a pacifist can insist on under the Free Exercise Clause is a conscientious objector exemption from personally engaging in military duties. Affording the pacifist the option of alternative civilian service obviates the “cruel choice” of bearing arms contrary to religious faith, and that is all that is required of a government which respects diverse religious beliefs.

An Establishment Clause claim need not be attended by coercion of conscience. The task of the clause is to mediate the relations of church and state. It is possible for either church or state to transgress the precincts of the other without causing coercion of a person’s conscience. Nevertheless, in such cases the Establishment Clause is violated. For example, most would agree that the Establishment Clause would be transgressed should Congress appropriate money to supplement the salaries of all Lutheran pastors. Yet, there is no coercion in such an arrangement. No person is prohibited from doing anything they believe their faith

in absence of claim by plaintiffs that statute in question coerced them as individuals in the practice of their religion); 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.”).

27. 374 U.S. at 223.
requires, nor are they pressured to do something which is against their religion. The most an individual claimant (presumably a non-Lutheran) can complain about is that he or she objects in principle to paying taxes into general federal revenues when a small fraction of those revenues go to support the clergy of a faith he or she does not share. This does not state a free exercise claim, however, for there is no general guarantee that a person’s taxes will only be used in ways compatible with his or her beliefs, religious or otherwise.

It was this very lack of an aggrieved individual that prompted the Supreme Court in Flast v. Cohen\(^2\) to allow taxpayers to sue the government in Establishment Clause cases. To permit such a claim required a deviation from traditional standing rules because the clause, rather than directly protecting individual rights, structures the relations between the two institutions of church and state. Yet, unless the Court afforded individual taxpayers standing to sue, the violation would be nonjusticiable and thus uncorrectable by the judiciary.

Numerous other examples can be found distinguishing the religion clauses. In Abington School District v. Schempp,\(^3\) Bible reading in the public schools was in question. The Supreme Court held that the claimants (students and parents) could challenge the practice under the Establishment Clause without testifying as to the coercive effect of the practice on students. The Court did not require proof that individual religious conscience was infringed, as would be required in a free exercise claim. To challenge the state’s action under the Establishment Clause, the record on appeal was sufficient if it merely showed that the students and parents were assigned to schools where Bible reading took place.\(^3\) The Schempp case struck down the Bible reading practice, but not because the student’s free exercise of religion was infringed. Probably some coercion in the form of peer pressure was present even though the record did not show it, but that was beside the point. Bible reading was prohibited in Schempp because it assigned to the state such sectarian duties as religious propagation and inculcation. Maintenance of the proper relationship between church and state leaves this task to the church.\(^3\)

\(^{29}\) 392 U.S. 83 (1968). See also Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982) (restricting Flast test; but the point made in the text concerning the Establishment Clause is still valid).  
\(^{30}\) 374 U.S. 203.  
\(^{31}\) Id. at 224 n.9.  
\(^{32}\) Id.
1. Tension Between the Clauses?

The misconception that the Establishment and Free Exercise Clauses are in constant tension has been a setback for religious liberty. The problem stems from a simplistic but wrongheaded notion that the Free Exercise Clause is pro-religion and the Establishment Clause is anti-religion in the sense that the latter's sole task is preventing governmental support of religion. If one were to follow this construction, these two clauses would be at war with each other in every first amendment case involving religion. The judicial task, then, would be to determine if the Establishment Clause eclipses free exercise (in which case the anti-religious forces prevail) or if free exercise prevails over establishment (producing a win for religion). This line of reasoning is fallacious. First, this view is not an analytical test at all. Rather, the face-off between the clauses construct would become a matter of ad hoc balancing without any guidance to the judge concerning how to weigh the competing interests. Second, this clauses-in-tension reasoning presumes that congressional authors of the first amendment placed side by side two phrases which contradicted each other. It would be as if the selfsame statesman 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 inclusion of such an intentional, built-in contradiction is highly improbable.

The matter of reconciling the Free Exercise and Establishment Clauses is clear. Both clauses advance religious liberty. The Free Exercise Clause protects a person's religiously informed conscience. Concomitantly, like other structural provisions in the Constitution, the Establishment Clause imposes an ordering of church and state that eventually inures to the benefit of individual freedom. Structural separation ensures that a believer's church is free of state control and that a believer's (or skeptic's) government does not promote a creed that he or she does not share.

It is not Orwellian doublespeak to construe the no-establishment Clause, which superficially appears directed against only government support of religion, to also preventing government interference with religious organizations. Due to the volun-

33. See Justice Brennan's comments in Schempp justifying the incorporation of the Establishment Clause into the fourteenth amendment as an individual "liberty" interest thus making it applicable to the states, id. at 256 (Brennan, J., concurring).
taristic nature of religion, churches are harmed by state aid. Government aid inevitably leads to dependence and control. The church must resist the expedience of government support, for the gain by the church is always short term.

Refreshingly, the Supreme Court has not been confused about this matter. The second and third parts of the Establishment Clause test require that governmental action not have the effect of advancing or inhibiting religion (note the reciprocity), and that such action not lead to excessive entanglement between the two. In short, some separation of church and state, properly understood, protects churches as well as the state, and consequently advances the liberty of believer and nonbeliever alike.

2. Verbal Maps

What does this mean for the Supreme Court’s tripartite test presently used in Establishment Clause cases? The three-part test announced in Lemon v. Kurtzman should be reexamined, for the Court’s choice of language is ambiguous in that the test is not clearly tied to the ultimate goals of the institutional separation of church and state. The Court’s verbal map can be improved upon, for it cannot be expected that every judge and lawyer will have an in-depth appreciation of the foundational principles which maximize religious liberty by ordering church-state relations. 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 follows:

First, the Establishment Clause requires that government be neutral toward the confessional aspects of 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.

As with the Lemon test, under this proposed formulation both the motive and the effects of the government’s action are

35. 403 U.S. 602 (1971). The current 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 governmental entanglement with religion. Id. at 612-13.
CHURCH-STATE RELATIONS

scrutinized. If the consequence of a government action is to foster excessive entanglement with churches, the action would violate the independence of the church. Discrimination among religious groups or on the basis of one’s religious affiliation (or lack thereof) would be prohibited as contrary to the neutrality requirement, for such unequal treatment would advance the interests of some while inhibiting others.36

In practice this proposal would frequently yield results no different from those under the existing three-part test of Lemon v. Kurtzman. There would, however, be a good deal more logical consistency with the literal language of the test. For example, many recent attempts at government regulation of religious organizations by the Department of Labor,37 National Labor Relations Board,38 Equal Employment Opportunity Commission,39 and

36. This is not a change from current case law. A statute which is facially neutral and does not have a legislative history evidencing purposeful discrimination, but the provisions of which happen to have a disparate impact on members of different denominations, is constitutional when such distinctions result from the application of secular criteria. Gillette v. United States, 402 U.S. 437 (upholding a classification which differentiated on the basis of religious belief, not by denominational or sect membership); Larson v. Valente, 456 U.S. 228 (1982) (charitable contributions statute unlawfully discriminates against new religious movements).

37. See, e.g., St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981) (federal unemployment compensation tax on religious schools). St. Martin is very different from the recent Supreme Court decision in Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953 (1985), holding that federal minimum wage and maximum hour legislation applied to the ordinary business activities of a religious organization. Alamo Foundation was a religious outreach to drug addicts, derelicts, and former criminals. In order to raise money for its ministry, Alamo engaged in commercial activities for profit. The businesses included service stations, retail clothing and grocery outlets, farms, construction, a motel, and candy production. The Supreme Court held that the Establishment Clause was not violated by application of the Fair Labor Standards Act to the commercial activities unrelated to Alamo’s “evangelical activities.” Clearly, if the FLSA was applied to religious endeavors, institutional separation would be implicated. Alamo claimed that its commercial activities were “‘churches in disguise’—vehicles for preaching and spreading the gospel to the public.” Id. at 1960. However, this factual assertion had been rejected below and would not be disturbed by the Supreme Court at the appellate level. It was this critical failure of proof by Alamo that caused the Establishment Clause defense to be lost.


Internal Revenue Service would be rebuffed by this proposed test. The newest of nemeses, suits in tort for invasion of privacy and emotional distress resulting from church discipline and suits for clergy malpractice, would also be prohibited. Absent some truly substantial threat to public health, safety, peace or order, regulation of the internal operations of religious organizations compromises their integrity. State regulation of religious schools would be permitted by the new test only to assure compliance with health and safety standards, and to verify through attendance records and achievement tests, that children are receiving an adequate education. Any additional regulation would begin to compromise the independence of religious schools. Finally, tax exemptions for religious organizations, upheld in *Walz v. Tax Commission*, are easily reconciled with this proposed test. Not only is tax exemption of churches not an establishment violation, but exemption is required by the Establishment Clause if churches are to remain free of state interference and control. The power to tax a religious organization is the power to control it.

3. **What is the State to be Neutral About?**

At what point has the state so entangled itself with a religious organization that the group's very identify and vitality is endangered? Given the complexity of our government and the


40. See, e.g., Lutheran Social Services of Minnesota v. United States, 758 F.2d 1283 (8th Cir. 1985) (striking down IRS regulation imposing more onerous filing requirements on church-related social ministries than on churches).


religious plurality of our society, the matter of institutional jurisdiction is so fraught with ambiguities that precise formulation is not possible. Nevertheless, reasonable distinctions must be made, for the conflicts have already overtaken us in the form of litigation. Concededly, religious organizations alone are competent to define the requirements of fulfilling their calling or mission. The state cannot dictate the work of the church. Every religious organization, however, views its role differently: some are insular from society while others are very interactive with public life. How does a government act in an amicable manner in its relations with all religious organizations and still carry out its own public policy goals in a uniform, nondiscriminatory fashion?²³

Two levels of religious activities can be discerned, although in practice they defy exactitude. First, when the American experiment with institutional separation required that churches be cut free of the state, the unique activities of worship and the propagation and inculcation of their understanding of ultimate truth (their creed or confession of faith) were to be without government support. These activities were understood to be central to the very life of a religious organization, and government should have no control over or involvement with them whatsoever absent compelling reasons of the very highest order.

⁴³See M. Bates, Religious Liberty: An Inquiry 302 (1945):
Obviously the individual or the religious body cannot make a private definition of religious liberty and impose it upon the community. A fortiori, the vast variety of societies, states, and moral convictions throughout the world inevitably, and rightly, brings a further relativity into the definition and interpretation of religious liberty.
See also McGowan v. Maryland, 366 U.S. 420, 461-62 (1961) (Frankfurter, J., sep. op.):
Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. It is postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men’s conduct, free of the dictates and directions of the state. However, this freedom does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation. As the state’s interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No con-
As an offspring of the first level or core activities, many religious organizations took on tasks of education and social welfare. Government today is heavily engaged in the same tasks, albeit out of notions of general welfare rather than religiously motivated service. Educational and social welfare activities are the response to or outworking of truths held by religious faith rather than activities which deal centrally with the particulars of an individual's perception of ultimate truth. On this second tier

institutional command which leaves religion free can avoid this quality of interplay.

44. By designating a second level of religious activity, it is not intended to imply that education and social welfare by the churches are of lesser priority or value. Nor is the classification an attempt to define for religious organizations what their ministry is or should be. See Ball, Secularism: Tidal Wave of Repression in Freedom and Faith: The Impact of Law on Religious Liberty 49, 53 (Buzzard, ed. 1982) (beware ploy confining religious liberty to "religion under the steeple"); P. Berger and R. Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy 30 (1977).

The danger today is not that the churches or any one church will take over the state. The much more real danger is that the state will take over the functions of the church, except for the most narrowly construed definition of religion limited to worship and religious instruction. Id. Accordingly, wariness must be exercised lest a classification of the activities of religious organizations into "core" functions and those of education and social welfare facilitate the government in co-opting the latter.

Although there is danger to religious freedom in breaking down religious activities into "core" functions and those which in degree are more their offspring, there is greater danger in not doing so. Unless religious organizations are willing to concede the government some limited oversight of educational and social welfare activities, sharp and perhaps polarizing confrontations will follow. The harvest of these clashes may be bitter fruit in the form of legal precedent permitting governmental intervention into even the very central matters of inculcation and propagation. Religious bodies must be sensitive to large elements of the public who are already overly cynical about the role of religion, conditioned by highly publicized frauds and other excesses by mail-order "ministries" and "mind-control cults." Limited government regulation can curb many of these abuses and thereby yield an environment of public goodwill which actually enhances the free play for religious beliefs.

45. Indeed, it is only because education and social welfare are widely held to have large secular components that government can engage in such activities at all. If education and social welfare were largely and essentially religious, the Establishment Clause would prohibit the state from engaging in them. Additionally, it cannot be argued that separation of church and state reserves an exclusive role for religious organizations in the education or social welfare fields protected from competition with government-run programs. This is the case, however, when it comes to matters of worship or religious inculca-
of religious ministry, some limited governmental interests are proper, even absent powerful reasons of state. The state is not totally incompetent concerning education and social welfare. The state can be, and in America has been, largely a positive force in promoting education and welfare. For example, a state may legitimately require that parochial school students perform at minimum achievement levels in such staples as math, science and grammar in order to insure that they become literate, productive citizens. The Supreme Court has condoned such regulation, even though the governmental interest cannot fairly be said to be compelling, only paternalistic. In contrast, government cannot regulate the more central matters of worship, propagation, and inculcation without delving into the very tenets of ultimate truth. The government has no competence in such matters.

Nevertheless, the government must have a healthy sensitivity to the distinctive religious character of this second level of ministry. The state cannot simply treat a religious school or social welfare ministry like its "secular counterpart." A special wariness should characterize the relationship so as not to inhibit fulfillment of a ministry's purpose. The relationship should avoid entanglements that in time may tend to absorb these agencies as quasi-governmental appendages for the promotion of state policies. In addition to the nature of the religious practices concerned, factors to be weighed are the substantiality of the entanglements and the duration of the resulting church-state relationship. The boundary delimiting the government's purview should be drawn far short of the point at which the result would be the denial or coercion of sincerely held religious convictions of individual members.

46. Compare Board of Educ. v. Allen, 392 U.S. 236, 245-46 (1968) (dicta) ("[A] substantial body of case law has confirmed the power of the states to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction") and Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (government has strong interest in literacy of students in English language, but means chosen to accomplish that task violated due process) with Wisconsin v. Yoder, 406 U.S. at 234 (Old Order Amish excluded from compulsory attendance laws by Free Exercise Clause).

47. Cf. Ball, Secularism, supra note 44, at 56.

of a religious organization. The entanglement with government becomes excessive well before the religious entity must choose either to obey the state or follow its own religious tenets. For example, the government has no authority over the content of the curriculum of religious educational and social welfare agencies, for this content reflects the philosophical or theological beliefs of the ministry, making them quite different from their "secular counterparts."

Secularists object to religious groups being treated differently from others because they see it as a privilege. This objection is due to an incomplete understanding. The key principle of social order at work in church-state separation is reciprocity. Only in a distorted sense is the secularist correct to characterize as "privilege" the exemption from general legislation given religious organizations. For the secularist to be consistent with this characterization, the reciprocal nature of church-state separation requires that he or she concede that religious organizations are also specially "burdened" by disqualification from state funding or other government support. Thus, the secularist's initial objection to the "privilege" is offset by this mutual "burden" borne by religious organizations.49

There is no escaping the fact that the Establishment Clause assumes the unique nature of religious organizations. We insist that churches not be funded by government. Why? Because they are unique, which is to say they are thought by religious adherents to be divine in origin and nature. It is because of this very uniqueness that churches must also be free of most government interference.

Note that the proposed Establishment Clause test permits state intervention in exigent circumstances. Because of their temporality, churches and other religious organizations are not immune from wrongdoing. Their activities, therefore, cannot be totally autonomous from the state when it comes to matters of high order, such as health and safety. The state must have the power to intervene in such exigent matters, even when it means overriding sincerely held religious beliefs.50


4. The Special Problem of Parochial Aid

The Supreme Court’s 1982-83 term witnessed the first real doctrinal break from the ban on government aid to primary and secondary religious schools. The Court sustained the tuition tax deduction plan in *Mueller v. Allen* because the choice of “spending” the government benefit at a religious school is left entirely in the hands of parents. The Minnesota tax statute upheld in *Mueller* did not have any onerous screening requirements on religious schools. Thus, the state did not use the tuition tax deduction as a means of regulating religious schools.

What if future tax benefit plans are used as a “backdoor” approach to control religious schools? That is, by accepting the tax benefit does a parent or religious school thereby relinquish all first amendment objections to administrative oversight of the school?

The consolidated cases of *Bob Jones University v. United States* and *Goldsboro Christian Schools v. United States*, have already given the Supreme Court’s assent to tax benefits conditioned on the absence of racial discrimination. More worrisome is *Grove City College v. Bell*, which hinted that the Constitution’s congressional spending power to extract regulatory compliance as a condition of federal financial assistance is very broad.

Deep-seated in American pragmatism there is a sense that whenever the government funds an activity it has the authority to regulate it. Indeed, all would agree that it would be irresponsible for government to fund an activity and not exercise the requisite control to ensure that the funds are spent for the designated public purpose. Numerous interests are lobbying hard and arguing persuasively that government should aid religious schools. Their basic argument begins with the truism that responsible education is inherently value-laden. All agree that government has a responsibility to educate its citizens. However, govern-


52. 465 U.S. 574.


ment, at least liberal government, should not, through the control of schools, impose on students an ideology on which there is no broad public consensus. If the inculcation of values lies initially and principally with parents, then parents must be able to choose, free of economic coercion, the type of educational philosophy desired for their children. This point and a belief (hotly contested!) that civic consensus is narrow in America,\textsuperscript{55} leads one to accept some form of government assistance to parents (or, at least low-income parents who cannot presently afford private schools), including those who choose religious schools.\textsuperscript{56}

\begin{quote}
55. Thayer S. Warshaw, on behalf of the National Council on Religion and Public Education, takes issue with the claim that civil consensus is so narrow in America that religiously neutral public education is impossible:

Our country is committed to pluralism and democracy, not to an American version of totalitarianism—even under the well-intentioned aegis of a nonsectarian "religion." Under church-state separation, public schools are secular. That need not make them either champions of secularism as an ideology or enemies of religion. The task for [the] educator and others is to engage in a thoughtful, slogan-free examination of how values are (and are to be) transmitted in the public schools of a pluralistic and democratic society.

I propose two premises for such an examination and discussion. First, public education must avoid extremes: either of complete moral relativism or of totalitarian moral absolutes. Certain basic moral principles seem almost universally agreed upon in our society: concern for others, acceptance of responsibility, and personal integrity; love of country and respect for law and order; a capacity and disposition to be informed, logical and critical; and a few others.

Second, agreement on such principles does not mandate unanimity in schools and classrooms with regard to two related fields: the authority for and the application of moral principles. Teachers may differ as to the religious or nonreligious authority for these moral universals. In my experience, pupils rarely raise questions of authority for moral principles. If they should do so, or if the teacher feels it pedagogically appropriate to raise such questions, I would expect that trained and honorable professionals would not express only their own beliefs, but also present alternatives. . . .

The process of growth in general, and of education in particular, is a continually expanding awareness of alternatives. Equally important, differences among teachers about the specific application of universal moral principles present to pupils vivid examples of how pluralism and democracy are distinguished from totalitarian control of thought and action.

\textsuperscript{39} Report from the Capital 11 (Feb. 1984) (emphasis in original).

Before continuing their campaign for state aid, it is incumbent on these parochial-aid interest groups to see to it that they do not lose control over the schools' educational philosophy. Some help may be found by a parallel to the recent case of *F.C.C. v. League of Women Voters*, which held that the Free Speech and Free Press Clauses were violated by a congressional ban against educational broadcasting stations airing opinions or editorials on public issues. Although the ban was tied to federal funding for the stations, the Court would not permit the receipt of funds to be conditioned on waiving first amendment rights. As of yet, however, federal courts have not applied this doctrine of "unconstitutional conditions" to the Establishment Clause. Presently, the extent to which governmental aid may compromise the independence of religious schools is not known.

C. Defining "Religion"

The word "church" does not appear in the first amendment. Rather, the amendment addresses "religion" and thereby religious organizations. Further, the word "religion" appears only once in the amendment and grammatically must receive the same definition for both the Establishment and Free Exercise Clauses.

In *United States v. Seeger* the Supreme Court broadly defined religion as "beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." Although the *Seeger* case concerned the interpretation of a statute, it was decided with an eye to construing the statute consistent with the Free Exercise Clause. Because this clause protects individual conscience, religion was defined so as to permit its being tailored to each believer. As

unexpected (and probably unintended) support for this syllogism from the liberal half of the Supreme Court. The plurality opinion states that the first amendment prevents a school board from removing a book from the school library when the board's motivation is to withhold from students ideas thought objectionable. Thus *Pico* suggests that public schools (or at least the libraries therein) cannot be used to shelter students from ideas simply because they are controversial. Only a small leap is needed to reach the additional point that government cannot use its schools to inculcate pupils with controversial ideas or an ideology on which there is no civic consensus. See Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 J. L. & EDUC. 523 (1984); Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983).

free exercise claimants became increasingly pluralistic in their religion, necessarily the Court's definition had to be broadened and made flexible to continue the protection of conscience.

When this same broad and subjective definition of religion is applied to the Establishment Clause, as grammatically it must, it initially appears problematic. If the state is to abstain from religious affairs, and religion by definition is broad and subjective, then one has the absurd result of government being estopped from participating in many of the activities in which it presently and quite properly engages. Examples would be education and social welfare, activities that some consider to be religious functions.

The definitional paradox is, however, a false one. Religion can and should be defined the same for both clauses. However, the danger which the Establishment Clause seeks to avoid is not any and all state interaction with religion. This 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. This 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 and 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 for drawing the line of institutional separation. The line is this: although it is impermissible for the state to be involved in worship and in the propagation or inculcation of the type of matters that comprise confessional or creedal statements, the Establishment Clause is not violated when the government's laws and actions merely reflect moral judgments arising from society's religious beliefs.59

This understanding of religion is only for purposes of the first amendment. It is not proposed as a universal or even adequate theological definition of religion, only a definition which fulfills the necessary jurisprudential functions of a clear and fixed legal standard.60

59. See text accompanying notes 61-62 infra.
60. Of course, the state in limited cases will be forced to be more specific in its definition of religion, such as the determination whether an organization is a bona fide church due a revenue code exemption or a scam to evade taxes.
D. Freedom of Religious Expression

The American Republic is not a sectarian state, but it is not a radically secular government either. The power of the sovereign lies in the first instance in "the people." The people, however, as the ultimate repose of power are ruled by those ideas and ideals which have captured their hearts and minds. When ideas are in conflict, truth is to be sought by permitting unhindered debate. Each citizen bears a heavy responsibility to contend for the truth. The role of the liberal state is to keep the arena open for continued debate, while protecting from extinction certain inalienable rights which may suffer at the hands of the majority.

When this marketplace of ideas produces a consensus around a social ethos which arises out of the people's religious traditions, the church-state separation implemented by the Establishment Clause is not violated. To censor and exclude from public discourse ideas which spring from religious faith would be to impose a new and radically secular regime upon the American political system. Popular sovereignty does not disqualify a view of law which is both transcendent of the state and theocentric. To insert religion into a public debate can, of course, be divisive and sometimes imprudent. But questions of nuclear arms, the wars in Central America, and taxes are divisive as well, and that does not give cause to exclude them from public discourse. Nor is prudence the test of constitutionally protected speech.

1. Legislating Morality

What if religious expression is directed at law making? Just how far can churches and believers go in trying to get the state to enforce religious standards of conduct? A state may and often does legislate concerning morality, whether it be against graft, racism, child abuse, incest, economic exploitation, or stewardship of the environment. There are appropriate instances for churches and individual believers to seek by persuasion and consensus the implementation of religiously based morality through legislation. This may be pursued by use of the rights of religious expression and association.

It makes little sense for secularists to concede to churches the freedom of speech, as they must, and then to argue that the separa-

For an excellent discussion on the problem of defining religion for first amendment purposes, see Malnak v. Yogi, 592 F.2d 197, 200 (2d Cir. 1979) (Adams, J., concurring in result).
tion of church and state is violated when religious groups win the debate leading to enactment of moral-based legislation consistent with their religious views. Were that the law, the church would be juridically isolated from the life of its age and compelled to be impotent. It is in effect an argument for separation from relevance. The church-state separation of the Establishment Clause does not disqualify the government from legislating against immorality simply because the moral principles involved arise out of a religious base. 61 If secularists hope to defeat moral legislation, they will have to proceed by the same means: speech, persuasion and consensus. The state need not be neutral on matters of virtue and morality by reason of the Establishment Clause. The clause separates church and state, but it does not silence a church which believes it is called to speak prophetically and criticize the government or address a matter of political ethics.

To be sure, not all morality can or should be codified into positive law. There are limits on what legal processes can accomplish in shaping human behavior for the better. For example, there is little point in passing laws which cannot or will not be enforced by the authorities. Moreover, churches should avoid any effort to enforce a new moralism through the coercive power of the state. Legislation defines all that is lawful, not all that is sinful. The civil and criminal law should be utilized only to restrain acts where harmful and disorderly consequences emerge in the community. 62

The right of free expression is limited by the Establishment and Free Exercise Clauses. For example, should religious organizations ever be successful in imposing by legislation sectarian efforts at creedal propagation or inculcation, the Establishment Clause would be violated. Likewise, should legislation attempt to coerce personal faith or worship, the Free Exercise Clause would be violated.

By and large the federal courts have recognized that a church separated from the state need not be a silent church. So long

61. If there can 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 prohibiting abortion.

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 organizations and adherents of all persuasions to speak, publish,

63. 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 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 of opinion"); cf. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding restrictions on the selling, exhibiting 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, 574 (1942) (conviction of Jehovah's Witness upheld for violating law against "fighting words" which did not unreasonably impinge upon the "privilege of free speech").

assemble and associate relative to matters of faith.

Even the few trouble spots concerning religious expression may have been favorably resolved. There is cause for optimism that Congress' passage of the Equal Access Act, affording voluntary high school religious clubs the same associational rights as other student groups during noncurricular periods, will have reversed court decisions to the contrary. In another example, two recent Supreme Court opinions indicate that the "political divisiveness" facet of the excessive entanglement test may now be toothless. In the Court's parochial aid cases of the 1970's, the potential for state aid to religious schools to cause political division along denominational lines was reason for invalidating the legislation under the Establishment Clause. In *Marsh v. Chambers* and *Lynch v. Donnelly* the Court all but eliminated the political divisiveness

(municipal ordinance prohibiting distribution of handbills without permit was restraint on "freedom of press" of Jehovah's Witness).

65. For cases concerning the freedom of religious assembly, 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 park without a license; petitioner had failed to pursue remedy through local court action); 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 precisely drawn time, place and manner regulation fairly enforced).*


inquiry by downgrading its relevance to little more than a warn-
ing that the matter should be given additional scrutiny.\textsuperscript{70}

2. \textbf{Moral Pluralism and the Open Society}

Some are discouraging an aggressive use by churches of the freedom to shape public opinion. They fear that moral and religious pluralism might thereby be lost, bringing on a passing of the American-style open society.\textsuperscript{71} To be sure, moral pluralism is a fact to be acknowledged, but it is not an intractable fact. Moreover, the current moral pluralism is neither a condition to be celebrated and maintained by the churches nor is it necessary to ensure democracy. It is perverse to say democracy is incompatible with moral absolutes. Indeed, moral pluralism which strips society bare of any transcendent notion of right and wrong is the surest way to trade in democracy for despotism. Growing moral relativism actually destabilizes government, causing the state to respond by exercising more control over citizens.\textsuperscript{72} Democracy requires moral self-discipline that bridles one’s use of liberty in order to enable voluntary order. However, in the final analysis, a church does not exist foremost to create national stability. Rather, political order and moral reform are mere by-products of the inner transformation wrought by religious faith.\textsuperscript{73}

The historic church was evangelistic with varying degrees of missionary zeal. Conversion, not celebration of comparative religion, was the marching order of the day. And widespread conversion out of free will would bring about a reduction in moral and religious pluralism. At its root the real fear of some is that the historic message of traditional religions will be believed and

\textsuperscript{70} Id. at 1367 (O’Connor, J., concurring). Justice O’Connor said: “[T]he constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself.”


\textsuperscript{72} 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., R. Neuhau\textit{s, supra} note 4, at 60; 138 C. Dawson, \textit{Religion and the Modern State} (1940); J. Murry, \textit{We Hold These Truths} (1960); Bellah, \textit{Cultural Pluralism and Religious Particularism} in \textit{Freedom of Religion in America: Historical Roots, Philosophical Concepts and Contemporary Problems} 33 (H. Clark, ed. 1981).

acted upon. To oppose the church’s opportunity to express its message, not only turns church-state separation into an artifice to avoid moral pressure, but does so by violating the church’s first amendment expressional rights.

III. Summary

The Supreme Court has confined the application of the Free Exercise Clause to the protection of individual conscience against governmental abuses. This limiting construction by the Court is necessary in order to prevent the clause from becoming a ready excuse for anyone wanting to avoid the duties of citizenship. Thus, the task of governing the functional separation of church and state is properly left to the Establishment Clause. Maintaining the integrity and independence of religious organizations requires that government neither be involved in worship nor become an agent for achieving creedal propagation and inculcation. This is what it means for the state to be neutral. Moreover, this structural separation of church and state not only guarantees an autonomous church, but accrues to the benefit of individual religious liberty by ensuring that one’s state is not aiding a religion he or she does not share.

Some political fragmentation along religious lines may result—indeed, likely will result—in a free society where expressional rights are brought to bear on public policy. Churches may properly engage in debates over political and public affairs, for they have a right to do so as a matter of free expression and association. Religion may be a personal matter, but it is not thereby a private matter. For its part, the offices and machinery of government do not betray their neutrality when moral pressure leads to legislation which is grounded in traditional religious values. So long as the instruments of state are not marshalled on one side or the other of sectarian efforts at worship or creedal propagation and inculcation, the requisite neutrality has been preserved.