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INVISIBLE STRINGS:

The Regulation of Religion in the Beneficent State

Prospectus for a Second Ph.D. Paper

Steven A. Samson

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The Problem

The First Amendment to the U. S. Constitution begins with a statement that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." For this reason, our country has not followed the example of England and other European nations by creating a national church. This constitutional prohibition is straightforward and has never been seriously challenged. In time, even the religious establishments that remained in a handful of states were dissolved, although the establishment clause was not applied to the states until this century. Neither has freedom of worship been directly challenged by the courts or Congress as a fundamental right--certainly, not on the surface. Yet exceptions come to mind, such as the belief-action dichotomy. And with exceptions come qualifications, such as stipulations concerning church political activities. And with qualifications come rationalizations, such as the notion that tax exemption is a subsidy. And, finally, with rationalizations come justifications, such as the need to avoid church-state entanglements.

One might ask why it should be any different for religious freedom than for any variety of the freedom to associate? This implies that the constitutional right to free exercise is simply an instance of a larger, extra-constitutional right: freedom of association. Like the right to privacy, freedom of association is a later construct--an interpretation of the intention of the authors of the Constitution. Over the years, several legal tests have been devised to weigh conflicting considerations, such as the excessive entanglement test and the compelling state interest test. Somehow in the process, the establishment clause has waxed and the free exercise clause has correspondingly waned in the judicial balance. The purpose of this paper is to examine some of the specific instances of church-state conflict that have resulted in the loss of traditional church prerogatives. Recent legislation and litigation will be given greatest attention.

Thesis

My thesis is simply that the state has been assuming the essential features of a church and has been progressively asserting regulatory control over church activities as a sovereign right. Historically, the state has always been reluctant to permit exceptions to its policies. As long as the sphere of civil government was small and clearly delimited, the independence of other spheres of government--church, family, university, private association--were comparatively free from interference. In our own colonial history, the legislatures had enjoyed a similar freedom from interference by Parliament and the Crown until the French and Indian Wars depleted the national treasury. Similarly, the tax exemptions of churches seem increasingly imperiled at a time of inflation and budget cutting. The revenue factor appears to be only one of several, however. Social legislation and land use planning may be having a greater and longer-lasting impact on church-state relations.

What is the proper sphere of civil government? Is it simply to administer justice and preserve the peace? If it exceeds these powers, what are the

trade-offs? These are some of the basic questions of political theory that must be addressed because their answers reflect the interests and viewpoints engaged in the controversy. Perhaps the central concept to be examined is that of "sovereignty." What is the relation of church and state? Does one have final authority over the other? Does the state itself have a religious dimension in fact? How may this dimension be defined? Can the state claim religious neutrality, or does it necessarily foster a civil religion? If the latter, does this civil religion violate the principle behind the establishment clause? What does this mean with regard to the separation of the church from the State as Church?

To assert that the state has been assuming the essential features of a church is not to deny that there are also other contenders in the arena. Hazel Barnes, one of my professors at the University of Colorado, wrote a book entitled The University as the New Church. It is evident that the traditional functions and prerogatives of churches have, for more than one hundred years, been adopted by other institutions as well--in some instances, absorbed. The prophetic voice of the church is now being stifled by the threat of having tax exemptions removed, and worse. Church-related schools are increasingly being regarded as merely educational appendages that may be directly licensed and controlled by the state. Personnel practices are coming under increasing scrutiny. And religious activity is being so narrowly defined for tax purposes that only the forms and rituals, and none of the substance, of religion may soon be left. The power to define involves the power to control, even as the power to tax involves the power to destroy. The proliferation of social regulations and programs complicates the entanglements even further. And many a church has blundered into the tangled web of law out of a sense of public duty only to find itself forced into costly litigation. The experience of Damascus Community Church, which fought for several years to operate a school on its premises, is a case in point. It is in these areas of competition between church and state--where social services are frequently at stake--that the issues of religious free exercise are most profoundly involved. If one of the basic motives of mice, and men, and organizations is to achieve greater security by attempting to assert control over their environment, the following hypothesis drawn from my master's thesis should serve as a point of departure: Organizations extend the scope of their activities in order to better master the circumstances through which they must operate. A corollary to this hypothesis is that organizations compete with rivals in an effort to achieve equilibrium or, more likely, dominance. Right now, the state has the upper hand.

What does this have to do with religion? Simply this: a religion in the modern sense of the word may be defined as an "ultimate concern." (Paul Tillich) Ultimate concern certainly involves the question of final authority or sovereignty. If the state claims sovereignty, can it tolerate any rivals? If the church claims to be answerable to God alone, does this not pose a potential threat to the state's authority? The issue thus raises the most fundamental questions about human nature and political power.

Besides political theory, elements of political history must also be considered. It may be argued that, although the state once tied its hands with respect to religion at a time when religion meant the worship of Almighty God (synonymous with what is today called the Judaeo-Christian tradition), the state cannot be expected to preserve the concept of "sphere sovereignty" during subsequent pluralist and secular eras. Should the state perhaps be expected to have an interest in creating a unifying civil morality and religion? A century ago "Americanization" was an integral part of public education, and the civil religion of that period had a definitely Protestant and increasingly

will be considered under several categories. One set of categories would cover the institutional sources of regulation. These include the following: 1) legislative: statutes, ordinances, and amendments affecting civil liberties, legal classifications, zoning, and other areas of concern; 2) administrative: IRS, Labor, OSHA, and other administrative rules and programs recorded in the Federal Register; 3) executive: executive orders, agreements, and proclamations; and 4) judicial: interpretations and legal tests. Regulations have traditionally been justified on the ground that they protect public health, safety, and morals. This paper will consider whether other grounds have been added to this list.

Another set of categories will cover the types of regulation: zoning laws, affirmative action requirements, deductibility requirements, unemployment compensation, school accreditation, quid pro quo expectations, as well as more traditional police powers.

Causal factors will be sought in order to better account for the changes in the church-state relationship. The following are just some suggested possibilities:

- 1) Entitlement programs that promote a more openly egalitarian, socially inclusive, or nationalist set of political references and values;
- 2) A bureaucratic ethos that emphasizes the identification and servicing of potential clients (i.e., bureaucratic ambulance-chasing);
- 3) A professional ethos that fosters morale by stressing such values as technical competence, professional authority, public service, and professional exclusivism;
- 4) Upwardly mobile bureaucrats that tend to commit themselves to an activist ideology which will help advance their careers;
- 5) Special interest groups that perceive social regulatory agencies as a means of advancing their claims on society;
- 6) Local taxing districts that covet new sources of revenue in this day of inflation, declining budgets, and diminishing tax bases;
- 7) Local school districts that face declining enrollments even as church schools are proliferating;
- 8) An increasing willingness by some interest groups to use legislation and litigation as a means of gaining sanction for formerly illicit activities, while at the same time muzzling potential opposition; and
- 9) The general lack of clear institutional boundaries and spheres of autonomous power, which encourages all interested parties to seek to extend their prerogatives in order to fill the vacuum.

In a word, the object of social regulation, like economic regulation, is "predictability." Direct physical control is the most expensive and risky means to this end. Politics is the art of devising subtler means of achieving the same end. Subversion thus tends to be more efficient than confrontation. Redefinition is subtler than voicing disapproval. If idle hands are the devil's workshop, simply apply Parkinson's Law and create a nation of busybodies.

Social regulation follows a seductive logic, as Frances Piven and Richard Cloward observed in Regulating the Poor. The point of all the sound and fury is not J. Willard Hurst's celebrated "release of energy," which he discovered to be the guiding light of 19th century American law, but rather the channeling of all that energy into something resembling a Rube Goldberg contraption. In the absence of a sense of national purpose, we have been making much ado about nothing, like the couriers of Franz Kafka's parable who spent their miserable lives shouting meaningless messages to each other. We have preserved many of the forms, but little else. This makes the subtler arts even more indispensable. The invisible strings that regulate the churches are only instances of a family of hidden persuaders that are being placed increasingly at the service of the state. What is true of the art of war and the art of love, then, is equally true of the art of politics.

Afterword

In case these may seem to be discouraging words, the reader should take heart. They merely reflect a continuing tension between church and state. As long as the issues can be recognized and addressed, there is no cause for pessimism. To put the thesis of this paper another way, bureaucratic power and what may be called "national purpose" (as defined by our national opinion leadership) are subtly working together to dilute all ideological challenges, and to weaken all competing or parochial loyalties. If this means trivializing spiritual life, reducing it to the lowest common denominator and domesticating it, then the strategy of absorbing the distinctives of church life into the mainstream of the culture would seem to serve this purpose well. But this is also merely to assume that religion is a decaying tradition, and that only its forms are left for preserving. This could more easily be said about some of its secular substitutes at the present time. The verdict is not in, but a review of recent trends is useful in order to delineate the universe of possibilities. The United States may be studied with the tools of comparative politics as a developing nation that is striving to create unity out of diversity. Its political and social leaders, being insecure in their own identity and position, perceive independent spheres of power as real dangers threatening to undermine the allegiance of the people. Only back in the 1950s, California churches were required to pledge their loyalty to the state. The U. S. Supreme Court declared this practice unconstitutional in 1958. In ancient Rome, every religion was granted permission, and its god was admitted to the pantheon of approved gods, just as long as the worshippers hailed Caesar as their lord. The early Christians refused to place Caesar above Christ, and suffered the consequences, although they were considered the most trustworthy of citizens. An imperial state must necessarily incorporate or eliminate autonomous spheres, whether they are churches, families, guilds, or schools. In this country, the primary strategy has been assimilation and absorption, rather than elimination, although coupled at times with strict immigration and naturalization laws in this century, and with the forceful resettlement of unwelcome groups. The object, as always, is mastery, or dominion.

The elements of a model may be found in Max Weber, Talcott Parsons, and the literature of comparative politics from the 1950s and 1960s. The two sides might be seen in terms of opposite: nationalism vs. parochialism, nationalism vs. universalism, secular values vs. sacred values, or civil religion vs. theistic religion. Somehow, such dichotomies seem to lead only up a blind alley. National inclusivism is as characteristic of a civil religion as a community of believers separated from and exclusive of outsiders is characteristic of orthodox Judaism or Christianity. Strangers have a similar place in both cases: they are welcome so long as they pledge their allegiance, accept the laws and customs of the body of believers, and become assimilated

into the society. Specific areas of conflict between these two spheres include the following especially: 1) the state's interest in prohibiting social and economic discrimination based on race, gender, creed, or social status may tend to militate against the church's interest in maintaining a separate identity and preserving doctrinal integrity (which requires the freedom to dissociate as well as associate), and 2) a municipality's interest in expanding its tax base may prompt it to circumscribe tax exemptions accorded to churches and church schools. Several bills currently before the Oregon Legislative Assembly would, in effect, redefine "church" and "school" for purposes of property taxation. Much of the paper will be devoted to developing a framework for interpreting specific acts in light of apparent trends. This framework may then be used to identify other potential areas of conflict.

SELECTED BIBLIOGRAPHY

Books

- Arons, Stephen. The Separation of School and State: "Pierce" Reconsidered. Menlo Park: Institute for Humane Studies, 1977.
- Berns, Walter. The First Amendment and the Future of American Democracy. New York: Basic Books, 1976.
- Commission on Private Philanthropy and Public Needs. Research Papers. 6 Vols. Washington, D. C.: Department of Treasury, 1977.
- Gilb, Corinne Lathrop. Hidden Hierarchies: The Professions and Government. New York: Harper and Row, 1966.
- Grover, Alan N. Ohio's Trojan Horse: A Warning to Christian Schools Everywhere. Greenville: Bob Jones University Press, 1977.
- Howe, Mark DeWolfe. The Garden and the Wilderness: Religion and Government in American Constitutional History. Chicago: University of Chicago Press, 1965.
- Kelley, Dean M. Why Churches Should Not Pay Taxes. New York: Harper and Row, 1977.
- Kelly, Kent. The Separation of Church and Freedom: A War Manual for Christian Soldiers. Southern Pines: Calvary Press, 1980.
- _____. State of North Carolina vs. Christian Liberty. Southern Pines: Calvary Press, n. d.
- Konvitz, Milton R. Religious Liberty and Conscience: A Constitutional Inquiry. New York: Viking Press, 1968.
- Kurland, Philip B., ed. Church and State: The Supreme Court and the First Amendment. Chicago: University of Chicago Press, 1975.
- Malbin, Michael J. Religion and Politics: The Intentions of the Authors of the First Amendment. Washington, D. C.: American Enterprise Institute, 1978.
- Krinsky, Fred, ed. The Politics of Religion in America. Beverly Hills: Glencoe Press, 1968.
- Lee, R. Alton. A History of Regulatory Taxation. Lexington: University Press of Kentucky, 1973.
- Marnell, William H. The First Amendment: The History of Religious Freedom in America. Garden City: Doubleday and Company, 1964.
- Manning, Leonard F. The Law of Church-State Relations. St. Paul: West Publishing Company, 1980.
- Morgan, Richard E. The Politics of Religious Conflict: Church and State in America. New York: Pegasus, 1968.
- Nisbet, Robert. Twilight of Authority. New York: Oxford, 1975.
- Nuttall, Clayton L. The Conflict: The Separation of Church and State. Schaumburg:

Regular Baptist Press, 1980.

- Pfeffer, Leo. God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation. Boston: Beacon Press, 1975.
- Robertson, O. B. Should Churches Be Taxed? Philadelphia: Westminster Press, 1968.
- Rushdoony, Rousas J. The Nature of the American System. Fairfax: Thoburn Press, 1978.
- Sorauf, Frank J. The Wall of Separation: The Constitutional Politics of Church and State. Princeton: Princeton University Press, 1976.
- Sowle, Claude R., ed. Police Power and Individual Freedom: The Quest for Balance. Chicago: Aldine Publishing Company, 1962.
- Verduin, Leonard. The Anatomy of a Hybrid: A Study in Church-State Relationships. Grand Rapids: William B. Eerdmans Publishing Company, 1976.
- Warshaw, Thayer S. Religion, Education, and the Supreme Court. Nashville: Abingdon, 1979.
- Way, H. Frank. Liberty in the Balance: Current Issues in Civil Liberties. 5th ed. New York: McGraw-Hill, 1981.
- Whitehead, John W. The Separation Illusion: A Lawyer Examines the First Amendment. Milford: Mott Media, 1977.

Articles

- Anderson, David L. "Proposed Internal Revenue Service Procedure Regarding Revocation of Tax Exempt Status for Private Schools Which Discriminate on the Basis of Race," Catholic Lawyer, 25 (Winter 1979): 73-92.
- Ball, William B. "What Is Religion?" The Christian Lawyer, 8 (1979): 7-15.
- Bittker, Boris I. "Churches, Taxes and the Constitution," Yale Law Journal, 78 (July 1969): 1285-1310.
- _____, and George K. Rahdert. "Exemption of Nonprofit Organizations from Federal Taxation," Yale Law Journal, 85: 299.
- Clark, Elias. "The Limitation on Political Activities: A Discordant Note in the Law of Charities," Virginia Law Review, 46 (1960): 439-466.
- Neuberger, Thomas Stephen, and Thomas C. Crumplar. "Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration," Fordham Law Review, 48 (1979): 230-276.
- Toscano, Paul James. "A Dubious Neutrality: The Establishment of Secularism in the Public Schools," Brigham Young Law Review (1979): 177-211.
- Whitehead, John W., and John Conlan. "The Establishment of the Religion of Secular Humanism and Its First Amendment Implications," Texas Tech Law Review, 10 (1978): 1-66.

Periodicals

CIA Defender
Chalcedon Report
Christian Legal Society Quarterly
First Freedom

Conferences

Conference on Government Intervention in Religious Affairs, Washington, D. C.,
February 11-13, 1981

The Impact of Law on Religious Freedom and Expression in the 80's, Notre
Dame University, April 23-26, 1981