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**FAUSTIAN BARGAINS:  
ENTANGLEMENTS BETWEEN CHURCH AND STATE IN  
AMERICA**

STEVEN ALAN SAMSON\*

**Abstract**

As the state extends its operations into all areas of social life, it breaches the protective 'wall of separation' that has traditionally kept the church free from overt regulation by the civil authorities. This is manifested in several ways: first, a statutory extension of state police powers through social legislation; second, a restriction or pre-emption of certain activities that were once held to be outside the purview of the state; third, a vitiation of the principle of religious non-interference through judicial interpretations of the First Amendment; and fourth, an adversary posture toward churches taken by many agencies of the state while pursuing their regulatory objectives. As a consequence, churches are facing novel restraints on their ecclesiastical or corporate rights, immunities, and privileges. Originally written in 1984, this piece is updated by a brief review of subsequent developments that addressed many of these concerns.

**I INTRODUCTION**

Two subjects most apt to be avoided in polite conversation are religion and politics. The reasons are not hard to fathom. We express our values and views in mixed company at the risk of exposing our identity: perhaps also our ignorance. Explanations are most easily avoided by a circumspect silence. As citizens of an increasingly pluralistic America, we put a

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premium on anonymity and privacy with regard to personal convictions.<sup>1</sup>

Consequently, these most public of commitments – religion and politics – are kept most private and guarded as Rumpelstiltskin guarded his name. Matters of faith tend to be consigned to a tacit dimension of being: a Homeric netherworld of the sort once inhabited by shades of the Greek dead. Religion in particular is becoming more mystic or ineffable, confirming psychologically a dualism in our thinking that has been embraced by modern philosophy. Ludwig Wittgenstein concluded his *Tractatus* on this rather diffident note: ‘What we cannot speak about we must pass over in silence.’<sup>2</sup> J. Glenn Gray has characterized the abstraction of modern social life as a consequence of its godlessness.<sup>3</sup>

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<sup>1</sup>This contrasts with the earlier emphasis on cultural life in which politics and religion were the great issues. See Guillaume Groen van Prinsterer, *Unbelief in Religion and Politics*, ed. and trans. Henry Van Dyke (Amsterdam: The Groen van Prinsterer Fund, 1975), 16: ‘Lamennais writes correctly: ‘There are truths and errors which are at once religious and political, since religion and society have the same origin, namely God, and the same end, namely man. Thus a fundamental error in religion is also a fundamental error in politics, and vice versa.’ See also Richard E. Morgan, *The Politics of Religious Conflict: Church and State in America* (New York: Pegasus, 1968), 21-23, on the close affinity between mainline Protestant and secularist perceptions with regard to church and state.

<sup>2</sup>Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, 2nd ed., trans. D. F. Pears and B. F. McGuinness (London: Routledge and Kegan Paul, 1961), 151. Working within the tradition of Kantian philosophy, Wittgenstein made an absolute distinction between facts and values that led to a kind of ‘ethical mysticism.’ Allan Janik and Stephen Toulmin, *Wittgenstein's Vienna* (New York: Simon and Schuster, 1973), 150-61, 232-35. This resolution of the dualism of fact and value is comparable to the ‘semantic mysticism’ that, according to some critics, characterizes so much of modern theology. See Hazel E. Barnes, *An Existentialist Ethics* (New York: Vintage Books, 1967), 379-99.

<sup>3</sup>J. Glenn Gray, *The Warriors: Reflections on Men in Battle* (New York: Harper & Row, 1959; Perennial Library, 1973), xxii. Gray, an American existentialist philosopher, regarded this change as an increasingly negative development.

## II RELIGION AND POLITICS

We are confronted by a twin paradox in America today: the private Christian and the private citizen. In a bygone generation, the Christian gospel was openly proclaimed abroad in the land. Christianity was recognized as part of the common law. Today, the proclamation is muted and the recognition of our Christian legal tradition is indistinct, even in the churches. The public religiosity of an earlier era has retreated from community life. A malaise has settled over the civil pageantry of the boisterous young republic that once marked time with seven league boots. Even the obligatory lip service paid to civic virtue by dubious politicians and doubtful citizens has grown cold.<sup>4</sup> Shakespeare's Brutus suggested a diagnosis for times like ours:

When love begins to sicken and decay,  
It useth an enforced ceremony.  
There are no tricks in plain and simple faith:  
But hollow men, like horses hot at hand,  
Make gallant show and promise of their mettle;

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<sup>4</sup> Borrowing a page from George Santayana, Leo Marx characterized the switch from a religious to a pragmatic emphasis in American letters as a change of language from the civil religion of the genteel tradition to the vernacular of the 'cruder, more colloquial, closer to the raw, often profane particularities of everyday life in the West.' Marx quoted Ralph Waldo Emerson to the effect that 'the corruption of man is followed by a corruption of language' and reiterated George Orwell's maxim that 'the great enemy of clear language is insincerity.' Leo Marx, 'The Uncivil Response of American Writers to Civil Religion in America,' in *American Civil Religion*, ed. Russell E. Richey and Donald G. Jones (New York: Harper & Row, 1974), 226-27. These observations may be compared with Eugen Rosenstock-Huussy, *Speech and Reality* (Norwich, Vt.: Argo Books, 1970), 10. While Gilbert Keith Chesterton once complimented America as the only nation founded upon a creed, he similarly warned against an insincere solemnity that is so often associated with church life. He regretted the weakness and weariness he saw in American politics and regarded them as evidence of decadence. See Sidney E. Mead, 'The 'Nation with the Soul of a Church,'' in Richey and Jones, *op. cit.*, 45; Gilbert K. Chesterton, *Heretics*, 3rd ed. (New York: John Lane Company, 1906), 216-31, 263-66.

But when they should endure the bloody spur,  
They fall their crests, and, like deceitful jades,  
Sink in the trial.<sup>5</sup>

We live in an age of transition. Sporadic church attendance and low voter turnouts each express a growing disdain for any sort of professionalism or civic obligation. Where once a confident public philosophy held court,<sup>6</sup> a strident skepticism has displaced the fairly broad moral consensus that, according to James Hitchcock, prevailed ‘until sometime after 1960.’

While there were inevitable disagreements over values, in retrospect these seem to have been relatively minor in scope, occurring within an accepted framework of belief. To cite one particularly sensitive example, the nation was overwhelmingly family-oriented. Hence there was general agreement about the undesirability of divorce, unmarried cohabitation, homosexuality, and other practices. However common they may have been in actuality, there was little inclination to defend them in theory. Agencies of public expression, like the schools and the mass media, tended overwhelmingly to honor this moral consensus.<sup>7</sup>

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<sup>5</sup> *Julius Caesar*, act 4, sc. 2, lines 20-27.

<sup>6</sup> Walter Lippmann, *Essays in the Public Philosophy* (Boston: Little, Brown & Company, 1955; New York: New American Library), 136-37, attempted to reformulate the earlier theistic public philosophy in terms that would be acceptable to an agnostic generation since, as he acknowledged, ‘public philosophy is in large measure discredited among contemporary men.’

<sup>7</sup> James Hitchcock, ‘Competing Ethical Systems,’ *Imprimis*, April 1981, 1. Harold Berman, who argues for a religious and against an instrumental conception of law, believes that a profound shift toward an exclusively secular theory of law has taken place during the last two generations. As a result, law is becoming unenforceable to the extent that it is seen merely as something expedient or arbitrary. ‘If law is to be measured only by standards of experience, or workability, and not by standards of truth or rightness, then it will be difficult to enforce it against those who think it does not serve their interests . . . . One who rules by law is not compelled to be everywhere with his police force. I think this point is proved today in a negative way by the fact that in our cities that branch of the law in which the sanctions are most severe, namely

Indeed, this consensus was securely established within our legal system, despite some signs of fraying at the edges even before the 1960s. A radical shattering of this outwardly Christian set of expectations scarcely could have been anticipated. The current fragmentation of values is being viewed positively within what Hitchcock calls the ‘new pluralism’ as a means to effect the transition from one orthodoxy to another.

While the call for “pluralism” is ostensibly merely a call for tolerance – a request that the reigning orthodoxy make room for newer “points of view” – in practice an orthodoxy which loses its authority has trouble even retaining the right of toleration. Although it is still extended bare legal toleration, in practice it finds itself more and more on the defensive, its very right to exist challenged in numerous ways.<sup>8</sup>

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the criminal law, has been powerless to create fear when it has failed to create respect by other means.’ Harold Berman, ‘The Interaction of Law and Religion,’ *Mercer Law Review*, 31 (1980): 409.

<sup>8</sup> Ibid., 2. See also Gary North, ‘The Intellectual Schizophrenia of the New Christian Right,’ *Christianity and Civilization*, 1 (Spring 1982): 23: ‘Education is deeply religious. So is any system of legislation. We cannot escape religion. There is no neutrality. *Everyone uses the neutrality doctrine in order to create his own version of theocracy*: humanist theocracy (man is God), Marxist theocracy (the proletariat is God), anarchist theocracy (the free market is God), or whatever. They use the doctrine of religious liberty to enthrone an anti-Christian social order -- an order which does not allow Christians to establish their God-ordained theocracy. (I am using theocracy here as ‘the rule of God,’ not the rule of ordained priests or the institutional church.) In short, those using the religious liberty argument say that they are maintaining a society open to all religions, when in fact it will be *a society closed to the God of the Bible and His law-order*.’ The experience of churches in the Soviet Union may serve as an illustration. Religious liberty was constitutionally guaranteed but the teaching of religion to children is prohibited to all except their parents. Vladimir Gsovski pointed out in the 1930s that Soviet policy was to dismember the old Orthodox establishment into isolated local units and deprive churches of their property holdings. Although the use of church buildings was granted by local soviets free of charge, members of the church were required to assume all financial responsibilities: taxes, fees, and obligatory insurance payments. Congregations were not allowed to incorporate and, for a time, members of the clergy were disfranchised. Vladimir Gsovski, ‘Legal Status of the Church in Soviet Russia,’ *Fordham Law Review*, 8 (1939): 1-28. The 1977 Soviet Constitution contained the following provision in Article 52: ‘In the USSR the church is separate from the state, and the

The bedrock of this older orthodoxy was an accommodation between church and state designed to maintain standards of law and morality based on Christianity. The disestablishment of the state churches appears to have been originally intended to strengthen rather than impair the cooperation between church and state as institutions. This is attested by numerous court rulings, including the decision of the Supreme Court of New York in the case of *People v. Ruggles*, 8 Johnson 296, 297 (1811):

Though the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation and weaken the security of the social ties . . . . The legislative exposition of the constitution is conformable to this view of it.

Here the Court noted at 296-97 that ‘the people of this state, in common with the people of this country, profess the general doctrines of christianity as the rule of their faith and practice . . . .’ Although the political system is not derived from any particular statement of religious doctrine, it was predominantly Christian in its legal assumptions, moral values, and religious sympathies.<sup>9</sup>

Today, however, there is strong evidence of a growing separation of the

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school is separate from the church.’ Robert Sharlet, *The New Soviet Constitution of 1977: Analysis and Text* (Brunswick, OH: King's Court Communications, 1978), 93.

<sup>9</sup> See H. B. Clark, *Biblical Law: Being a Text of the Statutes, Ordinances, and Judgments Established in the Holy Bible -- With Many Allusions to Secular Laws: Ancient, Medieval and Modern -- Documented to the Scriptures, Judicial Decisions and Legal Literature* (Portland, OR: Binfords & Mort, 1943), 36-41.

American legal and political system as a whole from its original, basically Christian, presuppositions. This trend raises questions of both a theoretical and practical nature concerning the nature and direction of the change.<sup>10</sup> The object of this study is to analyse and evaluate the implications of current public policy concerning the relationship of church and state and to do so in the context of a Christian philosophy of history, law, and government.

### III CHURCH, STATE, AND SOVEREIGNTY

The central questions of philosophy often lie at the frontiers of several disciplines. The problem of delineating the proper spheres of church and state, for instance, raises issues of great consequence in the fields of law, theology, political theory, and economics. The institutional conflicts between church and state nevertheless point to an even more fundamental question about the proper source of authority to which each may appeal: Who or what wields ultimate power in society? This is the question of sovereignty. It asks: What is the court of last resort? Where does the buck stop? The answers of philosophers and statesmen throughout history have been varied and often irreconcilable: the *polis*, the people, the king, the constitution, the church, humanity, destiny, and God. For our purposes here, the options ultimately boil down to two: God or Caesar.

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<sup>10</sup> In commenting on a book by Herman Wouk, Robert Ulich remarks: 'The author rightly believes that the Jewish people would not have survived the long years of persecution without faithful adherence to their rituals, festivals, and prayers. May then not the loss of the Christian past not jeopardize the future of this nation, just as the desertion from the covenant would have jeopardized the survival of the Jews? Nations, as well as men, though living by bread, do not live by bread alone.' Paul A. Freund and Robert Ulich, *Religion and the Public Schools* (Cambridge: Harvard University Press, 1965), 40. See Berman, 'Interaction,' *Mercer Law Review*, 405-13.



Our American forebears were faced with the delicate task of founding and properly outfitting a new system of government that would distribute authority, protect liberty, and simultaneously guard against the abuses of both. By the time of the Declaration of Independence, the concept of legal sovereignty that had for so long been claimed by kings and parliaments was thoroughly discredited.<sup>11</sup> It is noteworthy that the Constitution does not even use the word sovereignty and, instead, reserves for itself the more modest status of ‘supreme law of the land,’ a concept that may be traced back to the Bible through the Magna Charta.<sup>12</sup> The founders recognized

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<sup>11</sup> See, for example, Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917), 267-75; and Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt Brace Jovanovich, 1955), 44-45. On the term ‘political sovereignty,’ see John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960), 70-71: ‘Nowhere in the American structure is there accumulated the plenitude of legal sovereignty possessed in England by the Queen in Parliament. In fact, the term ‘legal sovereignty’ makes no sense in America, where sovereignty (if the alien term must be used) is purely political. The United States has a government, or better, a structure of governments operating on different levels. The American state has no sovereignty in the classic continental sense. Within society, as distinct from the state, there is room for the independent exercise of an authority which is not of the state. This principle has more than once been affirmed by American courts, most recently by the Supreme Court in the Kedroff case. The validity of this principle strengthens the stability of the Church’s condition at law.’ See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). But an unfortunate consequence of the inability or unwillingness by the courts to take faithfulness to doctrinal standards into consideration – as in Kedroff – is that they are often unable to provide relief to an orthodox faction seeking to prevent a congregational or denominational takeover. Corporation and property laws place the burden of responsibility on churches and denominations to anticipate and protect themselves against any such eventuality. Many churches are wary of the implications of incorporating, submitting to regulation, or turning to the secular courts.

<sup>12</sup> See Helen Silving, ‘The Origins of the Magnae Cartae,’ *Harvard Journal of Legislation*, 3 (1965): 117-31. Reprinted in Helen Silving, *Sources of Law* (Buffalo, NY: William S. Hein and Co., 1968), 237-49. Thomas J. Higgins, *Judicial Review Unmasked* (West Hanover, MA: Christopher Publishing House, 1981), 51-52, deals with the difficulty of trying to reconcile a separation of powers with the concept of political sovereignty.

that ultimate authority must be located at a point beyond human intervention and, hence, beyond politics. Noah Webster expressed a Christian understanding of sovereignty when he illustrated the word in his definition: ‘Absolute *sovereignty* belongs to God only.’<sup>13</sup> Without this common understanding, the question of who wields ultimate power necessarily becomes the supreme object of political contention.

The constitutional protection of the church from intervention by the state is a revolutionary idea. From the earliest days of the church, monarchs had often claimed authoritative powers in matters of church doctrine and government. The authority of the Roman emperor as the supreme pontiff over the state religion was maintained to some degree even as the empire became nominally Christian, though it was expressly repudiated by the Christian emperor, Gratian.

During the centuries that followed, emperors, popes, and kings fought to possess the keys to the kingdom of God. The American historian, Sanford H. Cobb, could thus remark with some justification that, in light of the long history of political absolutism, ‘this pure religious liberty may be justly rated as the great gift of America to civilization and the world. . . .’<sup>14</sup> Although Americans tend to take this gift for granted today, the proper juxtaposition of church and state is still an unsettled question.

Some degree of political divisiveness is to be expected when the place of

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<sup>13</sup> Noah Webster, *An American Dictionary of the English Language*, vol. 2 (New York: S. Converse, 1828; San Francisco: Foundation for American Christian Education, 1967), 76.

<sup>14</sup> Sanford H. Cobb, *The Rise of Religious Liberty: A History* (New York: Macmillan, 1902; Burt Franklin, 1970), 2.

the church in society is discussed because it involves the issue of ultimate allegiance. With the secularization of our cultural institutions, people's expectations about the interaction of church and state have changed.<sup>15</sup> Many Americans now regard the church as an unrepresentative special interest group and thus expect it to play a subordinate, even invisible, role in public affairs. This attitude is probably nearly as prevalent among church members as among non-members.

Pluralism is frequently prescribed as an antidote to the divisiveness of religious orthodoxies and enjoys a favourable image as a common denominator or neutral value.<sup>16</sup> According to Sidney Mead, it was the pluralist vision of a 'cosmopolitan, inclusive, universal theology' that guided the founders.<sup>17</sup> Similarly, it was an avowedly non-sectarian Christian moralism rather than religious skepticism that motivated Horace Mann and other supporters of the public education movement early in the nineteenth century.<sup>18</sup> But now that religion is generally considered to be a private affair, the church as an institution is today being relegated to the fringes of an avowedly pluralistic secular society. In his study of the phenomenon of revolution during the last thousand years of western history, Eugen Rosenstock-Huussy detected a gradual reversal in the identity of the public and private realms:

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<sup>15</sup> David Martin, *A General Theory of Secularization* (New York: Harper and Row, 1978), 278-80.

<sup>16</sup> See Mead, 'Nation,' in *American Civil Religion*, ed. Richey and Jones, 54-55, which distinguishes nonconformity from secularism.

<sup>17</sup> *Ibid*, 55.

<sup>18</sup> See Rousas John Rushdoony, *The Messianic Character of American Education: Studies in the History of the Philosophy of Education* (Nutley, NJ: The Craig Press, 1963).

Church and economy have changed their places during the last thousand years . . . . The universal church becomes more and more particular in her operations; economy becomes more and more universally organized. We still pray for One Catholic Church. The real trouble of the future will be, whether we can pray for it sincerely or not. It is true that for ten centuries the nations carried both visions, the vision of local rights and private property, and the vision of a universal realm of peace. Private property is being attacked today on the same ground as the unity of faith. Both ideals are imperilled. Bolshevism is radical enough to make the church a private affair for the individual, and property the public affair of the community. But the question is not dependent on any subjective theory about Marxism. It is an issue for any government which subsidizes industry, taxes private educational institutions, propagates political ideas, or repopulates its deserted villages with self-subsisting homesteads.<sup>19</sup>

Indeed, some secularists nurture a hope that the church will eventually die of sheer irrelevance if it is left isolated and unacknowledged.<sup>20</sup>

Ironically, the problem of reconciling the claims of church and state may be a more urgent one for a nominally secular society than for one in which religion officially plays a leading civic role. In the days when sovereignty was regarded as a transcendent concept, church and state at least had a common religious reference and a common source of appeal in Scripture, even though they may have competed for control of the civil sword from time to time.<sup>21</sup> Now that sovereignty has been brought down to earth in the

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<sup>19</sup> Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (New York: William Morrow and Company, 1938), 496.

<sup>20</sup> See, for example, John D. Dunphy, 'A Religion for a New Age,' *The Humanist*, January/February, 1983, 23-26. See also James Hitchcock, *What is Secular Humanism?: Why Humanism Is Becoming Secular and How It Is Changing Our World* (Ann Arbor, MI: Servant Books, 1982), 105.

<sup>21</sup> See Sidney E. Mead, *The Lively Experiment: The Shaping of Christianity in America*

name of the people, there is good reason to doubt that any institution remains sufficiently independent of the state to guarantee freedom of religion, or any other freedom, beyond the merest ‘considerations of what is expedient for the community itself.’<sup>22</sup>

The business of determining ‘community standards’ is inherently moral or religious in nature. Indeed, morality is just as readily legislated as it is preached or taught. If, in fact, religiosity and morality are basic human traits, secularity and amorality are not their opposites. The rejection of one system of values and beliefs only indicates that it has been replaced by another system considered more acceptable, believable, or valuable. If the really salient issue were the establishment of religion, what would be gained by a community if, in disestablishing the church, it simply established the state in its place?<sup>23</sup> When the state itself is sovereign, what

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(New York: Harper & Row, 1963), 59. For illustrations of this common religious reference, see B. F. Morris, *Christian Life and Character of the Civil Institutions of the United States, Developed in the Official and Historical Annals of the Republic* (Philadelphia: George W. Childs, 1864).

<sup>22</sup> Oliver Wendell Holmes, Jr., *The Common Law*, ed. Mark DeWolfe Howe (Boston: Little, Brown, and Company, 1963), 32. Similarly, Woodrow Wilson ‘believed that laws must be adjusted to fit facts ‘because the law . . . is the expression of the facts in legal relationships. Laws have never altered the facts; laws have always necessarily expressed the facts.’’ Quoted in Herbert Schlossberg, *Idols for Destruction: Christian Faith and Its Confrontation with American Society* (Nashville, TN: Thomas Nelson Publishers, 1983), 14. American legal philosophy tends toward a pragmatism that appears to be descended from scholastic nominalism. In its historicism, it recalls what G. E. Moore called ‘the naturalistic fallacy.’ See William K. Frankena, *Ethics* (Englewood Cliffs, NJ: Prentice-Hall, 1963), 81-82.

<sup>23</sup> Abraham Kuyper, *Lectures on Calvinism* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Company, 1931), 96-99, expresses concern about a tendency for the modern state to take the place of the church. Richard John Neuhaus, ‘Law and the Rightness of Things,’ *Valparaiso Law Review*, 14 (1979): 12, raises a similar concern: ‘This is precisely the cultural crisis of our society: the popularly accessible and vibrant belief systems and worldviews of our society are largely excluded from the public arena in which the decisions are made about how the society should be ordered . . . .

institution is sufficiently independent to stand apart from the state as a court of last resort fully equipped to assure civil and religious liberty? This is the dilemma posed by any establishment of religion by the state.

This is not to deny that disestablishment has created its share of difficulties. Even though Christianity still outwardly prevails as the majority religion, our accustomed religious liberty has furnished a rich soil for doctrinal innovations. Otto Scott's analysis suggests some of the perplexities that confront historians as they interpret the nature of American religion:

The United States was a government whose constitution claimed no higher authority than its own laws. That was essentially a lawyer's concept of civilization, and could be traced not to the church, but to Roman tradition. The novelty of a nation without an official religion was not fully appreciated in 1830 -- for no land was as crowded with churches and no people more prone to use religious terminology and Christian references in everyday speech, in their writings, and in their thinking, than the Americans. There was no question of the piety of millions. There was equally little doubt that they did not fully realize that a land with no religious center is a land where religion is what anyone chooses to claim.<sup>24</sup>

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With apologies to Spinoza, transcendence abhors a vacuum. Today there is such a vacuum in the public space of American law and politics. Unless it is democratically filled by the living moral tradition of the American people, it will surely be filled, as has so tragically happened elsewhere, by the pretensions of the modern state. As the crisis of legitimacy deepens, it will lead – not next year, maybe not in twenty years, but all too soon – to totalitarianism or to insurrection, or to both.'

<sup>24</sup> Otto J. Scott, *The Secret Six: John Brown and the Abolitionist Movement* (New York: Times Books, 1979), 97. But other commentators, like Philip Schaff in the late nineteenth century, strongly disagreed with critics who charged the constitutional system with 'political atheism.' It is important to realize, however, that this was largely a controversy among professing Christians. See Philip Schaff, *Church and State in the United States: or The American Idea of Religious Liberty and Its Practical Effects*, Papers of the American Historical Association, vol. 2, no. 4 (New York: G.

The varieties of religious expression are paralleled by the seemingly endless permutations to public law that attempt to accommodate them. No cultural vacuum remains unfilled for very long. The retreat of the church from many of its earlier social welfare and education commitments has been matched by the advance of the state in these same areas. The one has catalysed the other. But the state has also come to be regarded as a vehicle for promoting civil and religious unity and universality.<sup>25</sup> World history is the story of successive empires that have aspired to universal dominion in one form or another, among them Assyria, Babylon, Persia, Greece, Rome, Islam, Germany, Mongolia, Spain, England, France, the Axis, America, and Russia.

#### IV THE MYTH OF NEUTRALITY

America has long been a prolific breeding ground for new cults. In the absence of a healthy civil religion, almost anything goes. The Harvard sociologist, Pitirim Sorokin, characterized this phenomenon as “chaotic syncretism,” which he attributed to the decomposition of an ‘overripe sensate culture.’<sup>26</sup> Indeed, religious pluralism is just as problematic in its own way as the old church establishments once were for the American colonists. This is most strikingly reflected in the high level of litigation over church-state issues. The guarantee of religious free exercise upsets the status quo, especially once it is accepted as a distinct value apart from

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Putnam's Sons, 1888), 38-43.

<sup>25</sup> Rosenstock-Huessy, *Revolution*, 493-95.

<sup>26</sup> Pitirim A. Sorokin, *The Crisis of Our Age: The Social and Cultural Outlook* (New York: E. Dutton and Co., 1941), 241-52.

its original purpose of protecting dissenters – mainly Christian – from existing church establishments.

Regarding matters of religious belief and practice, the state today affects an attitude of disinterested neutrality. In a series of decisions, the Supreme Court has held that every government activity must be guided by a secular purpose and have a neutral ‘primary effect that neither advances nor inhibits religion.’<sup>27</sup> But these tests are not as straight-forward as they might appear to be for the simple reason that the effective spheres of political and religious activity cannot be neatly compartmentalized. Both politics and religion are comprehensive in their reach. Above all, they are inclusive; they are first of all inclusive even where they appear exclusive. Both are unavoidably value-laden. Neither is neutral in its effects, whether these are primary or subsidiary. Indeed, all perception, thought, and action begins with biases, presuppositions, or predilections.<sup>28</sup> Whether in theory or in practice, neither the state nor the church is apt to always agree which are the things of God and which are the things of Caesar (Matt. 22:21), assuming they even attempt to draw a meaningful distinction between the secular and the sacred. If Christian believers are to ‘Render . . . to all their dues’ (Rom. 13:7), then some yardstick is required to determine what is due to each. It is a problem of jurisdiction.

This problem of jurisdiction has been compounded by the divided state of the church. Public policy unavoidably differentiates among and differently affects the perceptions and practices of different churches and church

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<sup>27</sup> *Abington School District v Schempp* (1963) 274 U.S. 222.

<sup>28</sup> See Cornelius Van Til, *In Defense of Biblical Christianity*, vol.2: *A Survey of Christian Epistemology* (Nutley, NJ: Presbyterian and Reformed Publishing Company, 1977), 4-6.



communicants. What may be regarded as welcome assistance by some may be regarded as an unwelcome intrusion by others. Some religious traditions, like Puritanism, are militantly reformational. Others, like the Social Gospel and liberation theology, concentrate on the transformation of social institutions. Anabaptists, such as the Mennonites, generally tend toward strict separationism and political quietism.<sup>29</sup> Others, among them Roman Catholics, seek close cooperation between church and state.<sup>30</sup> Religious liberty means something very different in each case.

Particular laws and policies burden the members of some sects more than others. When class legislation was still the exception rather than the rule, relief was usually sought in the form of exemptions or favourable court rulings. But exemptions have come to be treated as privileges rather than immunities; and court rulings have become highly unpredictable and subjective in the absence of a clear interpretative tradition.<sup>31</sup> General policy legislation invariably imposes hardships on those who, for legitimate religious reasons, cannot or will not comply. These hardships may be further aggravated by overly stringent and sometimes quite logical renderings of the vagaries of legislative language into administrative practice. A simple turn of phrase or an undefined term may inspire novel

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<sup>29</sup> See John Howard Yoder, *The Christian Witness to the State*. Institute of Mennonite Studies, Number 3 (Newton, KS: Faith and Life Press, 1964); Willem Balke, *Calvin and the Anabaptist Radicals*, trans. William Heynen (Grand Rapids, MI: William B. Eerdmans Publishing Company, 1981), 59-65, 260-65.

<sup>30</sup> See Robert E. Webber, *The Secular Saint: A Case for Evangelical Social Responsibility* (Grand Rapids, MI: Zondervan Publishing House, 1979), 75-165.

<sup>31</sup> Walfred H. Peterson, *Thy Liberty in Law* (Nashville, TN: Broadman Press, 1977), 151, 156-59, notes the importance of personality factors in judicial interpretation. See also Rousas John Rushdoony, 'The War Against Christ's Kingdom,' *A Special Chalcedon Alert*, no. 1, January 1982.

bureaucratic initiatives. The courts are then placed in the position of having to referee the competing claims of government officials, private citizens, and churches.

The earlier cooperation that characterized the relationship of church and state was followed in this century by an era of relatively benign indulgence or accommodation. But by the late 1970s prominent religious leaders were expressing their concern that the relationship was becoming increasingly confrontational. Numerous books and articles appeared that criticized what the authors regarded as gratuitous regulatory interference in areas formerly left to church control.<sup>32</sup> Significant numbers of church members had become persuaded that incidents involving licensure and certification requirements for church-operated schools and day care facilities, demands for church records by revenue agencies, restrictions on property use by zoning authorities, and bureaucratic stipulations concerning the proportion of time devoted to “religious” as opposed to “secular” activities were not simply unforeseen by-products of more general policy changes, or unfortunate misunderstandings, but deliberate provocations by officials in pursuit of hostile purposes.<sup>33</sup>

Has the era of benign neglect of churches by the state come to an end? Considerable evidence suggests that the state is claiming such a wide scope of regulatory authority that its operations impinge upon routine church

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<sup>32</sup> Two examples are Kent Kelly, *The Separation of Church and Freedom* (Southern Pines, NC: Calvary Press, 1980); and Clayton L. Nuttall, *The Conflict: The Separation of Church and State* (Schaumburg, IL: Regular Baptist Press, 1980).

<sup>33</sup> See Franky Schaeffer, *A Time for Anger: The Myth of Neutrality* (Westchester, IL: Crossway Books, 1982).

activities.<sup>34</sup> If this is true, it may be due in no small part to the high premium many churches place on an entangling partnership with the state in furthering either their own programs or those of the state.<sup>35</sup> It does not necessarily or in all cases indicate a malicious intent. If, in fact, the religious institutions of our society are being brought under the effective supervision and control of the state, their independence is perhaps being most threatened by the logical consequences of an avowedly beneficent purpose: that is, the equalization of economic and social opportunities for all groups in our society.

It serves little purpose, however, to speculate about the motives or intentions of legislators, bureaucrats, and judges. Although intent – where it may be determined – does help confirm the direction of the changes, what matters in this context is the impact of the policy changes. Despite all the talk about secular purposes and neutral effects, what is the object of a policy of religious pluralism – or syncretism – if not the formation of “a more perfect union” on the basis of some variety of universalism? It is precisely here – in the realm of ideology – that the concern of churches with their doctrinal integrity and their customary immunity from state intervention in the form of regulation or taxation may come into conflict with the state's interest in ideological and administrative consistency. Exceptions admitted by either side tend to dilute the impact of its claims to authority in its proper sphere.<sup>36</sup>

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<sup>34</sup> Some degree of relief has been provided by Congress through the subsequent passage of the Religious Freedom Restoration Act in 1993 and the Religious Land Use and Institutionalized Persons Act of 2000. See Appendix.

<sup>35</sup> See Morgan, *Politics*, 37-38.

<sup>36</sup> William A. Stanmeyer, *Clear and Present Danger: Church and State in Post-Christian America* (Ann Arbor, MI: Servant Books, 1983), 58, warns that if the

How then may the current state of affairs best be understood? Have the most important conflicts between church and state already been resolved through a series of imperfect but generally agreeable compromises, or are the complexities of the issues only just now coming to the surface?

The issue may be stated in terms of a conflict of jurisdiction between church and state. As the state extends its operations into all areas of social life, it breaches the protective “wall of separation” that has traditionally kept the church free of obtrusive regulation by the civil authorities. The widening scope of official state activity is manifested in several ways: first, a statutory extension of state police powers through social legislation over what are still widely regarded as ecclesiastical and domestic spheres of authority; second, a restriction or pre-emption of certain activities involving commerce, employment, and social relations -- whether conducted in public or in private -- that were once held to be outside the jurisdiction of the state; third, a vitiation of the principle of religious non-interference through judicial interpretations that divorce the “establishment” and “free exercise” clauses of the First Amendment, and fourth, an adversary posture toward churches being taken by many agencies of the state while pursuing their regulatory objectives.<sup>37</sup> As a consequence,

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Christian does not assert a particular constitutional right ‘then he abdicates the protections that the laws have provided for him. Worse, he abandons these protections for others.’ On the other hand, weak cases often set bad precedents.<sup>37</sup> Stanmeyer notes, by way of illustrating the problem, the 1978 ‘proposed Revenue Procedure on Private Tax-Exempt Schools,’ which was delayed in its implementation as a result of intense lobbying: ‘This ‘procedure’ was actually a substantive rule; it proposed automatic loss of tax exemption for all private schools if found ‘discriminatory’ by a court or *agency*, or if they lacked a ‘minority’ student enrollment of twenty percent of the ‘minority school population’ of the *public* school district in which the private school was located. Further, the proposal set up a *presumption* that

churches are facing new restraints on their ecclesiastical or corporate rights, immunities, and privileges.

Several presuppositions that underlie this thesis have influenced the manner of its investigation and elaboration.

First, religion is a comprehensive human activity that embraces all of life, particularly the rules and values of society. The Christian theologian, R. J. Rushdoony, maintains that 'all law is enacted morality . . . and all morality presupposes a religion as its foundation.'<sup>38</sup> Paul Tillich's very broad definition of religion as an "ultimate concern," which has been cited by the Supreme Court, includes theistic, pantheistic, and atheistic religion within its compass.<sup>39</sup>

Second, the comprehensiveness of religion means that religious neutrality is a myth. Francis J. Powers has written that 'an attitude of indifference or neutrality toward religion, on the part of the state, is theologically and philosophically untenable.'<sup>40</sup>

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the private school is discriminatory if it fails to have, among other things, 'an increasing percentage of minority student enrollment' and 'employment of minority teachers.' The only way the school could rebut this presumption would be to carry 'the burden of clearly and convincingly' demonstrating that it did not discriminate on racial grounds. It would be only 'rare and unusual' to find a school not enrolling some minority students to be non-discriminatory.' *Ibid.*, 113.

<sup>38</sup> Rousas John Rushdoony, *Law and Liberty* (Fairfax, VA: Thoburn Press, 1977), 2.

<sup>39</sup> *United States v. Seeger* (1965) 380 U.S. 187.

<sup>40</sup> Francis J. Powers, *Religious Liberty and the Police Power of the State: A Study of the Jurisprudential Concepts Underlying the Problem of Religious Freedom and Its Relationship to the Police Power in the United States With Special Reference to Recent Decisions of the United States Supreme Court on the Subject* (Washington, DC: The Catholic University of America Press, 1948), 46.

Third, the American constitutional system is essentially Christian in its foundational character and assumptions. Justice William O. Douglas acknowledged this when he wrote that ‘a “religious” rite which violates standards of Christian ethics and morality is not in the true sense, in the constitutional sense, included within 'religion,' the 'free exercise' of which is guaranteed by the Bill of Rights.’<sup>41</sup> From the bench, he reiterated an assumption in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) that has frequently been stated by the Court: ‘We are a religious people whose institutions presuppose a Supreme Being.’

Fourth, the legal heritage of our country is Christian at its roots. Sir Matthew Hale's maxim that Christianity is part of the common law was often cited by early members of the American judiciary, both in their written opinions and their scholarly commentaries. For example, in his treatise on constitutional limitations, Chief Justice Thomas M. Cooley of Michigan wrote:

The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.<sup>42</sup>

What may be concluded from these observations, finally, is that perhaps too much attention has been paid to the alleged secularization of our political institutions and not enough to the religious and political

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<sup>41</sup> William O. Douglas, *An Almanac of Liberty* (Garden City, NY: Doubleday and Company, 1954), 304.

<sup>42</sup> Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, vol. 2, 8th ed. (Boston: Little, Brown, and Company, 1958), 91.

presuppositions that have favoured such an interpretation. In recent years, it appears that the state has been assuming – whether intentionally or not – the essential attributes of a church.<sup>43</sup> Far from pursuing a separationist course, the state has consistently attempted to convert churches and other institutions into instruments of its own social programs and has enlisted their cooperation or acquiescence by the granting and withholding of favours.<sup>44</sup> This is by no means an exclusively American problem. Writing in the 1930s, Eugen Rosenstock-Huessy depicted it as part of a universal modern trend:

The world owes it to the British Commonwealth that during the last centuries, donations, endowments, voluntary gifts, have been the mainspring of progress in many fields. Were it not for the right of man to do what he liked with his property little would exist in religion, art, science, social and medical work today. No king's arbitrary power was allowed to interfere with a man's last will as expressed in his testament. On the independence of 10,000 fortunes a civilization was based that allowed for a rich variety of special activities introduced by imaginative donors and founders. The ways of life explored under the protection of an independent judiciary form a social galaxy. Our modern dictators, however, are cutting deeply into this tradition. This is achieved through progressive taxation of inheritance or limitation of a man's right over his property, by subsidizing institutions, like Oxford, which were independent formerly. . . . The famous Dartmouth case

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<sup>43</sup> This is nothing new. The state was usually the central religious authority in ancient times. Other institutions serve much the same purpose, as suggested by Hazel Barnes, *The University as the New Church* (London: C. A. Watts & Co., 1970). The separation of religious and civil is unique to the biblical tradition, but it has been a source of contention ever since church and state first joined in partnership during the latter years of the Roman Empire. For the early modern period, see Otto Gierke, *Political Theories of the Middle Ages*, trans. Frederic William Maitland (Cambridge: Cambridge University Press, 1900; Boston: Beacon Press, 1958), 91.

<sup>44</sup> See, for example, Lyle E. Schaller, *The Churches' War on Poverty* (Nashville, TN: Abington Press, 1967), 77-79.

which Daniel Webster won against the State (a striking example of the progressive significance of the Whiggish principle) was tried only a century ago; yet the conditions which made it possible for Webster to win are rapidly vanishing, at least in Europe.<sup>45</sup>

Exemptions that were designed to protect religious liberties are now perceived in some political circles either as customary privileges which are not binding on the state or else as bargaining chips with which to advance its policies. The wall of separation, as it now stands, appears to be a permeable one that simultaneously consigns churches – often with their cheerful cooperation – to a position of irrelevance within the contemporary American culture and enables the state to absorb their traditional functions and prerogatives. Indeed, a retrospective look at the record suggests that the courts, legislatures, and bureaucracies of the land have become involved in an experiment to gradually disengage our political system from its dominant religious and legal heritage.<sup>46</sup> Secular equivalents to religious institutions now promote human relations, education, health, and welfare in a manner reminiscent of William James's proposal for 'a moral equivalent of war.'<sup>47</sup>

Although education has been at the centre of much of the conflict in recent years, school issues are only the most visible part of a more fundamental clash of religious values. Richard E. Morgan regards the "governmentalization of welfare services" and the "educational revolution" as the two major trigger issues that have led to a growing conflict between

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<sup>45</sup> Rosenstock-Huessy, *Revolution*, 29-30.

<sup>46</sup> Hitchcock, *Secular Humanism*, 99-113.

<sup>47</sup> William James, *Pragmatism and Other Essays* (New York: Washington Square Press, 1963), 289-301. 'A Moral Equivalent of War' is the title of one of the essays.



church and state due to the rise of a reaction in the 1960's against "the traditional ideology of privatism." Morgan adds:

These radical secularists tend to regard private charitable activity as illusory and psychologically corrupting, and the notion of religious institutions administering public funds is anathema. Religious schools are seen as especially regressive. . . . There is, it should be noted, a direct conflict between the radical secularist demand for governmentalization of social welfare and education, and the principle of "subsidiarity" which looms large in Catholic social thought. As formulated by Pius XI, this holds that it is "unjust" and "gravely harmful to turn over to a greater society . . . functions and services which can be performed by lesser bodies. . . ." Thus families and private associations should handle all possible functions, and nothing which they are capable of doing should be displaced "upward" to government.<sup>48</sup>

At stake is who or what will define the political and social agenda of the future? It is a question of whose vision of the future, whose values, whose religion will prevail. Since church and state are so influential in shaping public opinion, both have long been utilized as ideological proving grounds by various social movements seeking to mould society according to the desire of their hearts. Possibly as a consequence, church and state now claim overlapping spheres of authority. If they continue to find themselves

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<sup>48</sup> Morgan, *Politics*, 131-32. It would be a mistake, however, to regard this radical secularism as something fundamentally outside and antithetical to the Judeo-Christian religious tradition. Comparable views are expressed by many professing Christians. See W. Stanley Mooneyham, *What Do You Say to a Hungry World?* (Waco, TX: Word Books, 1975), 25-32; Ronald J. Sider, *Rich Christians in an Age of Hunger: A Biblical Study* (Downers Grove, IL: Intervarsity Press, 1917), 214-17. For a critique of these views, see David Chilton, *Productive Christians in an Age of Guilt Manipulators: A Biblical Response to Ronald Sider*, 2nd ed. (Tyler, TX: Institute for Christian Economics, 1982), 184-86; Schlossberg, *Idols*, 243-50.

at cross-purposes, each may be expected to assert an independent claim – perhaps even a monopoly of competence – over areas of that are of mutual concern.

More than any other social institution today, excepting the family, the church derives its original identity and authority from a source that is independent of the state.<sup>49</sup> The church steadfastly maintains that it answers to a higher authority regarding its sacraments, ceremonies, disciplines, and doctrines. Otherwise it risks becoming a creature or appendage of the state. The state is equally steadfast in upholding its immediate responsibility regarding the protection of public health, safety, welfare, morals, and peace. But the sphere of its interests has grown so large that the state is again coming into direct competition with the church and has begun asserting regulatory control over many church activities as a sovereign right. The concept of the church as a “charitable public trust,” which is a holdover from the days of established churches, has opened the door to inroads by the state into church affairs as, for instance, in California, where the Worldwide Church of God was temporarily placed into receivership by the Attorney General and more than sixty churches were recently threatened with sale for back taxes over a dispute concerning filing requirements.<sup>50</sup>

Several consequences appear to follow from the expansion of jurisdiction and the tightening of regulations by the state: first, a decline of civil and

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<sup>49</sup> Abraham Kuyper, *Lectures on Calvinism* (Grand Rapids: Wm. B. Eerdmans Publishing Company, 1931), 99-109.

<sup>50</sup> See Ted Witt, ‘Church Tax Veto Hits Home,’ *The Times-Advocate* (Escondido, Cal.), 2 October 1980, C-1; Ted Witt, ‘Poway Church Nears Line in Filing Marathon,’ *Times-Advocate*, 29 January 1982, A-5; Ted Witt, ‘Risking Jail for Freedom,’ *Times-Advocate*, 17 September 1982, A-2, A-8.

religious liberty in those areas of public life where explicitly religious expression is either excluded, as in the public school classroom and auditorium, or where it is otherwise made unwelcome, as in the use of some public facilities for religious gatherings and displays;<sup>51</sup> second, a withering away of independent public institutions – sometimes called ‘mediating structures’<sup>52</sup> – in favour of agencies dominated, subsidized, or otherwise regulated by the state; and third, an attitude among some public officials that may be described as missionary, messianic, or authoritarian.<sup>53</sup>

The relationship between church and state tends to fall into one of several categories: first, a union of church and state in which dissenters are persecuted; second, a union of church and state in which dissenters are tolerated; third, a separation of church and state in which believers are persecuted; and fourth, a separation of church and state in which religious liberty prevails.<sup>54</sup> But these categories are not necessarily exclusive. In ancient Rome, licensed religions were tolerated and unlicensed ones were

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<sup>51</sup> See Peter J. Ferrara, *Religion and the Constitution: A Reinterpretation* (Washington, DC: Free Congress Research & Education Foundation, 1983), 1-13.

<sup>52</sup> See Theodore M. Kerrine and Richard John Neuhaus, ‘Mediating Structures: A Paradigm for Democratic Pluralism,’ *The Annals of the American Academy of Political and Social Science*, 446 (November 1979): 10-18, hereafter cited as *Annals*; Rockne McCarthy. Donald Oppewal, Walfred Peterson, and Gordon Spykman, *Society, State, and Schools: A Case for Structural and Confessional Pluralism* (Grand Rapids: William B. Eerdmans Publishing Company, 1981), 1-3. Lawrence Rosen notes that the Supreme Court has given some recognition to the rights of what the calls an ‘interstitial entity’ – in this case, an Amish family and community – *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and wishes to see the principle extended further. Berman, ‘Interaction,’ *Mercer Law Review*, 420-21.

<sup>53</sup> For example, John McDermott, ‘Campus Missionaries: The Laying on of Culture,’ *The Nation*, 208 (March 10, 1969), reprinted in Herbert G. Reid, ed., *Up the Mainstream: A Critique of Ideology in American Politics and Everyday Life* (New York: David McKay Company, 1974), 303-15.

<sup>54</sup> See Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: The Macmillan Company, 1902; Burt Franklin, 1970), 7-18 *passim*.

persecuted. Historical circumstances have also depended on whether the state dominates the church or the church dominates the state. The prevalent pattern since the rise of nation-states has been a union of church and state in which the state dominates the church.

Historical experience – if not logic – shows religion and politics to be inseparable. Each is an arena for the interplay of basic beliefs about human nature, power, and society. Each is an expression of faith guided by presuppositions that are never finally definitive or indisputable.<sup>55</sup>

## V THE DYNAMICS OF THE PROBLEM

The dichotomy of church and state confronts us, initially and finally, as a political problem. It is a problem that began at a specific place at a specific time in a specific political context: the imperial reign of the Roman Caesars. As one writer notes: ‘In ancient times, as in primitive society today, there existed no problem of Church and State, for the very good reason that no church, in the modern sense of the word, existed.’<sup>56</sup> While the issue between them has not troubled all climes and all seasons equally, it looms large in the history of the West. Religion at one time served mainly as an accessory of statecraft. The advent of Judaism and

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<sup>55</sup> Addressing himself to the writing of history, Eugen Rosenstock-Huussy remarked: ‘Man is a name-giving animal. Conscious experience is the presupposition for a new name. . . . Gettysburg, Saratoga, Yorktown, Marathon, are not facts, but creations of a nation's memory. This creative process precedes historiography by as great an interval as that by which it follows the confusion of the thousands of soldiers or civilians who, among countless facts, did not know what it all meant. The Peloponnesian War was in the hearts and bowels of the Greeks long before Thucydides clarified its memory in the first scientific book on history.’ Rosenstock-Huussy, *Revolution*, 693, 694.

<sup>56</sup> T. M. Parker, *Christianity and the State in the Light of History*, Bampton Lectures (London: Adam and Charles Black, 1955), 1.

Christianity set new forces into motion that freed religious energies from a preoccupation with parochial loyalties. How the church – specifically the Christian Church – emerged independent of the state and how the two have interacted since that time are foremost among the institutional forces that have moded western civilization.

The problem may be explored in any of several dimensions. The political dimension may be brought into focus with a question: How can two distinct institutions, similar or overlapping in composition, make authoritative yet independent claims to the obedience and loyalty of their members? The durability of the coexistence of church and state may be regarded as a major catalyst in the development of western political traditions. Their rivalry in matters of jurisdiction often prompted accommodations which have served as prototypes for subsequent political innovations. American federalism, for example, owes many of its essential features to Puritan political experiments in colonial New England. Various constitutional liberties and concepts of limited government derived much of their original impetus from struggles for religious freedom.

This suggests another question: What circumstances permitted such a conflict of authority to be resolved by limiting the jurisdiction of the state? The ingredients for an understanding are stored in the laboratory of history. Issues raised during earlier religious controversies provide a basis for analysing current disputes. Early Christians and Jews challenged the state cult of imperial Rome by refusing obeisance to Caesar as their lord or master. Both groups sought immunity from the religious laws and had to endure periods of official persecution while defending their distinct identity

and way of life.

A third dimension, the ideological, is arguably the most important to a recognition of what is at stake on both sides. It involves a different question: How is it possible to establish and maintain a political consensus without bringing all authority under one sovereign head? Differing perceptions of sovereignty, law, and citizenship may, after all, indicate seriously divided loyalties. Where social institutions fall out of step with each other and unifying traditions are weakened, even ordinary stresses may threaten political disruption and demoralization. The ability of a society to face change and conflict with unity and equanimity is a measure of its moral health. Common values and a common political agenda are generally preferred as a society's first line of defence. Normally this means an assimilation of all groups and traditions to some existing or purposely devised set of norms. This function is usually filled by a civil religion.

It is sometimes objected that the relationship between church and state is not characteristically political and, compared with earlier eras, is no longer a matter of particular concern in a modern secular society. The contemporary American church – if it may be described in the singular – does not press a distinctly political claim. Its ordinances are not comparable in nature or force to those of the state. Moreover, people expect that questions of faith today be left to the private dictates of individual consciences. The church that addresses political issues or otherwise imposes its separate will overreaches these customary limits at its own peril.

While this point may be conceded in part, it fails to consider the dynamic nature of religion, particularly Christianity. Changes in political circumstances or religious priorities may redefine, even shatter, any existing accommodation between church and state. American political institutions have long operated on the basis of shared moral values and assumptions that derive in large part from the Bible and Christianity.<sup>57</sup> It is worth considering whether and how well such institutions can work under a deliberately secular, pluralistic regime. In the absence of a common moral ground that can help channel conflict, secular or religious militancy may stir up fear and reaction. The volume of current legislation and litigation concerning religious issues is a sign of growing dissension over the proper role of the state in religion and the church in public life.

As to whether this is a political question, then, the objection may be met very simply: any association between church and state is unavoidably political. On the one hand, the state values religion – at least in the generic sense – as a means of upholding an ideological consensus and encouraging civil peace. On the other hand, the Christian Church is historically called to acknowledge ‘one Lord, one faith, one baptism’ (Eph. 4:5): which is to say, one citizenship in which all final authority is vested in a sovereign God. Such a claim is treasonable if the state – if Caesar – is rightfully sovereign. Here, as always, the issue is joined. It is a suitable point of

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<sup>57</sup> By connecting the declining influence of Christianity with a growing indifference ‘to the hullabaloo of all verbiage,’ Rosenstock-Huessy distinguished between the creation of compelling names – an expression of a vigorous faith – and a mere ‘consumption of words’ that signals spiritual languish. Attempts to reformulate the country’s Christian heritage in terms of ‘a complete system of agnostic ethics and morality’ are still based on a ‘fundus of Christian standards implicitly lived.’ See Eugen Rosenstock-Huessy, *The Christian Future: Or the Modern Mind Outrun* (New York: Charles Scribner’s Sons, 1946; Harper Torchbooks, 1966), 6-11, 43-53.

departure for a historical study of the problem.

## APPENDIX: SUBSEQUENT CONTROVERSIES

This article is drawn from the first chapter, “The Imprint of Culture,” of the author’s doctoral dissertation.<sup>58</sup>

Many of the issues discussed above subsequently came to a head in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Supreme Court held that the Free Exercise Clause permitted the State of Oregon to prohibit the sacramental use of peyote through a neutral law of general applicability and, thus, also to deny unemployment benefits to employees who were discharged on these grounds.

This ruling met with strong opposition. Congress responded by passing the Religious Freedom Restoration Act of 1993, which, among other things, used section 5 of the Fourteenth Amendment to protect religious rights against action taken by the states. The Supreme Court struck down this provision of the law in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court upheld the City’s use of a historical preservation ordinance that prevented a church from expanding its facility.

Congress subsequently passed the Religious Land Use and Institutionalized Persons Act of 2000 in response. The new law bypassed the Court’s Fourteenth Amendment objection to the Religious Freedom Restoration Act by using the Constitution’s Spending Clause to require recipients of

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<sup>58</sup> Steven Alan Samson, *Crossed Swords: Entanglements Between Church and State in America*. Ph.D. dissertation, University of Oregon, 1984.



federal funding to accommodate the earlier law's provisions regarding religious freedom. Given that all localities rely on federal subsidies, the resulting irony is almost whimsical. What more appropriate illustration could there be of the much larger problem Congress itself has created: that is, a regime of fiscal, educational, and social regulation which has spawned so much First Amendment litigation in recent decades?