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Intentional Values and the Public Interest - A Plea for Consistency in Church/State Relations

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INTENTIONAL VALUES AND THE PUBLIC INTEREST— A PLEA FOR CONSISTENCY IN CHURCH/STATE RELATIONS

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INTRODUCTION

As the ancients once searched for truth, constitutional lawyers today, especially those involved with religious organizations, search for ultimate ways in which constitutional "truth" is revealed as a guide to the resolution of serious and divisive contemporary issues. Religious institutions debate with each other and with the state on such matters as the contribution of aid to the homeless,[1] their right to celebrate their holidays in public fora,[2] their ability to continue to supply needed child care resources in the community,[3] the role of parental choice in making educational decisions,[4] the legitimacy of the continuation of massive weapons programs,[5] the proper allocation of resources under government budgets,[6] and related questions. Whether the discussions are with legislators, judges, or their sister religious organizations, the debate is often intense and the issues sometimes defy compromise. One of its more redeeming aspects is that regardless of whether religious organizations agree on the particulars of an approach, they all agree on several basic principles.

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1. For example, a proposed rule of the Department of Housing and Urban Development would have disqualified religiously-owned property from inclusion in a federal emergency shelter program. *See* 51 Fed. Reg. 45,278 (1986).

2. Allegheny v. ACLU, 109 S. Ct. 3086 (1989) (creche in county courthouse and menorah outside city and county building); McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court,* 471 U.S. 83 (1985) (private creche in public park).

3. *See, e.g.,* Act for Better Child Care Bill, S. 5, 101st Cong., 1st Sess. (1989); S. REP. No. 484, 100th Cong., 2d Sess. 78 (1988).

4. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (illustrates the character of the debate which continues to this day). *See generally* E. MCDONAGH, FREEDOM OR TOLERANCE 13-32 (1967); New Life Baptist Academy v. East Longmeadow, 885 F.2d 940 (lst Cir. 1989); Vatican II Council, DECLARATION ON RELIGIOUS FREEDOM, ¶ 5 (1965) [hereinafter "DECLARATION ON RELIGIOUS FREEDOM"]. All three assert parental choice as an element of religious freedom.

5. *See* NATIONAL CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE (1983).

6. *See* NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL 318-20 (1986).

First, they agree that the first amendment[7] is the most fundamental of principles—it stands as an important protection *for* religion from the state and was not intended to be the other way around.[8] Second, they agree that public questions on which moral aspects may be debated and resolved pervade our society. As Cardinal Joseph Bernardin of Chicago has articulated:

> Individuals, institutions, and governments frequently make important decisions that affect human lives about such issues as distribution of the earth's resources, scientific research, and technological application. Increasingly, voices echoing the concepts of philosophers and the concerns of ordinary people say that the distinctive mark of human genius is to order every aspect of contemporary life in light of a moral vision. A moral vision seeks to direct the resources of politics, economics, science, and technology to the welfare of the human person and the human community.[9]

Significantly, the ability to add the moral dimension to the debate is linked inextricably to the protections guaranteed by the religion clauses of the first amendment.[10] Third, regardless of their outlook on substantive issues or particular applications of their unique moral principles, religious institutions all agree that the taxing and regulatory powers of the state can have insidious side effects when applied to the engines of religious organizations.[11] Finally, one of the more enduring proofs that the first amendment works, is seen in the way churches may continue to play an important role in the public arena without either expecting the benefits or suffering the burdens of such participation at the hands of the state.

The need for protection of personal religious liberty exercised through religious organizations is one of the keys to understanding the colonial experience and the process by which the United States was formed. In our constitutional experience, the United States is unique among western nations for its approach to dealing with religion. While other societies, including colonial America, were rent apart by the "religious question," the United States was spared much of this civil turmoil.[12] The religion clauses were

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7. The first amendment to the United States Constitution provides in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " U.S. CONST. amend. I

8. 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 556 (1950).

9. Bernardin, *The Role of the Religious Leader in the Development of Public Policy*, 34 DEPAUL L. REV. 1, 3-4 (1984).

10. *Id.* at 6.

11. D. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 2 (1976); *see* Nyquist v. Committee on Public Educ., 413 U.S. 756, 793 (1973); Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970). The list of religious organizations supporting the Church of Jesus Christ of Latter Day Saints in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), demonstrates the virtual unanimity of this point, including Protestant, Catholic, Jewish, and even separatist organizations.

12. The lamentable European and colonial experience with the entanglement of church and state, and the resulting loss of religious liberty, was a dominant influence on the framers of the first amendment. *See* Engel v. Vitale, 370 U.S. 421, 425-33 (1962); Torcaso v. Watkins, 367 U.S. 488, 490 (1961); L. WHIPPLE, OUR ANCIENT LIBERTIES 66-68 (1972). Colonial intol-

designed to protect religious liberty by guaranteeing that no religion could gain the special favor of the government and by assuring the equality and not mere tolerance of various religious groups. Equality required the state to avoid entanglement in the religious functions of churches, and to that extent be separated from them.[13] Both the individual *and* the institutional or associational aspects of religious professions were protected.[14]

One of the dominant themes in church/state relations has been the search for a useful guide for the resolution of these protracted public debates, often cast in grand constitutional language. However, neither the courts nor the legislatures have yet to identify one.[15] It is to that question that this Article turns. Questions of substance are equally interesting and unique, but cannot be resolved adequately in an article of any length. This Article will focus on the resolution of first amendment religion questions in church/state relations as questions of process, addressing not the format of a definitive test but the means by which certain transcendent values and concerns can guide decisionmakers. It is an invitation to further debate and dialogue.

This author approaches the debate on church/state relations as both a Catholic and a lawyer, providing both connections and viewpoints which are not necessarily shared with others in the debate. A lawyer approaches the debate, not necessarily from a historical or political view or even from the perspective of denominational thought. A lawyer is immersed in these disciplines as a means to perform adequately the lawyer's job as counselor and advocate. As a Catholic, this author approaches the debate on first amendment questions as one must from any honest religious tradition, that of a minority in a larger pluralistic society.[16] This Article makes no special claim

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erance was compounded with Royal action from time to time as religious fortunes changed in the Mother Country. James II, for example, denied freedom of worship in closed or diverted colonial churches by Royal Decree. *See* B. LONG, GENESIS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 106 (1926).

13. L. WHIPPLE, *supra* note 12, at 72. *See also* REPORT OF THE SENATE JUDICIARY COMMITTEE, S. REP. No. 376, 32d Cong., 1st Sess. 1-2 (1853). The elemental values of the religion clauses are developed within Part II, *infra.*

14. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1872). *Cf.* E. MCDONAGH, *supra* note 4, at 18 (same principle from a religious perspective.)

15. *See infra* notes 52 and 72 for a discussion and critique of the Supreme Court's current test.

16. J.C. MURRAY, SHOULD THERE BE A LAW? 168 (1960). Fr. Murray writes that many often ask:

> [W]hether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism. The question, thus turned, is part of the civil question, as put to me. An affirmative answer to it, given under something better than curbstone definition of 'democracy,' is one of the truths I hold.

Id. at ix-x.

A pivotal understanding of the Catholic identity and political questions is found in PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 76 (1965), a document of the Second

to having deduced the essential theme of American constitutional or political thought.[17] Rather, this Article is concerned about two dominant phenomena in church/state relations: result-oriented litigation without regard for the larger constitutional principles and the haste by which resort to the Constitution is sought.

Result-oriented litigation itself inherently disserves the public interest because it abandons any pretense of a thorough evaluation of what is actually at stake. It is as if mere invocation of the "first amendment" would have some talismanic effect on other participants in the debate who, now provoked, retaliate in the incantation of constitutional forms. Hasty invocation of the constitutional text tends to trivialize what should be a principle of last resort.[18] Many questions cast in constitutional language can either be avoided or resolved short of the constitutional text altogether, without resorting to a more vexatious process. The means to do so are within reach: by examination of intentional values as a guide for constitutional interpretation and of the public interest as a guide for the resolution of disputes in society. To these processes this Article will be addressed.

The ultimate touchstone in constitutional process is the preservation of civic peace and tranquility. The Constitution did not intend to lay out a philosophy for the life of mankind in society. It did not stake itself on ultimate questions, but rather staked itself only to a theory of government.[19] The theory of American government, to the extent that it can be understood, is that government cannot solve every problem, nor is every problem susceptible to legal solution.[20] It is to the greater society, the amalgamation of forces, associations, individuals, and communities, that government addresses itself. It is to the larger community that the enduring questions of what kind of people we are and what kind of society we would be are to be addressed

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Vatican Council. "The Church, by reason of her role and competence, is not identified in any way with the political community nor bound to any political system. She is at once a sign and a safeguard of the transcendent character of the human person." *Id.* As interpreted by Fr. Bryan Hehir of Georgetown University, the Pastoral Constitution provides:

> 1) the ministry of the Church is religion in origin and purpose; the Church has no specially political charisma; 2) the religious ministry has as its primary objective serving the reign of God—Church is, in a unique way, the 'instrument' of the Kingdom and history; 3) as the Church pursues its religious ministry it should contribute to four objectives which have direct social and political consequences. These objectives are protecting human dignity, promoting human rights, cultivating the unity of the human family, and contributing a sense of meaning to every aspect of human activity.

B. Hehir, *Responsibilities and Temptations of Power: A Catholic View,* J.L. & Religion 155, 158 (1990) (forthcoming).

17. Nor does its author claim to have the long experience with attendant wisdom on these great questions that others may bring to the topic.

18. *See* Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

19. On this point, too, Father Murray is instructive. *See* J.C. MURRAY, *supra* note 16, at 38-39.

20. Again, resort to "Catholic" roots is important. *Id.* at 8.

and resolved for our civic peace. The Constitution illuminates a philosophy of "domestic tranquility"[21] whereby these ultimate questions might be debated and resolved. On these ultimate questions, the Constitution is agnostic. There is no place where this reality could be better felt than in church/state litigation, and nowhere else is the philosophy most set aside.

The purpose here is not to review the battles past or rehearse battles to come. The purpose is much more limited—to reflect on where the great debates between religious organizations and between religion and the state have come over the last several hundred years as described by both constitutional doctrine and case adjudications in the United States Supreme Court. It is also to illustrate where we might go if certain adjustments are both made and not made. The dynamism of the 1990's is intimately connected with a search for balance between the vociferous competitors in the public arena, each one addressing the same kinds of issues but from different perspectives. The limitations on the state and, now, the consequent limitations the state is placing on religious organizations will both be brought into sharper focus.

First, this Article will review the existing dynamic in church/state relations as revealed in the law. It is not meant as an analysis of the "correctness" of church adjudications although a view on their "correctness" is apparent in the discussion. Second, there will be a review of the ways in which church and state are interrelated and must work together, and a suggestion offered for an alternative approach through which disputes might be avoided or resolved amicably. Third, reflecting on the discussion of church and state both serving the public interest, there will be some effort to address what might best be termed "constitutional mythology," those doctrines which have developed over time and have found their way into adjudication of church/state disputes but which either lack a basis in constitutional intentions or are inappropriate as pragmatic solutions to enduring problems. Finally, in the last analysis, the problems remain of what the role of the state and its proper relationship to religion should be, what the role of churches in their relationships with the governing authority should be, and when such relationships should yield to each other in a way that might best serve civic harmony.

I. THE PATTERN OF CASE ADJUDICATION, NOT CONSTITUTIONAL INTENTIONS, INFORM CURRENT INTERPRETATIONS

Generally speaking, the ability of religious institutions to inform and influence decisionmaking processes and to participate in public programs is substantially diminished from what it might have been two hundred years ago. Certainly, at the beginning of the Republic, religious institutions had

21. U.S. CONST. preamble. That organizational reality is illustrated by the other limited purposes for which the new federal government was "ordained."

firm charge over education and social services.[22] In many, but not all, of the colonies, there were official establishments of state churches.[23] No single theory or pattern predominated. After the revolution, in debates that led to the Bill of Rights, the first Congress adopted the two religion clauses as protection *for* religion, not *from* religion.[24] That lesson appears to have been lost on the Supreme Court.[25] The results of this unfortunate departure are illustrated in the cases. Because the Court treats each religion clause separately, each will be dealt with in turn.

A. The Establishment Clause

The establishment clause, like its twin the free exercise clause, is fundamentally a political compromise on the appropriate roles of state and church, each to be secure in its own domain. The secular government protects the tangible aspects of life and property, and relations between persons as they affect the common good. Churches exist ultimately for a higher purpose. The establishment clause preserves this basic distinction, the rationale for which is documented elsewhere and is not in serious dispute.[26] However, the

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22. W. BOWER, CHURCH AND STATE IN EDUCATION 23-24 (1944); B. COUGHLIN, CHURCH AND STATE IN SOCIAL WELFARE (1965); McConnell, *Political and Religious Disestablishment,* 1986 B.Y.U. L. REV. 405, 420-24.

23. A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 115-62 (1985). There was such a wide diversity of practices that no single state model for the treatment of religion by government could reasonably have been selected. Virginia and Rhode Island conceded full freedom, while New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina adhered to religious establishment, and Delaware and Maryland demanded christianity. Four states, Pennsylvania, Delaware, North and South Carolina required assent to the divine inspiration of the Bible, while Pennsylvania and South Carolina imposed a belief in heaven and hell. New York, Maryland, and South Carolina excluded ministers from civil office, while Pennsylvania and South Carolina emphasized belief in one eternal God, and Delaware required assent to the doctrine of the Trinity. Five states, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina insisted on Protestantism. South Carolina still referred to religious "toleration." S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 507 (1902). The actual clauses thus removed the matter of religion from the new federal government but preserved it to the individual and the very separate states. 1 ANNALS OF CONGRESS 730-31 (1789); M. MALBIN, RELIGION AND POLITICS—THE INTENTION OF THE AUTHORS OF THE FIRST AMENDMENT 16 (1978).

24. 1 A. STOKES, *supra* note 8. The religion clauses were intended as a complementary protection for religious liberty, which could not thrive in the absence of some special guarantee that the government would be separate from the affairs of religion and religion would be separate from the affairs of the government. L. WHIPPLE, *supra* note 12, at 63-78.

25. *See, e.g.,* McCollum v. Board of Educ., 333 U.S. 203 (1948). Most scholars agree that contemporary construction of the religion clauses dates, not from 1789, but from the 1947 Supreme Court decision in Everson v. Board of Educ., 330 U.S. 1 (1947). Johnson, *Concepts and Compromise in the First Amendment Religious Doctrine,* 72 CALIF. L. REV. 817, 817 n.2 (1984). *See infra* Part II for a discussion of the development of the intention and values that inhere in the religion clauses.

26. Both secular and religious writings attest to this reality. *E.g.,* Engel v. Vitale, 370 U.S. 421, 429-35 (1962). *See also* E. MCDONAGH, *supra* note 4, at 16. "The American thesis is that government is not juridically omnipotent. Its powers are limited, and one of the principles of limitation is the distinction between state and church, in their purposes, methods, and manner of organization." J. C. MURRAY, *supra* note 16, at 68.

establishment clause does not embrace any one person's theory of state or theology. Nor does it express or demand a hermetic separation of the two domains,[27] which, after all, have much in common.

Over the last forty years, however, religious organizations have seen many attempts at mutual cooperation with the government rejected by the courts. In its modern history, the Supreme Court has not always paid adequate attention to the history of the first amendment as revealed by its political framers, but instead has given undue weight to imprecise metaphor, and vague notions of separation of church and state. The Court has struggled to reconcile a separatist myth with the reality of church/state partnerships promoting the common good.[28] For the most part, setbacks to mutual cooperation have occurred in the area of education,[29] but the actual pattern of gains and losses defies rational explanation.[30] Recent evidence of this pattern is found in *Aguilar v. Felton*[31] and *Grand Rapids School District v. Ball,* both 1985 Supreme Court decisions.[32]

In two narrow defeats, proponents of cooperative ventures in education, specifically public involvement in remedial and other nonsectarian education on the premises of religious schools, lost significant ground. Both decisions introduced elements into establishment clause jurisprudence that either fundamentally altered the nature of evidence required (making it nearly impossible to prevail) or invited subjective judgments on the quality of links between public and private institutions serving a mutual public interest. Both decisions revealed substantial distrust of religious organizations on the part of some Justices and perhaps a growing movement towards a secular uni-

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27. Roemer v. Board of Pub. Works, 426 U.S. 736, 745-46 (1976).

28. *E.g.,* Walz v. Tax Comm'n, 397 U.S. 664 (1970); Abington Township v. Schempp, 374 U.S. 203, 294-96 (1963) (Brennan, J., concurring) (rejecting argument that the establishment clause requires reflexive invalidation of every cooperative effort).

29. Edwards v. Aguillard, 428 U.S. 578 (1987); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); McCollum v. Board of Educ., 333 U.S. 203 (1948).

30. In Wallace v. Jaffree, 472 U.S. 38 (1985), Chief Justice Rehnquist, dissenting, indicated many examples of unprincipled results:

> For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. . . . A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden . . . but the State may conduct speech and hearing diagnostic testing inside the sectarian school. . . . Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street.

Id. at 110-11 (Rehnquist, C.J., dissenting).

31. 473 U.S. 402 (1985).

32. 473 U.S. 373 (1985).

formity in the way that state services are performed. The lower courts may now routinely find that it does not matter, for establishment clause purposes, how much good a program does, or that there is no demonstrable constitutional detriment.

The educational program at issue in *Aguilar v. Felton* was Chapter 1 of the Education Consolidation and Improvement Act of 1981[33] ("Chapter 1"). That Act provides, among other things, that there should be remedial education and mathematics provided for students who are both educationally[34] and economically disadvantaged.[35] This program, enacted first in 1965 as Title I of the Elementary and Secondary Education Act[36] ("Title I"), was a centerpiece of President Lyndon Johnson's Great Society program. For nineteen years, the program functioned on the premises of both public and private schools. It was a public program, never part of the curriculum of private schools, and was expressly found by the Congress to be an aid to students, not to the schools.[37] Several times a week, public school teachers, retained specifically to teach remedial courses, would instruct those, who had been tested as educationally deprived, in schools throughout the country.

The challenge had been filed in 1978 to the New York City program which had the largest Chapter 1 (then Title I) program in the country.[38] That case was brought before a three-judge court which had ruled the program was constitutional.[39] In a subsequent lawsuit, before a single United States district judge, the program was likewise upheld. The judge could find no evidence based on an extensive record and after extensive discovery that the Chapter 1 program violated the Constitution.

On appeal, the United States Court of Appeals for the Second Circuit invalidated the program on grounds of entanglement.[40] The court was concerned that the Chapter 1 program would require extensive monitoring between public school supervisors and private school employees about the contents of the Chapter 1 program in order to assure that there was no violation of the establishment clause.[41] As outrageous as it might sound to a nonlegal ear, the court was concerned that public school teachers hired for the express purpose of teaching remedial English and mathematics to

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33. 20 U.S.C. § 3801-3876 (1981). The challenge subsumed both the current and the identical predecessor statute.

34. 20 U.S.C. § 3804(a) (Supp. III 1985).

35. *Id.* § 3805(b).

36. *Id.* § 2701-92 (1982).

37. S. REP. No. 146, 89th Cong., lst Sess. 4, 12 (1965).

38. Aguilar v. Felton, 473 U.S. 402, 407 (1985).

39. *See also* National Coalition for Public Educ. and Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980) (affirming the same challenge to the Title I program). Counsel for plaintiffs in *National Coalition,* Leo Pfeffer, failed to perfect his appeal in the United States Supreme Court on time and the Court dismissed for want of jurisdiction. 449 U.S. 808 (1980).

40. Felton v. Department of Educ., 739 F.2d 48, 49-50 (2d Cir. 1984), *aff'd sub nom.* Aguilar v. Felton, 473 U.S. 402 (1985).

41. 739 F.2d at 65-68.

educationally disadvantaged children could somehow also espouse religious doctrine, thereby channeling state money for religious education, unless they were scrupulously and thus unconstitutionally supervised.[42] An appeal was lodged with the Supreme Court.[43]

In *Grand Rapids School District v. Ball,*[44] there were two community programs at issue. First, a Shared Time program, involving supplementary remedial education for school children and second, a Community Education program, involving extra curricular community courses for children and adults alike. The Sixth Circuit Court of Appeals had little trouble finding that the publicly funded Community Education program, which included various arts and humanities courses taught before and after school to private school students, violated the Constitution. It found that this was a channel for public money to private schools to supplement the curriculum of the private schools.[45] Given the Supreme Court's disposition of other education cases, it might have been foreseeable that the Community Education program would be held invalid.[46] Unfortunately, the Shared Time remedial education programs also suffered the same fate. Both *Aguilar* and *Grand Rapids* were argued together before the Supreme Court in 1984.

On July 1, 1985, in two 5-4 decisions, the Supreme Court invalidated *Aquilar's* Chapter 1 program and struck down *Grand Rapids'* education programs for assisting private students with public funds. In *Aguilar,* the Court found that it did not matter that the record did not reveal a single instance in which there were actual violations of any funding restrictions involving public school teachers on private school premises. The Court found that the burden was on the state to prove that such violations would never happen. It found that the state could not prove that such violations would *never* happen unless it conducted massive surveillance, a presence the Court found would excessively entangle church and state.[47] The Court was concerned that the presence of public employees in a pervasive religious environment would lead, over time, to a subversion of the public character of the program and lead, inevitably, to misuse of public funds.[48]

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42. Indeed, the court conceded the program had done "much good and little, if any, detectable harm." *Id.* at 72.

43. 469 U.S. 878 (1984). The Court postponed jurisdiction for consideration of the merits. On the merits, the Court rejected the argument for appellate jurisdiction but nonetheless treated the jurisdictional statement as a petition for writ of certiorari granted it and proceeded to the merits. Aguilar v. Felton, 473 U.S. 402, 408 & n.7 (1985).

44. 473 U.S. 373 (1985).

45. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 718 F.2d 1389, 1404-05 (6th Cir. 1983), *aff'd sub nom.* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 396-97 (1985).

46. 473 U.S. at 395-97.

47. *Id.* at 412-13.

48. *Id.* To be fair, the Court was concerned that there would be no way in which an actual violation of the program conditions would come to the attention of state authorities.

In *Grand Rapids,* the Court concluded that parents and students would have no incentive to

The same fate befell the *Grand Rapids* education programs.[49] The Community Education program lost by a larger margin under more traditional Court doctrine.[50] The majority, however, invalidated the Shared Time remedial education program in a 5-4 vote by introducing the concept of "symbolic union" between church and state due to the presence of public employees on private premises.[51] "Symbolic union," undefined and unlimited, could provide a handy excuse for judges in trying to invalidate church/state cooperation. Because the Supreme Court did not give the parameters of, or indicate an objective measure for the concept, it has now introduced a subjective element into an area of law that has already been substantially confused over time.[52] In these cases, overreaching legal theory, uninformed

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report public school teachers who were involved in the advancement of religious teaching in the course of remedial mathematics. Because of the significant degree of autonomy of the teachers, it was likely that, absent massive surveillance, actual violations could go unnoticed for some long period of time. 473 U.S. at 388-89.

On the other hand, one would have thought that in a program involving thousands of children, and given the attention to the program for nearly ten years of litigation, some problems would have come to light that would require the attention of state authorities. Not a single instance, however, was documented. *See Aguilar,* 473 U.S. at 424 (O'Connor, J., dissenting).

49. 473 U.S. 373. Both remedial education programs lost by 5-4 margins. In her dissenting opinion, Justice O'Connor pointedly expressed concern for the educational needs of the children and the way that the record had not shown any unconstitutionality. *Id.* at 398-99. In the absence of some actual detriment or other evidence of harm, Justice O'Connor voted to sustain the program believing that the constitutional infirmity alleged was particularly weak and that any benefits to religion indirect. *Aguilar,* 473 U.S. at 421-31 (O'Connor, J., dissenting).

50. The vote was 7-2 with only Justices Rehnquist and White voting for the program. *Grand Rapids,* 473 U.S. at 400-01.

51. *Id.* at 389-90. The Court was concerned that the challenged action was likely to be perceived by adherents as an endorsement and by nonadherents as a disapproval of individual religious choice. *Id.* at 390.

52. *Id.* at 401 (Rehnquist, J., dissenting). The Supreme Court claims to use an objective test for determining violations of the establishment clause. The test minted in Lemon v. Kurtzman, 403 U.S. 602 (1971), and appropriately styled the "Lemon" test, has three parts. A law must: (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) not excessively entangle church and state. *Id.* at 612-13.

First, to determine a secular purpose, the Court often defers to the findings and purposes of the statute. *Aguilar,* 473 U.S. at 416 (Powell, J., concurring). In *Wallace v. Jaffree,* the Court departed from the test of deferring to the findings and purposes of the statute and looked to the views of the principal sponsor to determine that the Moment of Silence Law in Alabama had a religious purpose. 472 U.S. 38, 56-58 (1985). Detailed criticism of this jurisprudential departure is beyond the scope of the Article.

Second, to determine whether there is advancement of religion the Court has required that any such advancement be direct and material, not indirect and insubstantial. Lynch v. Donnelly, 465 U.S. 668, 683 (1984).

Finally, excessive entanglement is the closest element of the three to a subjective test. It invites a court to look at the actual state of relations between the religious and the public institutions and determine whether it offends the court's sense of balance and separation.

Since its beginning, many members of the Supreme Court have urged that the *Lemon* test be abandoned or modified. Beginning in *Lemon* itself, Justice White criticized the excessive entanglement prong of the test on the grounds that it creates an "insoluble paradox." *Lemon,*

by any consideration of the social good to be achieved, led to the invalidation of significant and effective social programs. These cases set the stage for other setbacks for religious organizations in other pursuits, notably the district court 1987 decision in *Bowen v. Kendrick*[53] and recent actions invalidating alternative programs designed to cope with the disruption in remedial education caused by *Aguilar*.[54]

In 1988, the Supreme Court solidified the laws in the educational areas, and at the same time permitted religious institutional participation in social services programs. In *Bowen v. Kendrick*,[55] the particular challenge was to the participation of religious organizations in the Adolescent Family Life Act.[56] That program invited demonstration projects and services grants from a broad spectrum of community services, expressly including religious services "as appropriate."[57] In a 5-4 decision, the Court, reversing the district court, found that the choice to include the religious organizations by Congress was not unreasonable or unconstitutional.[58] The Court found that Congress was within its constitutional discretion to decide that religious organizations could have something meaningful to say and therefore could play a role in the development of services towards adolescents.[59] Charges that the program was

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403 U.S. at 668 (White, J., dissenting in part). In her concurrence in *Wallace*, Justice O'Connor noted that the *Lemon* test "should be reexamined and refined . . . to make [it] more useful in achieving the underlying purpose of the first amendment." 472 U.S. at 68-70 (O'Connor, J., concurring). Further, Chief Justice Rehnquist, in *Wallace*, sharply criticized each prong of the *Lemon* test, and highlighted its paradoxical results. *Id.* at 110-11 (Rehnquist, J., dissenting). Justice Scalia has also criticized the *Lemon* test. *See* Edwards v. Aguillard, 482 U.S. 578, 613-19 (1987). So far, the Court has been unable or unwilling to find an alternative that satisfies its own needs.

53. 657 F. Supp. 1547 (D.D.C. 1987), *rev'd and remanded*, 108 S. Ct. 2562 (1988). The case is now on remand in the United States District Court. *See infra* note 61.

54. Congress, concerned about the detrimental affect of the *Aguilar* decision on the education of children most in need of such services, enacted remedial legislation to offset the impact. Congress provided that capital costs for moving the Chapter 1 program off premises could be separately funded from the state share prior to the allocation of monies on a per pupil basis between public and private schools. 20 U.S.C. § 2727(a) (Supp. III 1985). A number of school districts also began the rental or purchase of vans in order to move the program off the premise of a private schools. In *Pulido v. Cavazos*, the district court, which had previously heard Wamble v. Bell, 598 F. Supp. 1356 (W.D. Mo. 1984), invalidated both the method of cost allocation in the post-*Aguilar* Chapter 1 program and the location of vans on school yards, even in places remote from the private school. *Pulido*, 788 F. Supp. 574 (W.D. Mo. 1989). By contrast, in *Barnes v. Cavazos*, the U.S. District Court in Louisville, Kentucky upheld the van delivery of services but invalidated the method of cost allocation. Barnes v. Cavazos, No. C80-0501-L(A) (W.D. Ky. February 21, 1990). Both cases now mark the beginning of another cycle of education litigation heading ultimately for the Supreme Court.

55. 108 S. Ct. 2562 (1988).

56. 42 U.S.C. § 300 (1982 & Supp. III 1985).

57. *Id.* § 300Z(a)(8)(B).

58. 108 S. Ct. at 2579.

59. Unfortunately, as a way of drafting the opinion, the majority expressly distinguished *Aguilar* from *Bowen* and implicitly endorsed the rationale of the *Aguilar* and *Grand Rapids* cases. This was certainly a surprising result given that the Chief Justice who authored *Bowen*

being administered in an unconstitutional way such that it invited abusive practices[60] were brushed off with a remand.[61]

In *County of Allegheny v. American Civil Liberties Union,* one of the most puzzling and divisive opinions of the last few years, the Supreme Court invalidated the display of the creche at the county courthouse in Pittsburgh at the same time it upheld a display of a menorah next to a Christmas tree at the city/county building.[62] The actual division of the Court ruled 6-3 in favor of the menorah at the city/county building and 5-4 against the creche at the county courthouse.[63] The language of the Court in dealing with these issues, however, reveals a deep and perhaps untractable division on the role of religion in our society and the proper ways in which the courts might adjudicate these issues. For example, Justice Blackmun, writing for the plurality and joined only by Justice Stevens, found that a test articulated in a concurring opinion by Justice O'Connor in *Lynch v. Donnelly*[64] was the proper means for determining establishment clause cases.[65] *Lynch,* a 5-4

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was one of the leading dissenters in *Aguilar* and *Grand Rapids. Bowen,* 108 S. Ct. at 2576, 2578.

60. *Id.* at 2580.

61. This case continues, on remand, in the U.S. district court. In order to remand the case, the Court endorsed a broad view of taxpayer standing for establishment clause purposes. The Court upheld standing because the plaintiffs were challenging congressional action under the taxing and spending power as opposed to Valley Forge v. Americans United, 454 U.S. 464 (1982), which involved a challenge to executive action. The Court found that the relationship between the statute authorizing participation of religious groups and the actual administration of the program was so close that the taxpayer standing was justified. *Bowen,* 108 S. Ct. at 2579-80.

Justice O'Connor in her concurring opinion suggested that, on remand, it was still possible for the plaintiffs to prevail if they could show that either particular institutions themselves were so pervasively sectarian or the pattern of abuses was so rampant that the program was impossible to administer. *Id.* at 2581-82 (O'Connor, J., concurring). She neither ruled that "pervasively sectarian" institutions were disqualified *per se* nor expressed an opinion on the conduct of grantees. In either case, she directed that relief should be directed specifically to grantees and not to the AFLA itself. Justice Kennedy, joined by Justice Scalia, found that the character of the institution should not matter. In his view, what should matter is what the institution did with the money. *Id.* at 2582 (Kennedy, J., concurring). Motivation for performing a ministry seemed to be less important than its actual conduct. *Id.* at 2582. *See infra* Part III.

62. 109 S. Ct. 3086 (1989).

63. *Id.* at 3092-93. In numerous separate opinions, the actual split of the Court is difficult to follow. However, the display of the menorah was supported by Justice Kennedy, Chief Justice Rehnquist, and Justices Scalia and White, with separate opinions by Justice O'Connor and Justice Blackmun. The invalidation of the display of the creche is found in the joining of Justices Blackmun and O'Connor, in their separate opinions, with the opinion of Justice Brennan joined by Justices Marshall and Stevens.

64. 465 U.S. 668, 688-94 (1984) (O'Connor, J., concurring).

65. *Allegheny,* 109 S. Ct. at 3102. Justice O'Connor, in her concurring opinion in *Lynch,* articulated that the test is whether the particular item of contest would send a message "to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch,* 465 U.S. at 688.

decision, upheld the inclusion of a creche in the city of Pawtucket, Rhode Island Christmas display in a private park.[66] Interestingly, in *Allegheny,* Justice Blackmun, a dissenter in *Lynch,* adopted the reasoning of Justice O'Connor's concurrence along with the four dissents in *Lynch.*[67] This reasoning would have had the effect of implicitly rewriting the holding in *Lynch* (supported by Justice O'Connor's vote) that actually upheld the display. In *Allegheny,* Justice Blackmun, like Justice O'Connor, again concurring, agreed that the religious significance of the menorah in the city/county building was muted by the presence of what they considered a secular symbol—the Christmas tree—which conveyed the message that this was a traditional and secular celebration of the holiday season.[68] In Justice O'Connor's words, "the city . . . conveyed a message of pluralism and freedom of belief during the holiday season,"[69] the inference being that a solely religious message, even though communicated by nongovernmental and religious entities in a public park, would be invalid. Because the creche stood alone on the steps of the courthouse, the creche display violated the establishment clause because it conveyed a message of endorsement based on the Christian celebration of Christmas. Alone and unadorned, the Court found that in this case the display lacked a secular aspect which permitted the display of the creche in Pawtucket, and unfortunately doomed it in Pittsburgh.

This result, not surprisingly, drew sharp dissent, this time from Justice Kennedy, writing in his first major church/state decision.[70] Justice Kennedy found that both displays of the menorah and creche placed the city and the county merely behind seasonal celebrations and acknowledged the "historical background and religious as well as secular nature of the Chanukah and Christmas holidays."[71] He found that enforced recognition of only the secular would indicate a callous indifference and hostility towards religious faith that history and tradition do not require.[72] In Justice Kennedy's view, there was no realistic "risk" that the display of the creche or the menorah placed the power of government behind a religious celebration that would therefore have the effect of coercing citizens into accepting it as an integral part of their civic experience.[73]

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66. *Id.* at 672.

67. *Allegheny,* 109 S. Ct. at 3103 (opinion joined only by Justice Stevens).

68. *Id.* at 3122.

69. *Id.* at 3123 (O'Connor, J., concurring).

70. *Id.* at 3134 (Kennedy, J., dissenting).

71. *Id.* at 3138 (Kennedy, J., concurring in part and dissenting in part).

72. *Id.* at 3135. Justice Kennedy would adopt a test that would require an evaluation of whether there was an intent to proselytize in order to support a judgment of invalidity. *Id.* He found that the government may not coerce people to support a participating religion or its exercise or give direct benefits to religion to such a degree that it establishes a religion. In the absence of such findings, there would be no establishment of religion. For his part, the *Lemon* formulation does not "require a relentless extirpation of all contact between government and religion." *Id.* He, therefore, joined the criticism of the *Lemon* test. *Id.* at 3134.

73. *Id.* at 3139.

The evident confusion and deep division of the Court makes it difficult to predict the nature of establishment clause jurisprudence for the future. Some things, however, seem certain. The burden will be on the proponents of religious exercise or the supporters of religious institutions, and not on those attacking a particular program, to justify its constitutionality. The Court has apparently reversed the standard of proof.[74] Efforts to provide a more objective test or some evidence of a concrete violation of religious liberty in order to sustain a finding of invalidity do not seem to command a majority on the Court. Because the numerous mutual cooperations between church and state find their validation not in public benefit but in judicial inquiry, rooted in the Court's somewhat "separatist" view of the establishment clause, this observation may be of particular significance for the future.

One issue that is particularly implicated—and disturbing—in the establishment clause cases, especially after *Allegheny,* is the issue of fair participation. *Bowen* stands for the proposition that it is unfair to exclude religious organizations from broad-based social services programs. Churches and other religious institutions have a role to play in these programs, and the Constitution does not stand as a bar, on its face, to their participation in these programs. With respect to other aspects of religious expression, even the display of religious programs in public parks, one would think that the participation of religious institutions in these programs should be on equal footing with other institutions. For example, if a state makes park space available to all comers on a permit basis, it is unjust (and illegal) for them to exclude religious programs based on the content of the display.[75] Unfortunately, fairness has its limits, and an appeal to the equity of the situation is not necessarily a guarantor that justice will be done.[76] The purpose of this Article is to begin to address that situation through the development of new processes and enhancement of new considerations.

B. The Free Exercise Clause

No one disputes that the free exercise clause protects religious liberty. Where we divide is over the meaning of "liberty."[77] As Justice Cardozo commented:

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74. *See supra* note 47 and accompanying text.

75. O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (permit for Papal Mass on National Mall); Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) (creche in annual Pageant of Peace).

76. This point is more than amply illustrated by *Doe v. Small,* a recent district court decision, invalidating the display of a privately-owned and maintained religious portraits in a public park on a permit basis during the holiday season. 726 F. Supp. 713, 714 (N.D. Ill. 1989). The court put particular emphasis on the fact that the display during the holiday season was one of the few displays in that park and that the painting seemed to be displayed for much longer than the holiday season, except for those seasons during which the city council was intimidated by the threat of litigation. *Id.* at 717-18. This case is a rather unfortunate departure from the basic principle that fairness and justice should guide the course of adjudication. *See* Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989) (display of menorah in park on a permit basis invalid; court declined to follow rule of McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court,* 471 U.S. 83 (1985) after *Allegheny*).

77. As Abraham Lincoln once said: "The world has never had a good definition of the

> Liberty as a legal concept contains an underlying paradox. Liberty in the most literal sense is the negation of law, for law is restraint, and the absence of restraint is anarchy. On the other hand, anarchy by destroying restraint would leave liberty the exclusive possession of the strong or the unscrupulous. 'This is a world of compensation,' said Lincoln, 'and he who would be no slave must consent to have no slave.' So once more we face a paradox.[78]

The plain meaning of this statement is the essence of political compromise. The problem is that the sense of balance and compromise is absent from the Court's most recent pronouncements on free exercise.

In 1988, in *Lyng v. Northwest Indian Cemetery Protective Association,*[79] the Supreme Court confirmed that the free exercise clause has substantial limits, notwithstanding that it is cast in absolute terms.[80] In *Lyng,* the federal government insisted on its right to build a highway through federal land that had been used for many centuries as a sacred ritual ground of a particular American Indian tribe. The majority said,

> [E]ven if we assume that . . . [the highway] will 'virtually destroy the Indians' ability to practice their religion,' . . . the Constitution simply does not provide a principle that could justify upholding [the Indians'] legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires.[81]

The rights of believers to insist that the government adjust its practices to accommodate their religious practices have been limited.[82] What is remarkable for religious organizations is that individuals and their religious groups may not insist that the government take *additional* steps to accommodate or protect their religious practices. Thus, presumably, government could pass a facially neutral law offensive to Catholic values and practices and Catholics might not be able to resist the law successfully under the free exercise

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word liberty, and the American people, just now, are much in want of one. We all declare for liberty: but in using the same *word* we do not all mean the same *thing*."

A. Lincoln, Address at Sanitary Fair (April 18, 1864). Mr. Lincoln is right. We all speak the same words but we do not mean the same things. Therein lie the roots of the conflict between church and state.

78. B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 94 (1928) (footnote omitted).

79. 485 U.S. 439 (1988).

80. The first amendment provides in part: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

81. 485 U.S. at 451-52. This case continued a trend subordinating claims of individuals and groups to government institutional concerns. *E.g.,* Bowen v. Roy, 476 U.S. 693, 712 (1986) (federal statute requiring use of social security number did not violate Indian religious rights); Goldman v. Weinberger, 475 U.S. 503, 510 (1986) (Air Force allowed to prohibit *yarmulke* worn with uniform).

82. There were weaknesses with respect to both the factual record and the litigation strategy, for example, in that the native Americans often allowed non-native Americans onto their sacred lands for hiking, camping, and other recreational purposes. 485 U.S. at 452. Particular uses of tribal land tended to undercut the claimed sacredness of the land to the native Americans with respect to uniqueness and privacy that must be accorded their religious practices. *Id.*

clause.[83] Catholics, like other religious groups who are sometimes in and sometimes out of the mainstream of American life, could not insist that certain accommodations be made either in theory or in practice.

The United States has argued continually over the last few Supreme Court terms that the free exercise clause is limited to the protection of an *individual's* liberty. The government claims that a religious organization may not exercise rights protectable to that organization (as distinguished from individual members) under the free exercise clause. This argument is based on somewhat doubtful constitutional grounds,[84] and it has recently been rejected by a court of appeals reviewing the surveillance of religious exercises by government agents and the consequent damage to religious organizations (but not necessarily individuals) at the hands of Immigration and Naturalization Service agents.[85] The Supreme Court has not squarely faced what would seem to be an obvious facet of the freedom of religion protected under the free exercise clause.[86] As one commentator recently said:

> We live in a regime that, for better or for worse, has subordinated meaningful religious freedom to the moral sovereignty of politics. The Amish and other quaint dissenters provide a useful promotional service for the regime, for they permit us, through their differentness and occasional court victory, to pretend otherwise.[87]

In contrast to earlier cases broadening protection for religious groups against government regulation,[88] free exercise has been somewhat diminished as a broad guarantee for the protection of religion.

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83. One example of such a law might be the employer sanctions aspects of the Immigration Reform and Control Act of 1986. 8 U.S.C. § 1324 (Supp. IV 1986). The Act requires that all employers verify the citizenship of prospective employees or face substantial fines and penalties. *Id.* § 1324(a). That demand, placed on employers contrasts directly with, for example, the views expressed by the Bishops of the United States and others with deep roots in Catholic doctrine that one may not make distinctions among those who need employment based on alienage or even based on the artificiality of political boundaries. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, POLICY STATEMENT EMPLOYER SANCTIONS (1988). Nonetheless, the affirmative challenge based on the free exercise clause becomes problematic given the existence of this case law. *See infra* note 107 for a discussion of American Friends Service Committee v. Thornburgh, 718 F. Supp. 820 (C.D. Cal. 1989). On the other hand, if there is a challenge by the United States to the activities of a Catholic employer, that employer might legitimately object on constitutional grounds. *But see* Employment Division v. Smith, 110 S. Ct. 1595 (1990).

84. *See, e.g.*, Watson v. Jones, 80 U.S. (1 Wall.) 679 (1871) (court endorsed broad protection for churches as churches in certain matters). Recently, the Court implicitly confirmed the free exercise clause as a foundation for this protection. Employment Division v. Smith, 110 S. Ct. at 1601. The Court also recognized a link between individual free exercise rights and a right of association. *Id.* at 1602 (citing, Roberts v. Jaycees, 468 U.S. 609, 622 (1983)).

85. Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989).

86. *But see* Watson v. Jones, 80 U.S. (1 Wall.) 679 (1871). *See also* Employment Division v. Smith, 110 S. Ct. 1595 (1990).

87. Bradley, *Developments in Church-State Law: Analysis and Opinion,* 77 ILL. B.J. 806, 812 (1989).

88. For example, the Supreme Court stood firmly against efforts to regulate the proselytizing

In 1990, the Supreme Court confirmed suspicions that it was willing to place substantial limits on free exercise clause arguments. In a case brought by the California Board of Equalization to tax the sales of religious goods of the Swaggart Ministries in California, the Court unanimously ruled that the free exercise clause did not provide a bar to the imposition of sales and use tax.[89] In fact, the Court did not pause for any great deliberations on the meaning of the free exercise clause. Indeed, to this observer, it is remarkable that not a single Justice thought the argument was worth considerable weight. In that case, the California taxing authority imposed substantial tax penalties on Swaggart Ministries after its evangelistic crusades in California. Swaggart Ministries had maintained an extensive interstate sale of religious articles, part of which obviously was conducted with customers in California.[90] Separating out the religious from the nonreligious, the Swaggart Ministries argued that it was simply unconstitutional for the state to place any tax burden on their ability to evangelize in California, attempting to find support in the cases in which cities have attempted to license street ministers as a condition to their selling religious tracts on street corners.

In those cases,[91] the Court found the imposition of a license acted as a prior restraint of free exercise and was therefore unconstitutional. In *Swaggart Ministries,* the Court distinguished the sales and use tax from a license. A license is a precondition for a religious organization to exercise its ministry; sales and use taxes were the consequence of engaging in an activity, religious or otherwise, in society.[92] The Court was not persuaded that sales and use taxes burdened the exercise of the ministry and could arguably dissuade people from partaking of its benefits:

> California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. Thus, the sales and use tax is not a tax on the right to disseminate religious infor-

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of the Jehovah's Witnesses in the 1940's. Cantwell v. Connecticut, 310 U.S. 296 (1940). *See* Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268, 272-73 (1951) (local officials denial of public park to Jehovah's Witnesses because of officials' dislike of them was unconstitutional). These decisions form part of a consistent line of cases rejecting discrimination in public benefits or privileges on account of religion, recently affirmed in Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-40 (1987), and Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514, 1518 (1989).

89. Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990).

90. *Id.* at 692.

91. *See supra* note 88.

92. 110 S. Ct. at 696. Of course, part of the absence of "appeal" lies in the ready ability of Swaggart Ministries to distinguish between religious and arguably nonreligious articles that it was offering for sale in conjunction with its ministry. The ability to distinguish such articles undercut the argument that the imposition of tax was a great burden on the exercise of religion or otherwise invited the State to engage in an exercise of determining which articles were religious and which articles were not. *Id.* at 697-99.

> mation, ideas, or beliefs *per se*; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example, California treats the sale of a bible by a religious organization just as it would treat the sale of a bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale of the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.[93]

The Court confirms for the first time that the existence of a tax exemption is largely a matter of legislative or administrative grace.[94] Churches may not insist on an exemption from a facially neutral, broadly applicable law because it might arguably interfere with their practice of religion. Although the Court reserves for a future date whether there might exist some particular egregious case in which the taxing authority is either imposed for discriminatory intent or has discriminatory effect,[95] the Court is persuaded that absent those circumstances, there is no reasonable basis for giving credence to the free exercise argument.

In April, 1990, the Supreme Court went further in a case which some observers did not think would demonstrably affect the interest of institutional religion.[96] In that case, two drug rehabilitation counselors had been discharged for their use of the drug peyote in a ceremony of their Native American religion. They defended their disqualification for unemployment compensation on the grounds that, notwithstanding the state's criminalization of the use of the drug, there were overriding constitutional implications that justified their entitlement to unemployment benefits.[97] Before the United States Supreme Court the claimants argued that the criminal prohibition on the religious use of peyote was unconstitutional under the free exercise clause. The Supreme Court reversed, holding that absent an intention to single out religion for adverse treatment, a free exercise clause claim would not be allowed to override a neutral statute, otherwise constitutional when applied to nonreligious conduct. The Court found reasoning for its result in the "text" of the free exercise clause:

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93. *Id.* at 695-96 (citations omitted).

94. *Id.* at 696-97, 698.

95. *Id.* at 699-700.

96. Employment Division v. Smith, 110 S. Ct. 1595 (1990).

97. Relying on the line of Supreme Court cases in Sherbert v. Verner, 374 U.S. 398 (1963) and other cases, *supra* note 88, the Oregon State Supreme Court reversed their disqualification based on the exercise of protected religious practices. In the United States Supreme Court, on initial appeal, the Court noted that given the state's apparent willingness to criminalize the use of peyote even for religious purposes, it could certainly impose a lesser burden of denying unemployment compensation. Employment Division v. Smith, 485 U.S. 660, 670 (1988). On remand, the Oregon Supreme Court held that the religious use of peyote fell within the proscription of the Oregon drug control statutes but invalidated the prohibition under the free exercise clause. On certiorari, the United States Supreme Court reversed.

> It is a permissible reading of the text, . . . to say that if prohibiting the exercise of religion (or burdening the activity . . .) is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.[98]

The majority diminished protection for free exercise by noting that, in those cases in which the Court has sustained a religious exercise challenge to a state's statute of general applicability, the claim for constitutional protection of religious liberty was coupled with some other constitutional right, such as freedom of speech or the rights of parents to direct the education of their children.[99] Because the case here presented a bare claim of religious discrimination under the free exercise clause without any contention that this was either an attempt to "regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs",[100] the free exercise clause offered no protection. Moreover, except in those cases involving the denial of state unemployment benefits (under statutes already providing exception) or regulation aimed at religion as religion, the Court declined, both in this case and for future cases, to apply any compelling state interest test to balance the asserted religious infringement.[101] Perhaps the key to the harshness of the majority opinion lies in the fact that this conduct was criminalized and therefore worthy of higher concern by the Court.[102] If not, then religious rights can be expected to be routinely subverted.[103] Justice O'Connor concurred in the judgment but on the narrow grounds that the state statute criminalizing the conduct gave sufficient answer to the constitutional question presented in this case. Joined by the three dissenters, she was sharply critical of the Court's abandonment of "our long history of Free Exercise precedents."[104] In her view, the finding that religious practice has been burdened by a law, whether particularly directed at religious conduct or of otherwise general applicability, only meant that a reviewing court was required to go further in order to protect a constitutional right:

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98. 110 S. Ct. at 1600. The Court relied on Minersville School District v. Gobitis, 310 U.S. 586 (1940) as support for that proposition, without noting that the opinion had been overturned three years later in West Virginia Board of Education v. Barnett, 319 U.S. 624 (1943).

99. 110 S. Ct. at 1600. In this way, the Court further distinguished Wisconsin v. Yoder, 406 U.S. 205 (1972).

100. 110 S. Ct. at 1600-01.

101. *Id.*

102. Indeed, the Court has perhaps found in free exercise cases a rule which it now applies in establishment clause cases. In establishment clause cases, a law does not have a "primary effect" of advancing religion if it only provides an incidental benefit to religion. Similarly, now in free exercise cases after *Smith*, the Court finds that incidental effects on religious practices do not warrant a higher level of scrutiny by the Court.

103. In Townley Engineering v. EEOC, 859 F.2d 610 (9th Cir. 1988), Judge Noonan in dissent notes the same point—whatever interest is advanced by the state is routinely compelling and of greater weight than the religious infringement. *Id.* at 622-25 (Norman, J., dissenting).

104. 110 S. Ct. at 1608.

> The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order', *Yoder*, [406 U.S.] at 215.[105]

Indeed, she found in *Yoder* that the Court had expressly rejected the interpretation the majority now adopted.[106] Without citation, the Court majority arguably extended its line of reasoning in *Swaggart Ministries*, extending its prohibition on affirmative challenges to generally applicable laws to defenses to the enforcement of those laws to particular conduct. Whether this decision portends some new day for the Court's jurisprudence must await further cases. Yet, it does not ring well with either the text or history of the religion clauses.

For these reasons, litigation to *advance* religious participation in public life into the 1990's is risky.[107] Certainly, public policy will be made in the courts and the religious organizations need to be involved in those proceedings. Yet, unlike the legislative or the executive branches where compromise is possible, courts do not provide such a luxury: there will always be winners and losers. More often than not, under the current state of the law, religious organizations have much more to lose than to gain by affirmative resort to judicial remedies under the free exercise clause.[108]

II. THE SEARCH FOR CONSTITUTIONAL VALUES

The writers of the Constitution intended balance in the development and implementation of the constitutional text. They balanced both individual and institutional concerns. Plainly, they protected personal choice and practices. But they also protected institutional autonomy between churches and the state, and did not intend the subservience of one institution to the other. In fact, within its "precincts," each was considered supreme.[109] For this reason,

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105. *Id.* at 1609.

106. *Id.* at 1609-10.

107. *See supra* note 83. There, it is indicated that an affirmative challenge to the employer sanctions law has proved to be difficult. A district court in California, for example, not only rejected such a challenge but held, as a matter of law, that the assertion of a free exercise interest could never be of sufficient weight to warrant an exemption given the government's interest in maintaining the security of the borders. American Friends Serv. Comm. v. Thornburgh, 718 F. Supp. 820, 822 (C.D. Cal. 1989).

108. Justice Holmes once said "the law must be stable but must not stand still." This maxim accurately describes the means by which the law changes incrementally in the court system. Even the victories when won will likely be small and narrow. Courts are supposed to exist to right wrongs and to give remedies, not to adjust the law to prevailing social conditions. A strategy whereby the formation or reformation of public policy is made primarily in the judicial system is, therefore, inherently risky. Especially given the Court's pronouncements in *Swaggart Ministries* and *Smith*, the legal resources of religious organizations are best expanded primarily in assisting the religious organizations in the formation of public policy, and in the judicial system to protect hard won gains.

109. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

the civil courts have rules of deference to the adjudication of uniquely ecclesiastical disputes.[110] Also for this reason, churches may not exercise a veto over legitimate state functions.[111] Yet, the interactions between public institutions and religious institutions are numerous. Because of the development of the case law, and the enhancement of the standard of the perception of endorsement, there are substantial risks to these cooperative efforts, as discussed above. It is equally clear, however, that government action which happens to coincide with religious values is not a violation of the religion clauses.[112] Nonetheless, every coincidence between governmental action and religious value is likely to rankle some citizen who does not share that view and may quite honestly "feel" some denigration on this basis. If endorsement analysis is the law based on "perceptions," it invites mischief that could have grave consequences for the public interest.[113] For this reason, renewed consideration of the intentional values that inhere in the constitutional text and the ways in which the constitutional text was intended to serve the public interest is required.

This having been said, this Article does not intend for either strict construction of the text, rooted in words and phrases and legislative history, nor does it require a loose interpretation based on a sense of the demands of contemporary times. Both views have their supporters.[114] This Article is not among them. Strict construction of the text requires too rigid an adherence to words, laden with a particular meaning and in a particular context which may, in some instances, have outlived their literal usefulness. The development of the death penalty jurisprudence is one important and useful example.[115] Vague interpretation based on some sense of current needs is

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110. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 706-09 (1976).

111. Larkin v. Grendal's Den, 459 U.S. 116, 121-22 (1982).

112. Harris v. McRae, 448 U.S. 297, 319 (1980); Zorach v. Clauson, 343 U.S. 306, 313 (1952) (noting desired conformance between public function in accommodation to religious needs).

113. As one commentator has stated:

> "Endorsement" analysis is a pipedream, not because government never "endorses" religion but because it inevitably does do. Like it or not, the nature of governmental action is to take stands that will rankle some (or many, or most) citizens because of the citizens' religious scruples. Just ask pacifists about how much an "insider" they felt during the Vietnam War. Or about their taxes, roughly one-third of which go for instruments of mass violence. Ask "pro-lifers" about their discomfort with our constitutional order.

Bradley, *supra* note 87, at 808.

Some of the plaintiffs in Abortion Rights Mobilization v. Regan, 603 F. Supp. 970, 972 (S.D.N.Y. 1985) felt "denigrated" by claimed preferential treatment of Catholic bishops by the taxing authorities and felt further compelled to sue to revoke the Church's tax exemption. The challenge was recently and correctly dismissed for lack of standing. *In re* United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989), *cert. denied,* 58 U.S.L.W. 3693 (U.S. April 30, 1990).

114. Much of the argumentation and some of the authorities are found in Wachtler, *Our Constitutions—Alive and Well,* 61 ST. JOHN'S L. REV. 381 (1987).

115. Stanford v. Kentucky, 109 S. Ct. 2969 (1989), reflects colonial practice which imposed

equally invalid, for it lacks the sense of roots in the Constitution required for authentic interpretation. Some middle ground must be found, and this Article endeavors to give it substance.

A. Personal Liberty and Institutional Integrity as Touchstone Values

Despite the Supreme Court's regular insistence that the history of the first amendment aids interpretation of the religion clauses,[116] the sole historical underpinning in many lengthy opinions is often contained in one brief reference to Thomas Jefferson's "wall of separation" between church and state.[117] Whatever efficacy Jefferson's statement had in establishment clause analysis, it was thoroughly discredited by Chief Justice Rehnquist's scholarly dissertation on the history of the first amendment in *Wallace v. Jaffree.*[118] As explained therein, the wall has become a "blurred, indistinct, and variable barrier" which "is not wholly accurate" and can only be "dimly perceived."[119] "The concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[120] Much is made of the central role played by Jefferson and others, and much is attributed to their metaphorical descriptions. History is much more illuminating.

If anything, Jefferson's view of religion and the state was one in which religion played a central role in the order of society. Although Jefferson supported the disestablishment of a central religion, he and other founders believed that the interaction of religion and state brought about and preserved certain moral values essential to civil government. Mr. Jefferson, like others of his contemporaries, believed that religion was important in the public and private lives of the citizens of the state.[121] Among other things, he introduced

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the death penalty in rejecting Eighth Amendment challenges. Yet it allows for consideration of "evolving standards of decency." Trop v. Dulles, 356 U.S. 86, 101 (1958).

116. *E.g.*, Edwards v. Aguillard, 482 U.S. 578, 605-08 (1987) (Powell, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 673-76 (1984); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 (1973); McGowan v. Maryland, 366 U.S. 420, 437-41 (1961).

117. *See* McCollum v. Board of Education, 333 U.S. 203, 244 n.8 (1948) (Reed, J., dissenting) (quoting 1802 Letter to Danbury Baptist Churches in 8 THE WRITINGS OF THOMAS JEFFERSON 113 (Washington ed., 1861)).

118. 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

119. *Id.* at 112. At best, this Court considered the wall of separation little more than a "useful signpost" on the road to legitimate establishment clause analysis. Larkin v. Grendel's Den, 459 U.S. 116, 123 (1982). But more signposts, providing additional guidance, are surely needed on a road that "has become 'as winding as the famous serpentine wall' [Jefferson] designed for the University of Virginia." *Nyquist,* 413 U.S. at 761 (Jackson, J., concurring) (quoting McCollum v. Board of Educ., 333 U.S. 203, 238 (1948)). As Justice Douglas, writing for the Court in *Zorach v. Clauson,* stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." 343 U.S. 306, 312 (1952).

120. *Lynch,* 465 U.S. at 673.

121. PROCEEDINGS, EARL WARREN CONFERENCE ON ADVOCACY, CHURCH, STATE AND POLITICS 79 (1981).

bills to promote rest on the Sabbath as part of the religious duty that man owed to God.[122] Jefferson was President when tax exemption was first given to churches in Washington.[123] He recommended that various religious sects be allowed to establish schools of theology in Virginia's public university and recognized the public good in continuation of sectarian orphanages.[124] If one should look to Jefferson, his actions are far more meaningful than his metaphor.

The history of the drafting and negotiations that led to the wording of the religion clauses as finally adopted by the First Congress is detailed by the Chief Justice in *Wallace v. Jaffree.*[125] The generative process of extensive compromise that resulted in the establishment clause shows that it had two purposes: first, to prevent Congress from establishing or favoring a *national* religion; and, second, to prevent Congress from interfering with the *states'* policies with regard to religion.[126] The phrase "respecting an establishment" did not mean merely concerning or touching upon religion. Indeed, Representative Livermore of New Hampshire had proposed such language in the House of Representatives on August 15, 1789, and his proposal was rejected.[127] As the Chief Justice pointed out in *Wallace v. Jaffree:* "[n]one of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require the Government to be absolutely neutral as between religion and irreligion."[128] There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was in any way intended to alter the meaning of an *established* religion as being a *national* religion.[129]

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122. A thorough discussion of Jefferson's public life is in R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 41-46, 261-63 (1982). *See also* McCollum v. Board of Educ., 333 U.S. 203, 244-47 (1948). Mr. Cord also reviews the impact of Madison and others on the formulation of the religion clauses. The key point for understanding them is that the practices of no single state or no one framer dominated. The First Congress was fraught with compromise and the religion clauses were forged in that political furnace where individual differences are melted and blended to form the public's interest.

123. *See* Walz v. Tax Comm'n, 397 U.S. 664, 684 (1970) (Brennan, J., concurring).

124. *See* McCollum v. Board of Educ., 333 U.S. 203, 245-46 (1948) (Reed, J., dissenting).

125. 472 U.S. at 92-98. As *amicus curiae,* the United States Catholic Conference reviewed the history of the establishment clause in, *e.g.,* Mueller v. Allen, 463 U.S. 388, 399-402 (1983); Aguilar v. Felton, 473 U.S. 402, 413 (1985); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 621 (1986).

126. 1 ANNALS OF CONGRESS 730-31 (Gales & Seaton eds. 1789); M. MALBIN, *supra* note 23, at 6-13; 1 A. STOKES, *supra* note 8, at 539-40; Corwin, *The Supreme Court As National School Board,* 14 LAW & CONTEMP. PROBS. 3, 11 (1949).

127. Livermore's terminology, introduced August 15, 1789, was: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONGRESS 731 (Gales & Seaton eds., 1789).

128. 472 U.S. 38, 99 (1985).

129. At the time of the Constitutional Convention, there was a wide diversity of views and practices among the states regarding established religion. *See* 3 J. ELLIOT, DEBATES ON THE

The language of the religion clauses as ratified does not concern itself with religion in general, but with the particular problem of the fear of a national religion. The Framers of the Constitution "had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . .; they did not intend to spread over all the public authorities and the whole public action of the nation, the dead and revolting spectacle of an atheistical apathy."[130] There was no concern expressed during those first congressional debates that the government might enact a law beneficial to religion or religious institutions.[131] Any doubt on this point was surely dispelled by the early congressional actions accommodating and even directly benefiting religion in general.[132] "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."[133] The first amendment reflects the experience of its framers that an officially preferred or nationally established religion generates religious intolerance and infringes upon personal liberty.[134] The establishment clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty.[135]

The clauses were included in the Bill of Rights:

> [N]ot as a protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to ensure the continuance and the strengthening of

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ADOPTION OF THE FEDERAL CONSTITUTION 330 (2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (Madison's discussion of freedom of religion in Virginia). Madison asserted that the central government had no right "to intermeddle with religion." *Id.* The religion clauses were molded to meet the needs and wishes not only of the people of Virginia, whose proposal was not adopted, but of the varied and sometimes widely divergent views of all the states on the appropriate relation of government to religion. The Virginia model cannot reasonably be presumed to have been the desired prototype of states that for themselves selected very different models of church/state accommodation. S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 499 (1902).

130. S. REP. No. 376, 32d Cong., 2d Sess. 4 (1853); *see also* Zorach v. Clauson, 343 U.S. 306, 312 (1952) ("There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.").

131. 1 ANNALS OF CONGRESS 730-31 (Gales & Seaton eds. 1789).

132. Wallace v. Jaffree, 472 U.S. 38, 99-110 (1985); Lynch v. Donnelly, 465 U.S. 668, 675-78 (1983); Marsh v. Chambers, 463 U.S. 783, 786-90 (1983).

133. Edwards v. Aguillard, 482 U.S. 578, 606 (1987) (Powell, J., concurring) (quoting Abington Township v. Schempp, 374 U.S. 203, 213 (1963)).

134. *E.g.*, Abington Township v. Schempp, 374 U.S. 203, 228 (1963) (Douglas, J., concurring) (Douglas compared bible reading in school with requirement in Franco's Spain that all students follow religious practices); Torcaso v. Watkins, 367 U.S. 488, 490 (1961) (Court referred to the Oath of Supremacy required in England to take office in colonies when it found requirement that Governor of Maryland declare belief in God unconstitutional).

135. *See* Lynch v. Donnelly, 465 U.S. 668, 683 (1984).

> religion, which could not flourish under American conditions if any State Church were either provided for or tolerated.[136]

The Bill of Rights took effect when the Commonwealth of Virginia finally ratified the first ten amendments to the United States Constitution on December 15, 1791. Two years earlier, when the Virginia legislators initially considered the amendments proposed by the First Congress, they postponed ratification and stated their objection to the religion clauses:

> The [first] amendment, recommended by Congress, does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time, render it as powerful and dangerous as if it was established as the national religion of the country.
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> This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia and other states, for the protection of these rights.[137]

However, no change to the wording of the first amendment occurred between the time of this statement and Virginia's ultimate ratification. As part of the Bill of Rights, the establishment and free exercise clauses were intended by the framers to be complementary and comprehensive protections for religious liberty. The religion clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government.[138]

While it is plain that one of the purposes of the religion clauses through their placement in the Bill of Rights is to protect personal religious liberty, it is equally plain that one of the political purposes of the clauses was to promote civic stability by avoiding institutional conflict along religious lines.[139] In *Everson v. Board of Education,*[140] for example, the Supreme Court quoted with approval a statement about the "interrelation of these complimentary clauses" from *Harmon v. Dreher,*[141] an opinion of the Court of Appeal of South Carolina rendered in 1843: "[t]he structure of our government has,

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136. 1 A. STOKES, *supra* note 8, at 539-40.

137. *Journal of the Senate of the Commonwealth of Virginia, 1785-1790,* at 62-63 (1828).

138. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

139. *See e.g.,* Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (government neutrality toward religion prevents powerful sects from bringing about a fusion of governmental and religious functions, and also guarantees religious observance free of any compulsion from the state); Everson v. Board of Education, 330 U.S. 1, 15 (1947) (the federal governmental structure protects public and religious organizations from interfering with each other).

140. 330 U.S. 1 (1947).

141. 17 S.C. Eq. (Speers Eq.) 87 (1843).

for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[142]

In her concurrence in *Lynch v. Donnelly*,[143] Justice O'Connor's analysis of the establishment clauses identified two evils that could accompany the excessive interaction of religion and government: (1) the loss of political and institutional autonomy; and (2) the loss of personal religious liberty.[144] The second portion of her analysis is the often repeated "perception of endorsement" test which played such a critical part of the court's analysis in *Allegheny*.[145] The former evil that Justice O'Connor identified, the loss of political and institutional autonomy, was described as: "excessive entanglement with religious institutions . . . [that] may interfere with the independence of the institutions, [and] give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."[146]

Thus, the loss of institutional autonomy was not feared just for the consequences for personal religious liberty but "equally feared because of its tendencies to political tyranny and subversion of civil authority."[147] For this reason, it has long been held that one of the principal objectives of the religion clauses is to prevent, "as far as possible, the intrusion of either into the precincts of the other."[148] It is important, therefore, as one considers the various public interests served by church and state each to be independent and autonomous, that together they share important responsibilities with deep roots in our national tradition.[149]

History indicates that Jefferson and his contemporaries intended the establishment clause to prohibit the preference of one religion over another, but not to forbid any assistance, regulation, or other interaction.[150] Significantly, benevolence towards religion was not perceived as an evil, an attitude reflected in the practices of the framers. Rather, support and encouragement of religion was perceived to be in the public good. What has been lost in recent cases is not only a return to history but to the primacy of the common

142. *Id.* at 120.

143. 465 U.S. 668 (1983).

144. *Id.* at 687-88.

145. County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086, 3103-05 (1989).

146. *Lynch*, 465 U.S. at 688.

147. McGowan v. Maryland, 366 U.S. 420, 430 (1961).

148. Lemon v. Kurtzman, 402 U.S. 602, 614 (1971).

149. This is not to say that other institutions such as charities and private associations do not equally share in this responsibility. None, however, have the express constitutional underpinnings that both church and state have in this undertaking.

150. The framers of the religion clauses in the First Congress allowed some state involvement with religion including payment for chaplains, Marsh v. Chambers, 463 U.S. 783, 788 (1983), a Thanksgiving Holiday, *id.* at 788, and inclusion of churches in land grants in the new Northwest Territories. Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (citing Northwest Ordinance, art. III, ch. VIII, 1789 Stat. 50, 53).

sense judgment that every interaction with religion is not necessarily unconstitutional.

B. *Express Consideration of the Public Interest*

The public's interest requires in many instances a healthy and proper partnership with the state, through the "walls" that have been erected between church and state in areas where both have a vital stake.[151]

First, for purposes of brief definition, "public interest" denotes the conditions and circumstances which create the opportunity and freedom for persons to grow and reach their own perfection. The public interest, for example, consists of the various values people share as citizens and members of churches, such as educating the young, healing the sick, promoting social justice, and the like.[152] At the same time, on a different level, the public interest consists of the preservation of the social, political, and moral order under the Constitution which allows, among other things, the exercise of religious liberty.[153] The two religion clauses of the first amendment of the Constitution provide the essential framework for any analysis of how church and state serve the public interest. As noted above, the religion clauses confine and constrain either the church or the state only when one acts to the detriment of the other.[154] But falling short of a concrete threat by one to the other, the Constitution permits church and state to work together towards common ends and permits reasonable state interaction even in a church's activities when it promotes the common good. In the last analysis, serving the public interest means considering all of the relevant interests at stake in a given situation prior to conflict, especially in considering whether constitutional interpretation benefits or burdens the public interest.

1. The Public Interests

Church and state share interests in various activities. Those interests overlap and in many instances are the same in, for example, education,[155] health,[156]

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151. Bevilacqua, *Foreward—Church and State: Partners in Freedom*, 39 DEPAUL L. REV. 989 (1990).

152. *See generally* JOHN XXIII, MATER ET MAGISTRA: ENCYCLICAL LETTER OF HIS HOLINESS POPE JOHN XXIII ON CHRISTIANITY AND SOCIAL PROGRESS (1961) (policies of the Catholic church regarding some of these concerns).

153. J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 154-56 (1980); J.C. MURRAY, *supra* note 16, at 8-9.

154. *See supra* note 107 and accompanying text.

155. 20 U.S.C. § 2701, 2711 (Supp. VI 1988) (statute providing funding for special needs of children from low income families, migrant families, or children with handicaps both in public and private schools); W. BOWER, CHURCH AND STATE IN EDUCATION (1944).

156. 42 U.S.C. § 291, 291a (1982) (appropriations granted to both public and other nonprofit health facilities); Bradfield v. Roberts, 175 U.S. 291 (1899).

social services,[157] and social justice.[158] On the other hand, it is clear that church and state have entirely different perspectives on these interests. Churches exist primarily to unite their people with their God, and to add the demands of moral value as a dimension to society by the actions of their people both individually and collectively to promote equality, fairness, and justice.[159] When the church educates, heals, or provides for the welfare of its people, it does so because its religious mission is made more real through its actions. On the other hand, the state has certain roles which only it can fulfill—principally, providing for the common defense and security and promoting the general welfare of its citizens. When the state acts, it does so out of its obligation to govern. Disputes arise between church and state over shared goals concerning the means by which the goals should be achieved. For example, disputes arise over what standards of excellence we should educate toward, what is basic health care, and how much is demanded by obligations of social justice. The public interest is best served when dialogue and cooperation dominate the relationship and a sense of mutual responsibility permeates the consideration of the public issues.

It is also often noted that both church and state serve the public interest by creating and maintaining the social, moral, and political environment in which both can act freely for the benefit of all.[160] In this environment, religious liberty is constrained only when it directly threatens the liberty of others or when too close a relationship between church and state may impermissibly entangle one with the other. On this level, dialogue and cooperation are also important, especially in attempting to decide when liberty or assistance ends and interference begins.

2. *Constitutional Framework*

Whenever churches *act* on their beliefs, there is the prospect of state intervention. When state action reasonably promotes the common good, the intervention is not necessarily unconstitutional. Arbitrary state action, however, offends both common sense and the Constitution. The test of the reasonableness of a state intervention might normally require a balance of various "goods" held in common, not the least of which is the integrity of churches and their ministries. It is not suggested here that the Constitution authorizes or forbids widespread interference with church activities, only that such facts and circumstances can often blur motives and alter results.[161]

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157. 42 U.S.C. §§ 2931-2932 (1976) *repealed by* Act of Aug. 13, 1981, Pub. L. No. 97-35, Title VI § 683(a), 95 Stat. 519 (financial assistance granted to both public and private nonprofit organizations that assist older, low income people).

158. 42 U.S.C. § 626 (1982) (appropriations to both "public and nonprofit institutions of higher learning" for research in child welfare projects); *see* Pub. L. No. 99-603, 100 Stat. 3359 (1986) (use of religious groups in processing undocumented persons for amnesty).

159. Bernardin, *supra* note 9, at 7-8.

160. J.C. MURRAY, *supra* note 16, at 53, 57-59.

161. *Id.* at 162-63.

State action is seen most often in areas where the churches undertake a task, such as education, health, child and family services, and social justice, where the state clearly has an interest as part of its mission to provide for the welfare of its citizens. Undoubtedly there are times when the government perhaps has not shown that it appreciates that churches educate or heal because they see it as vital to their religious mission, and that the government interferes insensitively in their religious ministry. It is equally true that the state does not normally intend to displace churches in these areas, but only seeks to assure that the welfare of its citizens does not suffer in the process.[162] Whenever churches engage in these tasks, reasonable state regulatory action is not only expected, but also valid under the free exercise clause.[163] Therefore, when religious organizations raise free exercise clause arguments as a reflex reaction to reasonable state action, the public interest is not served. Under the first amendment the state may not control beliefs or thoughts, or indeed what may be written or spoken. The state may, however, constrain "expressions," even religious expressions, when they spill into conduct which may harm another.[164] The proper balance must consider what measure of restraint of religious liberty is reasonable and consistent with the public interest.

As one example, consider that both the church and the state have an interest in education. When the church undertakes education to assure, among other things, the inculcation of specific values, it seems reasonable that the state, in order to protect the welfare of its citizens, insist that teachers be qualified to teach or that the curriculum actually provide a basic education. In *Pierce v. Society of Sisters,*[165] the state government was enjoined from requiring all school children to attend public schools.[166] Here, however, parental choice was clothed in constitutional garb, yet the fabric was from

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162. *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (recognizing propriety of state regulation for schools but prohibiting mandatory attendance at public school as opposed to parochial schools).

163. This approach conflicts with the exclusion of religious shelters from the federal emergency grants program proposed by HUD in 1986. *See supra* note 1.

164. Davis v. Beason, 133 U.S. 333 (1890), carried the belief/conduct dichotomy to an extreme. The *Davis* Court upheld the validity of an Idaho territorial law that demanded, as a condition of voting and holding office, that a person swear that he did not advocate, teach, or practice polygamy. The effect of the law was to disenfranchise Mormons. The Court noted the religion clauses are:

> [I]ntended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, *not injurious to the equal rights of others,* and to prohibit legislation for the support of any religious tenets, or the mode of worship of any sect.

Id. at 342 (emphasis added). Thus sentiment and belief are unregulated but conduct is regulated when it injures the equal rights of others.

165. 268 U.S. 510 (1925).

166. *Id.* at 534-35.

a government store. The Supreme Court favorably recognized the state's authority:

> *[R]easonably* to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[167]

To take another example, both the church and the state have an interest in child care and support. It is not unreasonable for the state to insist that children in the care of churches not be treated differently from other children in other settings—not abused, not denied medical care, be subject to adequate health practices, etc. One would not tolerate that kind of treatment from parents in the secular community. There is no concrete threat to religious liberty by applying the same high standards to all charged with our most precious resources. For this reason, current versions of child care legislation[168] carry broad protections of the state, even if the provider is a religious institution.[169]

It is readily conceded that certain state actions abridge religious freedom in ways not contemplated by the Constitution. The most obvious examples are the impoundment of funds of the Worldwide Assembly of God by the Attorney General of California[170] and efforts by communities to "regulate" religious groups from proselytizing on city streets.[171] Tennessee has a statute that requires churches to register as political action groups if they lobby on any legislative proposal.[172] Given the number of legislative issues with moral dimensions, the opportunities for restraint of the mission of churches are numerous.[173] But examples of reasonable state action, which some would still call interference, are more numerous. The public interest requires, at a minimum, that churches understand the constitutional government they seek to preserve, be sensitive to the roles within society that churches play, and be wary to litigate over matters in which the church's claim on the common good is incidental. On the other hand, callous indifference by the state to the proper role of churches in the formation and implementation of public

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167. *Id.* at 534 (emphasis added). It is true, as Justice Holmes observed, that regulation that goes too far is a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Basic education quality standards do not "take" the religious liberty of citizens. In religious schools church and state are engaged in a partnership to serve the public interest in education. Narrow self-interest must yield to the public's greater interest.

168. *E.g.*, § 5, 101st Cong., 1st Sess. (1989).

169. *Id.* § 8.

170. *See* California v. Worldwide Church of God, 127 Cal. App. 3d 547, 178 Cal. Rptr. 913 (1982).

171. Larson v. Valente, 456 U.S. 228 (1982); Cantwell v. Connecticut, 310 U.S. 296 (1940).

172. Campaign Financial Disclosure Act of 1980, TENN. CODE ANN. § 2-10-101 (1985).

173. *See* Bemis Pentecostal Church v. Tennessee, 731 S.W.2d 897, 907 (Tenn. 1987) (Act did not violate First Amendment), *appeal dismissed,* 485 U.S. 930 (1988).

policy is lamentable and should be opposed by all persons of good will.

Where the boundary between freedom and restraint is disputed the first amendment is our only guide. It should not be trivialized by being overused or overstepped. The common good of the community of churches is best served by maintaining a set of conditions which assures our liberty to practice various faiths in peace with the state and with each other. Those conditions are domestic tranquility and stability, and strict obedience to the first amendment protection of personal religious freedom.

The following is offered as a mechanism for that critical examination by both church and public institutions when implementing public policy:

1. Are churches engaging in an activity in which the state also has an interest?
   (a) What is the state's interest?
   (b) What is the church's interest?
   (c) Do these interests compete? Are they coextensive or mutually exclusive?
2. Where does the public interest lie? Will constitutional conflict promote the public interest or are other means available to resolve our competing concerns?

Similarly, notwithstanding history and prudence, whenever church and state interact, there are those who use the establishment clause as a sword by reflex rather than by reflection.[174] One should examine whether the action to be challenged constitutes a concrete threat, not just *a* threat, of church/state involvement in such a way that infringes religious liberty. Courts should not invalidate every interaction between church and state based on conjecture and speculation, but rather examine the action for the real, not the possible, and for the practical, not the extreme.[175] The following analysis might be considered:

1. What is the nature of the action complained of?
2. What is the purpose of the action complained of?
3. Who is (are) the primary beneficiary(ies)?
4. Is there an alternative course available to reach the same purpose and benefit?

Several pertinent examples of where this kind of analysis could have been applied in recent cases follow.

For example, in *Allegheny,* the Supreme Court enjoined the display of a creche in a public building at private expense[176] after it had previously upheld

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174. *E.g.*, Aguilar v. Felton, 473 U.S. 402, 419-20 (1985) (Burger, C.J., dissenting) (condemning "paranoia" by which separatist groups see religious encroachment in programs). To a certain extent, those groups are reacting to a pre-Vatican II Catholic Church. The DECLARATION ON RELIGIOUS FREEDOM, *supra* note 4, recognized the fact that the Catholic Church was one of many voices and abandoned a concept of a "catholic" state.

175. Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986); Lynch v. Donnelly, 465 U.S. 668 (1984); Mueller v. Allen, 463 U.S. 388 (1983).

176. 109 S. Ct. 3086 (1989), discussed *supra* notes 62-73 and accompanying text.

such a display in a private park in *Lynch*. The Court distinguished *Lynch* by noting that the *Lynch* creche was placed with secular holiday symbols in the same display.[177] One must inquire how the establishment clause values are harmed by an action whose nature is simply the display of a creche (or, for that matter any other similar symbol) in the public square essentially by private organizations and efforts at appropriate times.[178] In a realistic sense, the display by permit does not empower the state to challenge, in a concrete way, the institutional autonomy of churches. Similarly, it allows a church no special claim under which it could undermine secular authority. It is but one example of church/state interaction which does not pose a concrete threat to establishment clause values, which might have been passed even without challenge. The public is denied a distinct benefit through access by religious groups to public property on a nondiscriminating basis by assertion of a narrow view. One should not need a Santa Claus to validate a creche, or a Christmas tree to validate a menorah.[179]

Another example is the consistent detrimental impact of *Aguilar v. Felton*.[180] Congress authorized grants to local school districts for public school teachers to teach educationally and economically disadvantaged children without regard to the affiliation of the schools they attended. The Supreme Court nonetheless viewed the establishment clause as a barrier to this benefit to children on the speculation that *some* of the interaction *might* involve excessive entanglement.[181] In her dissent, Justice O'Connor accurately noted

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177. *Allegheny*, 109 S. Ct. at 3103-05.

178. One should distinguish between a public display that uses public energy and funds and a truly private display on public premises. The state may have little claim to engage in a religious exercise, but may not bar private groups from doing so. *But see* Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989) (display of menorah in park on a permit basis held invalid); Doe v. Small, 726 F. Supp. 713 (N.D. Ill. 1989) (court found privately funded display of pictures of life of Christ in public park violative of establishment clause).

179. In his dissenting opinion in *Lynch v. Donnelly*, Justice Blackmun certainly has the better of the argument among the Justices about the nature of the display. The creche is a uniquely religious symbol. It should not be trivialized in its religious significance by a requirement that it be displayed along side secular symbols in order to justify its placement in public parks. *Lynch*, 465 U.S. at 726-27 (Blackmun, J., dissenting). On the other hand, one must question the lack of fairness in any rule of law which bars all such displays from public parks just because they are religious. As Professor Tribe has indicated: "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-7 (lst ed. 1978).

Similarly, commenting on moves to drive religion from the public schools, the American Council on Education stated:

> [T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.

AMERICAN COUNCIL OF EDUCATION, THE FUNCTION OF THE PUBLIC SCHOOLS IN DEALING WITH EDUCATION 6 (1955)

180. 473 U.S. 402 (1985), discussed *supra* notes 33-43 and accompanying text.

181. *Id.* at 412-14.

the tremendous value that remedial education programs have on the poorest and most disadvantaged children in our society. If anything, the Supreme Court's decision in *Aguilar v. Felton* exacerbates the disadvantages already possessed by the class of children most in need of remedial attention. Alternative education adds yet another layer of disruption to the educational day, requiring children to travel to alternative education sites for their basic instruction. Such a rule can only serve further to disadvantage these youths and to derogate the public interest in serving this group of children. After all, given the absence of a concrete threat to anyone's religious liberty interest or to the institutional autonomy that exists between church and state, the Chapter 1 educational programs do not establish religion. It is a disservice to the public interest to invalidate such programs which promote real educational, economic, and civil rights values in our society, and which do not, except by speculation, challenge either church or state.[182]

In any given situation, not only is it possible, but essential for both church and state to examine the allegedly or sometimes conflicting values at stake for evidence of a concrete threat by one to the institutional autonomy of the other.[183] If the interaction between church and state does not demonstrate such a threat, then the public interest is served by avoiding conflict and allowing the interaction.[184] Such a result is not only constitutionally permissible but may be socially mandated. Where the threat is real and offers the means to subvert the aims of one to the other, the Constitution and the public interest require that it be enjoined and eradicated.

It is unavoidable that at times one would characterize the other's interest as contrary to the public's. Yet the simple truth is that church and state both approach the public interest from different perspectives because of different traditions.[185] Church and state, when opponents, should characterize their disagreements more in terms of what is good for society rather than what is good for themselves. The public interest, in the last analysis, is that which comes from the dialogue of the disparate and sometimes disharmonious voices. The individual, in personal religious liberty and as a citizen, will benefit from this kind of interaction.

III. CONSTITUTIONAL MYTHOLOGY

Mythology is a useful device. It explains to one's posterity a kernel of truth through the retelling of an important story. Like other myths, constitutional myths are rooted in reality. Indeed, the myths that are discussed in this Article are not by any means the only myths that are perpetuated. However, there comes a time when one must question whether the story is

182. *Id.* at 424-26 (O'Connor, J., dissenting).

183. *See* Lemon v. Kurtzman, 403 U.S. 602, 614-15 (1971).

184. It might even be deemed an "incidental" burden. *See* Abington Township v. Schempp, 374 U.S. 203, 294-96 (1963) (Brennan, J., concurring).

185. *See supra* notes 23, 129-30.

worth its continued adherence in law if society is to grow and progress, or if the story becomes reality itself. Indeed, to the extent that the retelling of these important stories departs from reality, one must question their value at all. In order for religious organizations to play a major role in dispute resolution and advance their own causes and values in the formation of public policy aimed at reforming society, certain principles must form the core of constitutional understanding and certain myths must yield to correction by reality. Each myth that follows therefore must be evaluated in light of its usefulness as a tool and its relationship to reality.

A. Myth 1: Personal Autonomy, Not Shared Responsibility, is the Core of Constitutional Experience

Constitutional law protects individual rights and autonomy. Certainly, this is a dominant and consistent theme of American culture, with its emphasis on rugged individualism. The protection of the person and his home is considered preeminent throughout the history of constitutional litigation.[186] Often the rights of the vulnerable and the minorities were lost to majoritarian demands, an evil corrected by the courts in this century. Perhaps the closest legal reflection of judicial social responsibility has been the series of civil rights decisions to protect the rights of minorities in society over the last forty years.[187] There is also a trace of this theme in decisions upholding the New Deal legislation in the 1930's to rescue the nation from the depression.[188] However, over the last several decades, there has also been a dramatic rise in the emphasis on individual autonomy in society and in the courts.[189] Legally, the judiciary has moved from protection of disadvantaged minority groups to the protection of minorities of "one" who are seen as having no responsibility to society at large.

This trend is seen especially in the current debate on euthanasia, which is now characterized as the individual, alone and suffering, against the medical and legal establishments. In this battle, the individual who approaches the

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186. For example, although production and distribution of pornography is illegal, one's ability to possess it within the confines of one's home is protected against the state. Stanley v. Georgia, 394 U.S. 557, 567-68 (1969). *But see* Osborne v. Ohio, 58 U.S.L.W. 4467 (U.S. April 18, 1990) (distinguishing *Stanley* when pornography deals with children).

187. *E.g.*, Brown v. Board of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities [to keep minorities from the majority, white students] are inherently unequal."). Certainly this attitude is found in cases limiting constitutional prerogatives of parents in favor of socially-accepted conventions of child protection. *E.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (Court upheld Massachusetts child labor law challenged by Jehovah's Witness who argued this denied her child opportunity to practice religion).

188. *See generally* 2 C. ANTIEAU, MODERN CONSTITUTIONAL LAW §§ 15:45, 15:47, 15:48 (1969).

189. The rise in personal privacy as a protected constitutional interest is traced by some to Griswold v. Connecticut, 381 U.S. 479 (1965), and is certainly the essential underpinning of Roe v. Wade, 410 U.S. 113 (1973). A critique of this area of the law is found in Chopko, Webster v. Reproductive Health Services: *A Path to Constitutional Equilibrium*, CAMPBELL L. REV. (1990) (forthcoming).

judicial system does so as a weak and possibly disadvantaged suitor entitled to relief from a system that would seek to deny him needed assistance in achieving what he desires, a painless and swift death.[190] The current emphasis on individual autonomy makes this result not only possible but foreseeable.

At the same time, there is a diminution of social consensus that once acted as a bulwark against individual decisions undermining socially accepted values.[191] For example, some suggest, among other things, that society may exercise social restraint only insofar as there exists a consensus about the values which need to be protected.[192] As society continues to fragment, it is further argued, culture and the values that build society will divide, being shared only in increasingly smaller groups. Because consensus could only exist at the lowest common denominator of social values, there would be fewer opportunities to form consensus on issues of significance. The rush toward euthanasia, therefore, becomes inevitable, not because it is now "right" but because society is powerless to stop it. There seems to be little willingness to use the rule of law or development of public policy as a means to support a social framework that would condemn the hastening or choice of death.[193]

Although America is certainly peopled by "rugged individualists," the core experience of American society has been our willingness to care for each other. Indeed, the earliest colonial experiences in this country were marked by direct limitation of individual preferences when it served the common good. Such was the American experience that, were this not possible, the colonists could not survive.[194] Indeed, secular society is based upon rich religious roots in which a shared community responsibility in the giving of charity from individuals, the state, and those in authority is expected.

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190. *See, e.g.*, Brophy v. New England Sinai Hospital, 398 Mass. 417, 497 N.E.2d 626 (1986) (allowing personal guardian of vegetative patient to remove hydration and nutrition); Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1146-48, 225 Cal. Rptr. 297, 307-08 (1986) (Compton, J., concurring) (calling for physician assistance to aid Ms. Bouvia's death). *See also infra* Part IV, C.

191. *See generally* Bernardin, *Euthanasia: Ethical and Legal Challenge*, 18 ORIGINS 52, 55 (1988); Note, *Maine's Living Will Act and the Termination of Life-Sustaining Treatment*, 39 ME. L. REV. 83, 144-45 (1987).

192. *E.g.*, H.T. ENGLEHARDT, THE FOUNDATIONS OF BIOETHICS (1986). For example, Englehardt labels efforts to determine the "best interest" of a patient, "paternalism." *Id.* at 279-84. *See also* Engelhardt & Malloy, *Suicide and Assisting Suicide: A Critique of Legal Sanctions*, 36 SW. L.J. 1003, 1010-11 (1983) ("a secular state exists not to enforce religious or moral laws unless those rules are commonly agreed to be to its member's direct earthly benefit").

193. Even though the Hemlock Society ballot initiative in California failed to gather sufficient signatures to put legalized euthanasia to a referendum, its supporters attribute its failure to organizational weakness and not to some residual social resistance. For arguments outlining the Hemlock Society's support of euthanasia see Larue, *Patients Should Decide*, in EUTHANASIA: OPPOSING VIEWPOINTS 149-54 (1989) *reprinted from Euthanasia: The Time is Now*, FREE INQUIRY (Winter 1988-89).

194. "He who will not work, will not eat" is a maxim that bears witness to the need for service to the common good of the many.

Not surprisingly, the legal system grew out of essentially a blending of the private and public interests. For example, the earliest cases addressing privacy interests in the United States address individual liberty interests in the context of protecting and preserving the common good.[195]

The vaccination cases are particularly apt. In those cases, rejecting a claim of personal liberty to resist vaccination, the Supreme Court upheld the vaccination not on a public health rationale but on the need to subvert individual choices to the preservation of the greater good.[196] The contemporary demand for individual preference and autonomy[197] requires a critical evaluation by those making public policy and to those in the courts for ways in which this myth has subverted the reality.

Religious institutions can perhaps arrest this process of diminishing consensus through intelligent, thoughtful, and incisive debate. A society which finds the rule of law only in the lowest common denominator is not a society that will take great steps to feed the hungry, clothe the naked, and house the homeless. These actions are contrary to the urge to protect one's own autonomy—a cultural and legal trend that is rooted in selfishness. Moreover, to concede that there are different interest groups (as one must) is not to concede that consensus is impossible. That there are factions means there will be debate and compromise. If a religious organization is to inform the legal debate that surrounds controversial issues, it must start with the premise that social consensus *must* still exist on significant issues. Even without "consensus," there might still be some coalition of interests around certain premises. For example, the interests to live in peace and harmony, to provide some measure of care for those who are less fortunate, and to combine resources to educate our children are a few such premises. These interests, as defined by debate and compromise, may serve as a basis to balance the demand for absolute individual rights. In reaching those compromises, religious institutions can play an important role in the 1990's.

B. Myth 2: Uniformity, Not Diversity, is Essential in Preserving the Civic Peace

Because of the loss of government funding for certain initiatives, this country is returning to a time when private enterprise and private institutions,

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195. *E.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 583 (1897) (Court found statute prohibiting parties from purchasing insurance contracts that did not comply completely with Louisiana law unconstitutional although Court asserted if state had stronger interests it may consider those interests over personal liberty to contract).

196. Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905).

197. In his concurring opinion in *Roe v. Wade*, Justice Douglas discussed the nature of "liberty" as including *"autonomous control over the development and expression of one's intellect, interests, tastes, and personality."* 410 U.S. 113, 211 (1973) (emphasis in original). This right, he said, is "absolute, permitting of no exceptions." *Id.* No other rights encompassed by his notion of liberty, including the right of privacy, were labelled "autonomous," and no other opinion of any Justice or the Court spoke of autonomy in relation to personal liberty or privacy in *Roe*. 410 U.S. at 113-223. The first use is thirteen years later in *Thornburgh v. American College of Obstetricians & Gynecologists*, a reaction by a desperate majority to preserve its first victory. 476 U.S. 747, 772 (1986).

especially religious institutions, provided social services.[198] As reliance on private enterprise increased in the 1980's, and as unique and comprehensive government programs declined, there has been greater conflict, interestingly enough, among the various private players. Nonreligious organizations see the participation of religious organizations as a threat to their ability to market themselves and make profits. Religious groups debate the limits of government funding and the limits of government regulation.

This trend is amply illustrated in the debate over the child care legislation. Public education groups and their private interest allies are leading a charge, under the banner of "separation of church and state," to effectively exclude religious organizations from realistic participation in the program. Because religious organizations provide most of the child care in the United States, the exclusion of such a large segment from the child care program would favor public schools and others monetarily and eliminate choices of providers, especially for the poor.[199] What is lost on these advocates is that there are many valid delivery models and each one is important to a pluralistic community. Similarly, proposed rules issued by HUD in 1986 would have excluded any property owned by religious institutions from participation in emergency shelter grants. This would include even that property which had long since been abandoned by the religious institution for any use and would be ideally suited to this purpose.[200] Final rules compromise this approach by asking religious organizations to erect an intermediate secular corporation to receive the grant.[201] Although this proposal was acceptable to those who provide service, it is an exercise in excessive formality to preserve a principle of doubtful applicability.

Nonetheless, because the government has increasingly become the leading provider of certain services for such a long time, uniformity has become more or less expected. Government services are generally provided in one way, whether they are in Albuquerque or Albany. But because society is not uniform and, in fact, is made up of many groups with different cultural and value identities, there is not only an explanation, but also a justification for providing different service models in a community. The goal of serving a genuinely pluralistic community is not achieved by uniform delivery of services by only one type of provider.

Concern about the drive for exclusion of religious pluralism is not idle fancy. During the ongoing debate over *Kendrick*, the plaintiffs do not oppose the participation of religious organizations in Title XX *per se,* as much as

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198. *See* Abington Township v. Schempp, 374 U.S. 203, 238 n.7 (1963) (Brennan, J., concurring); W. BOWER, *supra* note 22, at 23-24; *see generally* B. COUGHLIN, CHURCH AND STATE IN SOCIAL WELFARE (1965) (review of policy issues involved in religious groups providing social services).

199. Liekweg, *Participation of Religious Providers in Federal Child Care Legislation: Unrestricted Vouchers Are A Constitutional Alternative,* 26 HARV. J. ON LEGIS. 565 (1989). *See* Chopko, *Don't Exclude the Churches,* Nat'l L.J., Feb. 29, 1988, at 13, col. 1.

200. *See supra* note 1.

201. *See* 24 C.F.R. § 575.21 (1989).

they oppose religious organizations which had views that were different than theirs on the question of abortion.[202] If they prevail, the result is not pluralism, but uniformity in accord with their own values. That is not only unfair, but it is also constitutionally suspect. It has been said, "[i]f we lose the right to be different, we lose the right to be free."[203] That proposition, which has important colonial roots,[204] should be a foundation for sound legal policy.

The debate over the first amendment began with Congress deciding whether a first amendment was needed at all. James Madison, long labeled the father of the first amendment, was certainly of the view that there was no need to expressly protect the freedom of religious organizations and believers and nonbelievers in the new United States.[205] At the time of the revolution, there were several hundred denominations in the United States and, it was said, the number of unchurched persons in the United States was so great that "America constituted the largest body of unchurched in all of Christendom."[206] Thus, Madison concluded that it would be quite impossible for the national government ever to establish a religion at the expense of others.[207] Nonetheless, several states believed that an express guarantee of religious liberty was important and thus, the first amendment was adopted.[208]

The first amendment elevated the rights of the many and the powerless over the privileges of the few and powerful. It guaranteed more than tolerance—it guaranteed that the state must not favor one religion over another. A tolerant state might establish one religion but permit others.[209] In this country, the constitutional tradition has been neutrality, that is, the government may neither favor nor disfavor any or all religions. The advantage of this system is in its protection for individual liberty. But more than that, for institutional liberty, it assured the ability of churches outside the realm of government, neither dependent on nor subject to the government, to "flourish according to the zeal of its adherents and the appeal of its dogma."[210]

In order to inform the public policy debate through the courts or the legislature, a call for a diverse and sometimes divergent public policy must

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202. *See* Reske, *The Abortion Counseling Case*, 74 A.B.A. J. 76, 78-9 (June 1988); ACLU NEWS 1, 1-3 (Oct. 26, 1983).

203. Remarks of James Wood, Baylor University, Gathering of Christians, May 24, 1988.

204. *Cf.* 2 J. Kent, *Commentaries of American Law*, Lecture XXIV (1826, da Capo ed.) ("When the spirit of liberty has fled, and truth and justice are disregarded, private rights can easily be sacrificed under the forms of law.")

205. 3 ELLIOT'S DEBATES, *supra* note 129, at 330.

206. *Cf.* 1 A. STOKES, *supra* note 8, at 228-30; J.C. MURRAY, *supra* note 16, at 58.

207. 3 ELLIOT'S DEBATES, *supra* note 129, at 330; *See* 1 ANNALS OF CONGRESS, *supra* note 23, at 731.

208. These states were New Hampshire, New York, North Carolina and Virginia. S. COBB, *supra* note 23, at 508.

209. L. WHIPPLE, *supra* note 12, at 72.

210. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

be rooted in constitutional terms. If the founders intended to protect the rights of the many, neither favoring nor penalizing any group, they could not be understood to mean that only one kind of religion or religious values would be allowed to participate in the national life. Moreover, given the historical reality that education and social services were in the hands of the churches at the time of the Revolution,[211] the founders could not be understood to adopt a system which would have radically restructured the way that American life was then lived. Rather, they might well be offended to witness the rush to an increasingly secular society at the expense of religion.

C. *Myth 3: Churches May Not Be Trusted to Observe the Constitution*

There is a certain myth propounded in the constitutional litigation that religious organizations serving the general public are inherently proselytizers. Thus, the argument goes, they cannot be trusted to manage public funds effectively, because at the slightest lapse in government vigilance, they will immediately resort to preaching and conversion. This attitude colored the perceptions of both the majority in *Grand Rapids*[212] and *Aguilar*,[213] as well as the district court in *Kendrick*.[214] People who believe that religious conversion can be accomplished through the use of federal funds for remedial mathematics or for emergency counseling of pregnant teenagers are also likely to believe that the blood shed in the crusades or in religious wars in Europe created authentic conversion. They do not seem to understand that conversion is person-by-person and from mind to heart. They persist in their innate distrust that religious organizations engage in the public debate to impress, like the crusaders of the twelfth century, one set of values and convictions upon an unwilling population. This distrust has now been fueled by additional national scandal caused by clergy in some denominations. What religious organizations need to be is more effective in communicating their reasons for public service.

Drawing on the principle of pluralism for legal argument, religious organizations often participate in the provision of either education or social services as witness of their concern for the life of the community. Their mission in providing service is not to convert, but to serve. This message has not been communicated through litigation and in the public policy arena, because although the message is spoken, it is not heard; what people hear is that churches seek to proselytize. On the contrary, religious organizations seek to engage in the formation of policy because they have something valuable to contribute to the debate.[215] In a pluralistic society, that is the most anyone can do or expect.

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211. *See* Marsh v. Chambers, 463 U.S. 783 (1983).
212. 473 U.S. 373 (1985).
213. 473 U.S. 402 (1985).
214. 657 F. Supp. 1547, 1564-66 (D.D.C. 1987), *rev'd and remanded*, 108 S. Ct. 2562 (1988).
215. *See* Bernardin, *supra* note 9, at 6.

In an effort to compensate for this phenomenon, many religious organizations strive to make themselves look like secular organizations, providing the same services as secular groups without limitation or reservation, and without reference to unique values and mission. This is especially unfortunate because it draws on the secular model as the only "good" or "realistic" model for delivery of education or social services. It makes more difficult the legal defense of the few privileges and exemptions obtained for religious organizations (such as labor and other specific statutory exemptions), and makes it easier for secular groups that target religious involvement to charge that religious organizations are themselves responsible for the loss of moral suasion in this country.

For religious institutions, public policy and legal strategy must be subsumed in the inherent mission of churches to serve, engage, and transform the society, by witness, action, dialogue, and persuasion. Such a strategy may then inform those making the laws or judging their validity to understand that churches do not seek to convert but to inform—that churches do not seek to impose, but to dialogue.

IV. Toward A Consistent Legal Theory—Other Applications

The search for constitutional value and the use of the public interest as a guide for resolving disputes (including adjudication) invites the application of constitutional value theory to other areas. The broader this theory is applied in other areas, the more utility it might have. Of particular conceptual importance is the way in which this method of dispute resolution leads towards a consistent legal theory—a theory providing some certainty as to the manner in which issues will be approached and under which disputes may be properly evaluated and ultimately resolved. Given the unique origins of this theory and its particular context—rooted as it is in Catholic social and political writings—the utility of this methodology might lack a broader appeal and application. However, as a process for exploring constitutional issues permeating with moral questions, it might be a useful exercise. In turn, this Article briefly touches three areas for possible exploration: indecency, civil rights, and euthanasia.[216] Others will have to determine ultimately after further analysis whether the methodology works.

A. Indecency

There are many rights and interests that are implicated in the regulation of indecent speech. Both sides in this debate claim that important first amendment speech interests are implicated by any kind of intrusion, forced or unforced, into the area of the creation and dissemination of information, entertainment, or ideas by any medium. Writers, cinematographers, store

216. Indeed, even briefer reflection is offered on the subject of capital punishment and the eighth amendment. *See infra note* 247.

owners, among others, and the public all claim rights to create, sell, or receive certain information or material that entertains, educates, panders, or even titillates to one's own personal satisfaction.

Others are concerned about the impact that such material has on the greater society. For example, to the extent that such material tends to exploit or trivialize women,[217] it is certainly a serious concern for all to assure equal treatment and dignity for women as unique persons, both in society and in the law. Certainly, the dissemination of indecent material also implicates certain parental interests in the upbringing and education of children.[218] Acting on these concerns, the state claims broad regulatory power over the dissemination of indecent material at least in the broadcast medium.[219]

The balance of these barriers, rights and interests, is of course, often the prerogative of the Federal Communications Commission[220] or the courts. In numerous cases, the Supreme Court has given some direction to the regulatory problem presented by indecent material. For example, the Court has long held that the protection of children does not require reducing adults to receiving only that information which is appropriate for children.[221] This does not necessarily mean that children must be exposed to indecent material as the price of living in a free society. But, as every parent knows, difficult social and ethical questions are often beyond the ability of children either to comprehend or learn, whether indecent or not.

Last term in *Sable Communications v. FCC,* the Supreme Court unanimously ruled that a twenty-four hour ban on telephone subscription services that rigorously promote indecent material was not sustainable.[222] The Court explained that the broad first amendment protections over the creation and dissemination of material could not be abridged absent a record demonstrating any invidious harm to children that would require a broader application of regulatory authority.[223]

There would appear to be a strong sense of intentional values inherent in the speech clause to protect the freedom to create and disseminate material even if it might offend the taste or sensibility of others in society. The

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217. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328-32 (7th Cir. 1985), *aff'd mem.,* 475 U.S. 1001 (1986).

218. Ferber v. New York, 458 U.S. 747, 756 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling") (citation omitted); Ginsberg v. New York, 390 U.S. 629, 640-41 (1968).

219. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

220. Federal Communications Act of 1934, 47 U.S.C. §§ 223, 303, 639 (Regulating obscene or harassing telephone calls in interstate communications, transmission of radio communications containing profane or obscene words).

221. Butler v. Michigan, 352 U.S. 380, 383 (1957).

222. 109 S. Ct. 2829 (1989) (Court upheld the constitutionality of "dial-a-porn" regulations by upholding a blanket prohibition on *obscene* speech by a 6-3 margin while unanimously invalidating a blanket ban on *indecent* speech).

223. *Id.* at 2837-38, 2840 (Scalia, J., concurring) This conclusion was also supported on the ground that an alternative approach less restrictive than a 24-hour ban was available but untried. *Id.* at 2837-38.

Canterbury Tales of Chaucer are often cited as one of somewhat bawdy material that is nonetheless literature often studied and repeated.[224] Given this historic and intentional commitment towards the freedom to create and disseminate information enshrined in the speech clause, the sufficient interest of parents and others for the education of their children, and the interest in the growing equality and mutual respect that is penalized somewhat by the unrestricted dissemination of indecent material, the balance of these objectives becomes more critical. The courts have skewed the balance in favor of broadcasters, writers and other creators and disseminators of information.[225]

The ultimate question for us is the extent to which the balance of these various interests must be adjusted in light of the public's interests. Depending on the weight attached to the various values in competition, one reaches different conclusions. Most important for both the application of the methodology described above, as well as the resolution of the numerous disputes that do in fact occur, is the consideration of the public's interests. On balance, the public's interest would seem to require express consideration of all the values rather than the views of one side to the exclusion of the other.[226] The precise balance and blend of the various interests is, of course, difficult. But one might see that there are some positive applications for a different balance based on express application of the above methodology. For example, the FCC has routinely considered whether it might write rules limiting the broadcast of indecent material to particular times and places.[227] Many object categorically to any restraints over the dissemination or broadcast of indecent material. Such demands, unbalanced in their considerations of the other interests and rights that are implicated as discussed above,

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224. Kingsley Int'l Pictures v. Board of Regents, 360 U.S. 684, 688-90 (1959) (invalidating New York statute which banned screening of "Lady Chatterley's Lover").

225. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328-32 (7th Cir. 1985).

226. For example, there are some that would advocate a complete ban of indecent material from the airwaves without regard to either the constitutional tradition which we inherit or the ways in which the application of *this* governmental power might be used to the detriment of *others* in the future. The Constitution appears to have set certain personal interests ahead of those of the government. *Compare* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.") *with* United States v. Reidel, 402 U.S. 351, 356 (1971) (*Stanley* "does not require that we fashion or recognize a constitutional right . . . to distribute or sell obscene materials"). *But see* Osborne v. Ohio, 58 U.S.L.W. 4467 (April 18, 1990). The price that one pays for the maintenance of this freedom, is the willingness to endure, perhaps, the results of someone else's use of those personal freedoms.

227. Enforcement of Prohibitions Against the use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order, 2 FCC Rcd 2714 (1987); Enforcement of Prohibitions Against the use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order, 50 Fed. Reg. 42,699 (1985); Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order, 49 Fed. Reg. 24,966 (1984). *See* Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

subvert one set of the public's rights and interests to others. Reasonable regulations along these lines would appear to be not only consistent with the intentional values that would guide consideration, but also the public's interest in compromise and balance as a way of articulating public policy.[228] The methodology offers a different way of addressing and resolving an old problem.

B. Civil Rights

Religious institutions have a particular concern with the actions of employee nonadherents. From time to time, both Congress and the courts have considered this issue and, with limited exception, the rights of religious organizations have been affirmed. Two recent cases illustrate the competition among the various rights and interests and the ways in which lines have been drawn by the courts.

In *Ohio Civil Rights Commission v. Dayton Christian Schools,*[229] the Supreme Court held that the federal courts should allow state agencies to impose civil rights jurisdiction over a private Christian schools as long as the private school's constitutional objections would be sufficiently heard in the course of the proceedings. The school discharged one of its teachers for failing to adhere to one of the practices of the denomination. The teacher complained of discriminatory treatment at the hands of her employers to the state civil rights authorities, who started an investigation. One obvious social good was the protection of the individual from discriminatory employment practices. The school, as a religious organization, on the other hand, insisted on its right to discipline a member of its faith community without interference by the state,[230] another obvious social good and likewise part of the public's interest. In this blend, the private interest offered by the teacher should have yielded to the interest offered by the religious organization. The important element in blending the public interests and seeking compromise is "choice."[231]

In such disputes, the area of religious choice is an important consideration in evaluating the public interest. The history of this country's experience with religious conflicts demonstrates that choice of religious faith carries with it certain indemnities.[232] One is consenting to the rights and authority

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228. Father Murray has addressed the problem of censorship. *See* J.C. MURRAY, *supra* note 16, at 155.

229. 477 U.S. 619 (1986).

230. *E.g.,* Serbian Eastern Orthodox Church v. Milivojevich, 426 U.S. 696 (1976) (first and fourteenth amendments prohibit civil courts from disturbing or being bound by decisions of ecclesiastical tribunals).

231. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.")

232. Consent to discipline even immunizes the denomination against certain torts while the person is a member of the faith. Higgins v. Maher, 210 Cal. App. 3d 1168, 258 Cal. Rptr. 757 (1989); Guinn v. Church of Christ, 775 P.2d 766 (Okla. 1988).

of the denomination over certain matters. Given the freedom by which people might stay or leave a denomination for no reason or any reason,[233] "it would be a vain consent and would lead to subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed."[234] Thus, courts have adopted a broad rule excluding civil courts from the adjudication of church disputes, a rule that should apply when the merits of the employment dispute in the *Dayton Christian School* are considered.

Similarly, when the Church of Jesus Christ of Latter Day Saints discharged one of its janitors for failing to obtain a "temple recommend," a certificate of his good standing in that church and a condition for maintenance of his job, many in the civil rights community were offended. Nonetheless, in Title VII, Congress has chosen to exclude religious entities from federal employment jurisdiction, as a means to eliminate conflict between state authorities and religious organizations about which positions an employee would be subject to the law and which ones an employee would not.[235] The Supreme Court, when confronted by the issue, upheld the validity of the Title VII exemption in 1987.[236] The private "goods" involved in this determination are similar to those presented by the teacher employee in the earlier example; the public "goods" are likewise similar. In sustaining the congressional balance of the various interests forming the public interest, the courts recognized that the freedom of religious organizations to pursue their missions in relative peace was a higher value than the individual rights of those who might be offended by such choices.[237]

C. *Euthanasia*

Making public policy concerning euthanasia and the direction of the time and manner of one's death is uniquely difficult. On the one hand, privacy interests implicated under the Constitution would appear to encompass a certain range of medical choice.[238] However, of equal, if not greater, moment is that the state has long been held to have an interest in the prevention of suicide.[239] Where one claims the right to end one's life, such a right, proposed as a matter of personal autonomy—unlimited, exclusive self-determination—

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233. Struemph v. McAuliffe, 661 S.W.2d 559, 563-64 (Mo. App. 1983), *cert. denied,* 104 S. Ct. 2659 (1984).

234. Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

235. Civil Rights Act of 1964, 78 Stat. 255, *as amended,* 42 U.S.C. § 2000e-1 (1982).

236. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

237. *But see* Bob Jones University v. United States, 461 U.S. 574 (1983) (upholding discrimination policies inherent in the tax code over a free exercise challenge).

238. Gray v. Romeo, 697 F. Supp. 580, 584-86 (D.R.I. 1988) (concern whether a gastrointestinal tube even constituted medical treatment).

239. For a general history of policies regarding suicide, see Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?,* 24 DUQ. L. REV. 1 (1985).

has never been a part of the foundation of our democratic system. The Supreme Court long ago rejected such a proposition as antithetical to individual freedom within an ordered society.[240] In *Bowers v. Hardwick,*[241] the Supreme Court summarized over a half century of constitutional jurisprudence and noted that, only those rights found within history and tradition to be necessary to a free society had been incorporated in a concept of liberty under the fourteenth amendment and preserved against state interference through some amorphus right to privacy.[242] Unrestricted personal autonomy in choosing the manner and place of one's death is not within these rights. On the other hand, the common law already contains a rough approximation of a balance of these interests in the nature of a public interest determination.

The common law allows for the express consideration of other interests besides one's interpretation of a personal interest, including, as a balance to the personal interest, the interest of a state in preventing suicide, the interest of innocent third parties (such as family members that might be impacted by such a decision), and the way in which that proposed exercise impacts the practice and ethics of medicine.[243] For this reason, courts have been reluctant to expand elements of self determination to include "a right to dictate the circumstances under which life is to be ended."[244] "[T]he resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting people, many endanger personhood."[245]

The precise calculus of these various rights and interests is presented to the United States Supreme Court currently in *Cruzan v. Harmon.*[246] In *Cruzan,* the parents of a patient in a persistent vegetative state claimed the right to terminate her nutrition and hydration as an expression of her personal right of self determination. Some question, correctly, the expansive notion of personal autonomy found within this asserted right. The common law, it is said, will adequately protect this interest in self determination without sacrificing all the other interests. The recognition of a broad unrestrained personal interest against all others could set the individual's choices against the interest of family, society, the medical profession and the ethics of the very practitioners chosen by the patient. The patients rights would become supreme and all other interests including those who believe that such choice

240. Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905).

241. 478 U.S. 186 (1986).

242. *Id.* at 190-92.

243. *Compare In re* Eichner, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981) (approving disconnection of respirator) *with In re* Storar, 438 N.Y.S.2d 266, 420 N.E.2d 64 (refusing approval to forego blood transfusion), *cert. denied,* 454 U.S. 858 (1981).

244. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1370 (2d ed. 1988).

245. *Id.* (footnote omitted).

246. 760 S.W.2d 408 (Mo. 1988), *cert. granted,* 109 S. Ct. 3240 (July 3, 1989) (No. 88-1503).

is antithetical under certain conditions, would be rejected. Such a result, it is asserted, would not only be contrary to the public interest, but would also be unethical. Further application of the methodology proposed could be usefully pursued.[247]

V. CONCLUSION

If this Article has accomplished anything, it has perhaps illustrated the need for further work in the area of church/state relations, unfortunately characterized more by conflict than by restrained conflict resolution. For courts and scholars, this Article points to the need for both more research into the kinds of values which underlie the constitutional text as well as ways more routine invocation of those values give fuller meaning to the text. Plainly much more can be done. The status quo always has its staunch defenders sometimes clothed in the garb of academic inquiry. More work can and should be done, and the debate should be joined, perhaps in the journals. One would suspect that it will continue whether or not the debate is informed in the courts.

To those, like this author, who strain to do justice to the aspirations of their faith communities as religious organizations, this Article counsels restraint. Conflict has been long and bitter, and perhaps is irreversible. Absent a better decisionmaking tool, that would certainly seem to be the case. The case is made here, not for constitutional slogans for our banners and bumper stickers, but for return to the common commitment to constitutional value. To this, one other element is added, a commitment that we all share the same society, linked together in mutual interdependence under a theory of

247. A similar line of reasoning could be employed to discern means of resolving disputes on capital punishment. The Supreme Court has recently reaffirmed the principle that, because our colonial forbearers regularly executed criminals, the imposition of capital punishment is not, *per se*, unconstitutional under the eighth amendment which forbids cruel and unusual punishment. Under colonial governments, capital punishment was certainly not unusual and, given the wide variety of practices, could not be deemed cruel. *See* Stanford v. Kentucky, 109 S. Ct. 2969 (1989). By contrast, twentieth century jurisprudence focuses more on those kinds of practices which "mark the progress of an evolving society." Trop v. Dulles, 356 U.S. 86, 101 (1958). That invites either speculation about the meaning of these contemporary times or, in the theory of this Article, a search for means to resolve those apparent disparities between original intentions and contemporary times, by seeking ways that are faithful to both. This would be a subject for a more thorough investigation into the generative history of the eighth amendment and a more thorough-going search for constitutional value. It would seem, at a minimum, that the colonials believed in effective punishment for crime but yet had enough sense of distributive justice that they did not want their society to be marked by the kinds of practices that characterized some of the excesses of monarchical Europe. It would be worth investigating, therefore, whether some new constitutional theory of adjudication could be adopted based on these and perhaps other constitutional values and comparing those values to the ways in which disputes are actually resolved. The pattern of arguments raised and, consequently, lost by opponents of the imposition of capital punishment in this society counsels an approach based on restraint and perhaps reconsideration of the basic strategy. Such is the stuff of further research.

constitutional government that preserves our diverse practices under the religion clauses of the first amendment. Use of a public interest standard, along the lines suggested above, at least offers the hope of finding a way out of this constitutional morass in which many have become lost over the last two centuries. This Article is not the first, nor will it be the last, to call for such express reference to the public interest. Given the repeated calls, one must ask whether the truth, searched for since the time of this Republic, is not one shrouded in the substantive language of any text or form, but rather is found in the common experience of human persons searching for a process by which they may live together in peace.