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Forum Juridicum: Church Autonomy in the Constitutional Order - The End of Church and State?

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FORUM JURIDICUM

CHURCH AUTONOMY IN THE CONSTITUTIONAL ORDER: THE END OF CHURCH AND STATE?

*Gerard V. Bradley**

> Was I scared floating around in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them—and God and faith and the separation of Church and State.
>
> —George Bush, on the campaign trail.

"Separation of church and state" is right up there with Mom, apple pie, and baseball in American iconography. That George Bush had to fudge the truth about his narrow escape attests to that. At least one *hopes* that the young pilot's thoughts on meeting his Maker turned to something more suitable than constitutional law. Even a Supreme Court junkie's priorities are not that askew. But if Bush's commitments remain partially obscured, those of his audience—the American voter—do not. Evidently, John Q. Citizen requires that the faintest whiff of a public man's religiosity be accompanied by assurances that, of course, God and Caesar remain securely in their respective domains. This is not solely a Republican phenomenon. Greek Orthodox Church officers provided the Democratic counterpoint to Bush's war story. They were asked about Michael Dukakis' standing in their church. They wouldn't say, and scolded their interlocutors. The Archdiocese said:

> With regret, we have observed recent attempts being made to inject religion into the political life of this nation, in direct contradiction to the First Amendment, and we will not become party to this effort.[1]

Another way of evidencing this consensus is to ask yourself if you know anyone who favors "integration" of church and state. The structure of a recent survey, the "Williamsburg Charter Survey on Religion

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1. See Religion & Soc'y Rep. B5 (August 1988).

and Public Life," illustrates that almost no one does.[2] On this foundational issue this survey gave respondents two options that amounted only to "strong" and "weak" emphasis on separation, but offered no option for "no separation." Aside from a small number of Christian Reconstructionists and totalitarian atheists, no party to the public debate on church and state wittingly questions separation of the two. Noises resembling such questions turn out to be either rhetorically-overheated denunciations of "strict separationists" like the ACLU, or the ACLU's denunciations of its denunciators.

If everyone agrees on separation of church and state, why does the relationship between religion and public life so vex, excite, and confound us? Part of the reason is that church-state separation, although it is the historical achievement of societies decisively shaped by a Christianity that was itself decisively shaped by Judaism,[3] is a commodious concept. The basic differentiation of orders denoted by "separation" does not, for instance, determine the propriety of state aid to parochial schools. Persons equally devoted to separation of church and state can legitimately end up on opposite sides of that question.

But "separation of church and state" is not contentless, and our conclusive agreement on it, I submit, provides a valuable common frame of reference in an otherwise discordant or "pluralistic" aspect of our life together. Americans do more than agree on "separation." They intuitively appreciate that "separation" is also the precondition of religious freedom. And religious freedom, which is usefully defined as political authority permitting (in the words of the Fourth Gospel) "the spirit to roam where it wills,"[4] is near-universally acclaimed a good thing and a distinctive feature of the American regime. This leads to Bush's predicament. Anything that sounds less than unequivocally "separationist" betrays religious liberty, because the commonly-held conclusion is that to preserve religion in America we must keep Christianity at bay, as walled-off from public life as possible. Thus the accepted ideal is Richard Neuhaus' "naked public square,"[5] one from which religious discourse has effectively been evicted.

The Constitution enters the fray as well. We all know it protects religious freedom, and that the Supreme Court insists the First Amend-

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2. See summary of Williamsburg Charter Survey on Religion and Public Life in America, in Religion & Soc'y Rep. B4 (April 1988).

3. Virtually *any* claim about Christianity's impact upon history includes within it important Jewish elements. Even parochial Christians confess formative Jewish influences upon their faith. Also, and for reasons beyond this paper's scope, Christianity's kinship with other forms of Western monotheism—Judaism, Islam, and Mormonism (if the latter is not within Christianity)—means that certain family resemblances among historical societies shaped by each are likely.

4. John 3:8

5. R. Neuhaus, The Naked Public Square (1984).

ment erects a "wall of separation" between church and state. The Court has consistently followed the same sequence of premises to the same commonly-held conclusion: that the wall is necessary to protect religious liberty. This conclusion has a quite respectable pedigree. It is the guts of the two hundred-odd year-old Enlightenment project to legitimate government and carry on political life without implicating religious commitments. Modern liberal theorists like John Rawls[6] and Bruce Ackerman[7] (among many others) continue this project, and expand the definition of forbidden resources to include all conceptions of objective value or of what it is truly "good" for persons to do. The position of these modern liberals, like that of their Enlightenment ancestors, is fueled by the belief that in a "pluralistic" society, publicly loosed religion leads in the short run to unmanageable conflict and in the long run to an authoritarian polity. Richard Rorty goes so far as to say that religion taken seriously threatens democracy, and that we must choose between commitment to religious truth and commitment to tolerance. Rorty reads Rawls as saying that we cannot have both, and we cannot live together peaceably unless we sheath our religious convictions by "privatizing" them, by limiting their relevance to our own individual spirtualities.[8]

All this is much too clumsy. It is quite true that certain religions—Islam is one—are in principle "intolerant" in some important sense. It is also quite true that others—eastern spiritually and certain quietistic Christian strands like Quakerism—are so politically indifferent that they make liberals like Rawls seem intolerant. The problem with statements like Rorty's is the failure to see that a religion's potential for political intolerance is entirely dependent upon that religion's precepts about truth and error, mistake and evil, how to treat persons with mistaken beliefs or who do evil, and what role, if any, political power should play in this process. Christians now almost universally accept that while God wants each person to love Him and do His will, it is God's will that persons freely choose to do that. (Ironically, many mainline Christian churches are now so "tolerant" that they dare not "impose" any particular conception of God's will upon their own members!) It may well be that at the dawn of the Enlightenment this insight, which the Church has quite consistently preached through the centuries, was obscured by some politically ambitious Christians. But the Enlightenment project rules out, as a possible exit from the problem, just that spiritual reform which has in fact occurred.

My view is that the Enlightenment or "liberal" (in its contemporary incarnation) project is an idea whose time has passed. Our time demands

6. See J. Rawls, A Theory of Justice (1971).
7. See B. Ackerman, Social Justice in the Liberal State (1980).
8. Rorty, Taking Philosophy Seriously, New Republic 31, 33 (April 11, 1988).

a rethinking of the "problem" of church and state and its "solution." The Enlightenment attempt to keep a concrete political society going without religious or other commitments to objective value has not and is not working. Olaf Tollefsen correctly claims that such theories, because they result in a practical solipsism that they are partly designed to escape, end by consigning humans to lives empty of any significant human enterprise.[9] Kent Greenawalt persuasively argues that some political issues *cannot* be resolved without recourse to religious convictions.[10] Greenawalt uses abortion as an example; I would add many others, including state regulation of reproductive technology and the cluster of issues usually associated with "the right to die."

If you wonder how we post-Enlightenment generations have gotten along with an architectonic theory that is unworkable, my response is threefold. First, "liberal" theories may not be "liberal" after all. As Tollefsen argues, to avoid practical solipsism, they may import a robust conception of objective human ends and values. If so, such theories are not trans-creedal or super-sectarian solutions to the problem of religious factionalism, but just another creed that happens to be presently regnant.

Second, we have not been getting along with them because we have not been using them. As a matter of fact, our common life has been ordered by political operatives, with the happy cooperation of the governed, in violation of Enlightenment principles. We *have* been resorting to religion, through the moral, ethical, and religious precepts of our political leaders. I must add that our Constitution was not interpreted as proscribing this until after World War II, when the Supreme Court began dismantling America's "implicit" Christian establishment.[11] In short, liberal theories may seem plausible—and affordable—precisely because we are living off the religiosity the theories tell us we cannot legitimately use.

The third reason is really a reason for the first two. Greenawalt and other authors[12] have identified the impossible demands that liberal theories place upon the human psyche. Liberalism would require humans who possess religious convictions—characteristically, their self definition—to put them on hold while participating in public life. Since people cannot do that, these convictions seep into the public sphere.

There are other reasons for a renewed look at the relationship among Christianity, separation of church and state, and religious liberty in

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9. Tollefsen, Practical Solipsism and "Thin" Theories of Human Goods, in 61 The Metaphysics of Substance 191 (D. Dahlstrom ed. 1988).

10. K. Greenawalt, Religious Convictions and Political Choice (1988).

11. The beginning of this demolition is the case of Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947).

12. See, e.g., Gedicks & Hendrix, Democracy, Autonomy and Values: Some Thoughts on Religion and Law in Modern America, 60 S. Cal. L. Rev. 1579 (1987).

contemporary American society. One is that the debate of recent memory is pretty much spent. Accusations against secular humanists by fundamentalists, and by secular humanists against fundamentalists have become tiresome, as are charges of godliness and fanaticism. Scholarly criticism of the Supreme Court's church-state corpus has grown so caustic, and is so widespread, that almost any new departure would be welcome. Specifically, the jurisprudential linchpin of the liberal synthesis—the 1947 decision in *Everson v. Board of Education*[13]—has now been decisively refuted by a host of scholars,[14] and only the judicial certification of its death stands between us and a fresh start in the courts.

The post-Enlightenment world may, however, never come because its price seems to be "separation" and therefore religious liberty. But what if the opposite were true? What if an invigorated, taut church-state separation was instead the new linchpin? That is the case I propose to make by examining church autonomy in our constitutional order. This should be the flagship issue of church and state, the litmus test of a regime's commitment to genuine spiritual freedom, and one whose proper basic handling is obvious in a separationist tradition. Instead it is the least developed, most confused of our church-state analyses, both in the law and in informed commentary, suggesting that the consensus sequence has badly deformed our traditional commitment to separation. My focus is on fundamentals, where mistakes engender increasingly ill effects all the way down the analytical line. I conclude that separation makes religious liberty possible but argue that the Judaeo-Christian tradition makes separation possible.[15] The inversion of the popular sequence is total: to preserve religious liberty we must, in some decisive way, keep Christianity *in* the public arena.

I

By "church autonomy" I mean the issue that arises when legal principles displace religious communities' internal rules of interpersonal relations (as opposed to prescriptions for personal spirituality).[16] The

13. 330 U.S. 1, 67 S. Ct. 504 (1947).

14. See, e.g., G. Bradley, Church-State Relationships in America (1987); R. Cord, Separation of Church and State (1982); D. Dreisbach, Real Threat and Mere Shadow, Religious Liberty and the First Amendment (1987).

15. Since in my view Christianity on this precise point does "consummate"—in a completely neutral analytical sense—Judaism, I speak of the "Christian" tradition here as including inchoate Judaistic elements.

16. More precisely, I focus on cases where there is not simply a practical convergence of norms stemming from incommensurable motives proper to the different orders—temporal and spiritual—in the one society. An example of such a convergence would be a legal ban on snake-handling because it is inimical to physical health, where believers indifferent to that risk handle snakes for spiritual benefits.

issue was presented in three recent Supreme Court decisions, the *Bob Jones*,[17] *Dayton Christian Schools*,[18] and (with qualification) *Amos*[19] cases. The Court avoided square confrontation with the same issue in *NLRB v. Catholic Bishop of Chicago*,[20] and in a District of Columbia court recently Georgetown University and a gay student association joined the issue.[21] "Church autonomy" issues, as discussed here, arise when the polity legislates "correct" interpersonal relations, decided upon after reflection upon intrinsic human dignity and the requisites of the "good," "great" or "perfect" community, and these political pronouncements come into conflict with religious pronouncements on the same subject. Of course, the attainment of a perfect is not necessarily the raison d'etre of churches, but it is close enough to make distinguishing the two kingdoms a formidable challenge.

The conflicts that can arise are of kaleidoscopic variety, as a few examples show. In *Bob Jones*, the religious community persuaded itself that race was a salient factor in ordering some interpersonal relations within the community, and forbade interracial dating. A flabbergasted polity, having just reached a fragile consensus to the contrary, used its tax laws to send a message. In *Dayton Christian Schools*, a religious group decided to follow the Matthean injunction not to take wrongs to civil courts and, more importantly, required its employees to abstain from political courts and submit only to religious authority when disputes arose. Elementary principles of justice in the polity again hold otherwise. In *Amos*, shared religious belief provided an ordering principle in the community's employment practices. The polity has determined that this is generally impermissible as a violation of equal protection of the laws. In *Catholic Bishop*, application of NLRB jurisdiction to parochial school teachers would have transformed the unique relation between diocesan ordinary and church employees. In the recent District of Columbia case, Georgetown University could not, in light of traditional Catholic teaching, regard sexual orientation as a matter of institutional indifference. The university feared that official recognition of the plaintiff organizations implied "endorsement" of a range of propositions hostile to Catholic belief. The District of Columbia, however, banned such "discrimination" in "educational institutions," with no exemption for sectarian endeavors.

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17. Bob Jones Univ. v. United States, 461 U.S. 574, 103 S. Ct. 2017 (1983).

18. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S. Ct. 2718 (1986).

19. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862 (1987).

20. 440 U.S. 490, 99 S. Ct 1313 (1977).

21. Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1 (1987).

This catalog of illustrations intentionally subordinates seminal cases in the church autonomy area, starting with *Watson v. Jones*[22] in 1871 and culminating with the 1979 decision in *Jones v. Wolf*.[23] "Church autonomy" was there investigated exclusively within the context of property disputes in schismatic churches. That scenario is only loosely related to my paradigm.[24] The conflict in property dispute/schism cases is between neutral legal principles concerning the interpretation of deeds and trusts, and questions no less than which of the schismatic groups in the "true" church. While the manner in which such cases are decided is important—the effect upon religious freedom can be significant—they portend less intellectual and political danger than the cases previously noted.

The common thread in the cited cases is the forced introduction into the religious community of civil "nondiscrimination" principles that are at odds with internally generated norms. The phenomenon here discussed is still in its adolescence. The muscular maturity of nondiscrimination still awaits us. But at the same time these norms, originating usually in the national government, have become broader, they have reached deeper. The *Brown*[25] ban on segregation is just 34 years old, and it coincided with invigorated hostility to ethnic and religious discrimination. Gender, alienage, illegitimacy, age, and handicapped status have been banished from legitimate public consideration only within the last generation. "Sexual preference" is now a serious contender for full fledged enshrinement, as is marital status. The list of future candidates is limited only by the imagination. The D.C. Human Rights Act even added a few—"family responsibilities," "source of income"—which on casual reading are not readily understood.[26]

As if penetrating ever-smaller concentric circles, first state and local governments, then almost all workplaces, any recipient of government benefits, educational institutions, and every place of public accommodation succumbed to their sway. Partial proof of this state of affairs is constitutional law's difficulty of finding *any* enclave outside the family immune from this onslaught. Our celebrated "right of privacy" extends precious little beyond the solitary individual and his "intimate" relations.

Marching steadily to meet this aggressor is an expanding religious establishment. The Founders' church was paradigmatically the local Protestant congregation of loosely affiliated, already converted (or saved)

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22. 80 U.S. (13 Wall.) 679 (1879).

23. 443 U.S. 595, 99 S. Ct. 1526 (1979).

24. These cases are much more like the snake handling hypothetical discussed supra note 16.

25. Brown v. Board of Educ., 349 U.S. 294, 75 S. Ct. 753 (1955).

26. The relevant portions of D.C. Code Ann. § 1-2520 (1987) are summarized in *Gay Rights Coalition*, 536 A.2d at 4 n.1.

individuals bearing a near-invisible juridical profile. These "visible saints"[27] did not produce tightly regulated ecclesia because they did not believe them conducive to spiritual health. This was true to an even greater extent of the dissenting fringe inhabited by Baptists and Quakers. In addition to the lack of religious establishment, the polity's "implicit" Protestant establishment[28] further mitigated conflict by assuring that convergence of legal and religious norms was harmonious. Put crudely but not incorrectly, neither the magistrate nor the pastor (and not because they were the same person, for they were not) was prone to treat women as they did men, or to depart from a democracy of the privileged-elect or freeholder. Specific exemptions, perhaps for Quakers,[29] resolved the conflicts that did emerge.

Sometime after the Civil War all this changed. A more aggressive state confronted a host of bickering, discordant religious voices, just as believers institutionalized their presence in educational and economic activities. Now there is no difficulty in locating what are indisputably full-integrated religious communities within prevailing legal definitions of workplace, school, grant recipient, or place of public accommodation. To illustrate this transition prosaically from a slice of constitutional law, consider this: if *either* the *Lochner*[30]-era belief that employment relations lay beyond legal regulation were accepted *or* if religious groups rarely established internal relations fairly called ones of "employment," then the problem of "church autonomy" does not present itself.

This is the array of hostile forces. Hanging over this battlefield is an intellectual haze that fundamentally obscures the combatants' lines and that transforms the fray into an almost undirected melee. Two political developments contribute to the chaos. First is the longstanding blind spot in liberal political theories concerning groups of all kinds. Liberalism adeptly reasons about the individual and the state, but cannot fathom groups. Second is the increasing attraction of what is hard to label "liberal," "conservative" or otherwise: the seductive invitation to "national community." This invitation is contained in the call of Democratic politicians to establish a national "family" or to practice the politics of "compassion"; in communitarian political philosophy and in constitutional law, especially by Critical Legal Studies devotees; and maybe the inevitable if unintended consequence of modernity. If we speak intelligently of a global village, the nation as family is rhetorically inevitable.

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27. See E. Morgan, Visible Saints: The History of a Puritan Idea (1963).

28. See G. Bradley, supra note 14, at 121-31.

29. During the early national period Quakers were frequently exempted from bearing arms and from taking oaths, both duties required of other citizens.

30. Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539 (1905).

The common effect is a runaway moral inflation of interpersonal relations in the polity. Integral to that inflation is a greater affinity between the premises of political reflection and those of interpersonal morality as such. Add the felt importance (for whatever reason or cause) of extending these politically derived norms to traditionally nonpolitical arenas, and the sum is an undifferentiated "justice" presuming relevance to the internal order of churches. The ironic result is nothing less than coercive evangelism. Finally, while the regime increasingly orders personal relations in the ever-ballooning public sphere, it denounces application of any objective norm at all to "private" relationships. *That* is the area of unbounded expression of individual subjectivity. Hence, churches teaching traditional sexual morality, for example, appear as authoritarian antiques propounding intrinsically improbable laws.

This approach is not limited to politics; there has been a corresponding expansion of the religious arena. Misrepresenting the next point is easy, so with caution I repeat what has become something of a cliche: the churches are increasingly "politicized." By that I mean they imitate political thinking about order. The political enthusiast and the church activist, it seems to me, agree that little in life is *not* political, and reason from common premises about common problems.

Risking too fine a spin to it, there are again two constituent elements of "politicized" religion. The first is the reduction of intrachurch relations to ones of "power" by (among others) feminist critics of patriarchal churches. The second is the powerful influence within Christian churches of "public theology,"[31] the insistence that religion is just one aspect of philosophical reflection and that common anthropological roots link it to other ostensibly nonreligious speculative enterprises. The joint effect of these trends is to extend the religious hand, so to speak, to meet the equally eager grasp of the reflective political operative. I concede that public theology *may* suggest an eventual return to the harmonies wrought by the implicit Protestant establishment: political and religious reflection might some day again coincide. But the short term effect is another thing. For now, the uneven absorption of public theology pits "traditionalists" and "modernists" against each other *within* churches, engendering conflicts that summon legal intervention.

Stir into this cauldron of considerations the general litigiousness of our society—if something makes you say "ouch" you need a lawyer—and you have an open invitation to the courts. Judges have not demurred. Since the 1947 *Everson*[32] decision they have decided for various reasons, articulated or not, that the political process is unable to adjust religious

31. See the excellent review discussion in Placher, Revisionist and Postliberal Theologies and the Public Character of Theology, 49 Thomist 392 (1985).

32. Everson v. Board of Educ., 330 U.S. 1, 67 S. Ct. 504 (1947).

conflict, and that courts can and should be the all-purpose umpire. In the give-and-take, ad hoc legislative process, clear thinking is a luxury that may tolerably be foregone. By contrast, where courts decide principled analysis is required. Thus, the "judicialization" of church-state means we must think clearly about the problem.

We have not done so. Consider some examples of the confusion gathered from recent Supreme Court lore. *Amos*[33] is the opener. In that 1987 case, a Mormon-owned gymnasium, whose operations were not "religious," discharged Amos for failing to qualify as a Church member. He then challenged the exemption of "religious" entities from a federal ban on employment discrimination on religious grounds. Amos contended that any reading of the exemption shielding the Mormon defendants from liability violated the Establishment Clause.

Amos lost, but it is hard to conclude that religion won, although the muddy, inconclusive opinions of the Justices make conjecture most risky. For one thing, *Amos* established no defense whatsoever to a hostile takeover of the field by a statute, and thus articulated no constitutional doctrine of "church autonomy." The majority opinion does seem to contemplate some constitutionally mandated (by Free Exercise, presumably) "noninterference" in religious practices, but neither in *Amos* nor in any other case has the Court squarely held that religious organizations possess constitutional rights. The strongest hint of breakthrough in *Amos* comes in the Brennan-Marshall concurrence, which recognized religious organizations have an "interest in autonomy in ordering their internal affairs." But the only warrant adduced for that proposition was a law review article by Professor Laycock.[34] The concurrence cautiously concluded:

> The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on Free Exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.[35]

Notwithstanding these encouraging signals, Brennan and Marshall never quite convince themselves that churches are more than aggregates

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33. 107 S. Ct. 2862 (1987).

34. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862, 2872 (1987) (Brennan, J., concurring) (quoting Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373, 1389 (1981)).

35. *Amos*, 107 S. Ct. at 2872 (Brennan, J., concurring).

of individuals or that churches may possess rights apart from those of individual members. For them, churches are simultaneously grounded in and potential enemies of what is securely founded: individual freedom of conscience. The tail that wags this dog is their inability to break free of the liberal philosophical poles of individual and state. This imprisonment is evident in their statement that deference to group concerns "permits infringement on employee Free Exercise rights."[36] The case presents *no* Free Exercise claim of individuals. No one has a *constitutional* right, most especially regarding a religious employer, to a private sector job on nondiscriminatory grounds. Only a statute, Title VII, raises such a possibility, not the Constitution. The same modern individual liberalism is evident in the following conclusion:

> Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities. Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce. We cannot escape the fact that these aims are in tension. Because of the nature of nonprofit activities, I believe that a categorical exemption for such enterprises appropriately balances these competing concerns.[37]

What is truly remarkable about the *Amos* case is that there is an *Amos* case at all. How did we arrive at a point where Congress may (or may not) "grant" church autonomy, and where a court seriously considers whether Congress "establishes" religion if it does? One must not be lulled by the majority's glib reassurances. The *Amos* plaintiff did indeed identify a potent constitutional impediment to the legislative exemptions. Under prevailing doctrine, *Amos* is a much closer case than the majority admits. Brennan and Marshall saw that, as did Justice O'Connor. She recognized that the relevant exemptions for church autonomy may well violate the Constitution, at least as now judicially interpreted:

> On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute per-

36. Id. at 2873 (Brennan, J., concurring).
37. Id.

> taining to religion can be viewed as an "accommodation" of free exercise rights.[38]

Remember too that *Amos* is virtually the most powerful case imaginable of church autonomy: a religious community making belief a litmus for membership is the stem from which the ancillary protection of community integrity in *Amos* follows.

Amos is not the most troubling Supreme Court foray into church autonomy of the Eighties; *Bob Jones*[39] is. The trouble there was not the confusion evident in *Amos*. The court in *Bob Jones* is quite sure of where it wants to go, and it allows nothing to obstruct its journey there. Nor is *Bob Jones* opaque, as *Amos* was. The central teaching of the *Bob Jones* case is quite clear, and leaves only the question whether its burial of church autonomy was decent enough. Yet with the notable exception of the late Bob Cover,[40] very few nonevangelicals have criticized the Court's decision. Among those arrayed against Bob Jones University were the mainline churches, whose commitment to racial equality evidently either outweighed their instinct for survival or overcame their ability to discern what was at stake.

The Court did concede that sincere Biblical exegesis underlay the university's prohibition of interracial dating and marriage. A composite institutional portrait revealed:

> a religious and educational institution [whose] teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities.[41]

In other words the university, in its own misguided way, was seriously trying to live the life of the Kingdom, to taste the world to come. From this profile it is easy to see that the only question in the case is whether this community's order *should* conform to "public policy," for there were lots of regulations (besides those about interracial fraternizing) that could never be legitimately adopted by a politically organized community in this country. Once critical comparison between Bob Jones University and the polity is undertaken, the university is a goner.

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38. Id. at 2874 (O'Connor, J., concurring in the judgment) (quoting from Wallace v. Jaffree, 472 U.S. 38, 82, 105 S. Ct. 2479, 2504 (1985)).

39. Bob Jones Univ. v. United States, 461 U.S. 574, 103 S. Ct. 2017 (1983).

40. See Cover, The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative, 97 Harv. L. Rev. 4 (1983). A fuller analysis of *Bob Jones* appears in G. Bradley, supra note 14, from which the present discussion is adapted.

41. *Bob Jones*, 461 U.S. at 580, 103 S. Ct. at 2022.

So it was. The Court went out of its way to conclude that "the purpose" of a tax-exempt entity may not be illegal or contrary to public policy.[42] (Query: Was it the "purpose" of Bob Jones University to forbid interracial dating?) This reworking of the statute so that it approximated "exempt status for religious organizations bereft of tenets contrary to public policy" easily placed the University outside the exempt class. The University fell back from this statutory defeat to a constitutional defense, which the Court immediately treated as a *Yoder*[43]/*Thomas*[44]/*Sherbert*[45] individual conduct exemption. At first, the Court wondered on whether the University was "burdened" by the denial of tax-exempt status, observing that denial of benefits would have a "substantial impact" upon religious schools, but "would not prevent those schools from observing their religious tenets." Relenting on that, they had no trouble adducing the necessary "compelling state interest" and figuring the absence of "less restrictive means," which is not surprising because the majority had already expended pages establishing the urgency of ending "racial discrimination" in education.[46]

Several questions are engendered by *Bob Jones*. In what sense is "subsidization" of only state-approved faiths "neutral," and how is that not an accurate account of *Bob Jones*? If Bob Jones University loses because it forbids adherents to marry outside their race, what of Catholic seminarians who are forbidden to marry anyone at all? For that matter, how can Catholic schools retain tax-exempt status so long as the church refuses to ordain women, and teaches the objective sinfulness of contraception? Are not "gender equality" and "privacy" overriding public policies? How is the autocratic polity of hierarchical churches squared with the fundamental constitutional principle of "one-man, one-vote"? While we may be accustomed to Congress playing "carrot-and-stick" with the states and economic actors, constitutional authority to treat religious institutions so hardly follows.

A bewildering footnote reveals the Court's awareness of this: "We deal here only with religious schools—not with churches or other purely religious institutions; here the governmental interest is in denying public support to racial discrimination in education."[47] But the Court is es-

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42. Id. at 586-99, 103 S. Ct. at 2025-32.

43. Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972).

44. Thomas v. Review Bd. of the Ind. Empl. Sec. Div., 450 U.S. 707, 101 S. Ct. 1425 (1981).

45. Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790 (1963).

46. *Bob Jones*, 461 U.S. at 592-604, 103 S. Ct. at 2028-35. Do not assume that racial discrimination is here *sui generis*. The *Georgetown* court concluded that the District of Columbia had a "compelling interest" in banning discrimination on grounds of "sexual orientation."

47. Id. at 604, 103 S. Ct. at 2035 n.29.

topped from saying that "religious schools" have no Free Exercise protection. If they don't, why does the text so carefully refute the "conduct exemption" claim? "Public support" too is an analytical diversion. If *Walz v. Tax Commission*[48] allowed tax exemptions for religious institutions, a fortiori, the public supports institutions "contrary to public policy" in the *Bob Jones* sense, and contrary to their own individual sensibilities. The balance of the footnote simply confirms the suspicion that churches must observe public orthodoxy. If an entirely intracommunal, faith-inspired discipline is supposed to mimic constitutional norms, to what "autonomy" should religious institutions aspire? Why is the result in *Bob Jones* not precisely the "corrosive secularism"—the imperious penetration of the private sphere by alien public influences—that the Court elsewhere fears on religion's behalf? "Corrosive secularism" is apparently, after *Bob Jones*, a claim that stems the flow of religious currents into the public sphere, but does not slow the incursion of political norms into the private realm.

Why all the excitement about *Bob Jones*? After all, how can the tax laws underwrite racial discrimination at this point in our history? This is a fair observation, and if the Court had conceded that *Bob Jones* could fend off an outright ban on racial discrimination, I would back off a bit. But little in the opinion supports that reassurance, and what *is* there is fundamentally troubling. The blithe *presumption* that once a principle assumes the status of self-evident truth in the political realm (and really, racial equality is still a relative youngster, and interracial marriages were declared constitutionally protected only in 1967[49]) a religious community out of step is desperately on the defensive. The presumption should be the opposite. The fact that a church is out-of-step with the state is, by itself, an unremarkable observation. There should be no expectation, least of all a glib one, that the writ of public policy should run so far into the churches.

The cases the Court sidestepped in *Bob Jones* by focusing on the *Yonder/Thomas/Sherbert* line dated from the 1871 *Watson v. Jones*[50] holding. *Watson* required judicial abstention on "internal ecclesiastic disputes" over faith, doctrine, discipline, and church polity. "The law knows no heresy, and is committed to the support of no dogma."[51] (Note the implicit "Christian-ness": many faiths, Judaism included, are not creedal and hardly permit the notion of "heresy.") To be sure, there was no schism at Bob Jones University. In fact, there was no evidence that anyone at the university objected to its policies. That is

48. 397 U.S. 664, 90 S. Ct 1409 (1970).
49. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817 (1967).
50. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).
51. Id. at 728.

the trouble. It may be that the *Bob Jones* Court believes that this "church autonomy" doctrine, such as it is, is unavailable in defenses against the regulatory power of the state. If so, we can reliably whittle down the available constitutional shields to those presently examined. That indeed seems the practical effect of *Jones v. Wolf*,[52] the latest comment on *Watson*. Courts are now invited to apply "neutral legal principles" where church autonomy is at stake. The problem with that is that the state will always win. By definition, where legislation threatens the religious community there is a "neutral" legal principle available.

What other constitutional home beckons to "church autonomy?" There is a "flip-side" of the second *Lemon* prong.[53] Legislation must not advance religion but (at least the ritual incantation holds) must not inhibit it either. This is no help. After forty-plus years and many cases, no Supreme Court (and few, if any, lower court) decisions have rested on this "no inhibition" prong. That is partially due to its analytical superfluity: it adds nothing of consequence to what is usually associated with Free Exercise. This may be largely true, but its truth owes to the immaturity of the entire corpus. That is, the Establishment Clause *is* more clearly attuned to institutional and group relationships with the polity, and invigoration of "no inhibition" to protect church autonomy seems more logical than its relegation to an inhospitable Free Exercise Clause.

Still another *Lemon* inquiry seems intended to prevent *precisely* the erosion of church autonomy: the third, "no entanglements" inquiry.[54] For reasons discussed in connection with the *Bob Jones* case, this inquiry too is of little use. Factor in that the inquiry inescapably is one of degree, and one sees that a Court insensitive to the nature of church-state separation will do little good with it.

That same difficulty afflicts Free Exercise analysis. Where the free exercise of religion is abridged by state action (and we will assume that is true of the scenarios examined here) the state can win (by displacing the religious community's norms) only if the incursion is the least restrictive means of accomplishing a compelling state interest.[55] That traditionally has been a high hurdle, but the Court has recently lowered its height even in its home context of individual exemptions.[56] The short story is this: when all is said and done this is a familiar balancing test. Hence the test is only as solicitous of church autonomy as the education, sensitivity and open-mindedness of the testers—the judiciary. That's the

52. 443 U.S. 595, 99 S. Ct. 3020 (1979).

53. Lemon v. Kurtzman, 403 U.S 602, 91 S. Ct. 2105 (1971).

54. Id. at 613, 91 S. Ct. at 2111.

55. Id.

56. See, e.g., Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147 (1986); Goldman v. Weinberger, 475 U.S. 503, 106 S. Ct. 1310 (1986).

good news. The bad news is that the analysis does not begin on a level playing surface. Virtually all the distorting intellectual and political currents previously described are at play here.

The analysis is imported from the field of individual relation to coercive state power. When transported to church autonomy, however, the church is analogized to the state because it possesses the "coercive" power, and a bias against the church immediately arises. In *Amos* and *Dayton Christian Schools*, an individual plaintiff armed with a nondiscrimination principle already championed by the judiciary confronted the church. Sympathy for this lonely dissenter is heightened by the prevailing placement of religion in the "private" sphere of endeavor where, according to modern liberal theory, authoritatively articulated "norms" are inherently suspect. The overriding goal of all church-state jurisprudence since *Everson*—individual freedom to "choose" beliefs and to authentically guide one's own spiritual life[57]—seals the fate of church autonomy. This analytical edifice obscures the liberty-enhancing virtues of the autonomy of the church as an *institution*, not least its historically pivotal role in guarding against political absolutism. In other words, we are caught in the familiar liberal trap: individual autonomy equals liberty. Authority takes liberty away. These forces play a zero-sum game. If you favor "liberty," you want individuals to prevail.

Here we have little more than the elementary logic of modern liberal individualism or "autonomy." This autonomy is the individual human being's capacity to determine its self, to create and master its identity through unconstrained, authentic individual choices. Obviously, individuals in relations of subordination or domination (defined in liberal thought as insufficient autonomy) do not possess this capacity, and the liberal state characteristically stands ready to put them in possession. That situation is characteristic of, for example, the traditional family and organized religion, most particularly in hierarchically-structured churches. So, unless or until liberalism incorporates some decisive limiting principle on its service as guarantor of autonomy, churches are defenseless against its depredations under the autonomy flag.

The problem is that liberalism does not have and cannot develop such a limiting principle. Its analytical field is constituted by the solitary subject confronting a mass of other individual subjects, all looking to the state for protection of maximum feasible self-mastery. All extra-individual existence is in a competitive field of power relations. Church autonomy is thereby obliterated because churches characteristically eschew power relations in their self-understanding. Christian churches have

57. If this point seems less self-evident, warrants for it can be found in Bradley, Dogmatochamy—A "Privatization" Theory of the Religion Clause Cases, 30 St. Louis U.L.J. 275, 311-12 (1986).

traditionally preached dispositions like obedience, service, and kenosis (emptying of self) as their rules for church fellowship. Such notions contribute to communion, and are rooted in the common New Testament idea of Christians possessing one spiritual substance in Jesus, with resulting corporate images like Paul's "Mystical Body" and John's vine and branches.[58] Obviously, where teachings like "the last shall be first" are taken seriously (as in Christianity) the liberal quest for self-mastery in a field of power relations is inapposite, to say the least. It should not be surprising then that a liberal constitutional theorist like Laurence Tribe, in the course of a 147-page treatment of the rights of "religious autonomy"[59] has no, repeat, no, tools at hand to cope with a cases like *Catholic Bishop*, and *Dayton Christian Schools*. He literally ignores them. They are invisible on his analytical screen.[60]

II

How do we reset an analysis so badly and so dangerously deformed by liberalism? One way is to recover what "separation of church and state" means. It symbolizes the permanent tension in Western societies between the exigencies of pragmatic existence in history and the consciousness of divine order arising in men's souls.[61] The reality so constituted is, most precisely, a field of tension bordered by two pulls, denoted "world" and "divine." It occurs in individuals who, when they form a cultural matrix, channel the tension into two authorities within their society: spiritual and temporal. This is the "core" of what we call church and state.

One way to momentarily glimpse both the distinction and the tension between these two authorities is to recall the origins of a movement that produced well-known victories for religious liberty in the Supreme Court, the Seventh Day Adventists. This group traces its origins to William Miller, a self-educated veteran of the War of 1812.[62] Miller attracted a substantial following due solely to the precision of his prophecy: the world would end sometime in 1843. Subsequent fine-tuning produced and exact forecast: October 22, 1844 was the "end time."

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58. See R. Brown, The Gospel According to John (XIII-XXI) 670 (1970).

59. L. Tribe, American Constitutional Law 1154-1301 (2d. ed 1988).

60. For a fuller critique—and support for the proposition in the test—see Bradley, A Gracious Passage to Oakland: Tribe's "Jurisprudence of the Religion Clauses," in The Jurisprudence of Laurence Tribe (forthcoming, G. McDowell ed. 1989).

61. This approximate formulation was suggested to me by the work of Eric Voegelin. See, e.g., E. Voegelin, 1 Israel and Revelation 182-83 (1956) [hereinafter E. Voegelin, Israel] and E. Voegelin, The New Science of Politics chs. 3 & 4 (1952) [hereinafter E. Voegelin, The New Science].

62. See generally Dick, The Millerite Movement 1830-1845, in Adventism in America 1-35 (G. Land ed. 1986).

Faithful "Millerites" were thus privileged to exemplify life lived at the edge of judgment, and they did so with zealoussness.

Historian Everett N. Dick describes the penultimate days:

> As the 22d of October approached, people prepared to leave the world bodily, just as someone going on a long trip gets his business affairs in order. . . . Newspapers of the day record that banks, the United States Treasury, and other financial agencies received large amounts of money from those who had defrauded creditors. A reporter for the PHILADELPHIA PUBLIC LEGER noticed the following in the window of I. T. Hough, the tailor, on Fifth Street. "This shop is closed in honor of the King of Kings, who will appear about the 22nd of October. Get ready, friends, to crown him Lord of all. . . ." The urgency of preparation is indicated by the following notice: "If any human being has a just pecunicary claim against me, he is requested to inform me instantly. N. Soughard." An eyewitness described the meeting of the believers at Rochester, New York, on October 22, the day of expectation. The day dawned bright and clear, and believers came to the meeting place early and continued to pray and testify of their faith. Speakers used such phrases as "last hours of time," "last moments of time," "we're living on the brink of eternity." The day dragged on slowly—to noon, to sunset to midnight. Finally, daybreak of October 23 came as on any other day, and the worshipers went home, worn out and bitterly disappointed.[63]

Imagine yourself carrying around the intensity of Millerite expectation *at the same time* that you take this world with utmost gravity. Familiar formulations of that effect include statements that believers should be "in" the world but not "of" it; that they live "between the times," in the "already but not yet"; that life is a "sojourn" or "pilgrimage"; that ultimately "the last shall be first, and the first last"; that one gains life by dying; and that "the meek shall inherit the earth." Millennialists help us appreciate the pull toward perfection in the beyond and they do so by singularly concentrating, and reflecting, the divine chord.

My claim is both a philosophical and a historical one: apart from the differentiated experience "church-state," as an irreducible and unique element of our common life, does not exist. Put differently, "church and state" is an idea rooted in a particular cultural matrix, a matrix itself comprised of underlying experiences socially transmitted and constitutive of a political community through effective, commonly-accessible

63. Id. at 29.

symbolization. Like all ideas, torn from its proper environment it loses its meaning and capacity to illumine.

The dilemma symbolized by "church and state" is a "problematic," a difficulty or challenge that summons a response. It is not fairly styled a "problem" because that commits one to a response, usually called a "solution." But "solution" is impossible. "Response" means proper management, coping as well as can be expected given the nature of the difficulty. Sustaining existence within the field of tension while avoiding the temptation to eradicate dissonance by migrating to one or the other pole qualifies as "success." Within that range of effective management is a variety of possibilities, and one possibility may work now but not later. That which worked before may now be inadequate, or dangerous. This is one reason to resist all attempts to work a "constitutional philosophy" of religion and to criticize the effective "judicialization" (the comprehensive management of the church-state problematic by courts) wrought by *Everson*.

The observations previewed early on now bear fuller repetition: we constitutionalists are not constructively engaging the church-state issue and have practically obliterated it. More exactly, either by neglect or by design "church-state" has become opaque. It is no longer transparent for the underlying experience apart from which the term is both meaningless and useless, either because it has lost all meaning, or because it is an empty vessel into which one pours whatever meaning is desired.

Now, in this time of acute hermeneutical consciousness in the law, especially that of the Constitution, claiming that a term (like "separation of church and state") is meaningful only in context is hardly novel. "Separation" might mean simply prohibiting clerics from serving in political office, or it might mean a "naked public square," depending upon its context. As John Noonan rightly observes,

> "Church and State" . . . is a profoundly misleading rubric. The title triply misleads. It suggests that there is a single church. But in America there are myriad ways in which religious belief is organized. It suggests that there is a single state. But in America there is the federal government, fifty state governments, myriad municipalities, and a division of power among executive, legislative, administrative, and judicial entities, each of whom embodies state power. Worst of all, "Church and State" suggests that there are two distinct bodies set apart from each other in contrast if not in conflict. But everywhere neither churches nor states exist except as they are incorporated in actual individuals. These individuals are believers and unbelievers, citizens and officials. In one aspect of their activities, if they are religious, they usually form churches. In another aspect they form governments. Religious and governmental bodies not only coexist

> but overlap. The same persons, much of the time, are both believers and wielder of power.[64]

All meaning is contextual, but my main point here is a bit more subtle. Apart from the meaning I am describing, "separation" (as far as I can tell) has no distinctive meaning. Other circulating "meanings" either trivalize it, or subsume it within broader concerns that then determine the meaning of "separation." In either event "separation" retains no irreducible, unique meaning. I submit that given its prominence in the Western tradition up to the moment, a distinctive (that is, an irreducible and unique) meaning has a claim to priority in our constitutional order.

The so-called "New Age" spirituality is an example of a trivializing meanings. Much of this is an eclectic mix of eastern mystical practice, occultism, speculative fancy and other less attractive elements. The compound then frequently ends by detaching religion entirely from the material world, so that "religion" is some fantastic voyage inward and upward that leaves untouched the increasingly routinized series of function-driven performances that make up our daily lives. If religion does not inform one's actions, then it has no effect on one's politics. In this context, "separation" (whatever its meaning) is superfluous because there is no urge toward integration.

Examples of subsuming meanings abound. Liberalism obviously joins the whole problem of religion to that of individual autonomy, so that the former is at best an aspect or accent of the latter. The reduction of religion either to a plan for transforming the world or to a recipe for psychological well-being is common in our Christian churches today. Given its attraction for the Tillichian notion of religion as "ultimate concern," the Supreme Court has predictably defaced the tradition by not requiring a divine element in constitutionally cognizable religion. (No doubt the engine behind that move was some mix or liberal notions of "equality" and "autonomy.") Churches are also increasingly treated in legal reflection as simply "voluntary associations," as if the Jaycees and the Roman Catholic Church were analytically fungible entities. In all these instances the church-state problematic is deformed by a decisive turning away from the divine pull.

Another exaggeration of the mundane pull is typically perpetrated by a conservative concern for order. I submit that deforming statist premises are introduced wherever "church and state" is spoken of as if the symbol's meaning was exhausted by identifying religion's contribution to social stability, even by its contribution to limited government. I am not denying that religion ordinarily does these things or contains

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64. J. Noonan, The Believer and the Powers That Are: Cases, History, and Other Data Bearing on the Relations of Religion and Government xvi (1987).

some of these elements. Nor am I saying that religion should not contribute to limited government. It does and that is good. I *am* saying that so long as we do not *insist* that the primary meaning is none of these current explanations, and beyond all of them, we will lose the distinctive meaning of the symbol.

That insistence has been noticeably absent, and here I summon testimony to that absence. Kent Greenawalt has said,[65] "Many law professors, like other intellectuals, display a . . . disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience. [These people] regard religious convictions as foolish superstition. . . ." Rex Lee writes,[66] "[T]here has been a reluctance . . . by legal educators with religious convictions to acknowledge anything other than a hermetically sealed relationship between their faith and what they teach." Fred Gedicks and Roger Hendricks argue,[67] "As religious language disappears from law, politics, and American public life in general, . . . it will not be long before we become incapable of describing ourselves in such terms, even privately, at which point we will no longer be religious." Since what we call "church-state" arises and can only be discussed within an intellectual field that presupposes religious, particularly Christian concepts, the testimony suggests that we cannot talk about church-state in the present environment. It should already be clear that no one in a "naked public square" can talk about separation of church and state.

What is the proper context, and what meaning does it bestow? It is routinely though not widely remarked in the nonlegal literature that Christianity, as a historical fact, causes or gives rise to the church-state problematic. That is, I think, basically true. By "basically" I mean that the main trajectory of Christianity since the post-apostolic era exhibits the problematic, while it is difficult or impossible to detect elsewhere. The reason for that hypothesis starts with historical situations not measurably penetrated by Christianity, and with noting whether, and why, the church-state problematic is there unobserved. In most such situations there is no church-state difficulty or conflict. This is not because the problematic has been "solved"; it is because the problematic does not exist. The necessary experience or required verbal symbols—or both—being absent, speaking of "church and state" is literally impossible.

The distinction between such cultures and one with a Christian matrix is made apparent in Shirley Jackson Case's depiction of life in such an environment:

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65. Greenawalt, Religious Convictions and Lawmaking, 84 Mich. L. Rev. 352, 356 (1985).

66. Lee, The Role of the Religious Law School, 30 Vill. L. Rev. 1175, 1187 (1985).

67. Gedick & Hendrix, supra note 12, at 1609.

> The sky hung low in the ancient world. Traffic was heavy on the highway between heaven and earth. Gods and spirits thickly populated the upper air, where they stood in readiness to intervene at any moment in the affairs of mortals. Any demonic powers, emerging from the lower world or resident in remote corners of the earth, were a constant menace to human welfare. All nature was alive—alive with supernatural forces.[68]

While a complete treatment of this problem would have to examine all the major world religions, examples here must be limited and accessible. "Animism" and "paganism" are religious systems still claiming adherents, even if only occasionally are they socially decisive. "Paganism" is perhaps the better known term. While colloquially it designates a crude unbeliever, an atheist lacking table manners, historically "pagans" were believers. They believed in what Christians called the religion of the Greeks and Romans, which is best rendered as "polytheism," a plurality of gods. "Animism" is technically the attribution of consciousness and (usually) spiritual powers to innominate things and verges on paganism in generating a multitude of "gods" or "spirits," each deserving some part of human spiritual attention. A contemporary example of practical fusion is the Native American religion increasingly encountered in church-state litigation. In *Bowen v. Roy*,[69] for instance, a Native American said that her "spirit" was diminished by assigning her a social security number. While accommodation of a lone litigant's spiritual needs may politically be the preferred course, the Supreme Court in *Bowen* properly sought a principled resolution of her claim.

The plaintiff lost her case, in an opinion that generally weakened the protection of conscientious objectors. The Court did not say as much, but I think (a thought supported by the most recent Indian belief case, *Lyng v. Northwest Indiana Cemeter Protection Association*[70]) that the perceived impossibility of sustaining our regime in an analytical matrix determined by native American belief caused a reevaluation of earlier, sweeping statements on religious liberty. "Spiritual liberty" where Indian spirituality prevails is incompatible with the existence of a secular state: *Bowen* makes clear that the spirit and the state cannot simultaneously roam where they will.

The three dissenters in *Lyng* frankly recognized this, even as they supported the Native American claim. They noted that for Native Americans, religion cannot be distinguished from the social, cultural, political, and other aspects of Indian life. That is because nature (unlike in other

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68. S. Case, The Origins of Christian Supernaturalism 1 (1946) (quoted in J. Pelikan, The Emergence of the Catholic Tradition (100-600) 132 (1971)).

69. 476 U.S. 693, 106 S. Ct. 2147 (1986).

70. 108 S. Ct. 1319 (1988).

Western systems) does not possess an intrinsic, regular order discoverable through scientific investigation but instead calls man to participate in an ongoing process of Creation. This approach to experience holds that "land, like all other *living* things, is unique and specific sites possess different spiritual properties and significance."[71] It is easy to agree with the dissenters that radically different categories are at work here, although by contrasting "Western" with Indian they betray a slippery grip on the priority of habitation in this hemisphere. But neither the dissenters nor the majority quite draw the inevitable conclusion: the contrast (at a minimum) is to Western monotheism, particularly Christianity, which provides the "categories" that make "separation of church and state" not just desirable, but thinkable. The opinion really says that religious freedom as we know it is (unsurprisingly) drawn from that same set of categories.

People in the ancient world, where such beliefs were the rule rather than the exception, would have a very hard time distinguishing the "sacred" from the "profane," and therefore the "world" from the "divine." Christians of the same era believed in miracles and in demonic possession curable by exorcism. Many now suggest that these were outmoded pagan encrustations that Christianity picked up from its incubating environment. Certainly exorcisms are rare and miracles in preciously short supply. Nevertheless, early Christianity did decisively distinguish itself from animism and paganism. For pagans, there is no pull toward the transcendant. Instead there is the practical problem of propitiating and thereby manipulating the various gods and supernatural forces. Technique, not tension, describes the believer's world situation, and mastery of "spiritual" methods results not only—or even primarily—in "eternal life" but in pragmatic success. More, pragmatic success is undivorceable, and perhaps indistinguishable, from spiritual perfection. Mundane events of all sort are thought controlled by various gods or manipulable spiritual forces. Here it helps to compare favorably paganism and animism with modern occultism and spiritualism, including astrology. Indeed, the sky is very low in the seance room, a space teeming with invisible beings and spirits awaiting the call of the adept.

In this kind of system, there are not two pulls at all, but one daunting task of correctly aligning the plural forces that sustain the universe. There can, in principle, be no "secular" state, content to carry on its business and "let the spirit roam where it wills."[72] Since the spirits determine temporal events, the political realm is fully divinized and only the foolish governor fails to establish official gods. Christians' refusal to regard theirs as just one of many gods officially worshipped

71. Id. at 1331 (emphasis added).
72. John 3:8.

by Rome—that is, its monotheism, as opposed to henotheism—led to their persecution. The spiritual insight amounted to political sedition where, as in pagan Rome, imperial fortunes were inseparable from divine service.

The earliest Christians were conscious of the divine pull, but E. P. Sanders persuasively argues in his *Jesus and Judiasim*,[73] that the pull took on the form (and much of the substance) of Jewish restoration "eschatology" (speculation about the end of time or ultimate purpose of history). The apostolic communities lived eschatologically, in accord with Jesus' assurance that some of his own generation would live to see the Second Coming, or "Parousia." Hence, the early church muted the tension (or did not experience its fullness) because of assurances that the entire present age would soon pass. The causes and concerns of worldly existence itself, much more the worries of politics, melt away as ice on a summer noon as the gathered faithful eagerly await the end. Thus, first century Christians exhibited an indifference to political arrangements, a disinterest evident in the Pauline teaching of submissiveness to temporal authority. This was not because of some kind of "conservative" political stance but rather because of the Christian view that the state was, in itself "valueless," for an eschatological community needs only to avoid outright prosecution. It is behooved to accept the constraints upon the flesh imposed by the "principalities and powers" of this world (regarded by Paul as alien to the real concerns of believers), which cannot, after all, separate Christians from the love of God that would soon be theirs in eternity.

As the Millerites would no doubt attest, where The End is soon expected, political authority need only be kept at bay. There is also no need for a "church," or any other organization to sustain the spiritual life or to transmit the saving news. But sometime soon after the second century dawned, the early Christians experienced the realization that was relived by the Millerites on October 23, 1844. Whenever or wherever the realization of a postponed parousia crept in, the question of "church" arose. This phenomenon is called "early catholicism" in biblical scholarship and denotes the early Christians' recognition, evidenced already in sacred scripture (Matthew's gospel prominently is assertedly an example) that *some* institutionalization of their religion was essential to historical transmission of the Gospel. Of this transition from living in imminent eschatological expectation to living as church in the world, Eric Voegelin wrote:

> [A] historical society can indeed derive little hope of survival from a religious attitude based on the assumption that the world

73. See, e.g., E. Sanders, Jesus and Judaism 91-122 (1985).

> will end tomorrow and that social order is therefore entirely irrelevant. If there were no more to Christianity than this radical eschatological expectation, it would never have become a power in history; the Christian communities would have remained obscure sects which could always be wiped out in the event that their foolishness seriously threatened the order of the state. . . . Christianity became historically effective through the Pauline compromises, one of which concerned the order of the world—not only the order of the state but the very being of the world, a world which will *not* end next week; the other concerned the transformation of the faithful living in eschatological expectation into the historical *corpus Christi mysticum*. these compromises were not an arbitrary addition; they were definitely implied as a possible evolution in the appearance and the teachings of Christ.[74]

The Church, and not the Kingdom, emerged after the Resurrection. Christian orthodoxy insists that the essence of Jesus' message was a spiritualized version of Old Testament prophecy, that the "Kingdom" refers to the union with God in grace after death. Orthodoxy further insists that "origins" obscured "essence" and suggests that the tension was muted by a cultural overlay.

We may better appreciate the Christian insight by locating it within the broader tradition of Western monotheism. The growth of Christianity from Judaism is most obvious in the common elements of Sacred Scripture. Less well-known is the familial tie of Islam to Judaism and Christianity. Muslims deny Jesus' divinity but accord him prophetic status, and retain some other Christian influences. Islam's relationship to Judaism is different and really much closer; one commentator even brands the two faiths "structurally akin."[75] The faiths of Abraham and Mohammed both posit a God who is rather remote and hidden from men, one not made accessible by the revelation that Christians believe occurred in Jesus. This God is served on earth primarily (but far from exclusively) by righteous conduct. "Righteousness" is a function of revealed "law," which covers both public and private affairs. The Law includes rules for purely personal conduct (dress, diet, piety), interpersonal relations (effectively an ethics), and state action. For Jews the law is "Halakha"; for Muslims "Shari'a." The emphasis upon legal observance works a convergence in priestly roles. The liturgical and sacremental life carried on by a Christian clergy dispensing grace is, in Judaism and Islam, replaced by a predominantly teaching function exemplified by the Jewish rabbi.

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74. E. Voegelin, The Philosophy of Order 453 (1981).
75. D. Pipes, In the Path of God 38 (1983).

One may now appreciate at a glance how—or why—there is not sacred-secular distinction in Muslim societies organized by Shari'a. Daniel Pipes elaborates upon this "relaxing" effect of law:

> Islam, unlike Christianity, contains a complete program for ordering society. Whereas Christianity provides grand moral instructions but leaves practical details to the discretion of each community, Islam specifies exact goals for all Muslims to follow as well as the rules by which to enforce them. If Christians eager to act on behalf of their faith have no script for political action, Muslims have one so detailed, so nuanced, it requires a lifetime of study to master. . . . However diverse Muslim public life may be, it always takes place in the framework of Shar'i ideals. Adjusting realities to the Shari'a is the key to Islam's role in human relations.[76]

Two critical distinctions between Judaism and Islam, one historical and one religious, frame discussion of the church-state problematic in Judaism. The historical fact is that Judaism has all but universally been carried by people composing a suspect minority in an alien political environment. Put differently, political organization has rarely coincided with a cultural matrix formed by Judaism. There has thus been little historical opportunity for distinctively Jewish thought (that is, not just thought by Jews on religion and law but their thought grounded in distinctively Jewish sources or insights) on church-state relations to develop. Both Christianity and Islam have enjoyed by contrast long periods of learning by their political mistakes, many of them made at Jewish expense. It is permissible then to posit just two basic strands of Jewish thought on "church and state": Zionist, or "quietest." The former favored a "restoration" to the "Promised Land," which implies a religious state, while the latter favored a "secular" state devoid of confessional commitments. Obviously the latter preference promises relative safety for dissenting and minority religions. There is an ironic commonality to the two. Historian R. Laurence Moore suggests that the ghettoization of Jewish life through most of the common era helped sustained Judaism by protecting it from assimilation.[77] The resurgent Zionism of the late nineteenth century is seen by another observer as the conscious continuation of ghetto life. That is, Jews' desire to preserve their distinctiveness, abetted for centuries by Gentiles' unwillingness to share a cultural life with them, crystallized in hospitable historical conditions into a desire to establish a Jewish ghetto of national size.[78]

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76. Id. at 11.
77. See R. Moore, Religious Outsiders and the Making of Americans 72-101 (1986).
78. See J. Avineri, The Making of Modern Zionism 3-13 (1981).

The "religious" contrast to Islam dovetails with this development. Compared to the Sahri'a, the Halakh contains very few prescriptions for the exercise of governmental power. The comparative deficit is partly offset by the abundant scriptural accounts of politically organized Jews (the Hebrews existed as a tribe before God chose them as his own people), and the abiding divine promise of a homeland. The difference then is not in the availability of an overarching divine plan for history but in the absence in Judaism of anything like the details of that plan.

This brief rehearsal permits the pertinent observations to proceed. As Eric Voegelin remarks, the Israelites did possess the twin foci, which in Christian reflection were identified as the "sacred" and the "profane," that of "church and state." The "sacred," or divine pull, was supplied by the Covenant through Moses; the monarchy supplied the necessary experience of mundane social order.[79] But, as Voegelin further concludes, Judaism before Christ never quite brought the reflection to the maturity that Christians' claim to see in even the original deposit of revelation.[80] Put differently, the experiential core was present but never fully differentiated itself in the symbols essential to constitute it a decisive social force. The combination of available concepts and inhospitable historical circumstances muted the tension's social articulation.

Zionism is a bit of a different story. Zionism refers to the distinctly Jewish notion of the restoration of God's chosen tribes to the land of Israel. It is, as E.P. Sanders remarks, almost synonymous with Jewish eschatology.[81] While God's precise role in bringing about restoration is controverted, Zionism clearly refers to events within historical time. Thus the mundane pole dominates in this Judaic field of tension.

The Millerites and their Seventh-Day Adventist descendants remind us that any historical division between Jewish and Christian thought here is indistinct, and hence a "Judeo-Christian tradition" may be posited for reasons other than political inclusiveness or sentimental ecuminism. While unquestionably a Christian sect, Adventists continue the restoration eschatology of first-century Palestinian Judaism. The *New York Times* last year reported that a small group of Millenialists were then awaiting The End (through a divinely wrought tornado) somewhere in Arkansas.[82] Jehovah's Witnesses still preach the Millenialist gospel, and Jarislav Pelikan writes that Millienialist expectations survived the apostolic era, neither heretical nor orthodox but within "the permissible range of eschatological opinions."[83] Pelikan contends that the Apostle's

79. E. Voegelin, Israel, supra note 61, at 179-80.
80. Id.
81. E. Sanders, supra note 73, at 97.
82. N.Y. Times, Jan. 15, 1988, col. 5, at 9.
83. J. Pelikan, supra note 68, at 125.

Creed incorporated Millenialist notions in its affirmation of bodily resurrection.[84] The work of Norman Cohn[85] demonstrates beyond reasonable doubt that Millenialism is a constant possibility in the Christian orbit. Thus the formulation: only the "main trajectory" of Christian thought, itself heir to Jewish experience and insights, concluded that not the body but the soul was the subject of gospel promises of deliverance and salvation, and that the promised kingdom was a purely spiritual one. Man's destination is eternal life in beatific vision. His earthly existence then becomes a journey of sanctification which can no longer be symbolically represented by political society, but only by the church. The church becomes a flash of that eternity into time, a community ahead of itself, the "already" of the "already but not yet," the vessel and the means of that sanctification which carries on after death. The church becomes effectively an eschatological community with one foot (at least) in the beyond.

The Christian position does not do away with the field of power, of political order. Nor could it, for once the Parousia[86] is indefinitely delayed, ongoing pragmatic existence identified itself as an equivalent "force" bounding the field of tension. But Christianity *does* affect the numdane order: it robs it of any ultimate meaning. Christianity "de-divinizes" or "temporalizes" the sphere of pragmatic power. In Voegelin's formulation, "the power organization of society as a temporal representation of man in the specific sense of a representation of that part of human nature that will pass away. . . . The one Christian society was articulated into its spiritual and temporal order.[87]

So much was implied from the moment and to the extent Christianity separated itself from an apocalyptic account of the Kingdom. Nevertheless, it remained for Augustine, writing in the early fifth century, to produce the enduring theoretical statement.[88] Augustine's special achievement was to legitimate the mundane pole in the field of tension of Christians to work for a just temporal order. Historical context helped direct Augustine's attention. He wrote shortly after the sack of Rome in 410 and to refute charges that Christianity, specifically the "other-worldliness" of Christians, undermined the pragmatic existence of Romans. There was some truth in the charge; Augustine knew that some earlier church fathers *had* been pacifistic and anti-militarist. Less con-

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84. Id. at 127.

85. N. Cohn, The Pursuit of the Millenium (2d ed. 1970).

86. "Parousia" refers to the anticipated Second Coming of Jesus in glory.

87. E. Voegelin, The New Science, supra note 61, at 109.

88. That statement of course is *The City of God*. My discussion of *Civitas Dei* is informed by recent reading of George Weigel, *Tranquilitas Ordinis* 26-32 (1987) and by highly informative conversations with Professor Glenn Olsen from the University of Utah History Department.

spicuous but still powerful in his work is his argument against pagan remnants within Christianity. Augustine insists that Christian piety is no more a guarantee of worldly success than pagan piety. He thus frees the temporal from the spiritual while he sustains Christian involvement in the world. In effect, Augustine christened the field of tension that we call "Church and State." He still stands as a corrective to the common Christian temptations to withdraw from the world, or to re-divinize it.

The former position is perhaps more often attributed (with implicit criticism) to Christians than Christians claim it for themselves. Charges of "other worldliness" suggest an irresponsible indifference to mundane affairs, and it is easy to see how that charge may be made. The corrective (one suggested by Ernest Fortin)[89] is to insist that Christianity is not "otherworldly" but "transpolitical," that it is engaging this world but in a way that transcends politics as such (defined as the realm of power relations), much more particular political systems.

Augustine's conception of the differentiation produced two pairs of adverse terms. The political community, which we would now call "state" but which for him was "empire," was contrasted with "church." Each is a visible community but with different identities. The church prepares men for eternal beatitude with God, while the "state" governs the regime of just dealings and civility among all in the polity. But since only God knows the hearts of men, there are two invisible "cities" overlaying church and polity: the heavenly City of God and the earthly City of Man. The saved strive for a goal beyond this life; those who seek no good beyond the present life are damned.

The basic Augustinian conception of two orders in the one society—one temporal the other spiritual—with accompanying (though hardly coincident) institutional channels is the achievement of Christianity. This Christian perspective (in Stanley Jaki's words) destroys "the mesmerizing impact of a divine sky," and frees man from the "monstrous conception of a realm of celestial bodies ruling all processes on earth, physical as well as human."[90] Soon afterward, in 494 A.D., Pope Gelasius wrote to Byzantine Emperor Anastasius of the mutual independence of spiritual and civil authority: "Two there are, August Emperor, by which this world is ruled on title of original and sovereign right-the corrected authority of the priesthood and the royal power."[91]

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89. E. Fortin, Otherworldliness and Secularization in Early Christian Thought (1988) (unpublished papers), delivered at Annual Meeting of the American Political Science Association, Washington, D.C.

90. S. Jaki, The Origin of Science and the Science of its Origin 70 (1978).

91. J. Murray, We Hold These Truths 202 (1960).

In summary, all talk of "church and state" symbolizes this permanent tension in Western civilization between the demands of successful pragmatic existence and the consciousness of divine reality arising in men's souls. In all other religious systems, the distinction is blurred by the fact that the spiritual and temporal worlds are considered inseparable parts of the whole of life. "State" and "Church," under the mainstream Christian approach, are polar pulls in a field of tension. The tradition provides many cognate symbolizations; the "sacred" and "profane," Augustine's two cities; the medieval two "sword" imagery, connoting the spiritual and temporal powers; Roger Williams' Garden and Wilderness; the Lutheran conception of two kingdoms. Preceding all of them was the Israelites' tension between Covenant and Kingdom. They all symbolize (though with varying accents) the tension between experience of the transcendant pull and the demands of successful pragmatic existence.

CONCLUSION

This brief essay has argued for a necessary relation between a Christian cultural matrix and "separation of church and state." What we call "religious freedom" or "religious liberty"—immunity from state interference on matters spiritual—is possible only where "church" and "state" are so differentiated. Why? Unless the temporal is distinguished from the spiritual, talk of letting the spirit roam where it wills is unintelligible, or presents intolerable threats to civil society. Just try to insinuate such a rough definition of religious freedom into a pagan or animist society. Can one really imagine political authority there assuming the pose of indifference to the affairs of the gods? I think that was the plight of the *Lyng* court. That case squarely presented the justices with the fundamental incompatibility of "separation" and Native American spirituality. A majority blanched, and responded with the contraction of constitutional liberties. My view is that, unless we keep traditional Christian concepts in analytical view, there will be a lot more such contracting statements.

Perhaps the most important implication of my argument is the attending reemergence of a unity beneath "separation." The *one* society differentiates the two orders of church and state within it. Both church and state are distinguishable from the society that manages the tension between them through public discussion of its commitment to *both* spirit and world. When an entire society openly discusses such matters, it is, in every sense of the phrase, living public life. I submit that precisely in order to separate church and state and to insure religious liberty, public disclosure in this country *need* be frankly religious. It needs to be decisively rooted in the differentiation between pragmatic exigencies and the pull toward spiritual perfection in eternity.

It should by now be clear that within that analytical field, "discrimination" is not an apt term for the situation in *Bob Jones*, for instance, especially now when "discrimination" means not just "different" but condemnably so, at best an "injustice" to be tolerated due to some fuzzy sense that somehow churches may do such bad things. It is precisely the lot of a church to live by norms unsuited to organize a polity acting in history. That no doubt is counterintuitive, if intelligible at all to many in our culture.

This is true partly because the statement presents great risks. This "church autonomy" means what it always meant. The medieval church insisted that there was a whole sphere of human thought and action that was in principle outside the legitimate power of government.[92] That this poses considerable risks to political stability is evident from the scarcity of societies in which such "separation" has occurred. This autonomy now insists that countries permit within their borders self-defining communities that significantly determine citizens' opinions affecting faith and practice, including public behavior. Moreover, some such communities (like the Roman Catholic Church) are part of international associations.[93] The moral sovereignty of the political order in our society—the primacy of liberal definitions of "justice"—will not lightly tolerate such "autonomy."

That "autonomy" effectively declares war on the new "foundationalism" of liberal justice. It will not be a pleasant engagement, and I suspect the outcome is already apparent. Anyway, if political life is distinguished from the Kingdom, we need appropriate conception of politics in line with that proposed by Martin Marty:

> [P]olitics is not the Gospel; it does not save souls or make sad hearts glad. It is a modest art or science designed to minimize the violence inherent in history and to assure the components of society some measure of power proportionate to their weight and scope in society.[94]

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92. Tierney, Religion and Rights: A Medieval Perspective, 5 J. L. & Religion 163, 167 (1987).

93. See Anastoplo, Church and State: Explorations, 10 Loy. U. Chi. L.J. 61, 193 (1987).

94. Marty, Religious Leaders and Public Policy, 34 DePaul L. Rev. 13 (1984).