

## INTRODUCTION

In political theory as in any inquiry, a question must begin with a perception or an impression. The question addressed in this dissertation is how can the identity, independence, and integrity of the church be maintained in the midst of a pluralistic, sovereign, officially secular American state? The perception that frames the question is that the American system of constitutional liberty derives its essential character from the theistic covenantalism of biblical Christianity and is not well equipped to function effectively on any other basis. It is in the conjunction of this perception and question that a problem suggests itself. The disintegrating public authority of the church in America today has left a cultural and moral vacuum that is both a cause and an effect of the enhanced power of the state to control the ideological agenda in public and private life. The larger question, then, is how to bring the competing claims of church and state into harmony without doing violence to their respective missions.

Any assumption of the traditional functions of the church by the state requires it to play the role of the church in society.<sup>1</sup> But the combination of the traditional kingly and priestly powers--the imperium and sacerdotium as they were known in ancient Rome--has supported political despotism since time immemorial.<sup>2</sup> Where once the American political system was strictly defined, federal, and cooperative, it is becoming highly complex, centralized, and intricately regulated. Like a codicil to will, each new policy effectively rewrites the whole

Constitution to the extent that the meaning of the latter is governed by the most recent theory or interpretation.<sup>3</sup> In many respects, the church is once more becoming an appendage of the state through regulation and subsidization. As a consequence, it is becoming less and less the independent conscience of the polity.<sup>4</sup> But is a true separation of the powers, offices, and jurisdictions between church and state--between the spiritual sword and the civil sword--any the less necessary for the better preservation of religious and political liberty? The original question may thus be rephrased as follows: How may religious liberty be preserved, and cooperation between church and state be renewed, in America today?

The traditional rivalry between church and state involves differences of perception about their respective spheres of authority. As a practical matter, it is a conflict of jurisdiction. As a philosophic issue, it is a disagreement over sovereignty.

The idea of "a free church in a free state" was proposed by the framers of the American Constitution and the Bill of Rights as a solution to this historic problem. Churches exchanged the entanglements of direct tax support, regulation, and compulsory attendance laws for doctrinal and governmental independence while continuing to enjoy the status of public--though not civil--institutions.

Recent events suggest that a relationship more characteristic of adversaries than allies is replacing this earlier accommodation. Cooperation is still evident but the former partnership between equals seems to be giving way to a pattern of domination by the state over the church and society in general. A major indicator of this power shift is

the gradual displacement of the protective immunities churches once enjoyed by, first, exemptions from taxation or regulation that depend on state permission and, lately, by a tendency of the state to hamstring or abolish these exemptions. These trends are reflected by changes in the constitutional thinking of the Supreme Court. In Chisholm v. Georgia, 2 Dall. 419, 455 (1793), Justice James Wilson criticized the European idea of sovereignty:

As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the sovereigns of the State. This second degree of perversion is confined to the old world, and begins to diminish even there: but the first degree is still too prevalent,<sup>3</sup> even in the several States, of which our union is composed.

Americans well might ask themselves whether this "second degree of perversion," as Justice Wilson called it, subsequently crossed the Atlantic. This is a timely question in light of a recent decision of the Supreme Court in United States v. Lee, 455 U.S. 252, 257-58 (1982): "Not all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." This statement arguably contradicts the original meaning of the First Amendment of the Constitution, to wit: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." At the very least, a serious tension between these statements is evident.

The originality of the Constitution lies in its attempt to secure

the blessings of religious and political liberty in a republic of self-governing people. The issue of concern here involves the questions of whether the original constitutional limitations on civil authority have been either superseded or abrogated--at least in part--and whether such a turnabout has placed the church, as well as the people generally, at the mercy of the state.

It is my contention that the expanding sphere of fiscal and regulatory activity by the state has led to an increasing conflict of jurisdiction with the church. Religious bodies are finding their independence and integrity endangered by public policies that contradict long-established doctrines and practices relating to church government, property, membership, ministries, discipline, sacraments, evangelism, and public affairs. Briefly stated, my thesis is that the effective extension of state operations into all areas of social life within its political and juridical boundaries is opening a serious breach in the "wall of separation" that has traditionally protected the church. As a consequence, churches are being subjected to novel strictures upon their corporate rights and privileges, tax immunities, property ownership, doctrinal expressions and practices, as well as specific ministries such as those involving education and missionary outreach.

The purpose of this dissertation is primarily exploratory: to identify and assess a number of factors that have helped define the relationship of church and state in America. What is missing in current discussions about church and state today is a comprehensive theory--even a common understanding--of the role each should play within the other's sphere of operation. While no such definitive theory is offered here,

various elements that might eventually form the nucleus of one are examined in these pages. Little more may be needed except the cement to hold them together. This suggests what is perhaps the real issue: the cement that holds a society together. In order for the American experiment in religious liberty to succeed, it is evident that unity must somehow be created and recreated out of diversity. This requires a strong consensual base, perhaps a common faith. Yet the very liberty that the founders wished to assure future generations of Americans is dependent on the same need to secure the blessings of consensus that has led other nations to destroy their people's liberty, doubtlessly as a matter of national self-preservation.

If the nature of religious liberty in America has changed during our history, perhaps it is because successive generations of policymakers have developed a different perception of what is needed to achieve social unanimity. It is here that a comparative and historical study can provide invaluable leads. As an illustration, let me suggest one possible point of departure for a theory. During the Jefferson Administration, the territorial extent of the United States was doubled through the Louisiana Purchase. A decade later, the Madison Administration fought and nearly lost a war with the British, part of which was fought in poorly defended frontier areas. Not long afterwards, our country's industrial revolution began in earnest and America officially opened its gates to a flood of new immigrants to multiply the labor force needed for its farms and factories. Immigration also provided men to build up the country's local militias and frontier defenses. The old Puritan vision of America as a city set

on a hill began to be realized anew. America was advertised as the land of opportunity and as a safe haven for the religious, political, and economic refugees of Europe.

But nativist violence had become a serious political problem by the 1820s. A period of social and economic turmoil began as vested property rights crumbled in the face of new industrial and commercial priorities, property requirements for voters were dropped, and popular political movements began to reshape public policy. Social peace seemed threatened by ethnic and religious conflict. An effective means of assimilating the foreign-born was needed.

Traditionally, nation-states have sought to achieve social cohesion through measures--often quite oppressive--designed to create or preserve religious, cultural, and ethnic homogeneity.<sup>6</sup> But the American situation has been complicated by several factors: a tradition of civil and religious liberty, a long-standing need to promote steady population growth, and a foreign policy that reflects the country's ethnic diversity. American politics consequently tends to reflect the historical alternation between a variety of discriminatory or compensatory policies and a cultural pluralism that has been gradually divorced from its religious origins in favor of a rather bland political pragmatism.

Changes in public policy have probably contributed to a weakening of the older consensus. Increasingly, social control is being asserted through direct administrative regulation, especially in the areas of education and social welfare, rather than on customary sanctions. The power of the public purse was recognized early as an effective

instrument of social policy and has been relied on heavily ever since. Indeed, money appears to be the root of most entanglements between church and state: if not in the beginning, then certainly at the end whenever conflicts dictate expensive remedies. In the face of consensus politics, the price of religious liberty can be very high.

The arrangement of the chapters in this dissertation reflects the variety of approaches instrumental to a systematic study of the church-state relationship. These approaches fall roughly into three overlapping categories: ideological, historical, and political.

The Introduction briefly states the thesis and characterizes the nature of the conflict between church and state.

Chapter One, "The Imprint of Culture," sets the stage with a preliminary overview of the ideological and cultural situation which defines the relationship between church and state today. Particular attention is given to the differences that result from competing religious and secular presuppositions.

Chapter Two, "Biblical Roots," is concerned with the origin and nature of the church as a distinct institution. It is illustrated with abundant references to the Bible that are based on the King James translation.

Chapter Three, "Early Christendom," is a historical case study of the conflict between church and state within the Roman Empire. The issues that beset church and state today were first raised during this period when a failure to pay homage to Caesar was an act of treason.

Chapter Four, "European Background," examines the changing relationship of church and state as they reacted upon each other in

medieval and early modern Europe. A series of schisms within Christendom added new dimensions to the ancient rivalry between church and state that culminated in the rise of the modern secular state during the late Middle Ages and the Reformation.

Chapter Five, "The American Commonwealth," discusses the historical change of venue from Europe to America, that adopted child of the Reformation. The early colonists endeavored to apply Christianity to the art of government in a way that recalled the biblical covenants. Clergymen played a prominent role in public affairs as expounders and interpreters of an explicitly or implicitly Christian public philosophy. Statesmen likewise gave expression to their faith in speeches limned with biblical motifs.

Chapter Six, "Early Constitutional Issues," mixes the historical and political approaches as it focuses on two major consequences of the War for Independence: the disestablishment of state churches and the development of constitutional liberties. Some of the early cases and controversies that accompanied the changing equation between religion and politics are evaluated.

Chapter Seven, "The Supreme Court as a Guardian," introduces the early development of the judicial doctrines of religious rights. Along with the following two chapters, it is organized around a historical and topical analysis of the religion cases decided by the Supreme Court.

Chapter Eight, "The Supreme Court as a Vanguard," is devoted to an analysis of the development and application of doctrines and tests concerning the First Amendment religion clauses. Mutually exclusive efforts to separate church and state while accommodating a traditional



cooperation between them has helped redefine the place of religion in public life. The rise of judicial activism is shown to have both widened and narrowed the scope of religious liberty, leading to some paradoxical results.

Chapter Nine, "Recent Constitutional Issues," completes this survey up to the end of the 1970s with a look at signs of the growing doctrinal tension within the Court's more recent decisions. Cases decided after 1980 are treated for the most part in the remaining chapters.

Chapter Ten, "Fiscal Regulation," is the first of three chapters that examine the policy ramifications of changing political and judicial practice. It deals with the tax policies and financial practices that sometimes protect and encourage religious liberty but at other times entangle churches in a maze of bureaucratic strings. Specific dangers faced by church ministries are studied in the context of broader constitutional issues.

Chapter Eleven, "Scholastic Politics," brings financial and social issues into sharper focus. Educational policy has long been the most important catalyst in defining and redefining the relationship between church and state because it is here--in providing for future generations--that their respective interests most clearly overlap.

Chapter Twelve, "Social Regulation," completes the trilogy with a survey of social regulations that have accompanied an expanded police power. Zoning, employment rules, and antidiscrimination laws are among those considered.

The Conclusion summarizes the issues, raises questions for further study, and offers some observations toward reconstituting existing

political options.

I can think of no better way to dedicate essay than to subscribe  
the words of the Qopheleth:

. . . Of making many books there is no end; and much study is a  
weariness of the flesh. Let us hear the conclusion of the matter:  
Fear God, and keep His commandments: for this is the whole duty of  
man. For God shall bring every work into judgment, with every  
secret thing, whether it be good, or whether it be evil (Eccl.  
12:13-14).

Notes

<sup>1</sup>This is not an unprecedented situation, although it represents a departure from the American ideal of a "free church in a free state." Eugen Rosenstock-Huessy contends that the English gentry inherited many of the responsibilities of the church after the dissolution of the monasteries in 1536 and 1539. Eugen Rosenstock-Huessy, Out of Revolution: Autobiography of Western Man (New York: William Morrow and Company, 1938), pp. 274-77.

<sup>2</sup>Lewis Mumford, The Myth of the Machine, vol. 1: Technics and Human Development (New York: Harcourt Brace Jovanovich, 1966), pp. 168-75, relates the cult of divine kingship to the rise of the "megamachine," or what Karl Wittfogel called "hydraulic civilization."

<sup>3</sup>John W. Burgess, The Reconciliation of Government with Liberty (New York: Charles Scribner's Sons, 1915), p. 372, contends that "the last will of the sovereign is law and displaces everything preceding in conflict with it." This principle may be compared with another expressed by Rosenstock-Huessy, Revolution, pp. 5-6: ". . . a great new event . . . rewrites history, it simplifies history, it changes the past because it initiates a new future." These statements raise a hermeneutical question of the first magnitude: whether history or law are governed by and property interpreted in light of their origins or their ends, the past or the present, precedent or innovation. Is the "sovereign" singular and self-identical? Or is it protean in character?

<sup>4</sup>Compare Nicolas Berdyaev, The Origin of Russian Communism (Ann Arbor: The University of Michigan Press, 1960) pp. 174-75.

<sup>5</sup>The Chisholm ruling has the distinction of being both the first use of judicial review as an implied power and the event that triggered the Eleventh Amendment. As constitutional artifacts, however, the opinions in the case are indicative of a general antipathy toward the common law doctrine of sovereignty. Justice Wilson, who is reputed to have been rather unorthodox in both his religious opinions and his business dealings, was the Constitutional Convention's most brilliant systematizer and the first great expositor of a distinctly American jurisprudence. See M. E. Bradford, A Worthy Company: Brief Lives of the Framers of the United States Constitution (Marlborough, N.H.: Plymouth Rock Foundation, 1983), pp. 81-88. See also Rosenstock-Huessy, Revolution, p. 313, on the difference between ministers and magistrates.

<sup>6</sup>For a discussion of nationalism and the political geography of population, see Norman J. G. Pounds, Political Geography (New York:

McGraw-Hill Book Company, 1963), pp. 116-43. Until the middle of the last century, for example, it was the national policy of Sweden to deport non-Lutherans. Roland Huntford, The New Totalitarians, revised ed. (New York: Stein and Day, 1980), pp. 20-23.