RELATIONS BETWEEN CHURCH AND STATE IN THE UNITED STATES, WITH SPECIAL ATTENTION TO THE SCHOOLING OF CHILDREN *

MICHAEL E. SMITH
Universidad de California. Berkeley

INTRODUCTION

It may be misleading to describe the subject of this article as the relations of church and state in the United States. As many readers already know, there is no «church» in the United States that fits the concept traditional to Western political thought. Rather, there are a multiplicity of religious bodies, none claiming the allegiance of more than a quarter of the population. Likewise, there is no «state» in the traditional sense. Beside the federal government, there are 50 state governments that still exercise independent territorial power to a substantial extent, and the latter have shared their independence with a plethora of local governments, some dealing with only a single subject such as schools. Moreover, within most of these governments, power is further dispersed among substantially autonomous branches—legislative, executive, judicial, and sometimes others as well. Consequently, church-state issues in the United States often come down to fights between a small religious group and a minor government agency.

The concepts of church and state may be inappropriate to the American [1] situation in an even more fundamental way. In traditional Western thought, they have meant much more than a collection of individuals or groups; they have signified realities in themselves. In the United States, however,

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The author owes an incalculable intellectual debt to the writings of three great scholars, Professors WILL HERBERG and MARK DEWOLFE HOWE, and Father JOHN COURTNEY MURRAY. It is fitting that they were offspring of the three main branches of American religion—Judaism, Protestantism, and Catholicism.

[1] In this article, *American* refers to the United States. The usage is somewhat disrespectful of people living elsewhere in North and South America. However, the only alternatives that our language provides are clumsy circumlocutions.

government is ultimately «we, the people», and the people have a strongly pluralistic sense of themselves. Moreover, Americans tend to think of a religious body as a group of individuals who have come together to satisfy common interests not necessarily shared by other people. As a result, church-state issues are not usually perceived as conflicts between two distinct entities. Rather, they are often, and most realistically, understood as arising out of conflicts between different groups of individuals within the population [2]. Much of what follows treats the subject in these terms.

For the purposes of this article, there is no need to say more about what is meant by the «state». The «church» is another matter; the definition of religion is a significant issue in the law of church-state relations in the United States. This article being descriptive rather than critical, we will follow the conventional American usage. The term includes the historic Western and Near Eastern religions—Christianity, Judaism, and Islam. It also allows for the widespread Asian religions, especially Hinduism and Buddhism, and the close analogs of the foregoing [3]. The exclusion of other systems of belief and practice is not meant to prejudge the definition of religion in American law, an issue that we do not explore.

One omission is worthy of special mention. We will not examine the relations between government and the American Indian religions. This part of the subject has had great significance for several centuries; it is essential to any complete understanding of church-state relations in the United States. It hardly overlaps with the rest of the subject, however. To treat it meaningfully would require another article [4].

Readers may be expecting a study characteristic of the legal literature on church-state relations in the United States. Such a study would concentrate on the U.S. Constitution, particularly the views of its framers and its interpretation by the U.S. Supreme Court. That kind of article has already been published in various forms and need not be repeated here [5]. In any event, a conventional article may not be what scholars in other countries, or even in the United States, would find most useful. The American legal literature assumes a familiarity with religious conditions and attitudes in the country and their history. It also assumes a knowledge of the array of legal rules and practices, past and present, that lie beyond the U.S. Constitution and decisions of the U.S. Supreme Court. A major pur-

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[2] MEAD, *The Nation With the Soul of a Church,* 92-93 (1975); ROOF & MCKINNEY, «Denominational America and the New Religious Pluralism», 480 *Annals,* 24, 25, 33-35 (July 1985) [hereafter cited as ROOF & MCKINNEY].

[3] HOWE, *The Garden and the Wilderness,* 161-62 (1965) [hereafter cited as HOWE].

[4] A good starting point for study of the subject might be BEAVER, *Church, State, and the American Indians* (1966).

[5] *E.g.,* KURLAND, *Religion and the Law* (1962); LOCKHART, KAMISAR & CHOPER, *Constitutional Law,* ch. 10 (5th ed. 1980); NOWAK, ROTUNDA & YOUNG, *Constitutional Law,* ch. 19 (2nd ed. 1983); TRIBE, *American Constitutional Law,* ch. 14 (1978).

pose of this article is to set out the information that the conventional legal literature assumes.

Readers may also be expecting the article to focus on the «separation» of church and state, the concept by which many people identify the American way of dealing with church-state relations. Unfortunately, the term has many potential meanings, some applicable to the United States, others not. For example, separation has meant something very different in France, with its heritage of the Revolution of 1789 [6]. In this article we will examine the realities to which the term might properly apply; we will make hardly any further use of the term itself.

Behind these choices of subject matter and presentation there is an argumentative point. Those who characterize separation as the basic principle of church-state relations in the United States are usually asserting a relatively adverse view on the issue of government support for religion. The same is true of the many commentators who emphasize the limitations of the U.S. Constitution, interpreted according to the views of certain especially articulate framers and members of the U.S. Supreme Court [7]. Insofar as this article has an argumentative point, it is to rebut the claim that the only authoritative American view is antithetical to any substantial government support for religion.

Part I of the article deals with the social conditions and attitudes that surround the law of church-state relations in the United States. It describes the history and present state of religious affiliation in the country and of prevalent attitudes toward religion. It also describes, at greater length, the underlying attitudes of Americans, past and present, toward church-state issues.

Part II connects the foregoing with the law of church-state relations and its history. We examine state and local law as well as federal, legislation and administrative practice as well as court decisions. Rather than disperse our attention over the full range of this material, we concentrate on the one topic that has given rise to far more church-state controversy than any other, the law relating to the schooling of children. In its general characteristics, this topic is representative of the entire subject of church-state relations in the United States.

In the context of this symposium, readers may be expecting a comparison with conditions, attitudes, and laws in other societies around the world. That is not the main point of what follows, even by implication. The article attempts to describe church-state relations in the United States as they have been experienced by those within the society. To put the point another way, the perspective is more historical than sociological.

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[6] BERGER, *The Noise of Solemn Assemblies,* 58, 60 (1961) [hereafter cited as BERGER]; MURRAY, *We Hold These Truths,* 67-68 (1960) [hereafter cited as MURRAY].

[7] *E.g.,* MCCLOSKY & BRILL, *Dimensions of Tolerance,* 104-05, 134-35 (1983).

Readers must judge for themselves whether what may seem characteristic of the society to the people within it would strike outsiders the same way.

I. Social Circumstances

For those who are prone to dichotomize, observers of society may be divided into the simplifiers and the complexifiers. Both have scope for their propensities in the study of religion in the United States; in some ways the pattern is remarkably diverse, in other ways remarkably unified. We will explore both views of American religion, without following either to its end.

We start with the complexities. Section A concerns the diversity of religious groups in the country, the historical unfolding of this diversity, and the resulting tensions among the groups. Section B deals with one important issue of church-state relations on which the religious groups hold widely differing views, differences that are both a result and a cause of their tensions.

We turn next to the simplicities. Section C analyzes the principles of church-state relations on which the American people agree widely, acknowledging also the limits of their agreement. Section D describes the common outlook toward religion that has promoted general agreement on church-state issues in the United States.

In describing present religious conditions and attitudes in the United States, we will rely heavily on the views of thoughtful scholars in the 1950s and '60s. There is a problem here. In the 1970s observers were apt to claim that counter-cultural developments had just dealt traditional American religion a devastating blow. Observers now seem to agree that, on the contrary, the traditionalist religious bodies are growing in numbers and vitality [8]. Until the historical dust settles, we may properly use the earlier studies as a solid starting point for discussing religion in the United States today.

A) *Diversities of Religious Affiliation*

Viewing the religious scene in the United States, a visitor from another country is apt to be struck first by its extent and variety. Religious statistics are notoriously undependable but may still be indicative [9]. According to one reputable source, about 60% of Americans are formal members of

[8] *E.g.*, compare Ahlstrom, *A Religious History of the American People*, ch. 63 (1972), with Roof & McKinney, *supra* n. 2 at 29-31.

[9] Kelley, *Why Conservative Churches Are Growing*, 14-16 (1972).

some religious body, and these bodies number well over 200. The largest single group is the Catholic Church, whose members constitute about 22% of the population. However, it is outnumbered by all of the Protestant [10] denominations combined, which claim about one-third of the people as members. There are 19 separate Protestant denominations with over one million members each; they include offshoots of the three main branches of the Protestant Reformation—Lutheranism, Calvinism, and Anglicanism. The largest, by a substantial margin, are the Southern Baptists and the Methodists. The remaining 5% of church members, according to this source, are divided about equally between Jews and Eastern Orthodox [11]. There are also an undetermined number of adherents of Islam and the Asian religions.

Another reputable source throws greater light on the approximately 40% of the people who are not formal members of any religious body. Taking into account religious leanings as well as membership, 25% of the total population is Catholic, 57% is Protestant, 2% is Jewish, and 8% identify themselves with some other religious body. Only 7% of the people express no religious predilection [12].

From the start, American religion was characterized by diversity [13]. By the end of the seventeenth century, two historically antagonistic bodies were dominant in different parts of the continent. In the populous southern colonies, especially Virginia, it was the Anglican Church, the established church in England, whereas in the most important northern colonies, including Massachusetts, it was a body of English Puritans organized on a congregational basis [14]. These two groups have remained centered in the eastern part of the country and still enjoy a high social status [15]. They constitute the core of what is sometimes called «mainline» Protestantism.

In the middle colonies and some others, especially Pennsylvania, the religious pattern by the end of the seventeenth century was already even more diverse. The population consisted of a variety of English Puritans, continental Protestants, and even a small number of Catholics and Jews [16] Moreover, in most of the colonies, especially those least densely settled,

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[10] In this category are included offshoots of Protestantism in the United States, such as the Mormons.

[11] *Yearbook of American & Canadian Churches 1984,* 231-38 (JACQUET ed.).

[12] ROOF & MCKINNEY, *supra* n. 2 at 26-27. The authors do not account for the remaining one percent. Compare *Yearbook, supra* n. 11 at 274.

[13] The most complete single source for the historical account that follows is AHLSTROM, *supra* n. 8, *passim.*

[14] GAUSTAD, *Historical Atlas of Religion in America,* 1, 3, 13-14 (1962) [hereafter cited as GAUSTAD]; HERBERG, *Protestant—Catholic—Jew,* 100 (rev. ed. 1960) [hereafter cited as HERBERG].

[15] BERGER, *supra* n. 6 at 80; HERBERG, 212-14, 217; HILL, «Religion and Region in America», 480 *Annals,* 132, 135 (July 1985) [hereafter cited as HILL].

[16] GAUSTAD, 1-4; HERBERG, 100.

there were a substantial number of people who belonged to no religious body [17].

By the time of the rebellion against English rule and the founding of the new nation in the last third of the eighteenth century, the religious scene had expanded considerably. At one end of the spectrum, the Enlightenment had penetrated the prosperous Anglican and Congregational classes, giving them a liberal, rationalistic outlook. This element included a disproportionate number of the leaders of the new nation, including Thomas Jefferson and James Madison [18]. In the next generation, the more liberal Congregationalists formally separated from the denomination and founded the Unitarian and Universalist Churches, which have since merged [19]. These groups, like the body from which they derived, remain strongest in the northeastern part of the country [20]. Before they disavowed conventional theism altogether they were the epitome of «liberal» Protestantism. That category still embraces some members of the mainline Protestant denominations, particularly within the leadership and the seminaries [21].

Meanwhile, a revival movement in the middle third of the eighteenth century, called the «Great Awakening», added many members to the groups of English Puritans not dominant in any of the colonies, particularly the Baptists and Presbyterians [22]. In the first half of the nineteenth century, there was another even more momentous wave of revivalism, this time focused on the western and southern frontier. It made the Baptists and Methodists, the latter a recent offshoot of Anglicanism, the largest religious bodies in the United States [23]. The Methodist Church is still especially strong in the rural midwest, while the Baptists dominate the southeastern part of the country [24]. This revival movement also fostered two large new bodies on the frontier, the Disciples of Christ and the Mormons, the latter of whom are now dominant in the intermountain west [25]. Indeed, the proliferation of revivalist Protestant bodies in the south and west continued into the present century; one group founded in 1914, the Assemblies of God, is now among the largest Protestant bodies in the country [26]. Some of these denominations have since joined the National Council of Churches, an organ of mainline Protestantism, but most still

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17 GAUSTAD, 1-4.
18 AHLSTROM, *supra* n. 8 at 366-68; GAUSTAD, 16.
19 GAUSTAD, 126-31.
20 HILL, 135.
21 Indeed, some scholars classify Congregationalists and Episcopalians (Anglicans) as liberal Protestants. *E.g.,* ROOF & MCKINNEY, 26.
22 GAUSTAD, 11-13, 20-21; HERBERG, 101-03.
23 GAUSTAD, 37-42, 52, 76-78; HERBERG, 103-05.
24 GAUSTAD, 159; HILL, 135.
25 GAUSTAD, 45-47, 63-64, 82-86, 159; HERBERG, 104-05, 109; HILL, 135.
26 GAUSTAD, 122-23.

belong to what is loosely called the «evangelical» wing of Protestantism, a grouping of lower social status [27].

In the middle third of the nineteenth century, slavery, the Civil War, and emancipation further diversified religion in the United States. Three of the largest Protestant bodies—the Baptists, Methodists, and Presbyterians—split along regional lines, north against south, over the issues of abolition and secession. The second and third did not reunite until recent times, and the Baptists are still divided [28]. Moreover, the end of slavery enabled southern blacks to join or establish churches of their own parallel to the white churches, mainly Baptist and Methodist, to which they had belonged while slaves. Four of these, the National Baptist Conventions and the African Methodist Episcopal Churches, are among the largest Protestant bodies in the United States today [29].

So far, we have talked only of English Protestantism. In the eighteenth century, immigration from Germany and the Netherlands made the Lutheran and Reformed Churches leading denominations in the middle colonies [30]. Another much larger wave of immigration from Germany and Scandinavia in the middle third of the nineteenth century greatly enlarged the Lutheran Church, this time mainly in the rural upper midwestern part of the country, where it is still dominant [31]. Lutherans in the northeast have since gravitated to mainline Protestantism, while midwestern Lutherans, particularly the members of the Missouri Synod, remain more traditional in outlook [32].

The era of renewed immigration that began in the middle third of the nineteenth century for the first time also brought vast numbers of non-Protestant Christians to the United States. The great majority were Catholics, first from Ireland, then from continental Europe. By the end of this era of immigration during World War I, the Catholic Church had become larger than the Methodists and Baptists combined and was dominant in large parts of the northeast and midwest. The acquisition from Mexico of the southwestern part of the country in the middle third of the nineteenth century, and continuing immigration from Latin America since then, made Catholicism dominant there as well [33]. The era of immigration also produced a significant Eastern Orthodox influx from Eastern Europe [34]. Until recently, these non-Protestant groups were of relatively low social status [35].

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[27] BERGER, 80; HERBERG, 212-14, 217.
[28] GAUSTAD, 57, 79, 81, 90; HERBERG, 109; *Yearbook, supra* n. 11 at 78.
[29] GAUSTAD, 57-58, 79, 150; HERBERG, 112-13.
[30] GAUSTAD, 17-18, 28.
[31] GAUSTAD, 70, 159; HILL, 135.
[32] *Yearbook, supra* n. 11 at 68, 69; KELLEY, *supra* n. 9 at 28, 89.
[33] GAUSTAD, 108-09, 159, 162; HERBERG, 141, 153, 213; HILL, 135.
[34] GAUSTAD, 119-20.
[35] HERBERG, 212-14.

Indeed, the great era of immigration for the first time made the United States in part a non-Christian nation. It brought a significant number of Jews, first from Germany, then from Eastern Europe. While the former dispersed throughout the country, the latter were concentrated in the cities of the northeast and midwest [36]. Jews in the United States are now of relatively high social status [37].

Although readily available statistics run out at this point, it appears that in the last 20 years or so, the United States may even have ceased being an overwhelmingly Jewish-Christian country. During the 1960s and '70s, significant numbers of blacks converted to some form of Islam, and numerous whites became followers of one or another of the Asian religions. These developments have been reinforced by continuing immigration from Asia.

Finally, throughout the history of the nation, there have also been many Americans without ties, even of sympathy, to any religious body. Some have been merely indifferent to religion; others have been «secularists», determined non-believers. At first these were concentrated on the frontier, where religious ties were hard to maintain, but now they are spread throughout the country, especially in the far west [38].

As for current trends among the largest categories, mainline and liberal Protestantism are waning in numbers. The Catholic Church is growing in membership and social status but may be declining in active worshippers. Evangelical Protestantism is definitely on the rise by all of the obvious criteria, including social status. The number of the unaligned may also be increasing somewhat [39].

Along with religious diversity in the United States, as one might expect, there has also been tension among the religious bodies. No one has been much at odds with mainline Protestants for many years. Likewise, liberal Protestants, Jews, and secularists have typically been at ease with one other. However, some tension persists between many evangelical Protestants and Catholics. The same is true between both of these groups and many liberal Protestants, Jews, and secularists [40].

Relations among the religious bodies used to be much more strained. Almost from the start of colonization, there was strong, sometimes violent animosity between the dominant and minority Protestant bodies in the northern and southern colonies. These hostilities were swept away in the course of rebellion against England and the founding of the new nation, and then in the common effort to revive religious belief, especially on the

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[36] GAUSTAD, 145; HERBERG, 173-74, 177-78; HILL, 135.
[37] HERBERG, 212-14.
[38] HILL, 135.
[39] ROOF & MCKINNEY, 29-30, 32-33, 37; *Yearbook, supra* n. 11 at 246-47, 275.
[40] HERBERG, 152, 232-38, 239; MORGAN, *The Politics of Religious Conflict,* 26-27, 35 (1968) [hereafter cited as MORGAN].

frontier. Since that time, there may have been more tension within the Protestant denominations, especially between traditionalists and progressives, than among them [41].

With the large-scale immigration of Catholics came intense animosity between the newcomers and all groups of Protestants. It was probably based more on historical memories and ethnic differences than on religious disagreements. In any event, it led to recurrent bouts of bloodshed and destruction in the middle third of the nineteenth century [42]. Incidentally, there was also tension among Catholics from different countries in Europe, which led some to propose federalization of the church [43]. As historical memories faded and the ethnic groups assimilated culturally, these divisions gradually diminished. The process was further promoted by the concurrence of John Kennedy's presidency and changes in the Catholic Church wrought by Vatican II [44].

The era of renewed immigration also introduced the United States to bad feeling between Jews and many groups of Christians, especially Catholics. The causes were similar to those dividing Catholics and Protestants. The same long-term developments have abated the tensions [45].

Periodically, there have also been intense, short-term conflicts between activist sects and the general population. The most violent involved the Mormons in the 1830s and '40s and the Jehovah's Witnesses just before World War II [46]. Although certain sects today are similarly assertive and have evoked hostile responses, none has been subject to such harsh abuse.

Some of the tension that remains among religious bodies stems, not from differences of theological doctrine, worship, and church structure, or even from history and ethnicity, but from disagreements over social questions. Traditional evangelical Protestants are divided from liberal Protestant and secularists on such issues as sexual morality, economic policy, and national defense. In the case of traditional Catholics, the great sticking point that unites them with many evangelical Protestants but separates them from liberal Protestants and secularists is abortion [47].

B) *Diversities on Church-State Issues*

The last observation brings us closer to our subject, for another category of issues that causes some tension among religious bodies in the

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[41] MILLER & FLOWERS, *Toward Benevolent Neutrality,* 2-4 (rev. ed. 1982); SANDERS, *Protestant Concepts of Church and State,* 191 (1964) [hereafter cited as SANDERS].

[42] HERBERG, 141-42.

[43] Id. at 143-45.

[44] HERBERG, 147-49, 159-61; MORGAN, 35, 133-34, 136-38.

[45] MORGAN, 133-34, 135-37.

[46] GAUSTAD, 83-85; 2 STOKES, *Church and State in the United States,* 602-03 (1950) [hereafter cited as STOKES].

[47] REICHLEY, *Religion in American Public Life,* ch. 6 (1985).

United States is church-state relations. The causal chain runs in the opposite direction as well; differences of viewpoint on church-state issues have been fostered by diversities of religious affiliation and the tensions that have accompanied them.

Observers of American society today may suppose that one persistently divisive church-state issue has been the role of churches, clergy, and the like in the resolution of social questions. For example, some proponents of abortion attack the political opposition of Catholics, particularly the heirarchy, as an impermissible intrusion of religious belief into governmental affairs [48]. Viewed in the perspective of the nation's history, however, this objection is hard to sustain. The clergy and others with religious motivations have played a large part in a variety of political causes throughout the nation's history. These have included matters of war and peace, from the revolution against England to current struggles in Central America; movements for «personal» reform such as the prohibition of alcohol; and social reform causes, notably the emancipation of slaves and racial equality. There has been a certain amount of tactical criticism of religious activism by opponents trying to gain a political advantage, but very little consistent opposition at the level of principle [49].

Only one issue of church-state relations has persistently divided the American people at the level of principle: To what extent may government support religion in general. By religion in general is meant the bodies, listed in the introduction, that most Americans have regarded as religious during their history. In terms of beliefs, it means those general propositions such as, «We are all children of God», that are supposed by most Americans to underlie all genuine religion [50]. As for government support, the issue refers to two main kinds. One is financial aid, the spending of material resources for the benefit of religious groups in general. The other kind is what Professor PETER BERGER felicitously calls «moral» support [51], the use by government of its various educational capacities to promote religious belief in general.

On this issue of government support for religion, the American people have developed a spectrum of views. We will concentrate on four positions that together probably account for a large majority of the populace. In describing them, it will be necessary to generalize about the views of certain groups. Readers should keep in mind that these generalizations are merely an approximation of reality.

At one end of the spectrum are three closely related groups, sometimes

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[48] Compare TRIBE, «Foreword: Toward a Model of Roles in the Due Process of Life and Law», 87 *Harv. L. Rev.*, 1, 18-25 (1973), with TRIBE, *supra* n. 5 at 928.

[49] See SMITH, «Religious Activism—the Historical Record», 27 *Wm. & Mary L. Rev.* (forthcoming), and sources cited.

[50] BERGER, *supra* n. 6 at 63.

[51] Id. at 59.

referred to as «strict separationists». First, there are secularists, people who are not merely indifferent to religion but are determined non-believers [52]. Second, there are liberal Protestants, formerly epitomized by the Unitarian-Universalists and still found in the mainline Protestant denominations [53]. Third, this position is also held by most Jews; some are secularists as well, but all have painful historical reasons of their own for holding it [54].

The crux of this position is that much of organized religion is bad for society. Its proponents are especially averse to the Catholic Church and evangelical Protestantism, partly because of disagreement on major social issues [55]. Accordingly, the groups holding this position are opposed to any significant financial aid to religious bodies; their opposition often extends to tax exemptions. These groups are also against any significant expression or advocacy of religious belief by government and its officials [56].

Proponents can trace a somewhat milder version of this view back to the founding of the nation, and in particular to Thomas Jefferson and James Madison [57]. Jefferson, of course, was the main author of the Declaration of Independence, while Madison was the leading intellect in the framing of the original U.S. Constitution and the Bill of Rights. Both were also among the most prominent activists of their time on church-state relations.

The next position on the spectrum is held by most evangelical Protestants. These are the groups we identified, first as dissenters from the dominant Protestant churches in the colonies, then as leaders of the great religious revivals of the eighteenth and nineteenth centuries. The largest and best known of these groups is the Southern Baptists.

Originally, this position arose out of a concern the opposite of the prior one; its adherents sought, not to protect society from the baneful influence of much of organized religion, but to protect true religion from the blighting effects of government intrusion [58]. The discrepancy did not prevent adherents of the two positions from working together against established religion during the last third of the eighteenth century and then against immigrant Catholicism a half century later [59]. To a certain extent the two positions still overlap. Traditionally, evangelical Protestants have tended to oppose any significant government subsidizing of religion, particularly of the manifold institutions of the Catholic Church. However,

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52 MORGAN, *supra* n. 40 at 22-23, 132.

53 SANDERS, *supra* n. 41 at 253.

54 HERBERG, 219-20, 238-39; MORGAN, 23-24, 55-57.

55 SANDERS, 161-65, 186, 197-98; MURRAY, *supra* n. 6 at 64.

56 Probably the most authoritative account of church-state relations in the United States from a strict separationist perspective is PFEFFER, *Church, State and Freedom* (rev. ed. 1967).

57 GAUSTAD, *supra* n. 14 at 128-31; HOWE, 2-3; SANDERS, 189.

58 MURRAY, 64; SANDERS, 186.

59 HOWE, 9, 172; SANDERS, 185-89, 212-13.

they have generally not opposed tax exemptions for religion, and their opposition to subsidies has abated in recent years [60]. As for moral support of religious belief by government, evangelical Protestants have been torn. Their tradition is against such support as a corrupting influence on true belief. Their historical experience, however, has disposed many of them to identify their religion with the national culture, so that when government teaches religious belief in general, it is merely promoting «Americanism». In any event, evangelicals have generally thought that government should support the moral values of traditional Protestantism [61].

Proponents can trace the ancestry of this position back to the founding of the nation and beyond. Few people appreciate that in the battles against established religion in the last third of the eighteenth century, the Baptists and Presbyterians were the indispensible allies of liberals such as Jefferson and Madison. These bodies, in turn, derived their views from the great seventeenth century dissenter against the Massachusetts religious establishment, Roger Williams [62].

The next position on the spectrum is held by many mainline Protestants. They are typified by the original dominant churches, Anglican and Congregationalist, but they are now spread through a number of the other denominations belonging to the National Council of Churches, such as the Presbyterians, northeastern Lutherans, and Methodists [63].

Unlike the prior groups, these are not strongly suspicious of either organized religion or government. They accept in principle the desirability of cooperation between government and the religious bodies to achieve common social objectives, although cooperation should not be carried to the point of making church and state interdependent or of encroaching significantly on the religious freedom of dissenters. Moreover, they are not particularly suspicious of the Catholic Church, although they remain wary of some of its traditional positions [64]. Accordingly, not only do many mainline Protestants support a variety of tax exemptions benefitting religion; they are also prepared to draw fine distinctions between permissible and impermissible subsidies for religious activities [65]. Likewise, they wish the government to give moral support to religion in general, so long as the effort does not stifle religious independence or oppress dissenters [66].

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[60] MORGAN, 43, 134, 138-39; SANDERS, 161-65, 212-16.

[61] SANDERS, 180, 182-83, 195, 206-11.

For a profound account of church-state relations in the United States that gives considerably more weight than most to the evangelical Protestant position, see HOWE, *supra,* n. 3.

[62] AHLSTROM, *supra* n. 8 at 376; HOWE, 5-6, 9, 19; SANDERS, 179-80, 185-89.

[63] MORGAN, 49, 52.

[64] HERBERG, 238; SANDERS, 223-25, 257-59, 262-67.

[65] MORGAN, 43, 52, 75.

[66] MORGAN, 66; SANDERS, 253, 259-62.

The most exhaustive account of church-state relations in the United States, STOKES, *supra* n. 46, is written from the mainline Protestant perspective.

Proponents of this position, too, can trace it back to the founding of the nation. A less cautious version was espoused by George Washington and John Adams, the military and diplomatic leaders of the rebellion against England and the nation's first two Presidents. Unbeknownst to many people today, Washington favored direct government grants to religious bodies in Virginia, and Adams was a staunch defender of established religion in Massachusetts. As Presidents, both men used their position to preach the dependence of good government upon religious belief [67].

Finally we have arrived at the opposite end of the spectrum, a position held by a single religious body, the Catholic Church. This is the only position that cannot be traced, at least in a line of inheritance, to the founding of the nation. There were Catholics in the colonies, but they did not become a major element in the United States until the great wave of renewed immigration beginning in the middle third of the nineteenth century [68].

Even more than mainline Protestants, most Catholics are disposed in principle to advocate cooperation between government and religious bodies, particularly the Catholic Church, for common social ends. They are also less likely to discern limits to the principle, other than the fundamental value of not arousing undue social discord. In the case of Catholics, the principle is reinforced by their material interest in providing for an expensive institutional structure [69]. Accordingly, Catholics have traditionally favored government subsidies to religious bodies in general, without significant reservations. Originally, they were more wary of government expression or advocacy of religious belief, supposing that in the United States it was bound to have a Protestant accent, but now they tend to have relatively few reservations about that form of support as well [70].

Most of the groups we have just discussed are inclined to identify their position with that of the nation's as a whole, and for substantial reasons. Strict separationists often claim that their great intellectual forerunners, Thomas Jefferson and James Madison, created the authoritative American position on church-state relations. Many separationists pride themselves on continuing to be the most knowledgeable and articulate members of society on the matter [71]. Evangelical Protestants might also claim to have played an important part in determining church-state relations at the founding of the nation. They are more likely to think of themselves as having been mainly responsible for creating the distinctive American ethos,

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[67] BELLAH, *Beyond Belief,* 173-74 (1970); GAUSTAD, *A Religious History of the American People,* 125-26, 127-28 (paper. ed. 1974).

[68] HERBERG, 136-38.

[69] MORGAN, 24-26, 35-36, 44; MURRAY, 56-58, 60; SANDERS, 213-14.

[70] Probably the most perceptive essay on church-state relations in the United States from the Catholic perspective is MURRAY, *supra* n. 6 at ch. 2.

[71] MCCLOSKY & BRILL, *supra* n. 7 at 134-35.

especially in relation to religion, an ethos of which they remain the most faithful exponents [72]. Mainline Protestants, the descendants of George Washington and John Adams, are another group entitled to trace their views to the leading founders of the nation. In any event, they are apt to regard themselves as the traditional keepers of the middle way in church-state relations, between the strict separationists and the Catholic Church [73]. Catholics, by far the largest single religious body in the country, may at least claim the prerogative of having their position given substantial weight in the resolution of church-state issues. The very plausibility of each of these assertions bolsters the contention that on the issue of government support for religion in general, the United States has, not one tradition, but a variety of competing traditions.

It is worth adding that although there is no consensus on the issue at the level of principle, there is widespread agreement on the results in certain cases. Some of the most important of these will be described in Part II.

Readers may question the omission of at least one other position, that of the small religious bodies which, from time to time, have been heavily burdened by the coercive power of government. These bodies are epitomized by the Mormons, Jehovah's Witnesses, and Amish. The main reason for omitting their viewpoint is that it focuses, not on the issue of government support for religion, but on government interference with religious exercise [74]. The latter has also been a recurrent problem in the United States, but it has not divided the populace at the level of principle.

C) *Unities on Church-State Issues*

As the preceding observation suggests, on a number of important issues of church-state relations in the United States, other than government support for religion in general, there is wide agreement in principle among the American people. We will examine the most important of these agreed-upon principles, and the values on which they rest.

The people of the United States have made at least two great disavowals in their law of church-state relations [75]. First, they have renounced what Anglo-Americans call Erastianism. In a strong form of this system, typified by the regimes of the French Revolution, government is quite free to regulate religious exercise strictly, or even suppress it altogether, in order to promote desired social ends. In opposition to any such system,

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[72] BERGER, 50.

[73] See STOKES, *supra* n. 46, *passim*.

[74] COVER, «Foreword: NOMOS and Narrative», 97 *Harv. L. Rev.*, 4, 26-30 (1983), describes the Amish position.

[75] MURRAY, *supra* n. 6 at 63-64.

Americans have agreed on certain principles embodying the value of religious liberty. If these principles need to be traced to the U.S. Constitution, they are most clearly expressed in Article I of the Bill of Rights, which provides, «Congress shall make no law... prohibiting the free exercise [of religion]».

Second, the people of the United States have also renounced theocracy. Typically, as in Calvin's program for Geneva, a theocracy uses the power of government to foster the dominant religious body, at the expense of religious dissenters. To this arrangement, the American people have opposed certain agreed-upon principles embodying the value of religious equality. In the U.S. Constitution, these principles are most clearly backed by the same article of the Bill of Rights that was just quoted, which further provides, «Congress shall make no law respecting an establishment of religion» [76].

The values of religious liberty and equality were cherished in some parts of the continent almost from the start of colonization in the seventeenth century. Rhode Island, founded by the great dissenting Puritan, Roger Williams, and Pennsylvania, named after William Penn, the famous Quaker, were particularly renowned for their devotion to these ideals [77]. By the founding of the nation in the last third of the eighteenth century, most of the other newly-independent states had also espoused the values of religious liberty and equality. For example, the New York Constitution of 1777 abrogated all laws «as may be construed to establish or maintain any particular denomination of Christians or their ministers», while the Virginia Act for Establishing Religious Freedom, adopted in 1786, provided that «no man shall be compelled to frequent or support any religious worship, place or minister whatsoever...» [78].

In some states, on the other hand, the values of religious liberty, and especially of religious equality, were hardly implemented in a rigorous way until well into the nineteenth century. In the most important of these, Massachusetts, the Constitution of 1780 contemplated that local communities would select and finance Congregationalist ministers to teach the people «piety, religion, and morality». It also authorized the state legislature to require attendance at the prescribed local services except by conscientious objectors, a power that the legislature promptly exercised [79].

Even after such arrangements were abolished in Massachusetts and elsewhere, the values of religious liberty and equality were often implemented very incompletely by current standards. Perhaps the most important limitation was on the range of religious bodies to which the values

[76] The dichotomy between the values of religious liberty and equality is elaborated at length in HOWE, *supra* n. 3 at ch. IV, V, and is summarized at 147-48.

[77] AHLSTROM, *supra* n. 8 at 166-70, 181-83, 207-13.

[78] Id. at 379-80; HOWE, 24, 44.

[79] HOWE, 25-27, 34-35; NOONAN, «Quota of Imps» (unpublished manuscript).

were thought to apply. By the middle third of the nineteenth century, members of the conventional Protestant denominations enjoyed religious liberty and equality throughout the country without any substantial qualifications [80]. Catholic and Jewish immigrants may have had to wait until the twentieth century before they were accorded comparable rights, depending on where they lived. It is only since the period of World War II that the American people have become similarly sensitive to the claims of the less conventional religious groups, such as the Jehovah's Witnesses and the Amish, and also of the non-religious [81]. By some people's standards, of course, the nation has still not extended fully the values of religious liberty and equality.

Under present American law, the basic principle of religious liberty is that government should not substantially burden the exercise of religion by any person or group, whether singled out or not, without an unusually good reason [82]. Of course, the principle means little without knowing what constitutes a good reason for interfering with religious liberty in the American culture. There are at least two ancillary propositions that help to explain the principle. First, only this-worldly interests count as good reasons. Conforming to God's will, saving people from eternal damnation, and the like are not adequate justifications for burdening the religious exercise of others. Second, Americans are responsive to a supposed distinction between action and belief [83]. As religious exercise moves from scruples about social activity, such as receiving medical care or paying taxes, through joining and administering a church, evangelization, and corporate worship, to purely inner states of intellect and will, government interference is thought to be increasingly less justified [84]. When we refer again later to sufficient reasons for government action encroaching on religious values, the same observations apply.

In Part II we will see a number of specific applications of the principle favoring religious liberty. For now, we will limit ourselves to what may be the nation's most ambitious expression of the principle. For over a century, since the Civil War of the 1860s, the U.S. Congress has allowed certain conscientious objectors to refuse military service. Moreover, since that time the breadth of the exemption has been repeatedly enlarged. At first it was limited to members of religious bodies, such as the Quakers and Mennonites, whose corporate doctrines forbid participation in war,

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[80] HOWE, 59-60.

[81] Some of the most important of these later developments are described in part II.

[82] The U.S. Supreme Court crystallized this principle in Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963), and Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[83] The classic Supreme Court dictum is in Cantwell v. Connecticut, 310 U.S. 296, 303-03 (1940).

[84] For example, compare United States v. Lee, 455 U.S. 252 (1982), with Wooley v. Maynard, 430 U.S. 705 (1977).

and even these objectors were exempted only from armed combat. By the time of World War II, Congress had extended the exemption to anyone conscientiously opposed to military service by reason of religious training and belief. Moreover, the exemption applied to any service in the armed forces, including ministering to the wounded. There has been a similar expansion of the legal rights of conscientious objectors in other contexts, such as the right to be naturalized as an American citizen [85].

Another agreed-upon principle embodying the value of religious liberty provides that government should not single out religion or its exercise for substantially less advantageous treatment than non-religion without an unusually good reason. This principle overlaps the prior one insofar as interference with religious exercise is involved; if religion alone is burdened, government may be hard-put to adduce a good enough reason to justify the burden. At the same time, the principle does not necessarily extend to certain kinds of government support. As we have seen, a significant group of Americans hold the position that government should not give substantial financial or moral support to religion, even when it is aiding comparable non-religious activities.

A recent decision of the U.S. Supreme Court shows an application of the principle in relation to the important issue of qualifications for government offices. Although a number of states, agreeing with Thomas Jefferson, originally denied elected offices to members of the clergy, by the beginning of this century only two states still did so. The last of these laws was struck down unanimously by the Court in 1978 [86].

As for the value of religious equality, the main implementing principle in American law is that government should not single out one or more religions, whether by name or other characteristics, for better or worse treatment than other religions, without an unusually good reason [87]. Again, this principle overlaps the basic rule of religious liberty insofar as government interference with religious exercise is involved; if only one or a few religions are burdened, the interference may be hard for government to justify. However, here the principle applies to government support as well. Financial or moral support for some religions but not others is presumptively improper.

We see a characteristic invocation of the principle, and its limits, if we revert to the example of conscientious objection to military service. From the institution of the exemption to the present, the U.S. Congress

[85] MILLER & FLOWERS, *supra* n. 41 at 145-53. Many states have granted a similar exemption from service in the state militia. ANTIEAU, CARROLL & BURKE, *Religion Under the State Constitutions,* 116-17 (1965) [hereafter cited as ANTIEAU].

[86] HOWE, 61-62; McDaniel v. Paty, 435 U.S. 618, 622-25 (1978).

[87] The U.S. Supreme Court expressly avowed this principle in Larson v. Valente, 456 U.S. 228, 246 (1982). The analysis in Gillette v. United States, 401 U.S. 437, 452 (1971) is somewhat different, but CHOPER, «The Free Exercise Clause», 27 *Wm. & Mary L. Rev.* (forthcoming), argues persuasively that the later decision is sounder.

has granted it only to draftees who object to all wars. Claiming a discrimination on the basis of religious belief, the statute was challenged by a number of draftees, including a Catholic objector who adhered to his church's doctrine of the just war. In 1971 the U.S. Supreme Court upheld the statute, with only one dissent. In effect the Court ruled that the government had good enough administrative reasons for refusing to acknowledge selective conscientious objection [88].

Another agreed-upon principle effectuating equality in relation to religion provides that government should not single out non-religion for substantially less advantageous treatment than religion without an unusually good reason. The principle certainly applies to the imposition of government regulations, taxes, and similar burdens. It does not necessarily extend to the distribution of certain kinds of government support. Moral support for religion, for example, often involves a preference over non-religion. On that issue, as we have seen, there is no widespread agreement in principle.

The principle protecting non-believers is exemplified by another decision of the U.S. Supreme Court involving qualifications for government offices. From the founding of the nation, the U.S. Constitution has forbidden religious tests for federal offices. Within the last 100 years, only a handful of states permitted them for state offices. Even in these states the tests required only a generalized belief in God, and the requirements were hardly enforced. When a rare case reached the Supreme Court in 1961, it unanimously held all such tests invalid under the U.S. Constitution [89].

Professor MARK DEWOLFE HOWE, a profound student of the subject, made a strong argument that this principle protecting non-believers is not an effectuation of *religious* equality, as understood throughout the history of the nation, but of the separate value of intellectual equality which has its own traditions [90]. Yet he also stressed that offenses against this principle are apt to accompany offenses against the primary principle of religious equality that forbids preferences among religions [91]. Whatever view of the matter one takes, the most important point to keep in mind is that this principle does not necessarily apply to government support for religion.

The extent of the consensus on church-state issues in the United States must not be exaggerated. Recalling the lessons of legal realism, readers will have observed that the principles just described leave much scope for disagreement over their application. In the often repeated words of Justice OLIVER WENDELL HOLMES, «General propositions do not decide concrete cases». People are less apt to quote HOLMES' succeeding remark that the general proposition he had just stated «will carry us far toward the end» [92].

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[88] GILLETTE, *supra* n. 87.
[89] ANTIEAU, 102-04; Torcaso v. Watkins, 367 U.S. 488 (1961).
[90] HOWE, 151-57.
[91] Id. at 94-96.
[92] Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion).

The principles we have examined create strong presumptions that are bound to influence any sympathetic person responsible for applying them. In many cases, such as the ones just described relating to conscientious objection and qualifications for government offices, they lead to widespread agreement on results as well. Yet it is also undeniable that in many other cases, the American people are divided on the implications of religious liberty and equality. We will see an array of examples in Part II.

Astute readers may also have noticed that the principles we have examined are capable of conflicting with one another. For example, the presumption against burdening religion may clash with the presumption against disfavoring non-religion. The former may require that religious believers be exempted from general social duties. The latter, however, may forbid an exemption that excludes non-believers. A way out of such conflicts is to extend the exemption more widely, but that may have the effect of nullifying the government regulation.

A 1970 U.S. Supreme Court decision concerning conscientious objection to military service exemplifies the difference of views on resolving these conflicts. Recall that in order to qualify for an exemption, the congressional statute requires that the objection be based on religious training and belief. Faced with a draftee who acknowledged that his objection was ethical but not religious, four Justices avoided his constitutional attack on the statute by applying it to any deeply held, non-pragmatic objection. The other Justices balked at this way out of the dilemma but divided among themselves, one asserting that to limit the exemption to religious objectors denied equality to non-believers, the other three contending that the limitation was in accord with the special status of religious liberty in American law [93].

D) *Unities of Religious Outlook*

To the question, what accounts for the relatively widespread agreement in the United States on the foregoing principles of church-state relations, perhaps the commonest answer is practical necessity. According to this interpretation, Americans have been driven to their principles by the diversity of their religious life. Except locally, no religious body has been powerful enough to dominate the others without an exorbitant struggle. Since the middle of the nineteenth century, the same has been true of the Protestant bodies combined, and even of Christians generally. Under these circumstances, rather than waste themselves in fruitless struggles for supremacy, the people have agreed to live with each other on the basis of religious liberty and equality [94]. In the phrase of Father JOHN COURTNEY

[93] Welsh v. United States, 398 U.S. 333 (1970).
[94] MURRAY, *supra* n. 6 at 56-60.

MURRAY, a profound student of the subject, American church-state arrangments are «articles of peace» [95].

Yet there is more to the matter than that. At the least, many thoughtful observers of the religious scene agree that the people of the United States have made a virtue of necessity [96]. They have determined that religious pluralism is intrinsic to their identity as a nation; they picture themselves, to use a somewhat outworn term, as an «interfaith» enterprise. They would not want to change that identity by restricting religious liberty and equality even if they could imagine their individual religious bodies benefitting thereby [97]. This is true even of American Catholics. Many may still be faithful to the traditional doctrine that their's is the true church. Nevertheless, they accept the religious pluralism of their society without substantial reservations [98].

There may be more to the matter even than that. If visitors to the United States first notice its abundant religious diversity, the more thoughtful of them are apt next to discern an underlying unity. The unity consists of a common outlook on religious matters, and this common outlook is more momentous than the diversities. In the words of ALEXIS DE TOCQUEVILLE, «Although the Christians of America are divided into a multitude of sects, they all look upon their religion in the same light. This applies to Roman Catholicism as well as to the other forms of belief» [99]. Probably only the early date of his visit to the United States prevented TOCQUEVILLE from extending his observation to American Jews.

We are now on debated ground. Scholars writing in the 1950s, and those whose minds were made up then, are prone to find consensus in American life. For many of the most thoughtful sociologists, it goes so far as to take the form of what Professor ROBERT BELLAH calls a «civil religion» [100]. Scholarly children of the 1960s, on the other hand, are much more likely to detect disunity in American society. Rather than become deeply involved in this debate, we will limit ourselves to two observations about religion in the United States that are relatively uncontroversial.

One prevalent characteristic of American religious life is its this-worldliness. This observation does not refer to an explicit ideology of secularism, for as was pointed out before, determined non-believers, while influential, are a relatively small minority. Rather, it refers to an implicit outlook that pervades religion itself. The recent trend of interest in Asian religion has hardly changed this prevalent American predilection. The focus of most religion in the country is the affairs of this world. The main

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[95] Id. at 48, 56.
[96] *E.g.*, BERGER, *supra* n. 6 at 69; MORGAN, *supra* n. 40 at 21.
[97] HERBERG, *supra* n. 14 at 27-28, 85-86, 124-25, 242-46.
[98] Id. at 86, 151-51; I TOCQUEVILLE, *Democracy in America,* 301 (Bradley, ed. 1945).
[99] II TOCQUEVILLE, *Democracy in America,* 27 (Bradley ed., 1945). Also see HERBERG, 82
[100] BELLAH, *supra* n. 67 at ch. 9. Also see BERGER, 40-49; HERBERG, 74-81.

function of religion is to promote this-worldy values; the worth of religion is usually judged by its worldly effects. What is more, religious values are largely derived from worldly commitments rather than from an autonomous religious source.

Other aspects of religion not seen as directly relevant to the concerns of this world are usually slighted. These include theological doctrine, liturgy, and church structure. American believers do not much concern themselves with such matters as the Real Presence and the Apostolic Succession. According to Professor WILL HERBERG, their prevailing outlook is summed up in the slogan, «Deeds, not creeds» [101].

This outlook is shared by secularists. They are not primarily concerned with debating the existence of God and related propositions. They too mainly judge beliefs by their impact on worldly affairs [102].

If any readers doubt these contentions, there is a cloud of witnesses to be summoned. TOCQUEVILLE, the greatest foreign observer of American life, wrote in the 1830s, «Not only do the Americans follow their religion from interest, but they often place in this world the interest that makes them follow it... [T]he American preachers are constantly referring to the earth, and it is only with great difficulty that they can divert their attention from it» [103]. MAX WEBER made a related observation 70 years later [104]. This proposition has been reiterated in our own time by three of the most profound sociologists of religion in the United States, BELLAH, HERBERG, and Professor PETER BERGER [105]. For example, BERGER has written, «Perhaps the most striking characteristic of this 'common [American] faith' is its intense this-worldiness» [106].

The this-worldliness of American religion has been evidenced throughout its history. To cite some obvious instances, it was a major premise of the liberal Protestantism of the nation's founders in the last third of the eighteenth century. The great Protestant revival of the first half of the nineteenth century was strongly devoted to social reform, including the abolition of slavery. Later in the century, evangelical Protestants concentrated more heavily on personal reform, especially the prohibition of alcohol. During the Depression of the 1930s, progressives of all religious faiths advocated redistribution of economic power and wealth. In our own

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101 HERBERG, 82.

102 MORGAN, 135.

103 TOCQUEVILLE, *supra,* n. 99 at 126-27. He observed previously, «If you converse with [the Protestant evangelists], you will be surprised to hear them speak so often of the goods of this world, and to meet a politician where you expected to find a priest.» *Supra* n. 98 at 306-07.

104 WEBER, «The Protestant Sects and the Spirit of Capitalism», in GIRTH & MILLS, *From Max Weber,* 307 (1946).

105 BELLAH, *supra* n. 67 at 172, 180; BERGER, 40-42, 44-45, 87-88; HERBERG, 1-3, 82-83, 149-50.

106 BERGER, 42.

generation, a wide array of religious bodies are again largely absorbed with social questions, including racial equality, poverty, disarmament, and abortion [107].

The this-worldliness of American religion has important consequences for relations among the religious bodies and with the non-religious. As the sixteenth and seventeenth centuries in Europe demonstrate, people may differ widely on theological, liturgical, and ecclesiastical issues, and these disagreements may foster a strong desire to suppress other people's religious liberty and equality. In the United States, these issues have generally not been thought important enough to warrant social conflict.

More recent centuries prove that worldly matters such as race and class may be an equally fertile source of social conflict and oppression. As mentioned previously, these matters have caused some tension among religious bodies in the United States. However, insofar as the American people have divided on worldly issues, the divisions have generally not followed religious lines. Some of the issues, notably slavery and the Civil War in the middle third of the nineteenth century, have caused splits within religious bodies, and most of the issues, including the ones just mentioned, have brought various groups of believers and non-believers together on the same side. To mention two other prominent examples, the rebellion against England in the 1770s was strongly supported by Congregationalists, rationalist Anglicans, and dissenting Protestants [108]. The movement for racial equality in the 1960s featured leaders of nearly all of the northern and black religious bodies—Protestant, Catholic, and Jewish, as well as secularists [109]. Indeed, anyone organizing a moral movement in the United States today is apt to strive hard for interfaith support [110].

Under these circumstances, most Americans regard religious controversies, not only as irrelevant, but as harmful to the pursuit of worldly objectives such as economic prosperity or social reform. Accordingly, they are apt to insist that at bottom they all hold the same theological beliefs. When formulated, these beliefs consist of heartening general propositions such as, «We are all children of God» [111].

This is not to suggest that issues, whether worldly or otherwise, are the only ground on which religious or secularist groups are prone to impair the liberty or equality of others. There are also tribal factors of the kind previously mentioned—historical memories, ethnic differences, and the like. These were once a source of considerable religious tension in the United States, but over time they too have diminished, in part on account

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[107] See SMITH, «Religious Activism—the Historical Record», 27 *Wm. & Mary L. Rev.* (forthcoming), and sources cited.

[108] AHLSTROM, *supra* n. 8 at 361, 374; GAUSTAD, 16, 21.

[109] GAUSTAD, *supra* n. 67 at 340-45.

[110] HERBERG, 243.

[111] Id. at 244-45.

of the overriding concern for worldly objectives such as economic prosperity or social reform.

Another prevalent characteristic of the American people is their devotion to religion. Compared to other western countries, religious belief is unusually widespread in the United States. So is the view that people ought to be religious believers, that religious belief in itself is desireable.

Here again our witnesses agree strongly with each other. TOCQUEVILLE commented repeatedly on the pervasiveness of American religion in the 1830s; WEBER found the same conditions 70 years later; and BELLAH, BERGER, and HERBERG have brought the observation nearly up to date [112].

This characteristic is at least partly explicable by the one just discussed. If religion derives its values from people's worldly aims, and if it is judged mainly by its contribution to their worldly aims, it is almost certain to be found desirable; it constitutes a useful means to ends determined on other grounds. BERGER made a similar point when he concluded that organized religion «is functional precisely to the degree in which it is passive rather than active, acted upon rather than acting. It is in this capacity that it is respected socially and supported politically» [113].

The religious devotion of the American people also has important consequences for church-state relations. From the Enlightenment of the eighteenth century to today, certain governments have sought to suppress religion in general because it has been thought to interfere with worldly interests. In the United States, there has never been any significant movement toward that end [114].

II. SCHOOL LAW

In the United States, the schooling of children has given rise to an abundance of church-state issues. Concerning public schools, to what extent may they teach or practice religion? To what extent may they teach material that offends some people's religious beliefs? As for religious schools, to what extent may they operate as an alternative to public schools? To what extent may government regulate them? To what extent may it support them financially? We will touch on the major aspects of all of these issues, without exhausting any of them.

To Professor PHILLIP JOHNSON we owe the insight that the law on these issues is inextricably interrelated. The doctrine on any one issue is dependent upon, and may even be a reaction to, the doctrine on other

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[112] TOCQUEVILLE, *supra* n. 98 at 303-07; WEBER, *supra* n. 104 at 302-03; BELLAH, *supra* n. 67; BERGER, 31-34; HERBERG, 46-56, 72, 84.

[113] BERGER, 103.

[114] MURRAY, *supra* n. 6 at 58.

issues [115]. Analytically, there is no clear-cut beginning or end to the subject. Perhaps the best way of dealing with this dilemma is to take up the issues somewhat chronologically. We will examine them roughly in the order in which they have attracted widespread public attention, particularly in the courts since World War II.

Section A deals with the first and perhaps the only issue to be well-settled, the right of religious schools to substitute for public schools. Sections B and C turn to the other side of the picture. They deal with the teaching and practice of religion in the public schools, and the teaching there of what some people regard as anti-religion. Sections D and E return to religious schools. They concern government financial support for these schools, and government regulation of them. Section F sums up the interrelationship of the law on these various issues.

On each of the issues we will look far beyond the prevailing decisions of the U.S. Supreme Court. We will also be concerned with the decisions of state courts and the laws and practices of the legislative and administrative branches of government, local and state as well as federal. Moreover, we will briefly relate all of these elements of law to their history, their context of changing school conditions, and the attitudes toward church-state issues described in the previous part.

A) *The Right of Religious Schooling*

At the start of the country's history, most schools for children were run by religious bodies, or at least by people with strong religious commitments [116]. With the founding of public schools in the middle third of the nineteenth century, religious schools soon dwindled to secondary importance. By the 1960s, attendance at non-public schools had shrunk to one of every seven children [117], and only two religious bodies ran extensive school systems. Both were the product of the renewed large-scale immigration that also began in the middle third of the nineteenth century, and as such they expressed a desire to preserve religious and ethnic identity [118]. By far the bigger of the two systems belonged to the Catholic Church; in 1960, Catholic school students constituted 90% of the entire private school population [119]. Lutherans, particularly members of the Mis-

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115 JOHNSON, «Concepts and Compromise in First Amendment Religious Doctrine», 72 *Calif. L. Rev.*, 817, 840-41 (1984).

116 STOKES, *supra* n. 46 at 677.

117 FELLMAN, *Religion in American Public Law,* 71-72 [hereafter cited as FELLMAN]; MORGAN, *supra* n. 40 at 39.

118 STOKES, 645.

119 COOPER, «Who Operates Private Schools?», *IFG Policy Perspectives* (Winter/Spring 1985).

souri Synod, a midwestern branch of the denomination, ran the only other extensive religious school system [120].

Government in the United States has almost invariably allowed religious schooling. Moreover, when the states began enacting compulsory school statutes in the last third of the nineteenth century, religious schools were deemed to satisfy the requirement [121]. To be sure, the schools have typically been subject to government regulation to assure that they serve certain social interests, and they have been denied most of the government financial aid given to public schools; much more will be said later on these two points. Nevertheless, the prerogative of educating children in religious schools has almost never been in serious legal doubt.

Only a few states ever came close to abolishing religious schools. Just after World War I, as part of a campaign to «Americanize» the schools, several midwestern states enacted statutes requiring that all elementary schooling be in English. This statute bore especially heavily on the Lutherans, much of whose Schooling was in German [122]. Likewise, in the 1920s, as part of a similar campaign, the voters of Oregon adopted an initiative forbidding parents to send their children to private schools, except those that could get the approval of the local school superintendent. This law was mainly aimed at Catholic schools in the state [123].

Both sets of laws were promptly challenged in court. When the English-language statutes reached the U.S. Supreme Court in 1923, it held them invalid under the U.S. Constitution by a vote of 7-2 [124], and two years later, in *Pierce v. Society of Sisters,* it unanimously struck down the Oregon initiative [125]. The Court based both decisions on a general liberty of teachers and parents to do as they please and made no mention of the religious aspects of these cases. Almost half a century later, however, the Court reinterpreted *Pierce* to rest alternatively on the right of parents to educate their children in the family religion [126].

The nearly universal practice of allowing religious schooling, as well as the Supreme Court decisions declaring it to be a federal constitutional right, are manifestations of one of the main principles of church-state re-

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120 STOKES, 675.

121 MCLAUGHLIN, *A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870-1945,* 65-67 (1946) [hereafter cited as MCLAUGHLIN].

122 HOWE, *supra* n. 3 at 121; MCLAUGHLIN, 102-03; YUDOF, KIRP, VAN GEEL & LEVIN, *Educational Policy and the Law,* 44 (2nd ed. 1982) [hereafter cited as YUDOF]. For a description of a similar episode in Wisconsin near the end of the 19th century, see MCLAUGHLIN, 72-74; STOKES, 674.

123 MCLAUGHLIN, 106-08; YUDOF, 11-12, 13. YUDOF and his coauthors observe what many other scholars overlook, that the Oregon statute did not purport to abolish private schooling altogether.

124 Meyer v. Nebraska, 262 U.S. 390 (1923).

125 268 U.S. 510 (1925).

126 Wisconsin v. Yoder, 406 U.S. 205, 213-14, 232-33 (1972).

lations on which the people of the United States generally agree. They exemplify the proposition that government should not interfere with the exercise of religion unless it has an unusually strong reason. To be sure, in prior times, evangelical Protestants, joined by liberal Protestants, Jews, and secularists, sometimes asserted that religious schools do considerable harm to this-worldly interests. They charged Catholic schools in particular with promoting social disunity and teaching anti-social values [127]. Even at their height, however, these criticisms were insufficient to overcome the presumption in favor of religious liberty.

B) *Religion in the Public Schools*

As we saw before, beginning in the middle third of the nineteenth century, public schools generally superseded those run by religious bodies. From the start, however, the new schools were steeped in Protestantism. There were daily readings from the King James Version of the Bible, typically without comment. These were often accompanied by prayers such as the so-called Lord's Prayer. School ceremonies characteristically began with an invocation and ended with a benediction. The schools celebrated the most important Protestant holidays, especially Christmas. They held baccalaureate services in conjunction with graduation. Perhaps most important of all, the teaching of non-religious subjects explicitly or implicitly imparted a Protestant point of view [128].

At the same time, many states by law forbade the teaching of what was called «sectarian» religion in the public schools, and schools districts elsewhere did the same by common consent [129]. This was an important early manifestation of the widely held principle that government should not prefer some religious groups over others. By sectarianism, however, most government officials of the nineteenth century meant the beliefs and practices of particular Protestant denominations—and of the Catholic Church; they did not regard non-denominational Protestantism as sectarian. Accordingly, some states expressly exempted reading of the Bible without comment from the prohibition of sectarianism [130].

In the first third of the twentieth century, growing concern with the «secularism» of the society led to the development of more concerted programs for the teaching of religion. Many states enacted statutes or issued administrative rulings allowing public schools to set aside time for religious instruction as such. The most widespread of these programs was

[127] STOKES, 659-60, 737. Justices of the U.S. Supreme Court have occasionally expressed this view. SMITH, «The Special Place of Religion in the Constitution», 1983 *Sup. Ct. Rev.*, 83, 98-100.

[128] SANDERS, *supra* n. 41 at 195-96, 253-55; STOKES, *supra* n. 46 at 573-79; YUDOF, *supra* n. 122 at 125.

[129] MCLAUGHLIN, *supra* n. 121 at 26, 46; STOKES, 69-70.

[130] MCLAUGHLIN, 26; STOKES, 554.

called «released time». Typically lasting for an hour or so each week, the classes were conducted by the religious bodies themselves, sometimes in the schools, sometimes in churches. In mixed communities, there was usually a class for Catholics and Jews as well as Protestants. Students not wishing to participate in the program attended ordinary non-religious classes or study hall [131].

These practices, particularly the daily classroom exercises, have given rise to one of the few classic controversies in the history of American church-state relations. From the beginning, many of the Protestant denominations, including the largest and most dynamic—the Methodists and Baptists, readily supported the public schools, including the teaching and practice of moderate, non-denominational Protestantism; the other main denominations soon joined the movement [132]. On the other hand, Catholics objected strenuously to use of the King James Version of the Bible, including its rendition of the Lord's Prayer, to reading of the Bible without authoritative clerical comment, and to teaching from a Protestant point of view [133].

As a result of Catholic and other protests, government significantly extended the value of religious equality in the public schools beyond non-denominational Protestantism. By the middle of the twentieth century, nearly all school districts, either on their own or at the behest of state authorities, stopped requiring students to participate in the Bible readings and prayers; objecting students were excused during the exercises [134]. Some districts also sought a program of Bible readings and prayers that would be generally acceptable to the various religious bodies in the locality [135]. Moreover, when objections were raised, some districts took pains to avoid the teaching of non-religious subjects from an explicitly Protestant point of view [136].

A major motive of the protests by Catholics was to lay a basis for the claim that government ought also to fund Catholic schools. When Catholics eventually built religious schools with their own resouces, they mostly ceased objecting to daily exercises in the public schools. Indeed, in recent times many Catholics have become supporters of religion in the public schools [137]. Leadership of the opposition to the practices has passed to strict separationists, who regard nearly all government support of religion as objectionable [138].

State and local authorities were less ready to adopt the strict separa-

131 McLAUGHLIN, 175-78; STOKES, 525-30. Also see STOKES, 500-15.
132 Sources cited *supra* n. 128.
133 STOKES, 549-50, 566-67, 573-79.
134 Abington School Dist. v. Schempp, 374 U.S. 203, 272 (1963) (concurring opinion).
135 STOKES, 570.
136 Id. at 573-79.
137 Id. at 545-47, 566; HOWE, *supra* n. 3 at 130-31.
138 STOKES, 547-48, 567-68, 571.

tionist position. Many districts dropped the daily exercises altogether, some on their own, others because the exercises were declared to be forbidden by state constitutional or statutory law [139]. On the other hand, the courts in most states ruled that the exercises were permissible [140]. Indeed, in the early twentieth century, as part of the attack on secularism in the society, roughly a dozen states passed statutes requiring daily reading of the Bible in the public schools [141].

The upshot was that at the start of the 1960s, according to one reputable study, 42% of the school districts in the United States still had daily Bible readings, and many of them also recited daily prayers. These districts were concentrated in the northeastern and southern parts of the country. According to the same source, 88% of the public schools in the country celebrated Christmas in some way, 87% held baccalaureate services, and 30% of the school districts had released time programs of some sort [142].

After World War II, opposition to religion in the public schools shifted from local and state forums to the federal courts, particularly the U.S. Supreme Court. The first cases to reach the Court involved the released time program, whereby the public schools released students for an hour or so of religious instruction each week. In 1948, by a vote of 8-1, the Court ruled that the program violated the U.S. Constitution when conducted inside the public schools [143]. The decision aroused strong criticism from many Catholics and mainline and evangelical Protestants [144]. Within a few years the Court took another case for review, this time involving released time classes outside the public schools. By a vote of 6-3, the Court ruled that the latter program was valid; three of the Justices in the majority had voted the other way in the prior case [145].

Many commentators have professed great difficulty in reconciling the two decisions, claiming that the cases cannot be distinguished according to the amount of material government aid involved, the degree of pressure put on non-believing students, or the like. Indeed, some opponents of the released time program have claimed that the only tenable explanation of the later decision is that the Supreme Court succumbed to political pressure [146]. This may have been true of some Justices; there is substantial evidence that it was not true of others [147].

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139 SCHEMPP, *supra* n. 134 at 272-75.

140 ANTIEAU, *supra* n. 85 at 53; FELLMAN, *supra* n. 117 at 98-99.

141 SCHEMPP, *supra* n. 134 at 269.

142 FELLMAN, 84; also see CHOPER, «Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights», 83 *Mich. L. Rev.*, 1, 77 (1984) [hereafter cited as CHOPER].

143 McCollum v. Board of Educ., 333 U.S. 203 (1948).

144 FELLMAN, 88-89; STOKES, 522.

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

146 «The "Released Time" Cases Revisited», 83 *Yale L. J.*, 1202, 1228, nn. 151-55 (1974).

147 Id. at 1228-29.

In any event, the decisions can be adequately understood in terms of the earlier discussion of traditional American attitudes concerning government support for religion. There is no social consensus on the issue, even at the level of principle; rather, there is an array of traditions within the society. The decisions of the Court, whether intentionally or otherwise, reflect this pluralism by granting a measure of legal support to each of the competing positions [148].

The next cases which reached the U.S. Supreme Court in the early 1960s concerned the much more controversial practice of daily Bible reading and prayer. In one case, the state board of education of New York had taken the unusual step of recommending to local school districts a prayer that was calculated not to offend the great majority of religious believers in the state [149]. The other cases were more typical; the schools began the day with a reading from the Bible, sometimes using different translations in turn, and sometimes adding recitation of the Lord's Prayer. In *Engel v. Vitale* [150] and *Abington School Dist. v. Schempp* [151], both times with only one dissenting vote, the Court held that all such practices violate the U.S. Constitution.

There are at least two ways of understanding what the Supreme Court did, both supportable by its opinions [152]. First, the Court may have thought that the exercises put pressure on non-believing students to participate, even though they could be excused upon request, or that the schools unavoidably ran the risk of favoring some religious beliefs over others, as in the nineteenth century. From this viewpoint, the practice offended principles of religious equality widely shared in the society. Second, the Court may have regarded the practice as a form of government support for religion in general, an issue on which there is no national consensus. By ruling against the practice, the Court temporarily committed itself to the strict separationist position, or perhaps to one strand of the evangelical Protestant tradition.

In any event, the decisions again aroused strong criticism from many Catholics and mainline and evangelical Protestants [153]. After a time, the balance of public opinion seemed to be shifting in favor of the decisions, as leaders of the mainline Protestant denominations joined liberal Pro-

[148] This article being descriptive rather than critical, there is no call to appraise the outcome of these cases. Note, however, that many American legal scholars would object to the Supreme Court's mediating among competing social positions as a betrayal of constitutional principle. It is also worth noting that the Court might better have achieved the same outcome by declining to pass on the issue at all. Similar remarks apply to the discussion *infra* at n. 164, 206.

[149] «Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.»

[150] 370 U.S. 421 (1962).

[151] 374 U.S. 203 (1963).

[152] For example, compare id. at 208-09 with 223.

[153] MORGAN, *supra* n. 40 at 76-77.

testants, Jews, and secularists in defending the Court [154]. In the past decade, however, evangelical Protestants in particular have become increasingly critical of the decisions. An unusually careful recent survey of public opinion reported that 80% of the respondents favored permitting institutionalized prayer in the public schools and only 10% objected to it [155].

Some of the opposition to the decisions has taken the ofrm of outright resistance. Almost immediately, several hundred members of the U.S. Congress and a majority of the nation's state governors called for an amendment to the U.S. Constitution permitting prayer and Bible-reading in the public schools [156]. For a number of years, many school districts refused to abide by the decisions; in 1966, according to one study, over 50% of the districts in the south continued the old practices [157]. In the present decade, a renewed effort to amend the U.S. Constitution, supported by the President, won the votes of a majority of the U.S. Senate but not the two-thirds necessary for a constitutional amendment [158].

Meanwhile, in the 1970s, proponents of daily religious exercises developed two potentially valid alternatives. First, half of the states have enacted statutes authorizing a period of silence for reflection or prayer at the start of the school day. Opponents of the exercises immediately attacked the statutes in court as an evasion of the prohibition of institutionalized prayer [159]. The only case to reach the U.S. Supreme Court so far involved a statute whose sole purpose, according to the majority, was to promote prayer, and by a vote of 6-3 the Court invalidated the statute under the U.S. Constitution. However, one Justice in the majority stated that she would join the minority in upholding any of the other statutes not expressing a preference for prayer over other uses of the period of silence; another Justice strongly suggested the same; and the four other members of the majority also left open that possibility [160].

Second, high school students, mainly evangelical Protestants, have formed religious groups and asked public school officials for permission to hold meetings in school rooms while classes are not in session. Some school officials granted the requests, others denied them, and both were challenged in court for either supporting or impeding religious exercise. Most lower federal courts ruled against the student religious groups [161]. In 1984, however, the U.S. Congress intervened, forbidding public high

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154 YUDOF, 136.

155 MCCLOSKY & BRILL, *supra* n. 7 at 133; ROOF & MCKINNEY, *supra* n. 2 at 31.

156 YUDOF, 135-36.

157 Id. at 136-37; also see CHOPER, 78-79.

158 GUNTHER, *Constitutional Law,* 1491, n. 9 (11th ed. 1985).

159 «The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools», 96 *Harv. L. Rev.,* 1874-75 (1983).

160 Wallace v. Jaffree, 105 S.Ct. 2479, 2491, 2493, 2498-2501 (1985).

161 «The Constitutional Dimension of Student-Initiated Religious Activity in Public High Schools», 92 *Yale L. J.,* 499, 503 (1983).

schools that allow the use of school facilities by some extra-curricular student groups, and that receive federal funds, to deny use of the facilities to student religious and political groups [162]. It is too early to tell how most school districts and courts will react to the statute; the U.S. Supreme Court relinquished an opportunity to settle the question in its last term [163].

Again, there are at least two ways of understanding these recent actions by the Supreme Court and Congress. Supposing that the original Bible reading and prayer decisions, *Engel* and *Schempp,* were founded on a judgment that the practice violated widely agreed principles of religious equality, the Justices and members of Congress may think that the alternative practices are distinguishable. Arguably they do not put as much pressure on dissenting students to participate in religious exercises, nor do they run the same risk of preferring some religions over others. Indeed, in the case of student religious meetings, the Congress may think that to prohibit them when other extracurricular student meetings are permitted is to violate the principle against singling out religion for less advantageous treatment without an unusually good reason. On a somewhat related ground, the Supreme Court recently held, with but one dissent, that for officials of a public university to disfavor religious groups in the use of university facilities violates the U.S. Constitution [164].

Supposing instead that *Engel* and *Schempp* were based on opposition to government support for religion in general, an issue on which the people of the country disagree, the recent actions may broaden the law's position. The earlier decisions, which the Supreme Court has in no way disavowed, expressed the traditions of only a part of the society on the issue. The recent actions may have caused the law to reflect also the commitments of many other Americans concerning government support for religion. If so, this outcome is reminiscent of the position the Court arrived at over 30 years before in relation to released time programs.

The ceremonial practice of religion in the public schools—invocations and benedictions at school functions, the celebration of Christmas, baccalaureate services in conjunction with graduation, and the like—has yet to reach the U.S. Supreme Court. This is not because the practices have disappeared, nor is there universal acquiescence in them. Since *Engel* and *Schempp,* lawsuits have resulted in conflicting lower court decisions [165]. On this issue the Supreme Court is apparently content to reflect the pluralism of the society by leaving the matter to others.

As for the teaching of religion in the public schools, there seems to be widespread social agreement at least in principle, and perhaps for that

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[162] GUNTHER, *supra* n. 158 at 61-62 (Supp. 1985).
[163] Bender v. Williamsport School Dist., 106 S.Ct. 1326 (1986).
[164] Widmar v. Vincent, 454 U.S. 263 (1981).
[165] REUTTER, *The Law of Public Education,* 40 (3rd ed. 1985).

reason there have been few decisions at any level of the judiciary—other than on a topic discussed in the next section. On the one hand, most Americans would almost certainly object to the teaching of theological doctrines, modes of worship, or church structures peculiar to particular religious bodies. In many localities the same would probably hold for theism itself. On the other hand, there is also widespread agreement on the propriety of teaching certain tenets of morality in general, even though they may be rooted in Judaism and Chistianity [166]. Perhaps the most important of these tenets for Americans today is the immorality of racial prejudice.

In the only case on this issue to be decided by the U.S. Supreme Court during the last decade, the dispute was not about these general propositions but only about their application. In 1980, by a vote of 5-2, with two other Justices expressing no opinion on the merits, the Court ruled that posting the Ten Commandments in public school classrooms was impermissible under the U.S. Constitution. It characterized the program as support for particular theological doctrines rather than for morality in general [167].

C) *Anti-Religion in the Public Schools*

The reaction against exclusion of daily religious exercises from the public schools has taken another course. Many evangelical Protestants and some Catholics claim that the public schools now are not just non-religious but anti-religious. They have sought to exclude what they regard as the anti-religious elements from the public schools, just as Bible readings and prayers have been excluded.

Rarely, if ever, do the public schools explicitly teach disbelief of religion in general, or even of particular religions. To do so might violate the widely agreed principles that ordinarily government should not single out some or all religious groups for unfavorable treatment. On the other hand, the public schools do espouse certain views of this world; they teach students scientific theories, historical interpretations, moral values, and the like. The critics complain that some of these views are contrary to religious belief in general, or at least to the beliefs of their particular religious bodies.

There are at least two topics of widespread concern. One is the origins of humankind. Public schools typically teach the so-called Darwinist theory, which postulates that human beings evolved by natural means from simpler animal forms. Many evangelical Protestants object that this theory

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[166] STOKES, 512.
[167] Stone v. Graham, 449 U.S. 39 (1980).

is inconsistent with the biblical account, according to which God created human beings, and indeed all species of animals, separately. Another topic of widespread concern is sex education. Many public schools teach how human beings reproduce, methods of birth control, and the like. Critics complain that the schools are thereby encouraging extramarital intercourse, which is antithetical to the morality of their churches [168].

Concern about the teaching of human origins goes back at least to the 1920s. At that time, traditional evangelical Protestants were engaged in a strenuous campaign to counteract liberal tendencies in their denominations and elsewhere. Three southern states enacted statutes forbidding public schools to teach that human beings evolved from lower forms of life, and in other states school officials adopted the policy administratively. The campaign came to a climax with the trial of John Scopes, a biology teacher in a small town in Tennessee. The event attracted national attention, mainly because it pitted William Jennings Bryan, three times the Democratic candidate for President, who testified for the prosecution on the truth of the biblical account, against Clarence Darrow, renowned defense lawyer and outspoken secularist, who represented Scopes. The outcome of the trial was inconclusive. The jury convicted Scopes, but the Tennessee Supreme Court overturned the sentence on an incidental point. The anti-Darwinist statutes remained on the books, but they were never again applied. The administrative policies against Darwinism were effective for a considerably longer time [169].

Four decades later, opponents of the statutes, in an effort to win the conclusive victory previously denied them, contrived another lawsuit and this time got the case to the U.S. Supreme Court. In 1968 the Court ruled that the statute under attack violated the U.S. Constitution, because its original purpose had been to promote the biblical account [170].

The Supreme Court's decision would have been of little immediate consequence, were it not for the recent renewal of concern about the teaching of human origins. With exclusion of the Darwinist theory forbidden by the Court, critics next sought to add to the public school curriculum a non-theistic version of the biblical account. Several states and local school districts required that both views be taught or adopted textbooks that do so. When these programs were attacked in the lower federal

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168 «Freedom of Religion and Science Instruction in Public Schools», 87 *Yale L. J.*, 515, 519-22, 565 (1978).

Many religious believers also object to methods of moral training that disparage objective morality. «The Establishment Clause, Secondary Religious Effects, and Humanistic Education», 91 *Yale L. J.*, 1196, 1205-10 (1982). Books in public school libraries are another target of concern about anti-religion. For a recent U.S. Supreme Court decision on the subject, see Board of Educ. v. Pico, 457 U.S. 853 (1982).

169 CHOPER, *supra* n. 142 at 79-81; STOKES, *supra* n. 46 at 592-99.

170 Epperson v. Arkansas, 393 U.S. 97 (1968).

courts, however, the judges invariably invalidated them as another attempt to teach a religious doctrine in the public schools [171]. The Supreme Court has an opportunity to resolve the issue in its present term [172].

It may be too soon to understand fully the point of these judicial decisions. We may have to wait until some government body decides instead to exclude the entire subject of human origins from the schools. Some school districts have adopted this alternative in relation to sex education, and the lower courts have upheld them [173].

There is another form of relief for which critics of «anti-religion» in the public schools might ask—that their children be excused individually from the offending activities. School officials and courts are apt to be much more receptive to this plea. Many states and local school districts already excuse children from sex education classes upon request [174], and probably they would do the same for classes on human origins. Moreover, when critics complain to the courts about the failure of the schools to exclude these topics altogether from the curriculum, the courts typically respond that having their children excused from the classes is an adequate remedy [175].

The readiness of government to provide individual exemptions from offensive school programs again exemplifies the strength of the principle that government should not interfere with religious belief without an unusually good reason. Darwinism is generally regarded as sound science, worthy of being taught in the public schools. It may not be useful enough to overcome the presumption in favor of religious liberty.

The presumption has been carried to considerable lengths in two other school settings, both involving well-known sects. On the eve of World War II, more than one-third of the states, and many school districts elsewhere, required public school students to salute the flag at the start of the school day. The Jehovah's Witnesses, a group already widely resented at the time because of its proselytizing techniques, refused to salute the flag for religious reasons. Consequently children were expelled from school and their parents prosecuted [176]. When the issue reached the U.S. Supreme Court it repeatedly upheld the states [177], but finally it voted 6-3 that to require objectors to salute the flag violated the U.S. Constitution. Some

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171 87 *Yale L. J.*, at 515-17, 555-56, 559-60; McLean v. Arkansas Bd. of Educ., 529 F. Supp., 1255 (E. D. Ark. 1982); Aguillard v. Edwards, 765 F. 2d 1251 (5th Cir. 1985).

172 Edwards v. Aguillard, prob. juris. noted, 106 S.Ct. 1946 (1986).

173 87 *Yale L. J.*, at 565-67.

174 VAN GEEL, *Authority to Control the School Program,* 141 (1976).

175 87 *Yale L. J.*, at 547.

176 CHOPER, 18; STOKES, 600-06.

177 *E.g.,* Johnson v. Deerfield, 306 U.S. 621 (1939); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

of the Justices in the majority rested their decision on the general value of intellectual liberty, others on religious liberty in particular [178].

Seen in the latter light, the case involved what may be the quintessential offense—requiring people to avow beliefs antithetical to their religion. On the other side, however, there was arguably a weighty reason to interfere with the liberty; the decision was rendered in the midst of World War II, with patriotism at a premium. Consequently, the vote fifty years ago was relatively close. Today, a much larger proportion of people in the United States would probably endorse the decision [179].

The Amish are another sect who have tested the limits of religious liberty in relation to schooling. When they run their own schools, they refuse to comply with certain government regulations; more will be said of this later. They also object to giving their children any conventional schooling after the age of about 14, claiming that it will interfere with preparation for the Amish way of life. After several well-publicized clashes, the states in which they are concentrated finally resolved to let them alone, apparently with public approval [180]. Wisconsin, however, determined to prosecute the parents. When the issue reached the U.S. Supreme Court in 1972, it ruled that the Amish were protected by the U.S. Constitution; there was but one partial dissent [181].

This decision by the Supreme Court, and the practice of government officials in the other states, are an especially striking manifestation of the principle that government should not interfere with religious bodies without an unusually good reason. For at least a century, the people of the United States have been strongly committed to the value of elementary and secondary schooling. Yet this commitment seems not to have come close to overriding the value of religious liberty. To be sure, this-worldly considerations were also involved. The Court openly expressed its admiration for the Amish contribution to American life, and it emphasized that it might not grant the same protection to less worthy groups [182].

D) *Financial Aid to Religious Schools*

Yet another reaction of evangelical Protestants to the exclusion of daily religious exercises from the public schools, and to what they regard as a general decline in the teaching of traditional morality there, has been

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[178] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), especially at 643-46 (concurring opinions).

[179] See CHOPER, 19; MCCLOSKY & BRILL, *supra* n. 7 at 108; Wooley v. Maynard, 430 U.S. 705 (1977).

[180] CHOPER, 180-81; YUDOF, *supra* n. 122 at 33-34.

[181] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[182] Id. at 222-27, 235-36. The impact of Yoder on prior lower court decisions rejecting related claims of religious liberty is still uncertain. YUDOF, 34-35.

to send their children instead to religious schools. For these and other reasons [183], between 1965 and 1984 the number of students attending evangelical Protestant schools rose from 100 thousand to over 900 thousand [184]. Catholics also have used the exclusion of religion from the public schools as a further justification for perpetuating their own school system. However, for various reasons, including the increased integration of Catholics into middle class American life, during the same period enrollment in Catholic schools dropped from 5.6 million to under 3 million [185].

These developments in the last two decades have largely remade the pattern of religious schooling in the United States. In 1960, Catholic schools accounted for 90% of all private school attendance and Protestant schools for only a part of the remaining 10%. In 1984, the proportion of Catholic school attendance was down to 57%, while Protestant school attendance had risen to 28%, including 17% at evangelical Protestant schools. Jewish religious schools accounted for another 2% of the private school population and non-religious schools for most of the remainder [186].

The changes in religious school attendance have had a major effect on two aspects of church-state relations concerning religious schools. One is the issue of government financial aid to these schools, the subject of this section. The other is regulation of religious schools by government officials, which is discussed in the next section.

Financial aid to religious schools is another of the handful of classic issues of church-state relations in the United States. Yet even here there is widespread agreement at the margins. On the one hand, from the founding of the nation in the last third of the eighteenth century, governments have exempted church property, including the property of religious schools, from property taxes. Later, as taxes were extended to other assets and transactions, the exemption was also extended. Thus, religious institutions need not pay income taxes on their ordinary earnings, and in some states, even their income from profit-making businesses is exempt from taxation. Moreover, the individual taxpayer can deduct contributions to religious institutions in the payment of income and estate taxes. In many states, certain of these exemptions are written into their constitutions [187].

To be sure, tax exemptions for religious bodies have been opposed by many liberal Protestants, Jews, and secularists as improper government

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183 Among the other reasons is avoidance of court-ordered racial integration of the public schools, particularly in the south. YUDOF, *supra* n. 122 at 63. In the view of one southern politician, «They put the Negroes in the schools, and now they've driven God out». FELLMAN, *supra* n. 117 at 95.

184 COOPER, *supra* n. 119.

185 Ibid; HOWE, *supra* n. 3 at 130-31.

186 COOPER, *supra* n. 119.

187 ANTIEAU, *supra* n. 85 at ch. 6; FELLMAN, 44-45; MCLAUGHLIN, *supra* n. 121 at 60-61, 117-18; Walz v. Tax Comm'n, 397 U.S. 644, 676-78, 682-85 (1970).

support for religion [188]. These groups, however, have been almost alone in their position .When a case challenging the property tax exemption reached the U.S. Supreme Court in 1970, Catholics, mainline Protestants, and even evangelical Protestants joined in asking the Court to uphold the practice. The Court did so with only one dissenting vote [189].

It took more time to hammer out widespread agreement on the matter of unrestricted grants of money to religious schools. In Virginia, a proposal to institute a tax for educational purposes, whereby taxpayers were encouraged to designate a religious body as the recipient of their payments, was defeated in a historic clash in 1785 [190]. In other states or localities, however, including Massachusetts and New York, grants to religious schools continued well into the nineteenth century [191]. Practices became more uniform starting in the middle third of the century, with the development of public schools and the increasing identification of religious schools with the two immigrant groups, Catholics and German Lutherans. By the end of the century, most states had adopted constitutional provisions forbidding grants of government funds to religious schools. By the 1960s, nearly all other states had accomplished the same legal outcome by constitutional amendment, statute, or judicial decision [192].

Catholics traditionally have seen nothing improper in unrestricted government grants to religious schools. They have generally declined to claim such aid, however, considering the strength of the opposition [193]. Their diffidence has been well-advised, for this is one point on which evangelical and mainline Protestants tend to be in wholehearted agreement with strict separationists. Even Lutherans, with an extensive school system of their own, generally renounced unrestricted grants to religious schools [194].

On the in-between issue of government subsidies for non-religious activities in religious schools, no general agreement had been worked out by the 1960s. To speak only of the programs most often discussed, government bodies generally provided for the physical welfare of religious school students through medical care, subsidized lunches, and the like. Most bodies declined to supply textbooks, even on non-religious subjects, and in some states they were forbidden to do so by state law. Governments divided fairly evenly on whether it was desirable and permissible to furnish free bus transportation to and from religious schools [195].

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188 MORGAN, *supra* n. 40 at 42-43.

189 WALZ, *supra* n. 187.

190 The story is told from the strict separationist point of view in Everson v. Board of Educ., 330 U.S. 1, 36-38 (1947) (dissenting opinion).

191 FELLMAN, 43; STOKES, *supra* n. 46 at 684.

192 ANTIEAU, 2-3, 24-29; FELLMAN, 72-73; MCLAUGHLIN, 26, 46-48, 120.

193 STOKES, 649, 682.

194 Id. at 644, 693.

195 ANTIEAU, 29-36; FELLMAN, 73-76, 81-83; STOKES, 720.

As one might expect, strict separationists, bolstered by public school employees [196], tended to regard most of the programs as improper government support for religion, and on this issue evangelical Protestants traditionally took the same view. Catholics tended to regard all of the programs as permissible and desirable. In the middle, mainline Protestants were inclined to distinguish according to certain verbal formulae. Thus, it was said to be permissible to give «indirect» aid to religious schools but not «direct» aid, or to give aid to religious school *children* but not to the schools themselves [197].

Except for a handful of earlier rulings that were no longer regarded as conclusive by the 1940s [198], only one of these programs reached the U.S. Supreme Court before the late 1960s. In 1947, the Court held that providing free bus transportation did not violate the U.S. Constitution. The Court's disposition of the case reflected how closely the country was divided on the point. The vote was 5-4, and before upholding the program the majority asserted as an absolute principle the view that governments should give no financial support of any kind to religion [199].

Thus matters stood at the time of the Supreme Court decisions on Bible reading and prayer in the public schools. Since then, on both the federal and the state level, there has been a proliferation of financial aids to religious schools earmarked for non-religious uses [200]. This proliferation is related to the changes in religious school attendance described before. The growth of evangelical Protestant schools has given that group of religious bodies a material stake in financial aid that they never had before. It has also changed the image of religious schooling in the eyes of evangelical and mainline Protestants from an almost purely Catholic enterprise to one in which Protestants are also deeply involved. At the same time, one of the factors that has contributed to the decline in Catholic school attendance, increased integration of Catholics into middle class American life, has made non-Catholics less reluctant to aid Catholic schools. The decline has also made Catholic schools more in need than ever of government financial support [201]. Yet the people of the United States remain sharply divided on the issue.

Opponents of financial aid to religious schools have repeatedly carried their fight against the new programs to the federal courts, and a remarkable number of these challenges have reached the U.S. Supreme Court. Speaking generally, the Court has responded by drawing an array of fine distinctions among similar forms of aid. It has continued to uphold free bus transpor-

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196 MORGAN, 58-59.
197 Id. at 52, 75; STOKES, 688.
198 The most important was Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930).
199 Everson v. Board of Educ., 330 U.S. 1 (1947).
200 CHOPER, *supra* n. 142 at 182-83.
201 MORGAN, 38-40, 130-31, 134, 138.

tation to and from religious schools but has invalidated the provision of buses for field trips [202]. It has permitted government officials to furnish textbooks on non-religious subjects but not other materials such as maps and laboratory equipment [203]. It has invalidated reimbursement of religious schools for administering and grading state-required tests that are prepared by teachers but not tests prepared by the state [204]. It has forbidden governments to send their employees into religious schools to give remedial, psychological, and counseling services but not to give these services outside the buildings [205]. The summary could be prolonged, but presumably readers have gotten the point.

Almost every one of these cases was decided with at least three Justices out of nine in dissent. The ultimate may have been reached in 1977, when the Supreme Court reviewed a package of six aid programs enacted by the Ohio legislature. Three Justices would have upheld all six programs, one would have struck them all down. The other five Justices were arrayed in between, with no more than two agreeing on the validity of the same number of programs [206].

Commentators, for obvious reasons, have tended to characterize these decisions as exceptionally refined or even incoherent. They may be adequately understood, however, in light of the society's inability to agree, even at the level of principle, on the issue of government support for religion. By drawing fine distinctions among similar forms of aid, the decisions, whether intentionally or otherwise, give legal expression to the pluralism of traditional American views on the issue. This is the same outcome that we saw previously in connection with religion in the public schools.

E) *Regulation of Religious Schools*

The recent extraordinary growth of evangelical Protestant schools has also had an effect on government regulation of religious schooling. Regulation of private schools goes back to the last third of the nineteenth century, when states began adopting compulsory school statutes. By now patterns of regulation vary widely from state to state. To mention some typical provisions, most states prescribe a minimum number of hours in the annual private school program. Most require the teaching of certain

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[202] Wolman v. Walter, 433 U.S. 299, 252-55 (1977).

[203] Compare Board of Educ. v. Allen, 392 U.S. 236 (1968), with Meek v. Pittenger, 421 U.S. 349, 362-66 (1975).

[204] Compare Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973), with Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

[205] Compare MEEK, *supra* n. 203 at 367-72, with WOLMAN, *supra* n. 202 at 244-48.

[206] WOLMAN, *supra* n. 202.

basic courses. Many forbid private schools to operate without the approval of government officials, in whom considerable discretion is vested. Some states require private school teachers to qualify for a professional certificate. Some require the use of textbooks on non-religious subjects approved by government officials [207].

As extensive as the scheme of regulation may be in some states, it has been almost universally accepted as appropriate until recent times. Even the Catholic Church, whose system is the main object of private school regulation, has generally acquiesced [208]. Indeed, in *Pierce,* the case in which the U.S. Supreme Court invalidated the Oregon initiative that virtually abolished private schooling, the Court acknowledged that government may administer reasonable regulations to assure that the schools are performing certain basic social duties [209]. At the same time, the earlier Supreme Court decision invalidating the requirement that private school teaching be wholly in English, and a similar decision shortly after *Pierce,* constituted a warning that government may not regulate so strictly as to destroy in effect the prerogative of non-public schooling [210].

Until the last decade, the only religious body persistently resisting government regulation of religious schools was the Amish. For this sect, the main stumbling block was the requirement of teacher certification, since the Amish want their own people teaching in their schools but shun the higher education necessary to qualify for certificates. In the states in which the Amish are concentrated there were highly-publicized conflicts on this issue. Public opinion having swung to the side of the Amish, state officials resolved to let the sect go its own way unmolested [211].

With the great expansion of evangelical Protestant schools, many more groups are now taking the same position as the Amish. Their resistance has given rise to lawsuits challenging the propriety of government regulation of religious schools, and so far the evangelicals have won some partial victories. All courts have upheld state requirements relating to the duration of the school program and the teaching of certain basic courses. Several courts, however, have struck down the requirement that specified amounts of time be devoted to these courses, and at least one court has also invalidated the requirements of teacher certification and government approval of textbooks. In another state the victory was won instead in the legislature, which largely abolished regulation of private schools while a court challenge

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[207] McLaughlin, *supra* n. 121 at 92, 95-96, 100-01; van Geel, *supra* n. 174 at 153-57, 166-68.

[208] Stokes, *supra* n. 46 at 735; Yudof, *supra* n. 122 at 46.

[209] 268 U.S. 510, 534 (1925).

[210] Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokushige, 273 U.S. 284 (1927).

[211] Yudof, 33-34.

was pending [212]. It is unclear to what extent other legislatures or courts will respond similarly [213].

These decisions, legislative and judicial, are reminiscent of the case involving Amish objections to compulsory schooling after the age of 14. They are a remarkable testimony to the strength of the principle that government should not interfere with religious practices unless it has an unusually strong reason. They may also be evidence of the extent to which some people today have more confidence in traditional religion than in education supervised by government officials, even for the promotion of this-worldly values.

Religious schools are subject to numerous other kinds of government regulations. Two major disputes that recently reached the U.S. Supreme Court further illuminate the contours of the value of religious liberty. First, the federal government guarantees the collective bargaining rights of the employees of most large private enterprises. The agency administering the program extended it to teachers in the Catholic school system. The church brought a lawsuit challenging the action, and in 1979 the Court upheld the challenge by a vote of 5-4. It did so on the ground that the statute did not authorize the action of the agency, but the Court acknowledged that it was mainly seeking to avoid what it regarded as a serious issue of religious liberty [214].

Second, as mentioned before, the federal government, along with perhaps all of the states, exempts religious schools from payment of income taxes on their ordinary earnings. Federal tax officials withdrew the privilege for religious schools practicing any kind of racial discrimination or separation. Certain evangelical Protestant schools attacked the action in court, claiming in part that the government was infringing their religious belief in the differences between the races. When the case reached the Supreme Court in 1983, the Justices had little apparent difficulty in upholding the tax officials; without any dissent they disposed of the claim of religious liberty in two pages [215]. There may be wide agreement on the presumption that government should not burden religious practices, but racial integration in education is an overriding national dogma.

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[212] «The State and Sectarian Education: Regulation to Deregulation, 1980 *Duke L. J.*, 801-03, 818-28.

[213] *E.g.*, see State v. Shaver, 294 N.W. 2d 883 (N.D. 1980); State v. Faith Baptist Church, 207 Neb. 802, 301 N.W. 2d 571 (1981); Sheridan Rd. Baptist Church v. Department of Educ., 132 Mich. 1, 348 N.W. 2d 263 (1984).

[214] NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

[215] Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983).

F) *Interrelatedness of the Law*

The introduction to this part claimed that the law of church-state relations in the schooling of children is closely interrelated. We have already seen examples of this interrelatedness *within* the sections of this part. The invalidity of released time classes in the public schools is balanced by the validity of holding the classes elsewhere. The invalidity of Bible reading and prayers in the public schools may be balanced by permitting periods of silence at the start of the school day, and also by the requirement that student prayer meetings be permitted equally with other student activities. The invalidity of anti-Darwinist statutes is balanced by the likely exemption of objecting students from Darwinist classes. The invalidity of many financial aids to religious schools, including unrestricted grants, is balanced by the validity of many other similar aids.

It may be even more important to note the many interrelationships *between* the sections of this part. Notwithstanding what used to be a widespread American preference for public education, the people of the United States have clearly espoused the right of parents to send their children to private religious schools (section A). In return, however, they have generally taken the position that if parents insist on sending their children to religious schools, where society's interests may be served less fully, the parents should have to do so largely at their own expense (section D). They have also generally insisted on the power to regulate religious schools, to assure that the social interests supposed to be promoted by the public schools will be served at least to some extent (section E). Indeed, insofar as government has given financial support to religious schools, that has constituted a further justification for regulating them. Finally, a substantial minority of the people, backed to a considerable extent by the U.S. Supreme Court, wants the public schools to be free of religious teaching and practices (section B). When criticized for preferring non-believers over religious believers, proponents of this policy have pointed to the right of parents to send their children to religious schools as adequate compensation.

The rest of the people have not regarded the compensation as fully adequate. Most religious teaching and practice is now excluded from the public schools, notwithstanding the widespread view that this policy unduly disserves individual and social interests in religious education (section B). Consequently, there may be increased sympathy for parents who think it necessary to send their children to religious schools. In the last two decades, the people of the United States have been more willing than previously to relieve parents of some of the financial burden of religious schooling through government aid (section D). Although it is too early to know for certain, they may also have become more willing to allow religious schools to

operate without extensive government regulation (section E). There seems also to be greater sympathy for religious believers who remain in the public schools. Considering that non-believers to a great extent have been freed from offensive religious activities, government may be increasingly willing to excuse believers from activities that they regard as anti-religious (section C).

In the end, we come back to what was said before about the common outlook toward religion in the United States. The people as a whole retain their devotion to religion. At the same time, they are committed to their religious pluralism, and they have no wish to let religious differences interfere with their worldly objectives. In relation to school law, this outlook is expressed in the preservation of a balance among groups that disagree on church-state issues. No generally recognized group is to have its way entirely, or to be entirely defeated. All are to enjoy a share in the outcome, as a matter both of mutual respect and of a desire to foster cooperation on worldly ends. To put the matter on a rather more exalted plane, suppose that «humanity is divided into two categories, according to one's idea of justice. For some it is a balance, a compromise. For others... [it is the] triumphant realization» of some absolute ideal [216]. In their church-state relations, the people of the United States have chosen the former way.

[216] BERNANOS, *The Diary of a Country Priest*, 63 (paper. ed. 1954).