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NOTES
NINETEENTH CENTURY JUDICIAL THOUGHT CONCERNING CHURCH-STATE RELATIONS

The adoption of the first amendment to the Federal Constitution assured Americans that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This clause was included in the amendment because of two public realizations: (1) that a federal establishment of religion would be unsuccessful, since the religious sympathies of the people were divided among a number of sects, each in itself composed of far less than a majority of the voters; and (2) that force cannot and ought not control the religious opinions of men.

Although this provision did not bind the states, by 1833 all the state constitutions but one had provisions prohibiting establishment of religion and guaranteeing freedom of conscience. Since legal history is peculiarly valuable in settling live constitutional issues, an historical approach to Church-State problems should enlighten more than mere pursuers of esoteric data; therefore, discussion in this Note will be limited chiefly to the determination of what the nineteenth century courts considered the proper relationship between the Church and the State.

The two Church-State relationships most often advocated as proper throughout American history are each traceable to some alleged intention present at the constitutional convention of 1787. One view, propounded by Thomas Jefferson and James Madison favored complete separation. The reasoning behind it seems to be that since man's opinions are a naturally private matter, the State should penalize him in no way for holding them. Control of action, not thought, is the province of the State. If the State connects itself with religion in any way, it attempts to control opinion. The other view, held generally by churchmen, stressed the predominant Christianity of the delegates to the constitutional convention, and

1. U. S. Const. amend. I.
2. Story, Commentaries on the Constitution § 1879 (1833).
5. The New Hampshire constitution provided then and still provides that legislative authorization may be given to the towns to support "public Protestant teachers of piety, religion, and morality. . . ." N. H. Const. Pt. 1, art. 6.
asserted that they intended Christianity to be the religion of the nation, even though they prohibited its formal establishment or the interference with the religion of non-Christians.⁹

Even if Jefferson's "wall of separation" were erected, it could never be impregnable so long as subjects of the State have religious feeling. Where the inevitable points of contact erupt into conflict, the courts must determine the proper Church-State relationship.

CASES SUPPORTING AN INFORMALLY ESTABLISHED CHRISTIANITY

Just as there are limitations on freedom of speech or on any other constitutional freedom, there must be limitations on freedom of religion. Belief that action is divinely dictated cannot justify criminal conduct if government is to govern.¹⁰ Yet to retain religious freedom, conduct should not be judged criminal solely because it is prohibited by a religious doctrine. The standard for determining which acts are criminal must be non-religious or the State attempts to force religious standards on its subjects.

*Lindenmuller v. People*¹¹ upheld a conviction for defendant's desecration of the Sabbath by his staging a dramatic performance on Sunday. The court held that the act of the legislature punishing such conduct did not violate the New York constitutional provision granting free exercise of religion,¹² since that provision granted toleration to all other religions, but still left Christianity unaffected as the people's religion. Since the State recognized the general Christianity of the people, it could preserve their customs from desecration.

Few of the other cases upholding Sunday laws justify them by specific statement that Christianity is the informal State religion. Most courts sustain such laws as mere exercises of police power requiring that people be free from work one day in seven.¹³

The reasoning in the *Lindenmuller* case is reminiscent of that used by Chief Justice Kent in *People v. Ruggles*.¹⁴ Ruggles was indicted and convicted for contemptuously reviling the Christian religion. His conviction was upheld on the ground that by ma-

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9. Not all ecclesiastics took this position. Among the exceptions the Baptists are notable. They desire, the State's utter disconnection from the Church, since they thought religion would benefit by it. I Stokes, Church and State in the United States 112-14 (1950).
11. 33 Barb. 548 (N.Y. 1861).
12. N. Y. Const. art. 1, § 3 (1846).
liciously ridiculing Christ he had committed the common law crime of blasphemy, which still existed despite the New York constitutional provision allowing free exercise of religion. According to Kent that provision did not prevent the courts from recognizing offenses against religion. He denies, however, the necessity to protect similarly the religion of Mohamet or that of the grand Lama, since "the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those imposters."

Thus Lindenmuller and Ruggles stand for the proposition that the State can recognize and specially protect the religion of the majority, while extending mere toleration to the worship of the minority.

The rationale behind the State's preferment of Christianity is more fully explained in Updegraph v. Commonwealth, an 1822 blasphemy case from Pennsylvania. To the charge that punishment of blasphemy is religious persecution the court answered that the crime against God was not being punished, only the crime against man. Deriding Christianity is a crime against man because the morals of the people are Christian. Since it is the State's duty to protect morality, it must protect Christianity.

Implicit in this reasoning, however, is the assumption that the State has the right to protect morality even if based solely on religion. If the only justification for State enforcement of a moral precept lies in its foundation upon the religion of the majority, punishment for violation of that precept is punishment inflicted on religious grounds.

The theory that Christianity is this nation's religion has not been immune from recognition by the United States Supreme Court. In Vidal v. Ex'rs of Girard, though the Court sustained provisions of a will which established a school for orphans on condition that no ecclesiastics be allowed on the school grounds, there was dictum in the opinion that Christianity is part of Pennsylvania's common law in the sense "that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." Though the Court was merely construing Pennsylvania law, the language used approved the Kent theory that

15. N. Y. Const. art. 38 (1777).
16. 8 Johns. R. at 295.
17. 11 S. & R. *394 (1824).
18. 43 U. S. (2 How.) 126 (1844).
19. Id. at 198.
the religion of the majority should be preferred by the State at least in protecting it from malicious criticism. What is more distressing, the words quoted imply that the Court, itself an instrumentality of the State, is capable of making a distinction between true and false religion.

The reasoning used to support Bible reading in public schools was not often so openly pro-Christian as Kent's. Since the plaintiff in such cases was usually Roman Catholic, determination of Christian supremacy would be immaterial. When a Roman Catholic objects to the use of the King James version of the Bible in public schools, he does so on the ground that the State teaches sectarian doctrine. Few nineteenth century courts agreed with him.

In *Hart v. School District of Sharpsville* the court disagreed with the Catholic plaintiff in such a case. Since the moral system of the country was based on Christianity, the Bible was a proper book to be used in teaching morals to the children. Any version might be used, since it was beyond the court's power to decide which translation was correct. No State support of religion was present, since the State in teaching Christian morals was merely preserving itself. By recognizing the "best" moral system the State did not make a theological judgment, merely a secular determination of what would best perpetuate society.

The history of the nineteenth century courts shows a predominance of sympathy toward Christianity. In some cases this is explicitly revealed and justified as a preservation of American morals. In others devious justification for obviously pro-Christian laws is attempted by use of seemingly secular police power rationalizations.

Where the expressed sympathy appears, the court should be commended for its honesty, but condemned for its judicial establishment of one sect as superior to others. If the State is neither to establish a religion nor prohibit its free exercise, any expression of judicial sympathy for one type of religion is irrelevant. Whenever the expression is a necessary premise to a decision favoring Christians or disfavoring non-Christians, the State through its courts supports Christianity.

It has been seen, however, that these courts attempt to justify their preference of Christianity as an exception to constitutional limitations requiring Church-State separation. This they do by noting the obvious necessity for government to preserve morality. The difficulty of the argument, which on the surface seems valid,

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appears with the next step in reasoning. For some unproved and seemingly unprovable reason morality for these courts equals the moral teachings of the religion of the majority. Such a position reduces to the absurd the constitutional provisions which prohibit establishment or hindrance of religion. According to this doctrine, if the majority religiously believes freedom of conscience should not be allowed, the State may disallow it, despite the constitutional provision to the contrary. If the constitutional limitation is to retain any meaning at all, the standard of morality enforced by the State must be derived from a source other than religion. Though any moral system the State established would greatly parallel the Christian ethic, establishment of the Christian ethic, itself, would include some solely religious morals along with the civil morals necessary to good government.

Where the reason for the existence of a particular taboo was solely religious, many of the nineteenth century courts recognized the need for basing their maintenance of religious custom on some purely social and non-religious standard. This need can be seen in the attempts to defend on specious social grounds the continued punishment of blasphemers and Sabbath-desecrators.

**Cases Supporting Separation Without Preference**

*State ex rel. Weiss v. School Board,*21 another Bible reading case, uses language approving the moral system taught by the Bible.22 The case holds, however, that the Bible cannot constitutionally be used as a text book in public schools because of its sectarian nature. The book itself naturally tends to impart belief in its divine origin. The reason for the constitutional prohibition of State supported sectarian instruction23 is not State hostility toward Church. Rather it is the wish to promote both civil good, by ridding the school system of theological disputes, and religious good, by protecting the parents' interest in religious education.

In the concurring opinion of Justice Orton concise explanation is given this concept: "Religion needs no support from the state. It is stronger and much purer without it... The connection of church and state corrupts religion and makes the state despotic."24 Thus for these judges complete separation is necessary for the benefit of both government and religion. Religion is stronger when it is a movement

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21. 76 Wis. 177 (1890).
22. Id. at 195.
23. Wis. Const. art X, § 3.
24. 76 Wis. at 221.
of thought and not official force. Government thrives as religion strengthens, since the Church promotes order.

*Ex parte Newman*, an 1858 case which held a California Sunday statute unconstitutional, explains the relation of religious liberty to separation of Church and State. Religious liberty to Chief Justice Terry demanded "a complete separation between Church and State, and a perfect equality without distinction between all religious sects." Justice Burnett in a concurring opinion embellished this concept, pointing out that the constitutional provision forbidding religious discrimination requires the legislature not to breach man's inalienable right that religion, whether of the majority or of the minority, should never be the sole foundation for prescribing conduct. This constitutional limitation on the State is based on "the system of abstract justice (which ... springs from the natural relation and fitness of things)...." For this court the State has no right to conform its laws to the religious fervor of the majority. Complete separation allows neither tolerance nor intolerance.

The nineteenth century case that best explains the need for complete separation of Church and State is *Board of Education v. Minor*. Plaintiff sought to enjoin the board from enforcing its resolution to eliminate the use of the Bible in public school classrooms. The court denied the injunction with a salvo of fine phrases supporting the disconnection of government from religion. To Justice Welch, the writer of the opinion:

> Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.

For this court religious subjects are matter with which it is inappropriate for governments to deal. Impartial protection is the Church's only claim upon the State. The State is in the immediate control of but a few men. Endowed with good judgment these men may make decisions dependent on sense and reason. Religious convictions, however, are dependent on faith. Since faith is by nature

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25. 9 Cal. 502 (1858).
26. 9 Cal. at 506.
28. 9 Cal. at 511.
29. 23 Ohio St. 211 (1872).
30. Id. at 248.
a purely personal and individual basis for choice, the few controllers of government cannot and must not choose religious concepts for any individual.

Justice Welch argued that religion, used in its broadest sense which includes every belief of every man concerning his relation to God, is essential to good government as a means of producing the best form of government. Because religion is essential to good government, the best government needs the best religion among its people. The people themselves, however, must have free choice of religious concepts if the best religion is to flower. With a free field, religious doctrines will join in intellectual, moral, and spiritual combat. "The weakest—that is, the intellectually, morally, and spiritually weakest—will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of 'church and state.'"31 The form of religion which cannot exist under equal and impartial protection from the government will and should naturally die from its loss of the moral battle for man's belief.

Addressing himself to American Christians generally, Justice Welch cites the golden rule as a religious concept which should eliminate any desire for State adoption of the religion of the majority. If Christians wish others to be treated as they themselves would be treated, they cannot consistently ask that their religion be supported here unless those of them who live in Egypt would ask for State support of Islam, an unlikely event. Thus Christianity itself teaches complete separation when the golden rule is applied to Church-State relations.

Even for many of the complete separatists of the nineteenth century the "impartial protection" given to all religions by the State was impartial only in the sense that the various sects were treated equally. The protection given was greater than that given to the ordinary individual or corporation. The State, though preferring no sect, preferred religion in general by granting it privileges which were withheld from other movements. This beneficent protection included the exemption of religious organizations from taxation,32 the favorable environment that zoning laws built up around churches,33 and many other civil,34 criminal,35 and administrative aids.36 There were also limitations on Church power,37 which were necessary to prevent religious usurpation of secular life, but

31. Id. at 251.
the legal atmosphere created by the State favored religion over secularism.

Though most of these expressions of favor toward religion were legislative rather than judicial, the courts consistently upheld them as neither abridging religious freedom nor establishing religion. They reasoned that governmental patronage of religion was no more than the payment of a debt. The Church, by teaching duty, love, and morality diminished beyond estimation the State's expense in maintaining order. Since a natural function of religion eliminated much of government's burden, the State eased the task of the Church.38

The arguments used against the informal establishment of Christianity seem equally applicable to any informal establishment of religion in general. If the constitutional provisions against establishment require the State to treat Christians and non-Christians equally, the same provisions must require equal treatment for religionists and non-religionists. Since all men are not so fortunate as to have religious feeling, the State should not penalize those who have no faith by preferring religion to irreligion.

CONCLUSION

The Church-State problems for which these nineteenth century courts sought answers are still unsolved. Whether Christianity should be accepted by the State as an informally established religion is a question still unsettled in the minds of many.39 What privileges the Church may demand and what the State may grant cannot be determined by looking at the words of constitutions alone. The diverse Church-State conflicts are not soluble by a few ambiguous words. As Mr. Justice Frankfurter has stated,40 the general idea of separation of Church and State given by the first amendment is only a vague goal, the clear recognition of which re-

33. See, e.g., N. C. Laws 1879, c. 232.
34. E.g., Act of July 5, 1838, § 18, 5 Stat. 259 provided for the employment of chaplains in the army.
36. E.g., in 1865 Congress authorized the director of the mint to stamp the motto "In God We Trust" on coins of the United States. 13 Stat. 518.
37. See Zollman, American Church Law, §§ 167-69 (1933).
38. See Trustees of First Methodist Episcopal Church v. Atlanta, 76 Ga. 181 (1885); People ex rel. Seminary of Our Lady of Angels v. Barber, 42 Hun. 27, 30 (N.Y. Sup. Ct. 1886) (dictum).
39. See III Stokes, Church and State in the United States 582-95 (1950).
quires reference to the wisdom and error of the past, if we are to reach a satisfactory resolution of specific modern conflicts.

The judicial thought of the nineteenth century concerning these problems has not solidified into settled doctrine. Though modern courts seldom employ language favoring Christianity as explicitly as did the biased Kent, implication of favor toward Christians is evident in many a seeming subterfuge of upheld police power.

Recent opinions of the United States Supreme Court confuse the old confusion past recognition. In 1947 without breaching the wall of separation a New Jersey school board could pass a resolution providing payment for children's transportation to Catholic or public schools but not providing for transportation to private or other religious schools. In 1948 the wall of separation was reinforced in terms implying future disallowance of nearly all connection between Church and State. In 1952 because "we are a religious people whose institutions presuppose a Supreme Being," New York was permitted to use State authority to promote impartial religious education for its school children.

Admitting that we must look to history to settle these inconsistencies does not choose history's best theory. The standard for choice must be modern experience. Bias dressed as "truth" is an inapt premise to a legal conclusion drawn by a free society. The truth for the Russian government is atheism; for the Spanish government, Catholicism. For the government of the middle ages the existence of witches was a truth. The inconsistency of these "truths" shows only that government is unqualified to distinguish truth from falsity when judging matters of faith. No judgment can be made. The choice of theory taken from history dictated by our modern love of liberty must be complete abstention from either interfering with or preferring Christianity or religion.

41. Everson v. Board of Education, 330 U. S. 1 (1947). It should be noted that the New Jersey resolution was attacked not on the ground that it discriminated in favor of Catholics but rather because it aided a religious school. The facts of the case, nevertheless, remain facts.