

CAVEAT EMPTOR EN EL DERECHO ECLESIASTICO

MICHAEL E. SMITH
Universidad de California

I gather that you have invited me here because my countrymen have a reputation for practicality and you hope to hear about our solutions to practical church-state problems. If that is right, I fear that I may disappoint you. I do not think that you should regard my country as a fund of useful ideas about how to arrange church-state relations.

Now I can imagine some of you thinking, this is absurd. We invite this person to come all the way across the Atlantic to tell us —that he has nothing useful to tell us. How foolish of us to have gone to the trouble of bringing him here.

I hope to convince you that it was not foolish, even though I come with no solutions to practical church-state problems. When we are faced with difficult social questions, such as the relations between church and state, we may tend to hope that others have somehow solved our problems for us. If this tendency is unwise, it is worth our while to be reminded so.

That is the point of my talk. I want you to consider the possibility that we cannot expect to find useful solutions to church-state problems in the practice of countries very different from our own. On the contrary, what we mainly learn from the experience of such countries is that we must find our practical solutions largely within the history and character of our own countries.

I

I might develop this argument in at least two ways —abstractly and philosophically, or concretely and historically. Insofar as I am anything other than an ordinary lawyer, my bent is historical rather than philo-

sophical. I will make my argument to you mainly through a series of historical cases.

However, I should start by saying a little about the general ideas on which my argument rests, so that you may understand better the point of the argument. I think that in order for a community to be good for the people in it, it may have to satisfy certain indispensable, universal conditions. Beyond these, however, I think that there are many differing social arrangements that can be good for people, depending upon the character of the particular community.

This idea is implicit in the Declaration on Religious Liberty of the Second Vatican Council. The Council stated, for example, «If because of the circumstances of a particular people special civil recognition is given to one religious community in the constitutional organization of a State, the right of all citizens and religious communities to religious freedom must be recognized and respected as well.» Note the distinction. Religious freedom, according to the Council, is good for all people everywhere. The preferring of one church may or may not be advantageous, depending on the character of the particular community.

That is one general idea on which my argument rests, the idea that to a considerable extent, people may be benefited by quite different social arrangements. The other general idea is that even if I am right, a particular community is not free to pick and choose among these possible arrangements. The community must employ an arrangement that fits its own historical experience, its own deeply rooted character. Otherwise it will disserve the well-being of the people living in it.

On this point I cite the greatest Catholic scholar of church-state relations in my country, Father John Courtney Murray, who played a central role in the development of the Declaration on Religious Liberty at the Second Vatican Council. He wrote, «The American Catholic is entirely prepared to accept our constitutional... policy of no [preference for any church] as the first of our prejudices. He is also prepared to admit that other prejudices may obtain elsewhere—in England, in Sweden, in Spain. Their validity in their own context and against the background of the history that generated them does not disturb him in his conviction that his own prejudice, within his own context and against the background of his own history, has its own validity.»²

If I hoped to make my argument in an abstract, philosophical way, I would have to elaborate greatly on these two general ideas and defend them against weighty objections. But as I said before, my only purpose in introducing them is to help you understand better the point of my argu-

¹ *Vatican Council II—The Conciliar and Post Conciliar Documents*, 804 (Flannery ed. 1975).

² MURRAY, *We Hold These Truths*, 47 (1960).

ment, which I am mainly going to develop through concrete, historical cases.

My plan is to narrate three cases from the history of church-state relations in my country. The cases are dispersed in time; one is from our founding as an independent nation, another centers on a catastrophe in the midst of our history, and the third deals with a recent development. The cases are also different in character. The first two involve church-state arrangements that, in my country, are fairly well settled. In discussing these I implicitly contrast our historical experiences with your own. The third case involves what I regard as a derangement in my country's church-state relations. Here the contrast is between our historical experience and what certain of our own people have sought to make of us.

II

Case number one: In several western countries today, as all of you know better than I, there is some such arrangement as the following. On his tax return, the taxpayer is asked if he wants a small part of his taxes to go to a church that he names or to no church. Whatever he designates, the government complies with his wishes.

This arrangement does not strike me as an inherent violation of religious freedom. No one is compelled by law to give money to a church of which he conscientiously disapproves—or to any church, for that matter.

Yet in my country, I think that such an arrangement would be largely unthinkable. Secularists, liberal Protestants, and many Jews would fight it strenuously, and a substantial majority of evangelical and other Protestants would side with these opponents. They would regard it as what we call an «un-American» arrangement.

If I am right, there are many reasons that my countrymen would react in this way. Some would be good reasons for rejecting the arrangement in other countries as well, but at least one reason is unique to my country. It is an event that occurred over 200 years ago that still exercises an influence on us today.

Before our war for independence from England in the 1770s, the colony of Virginia had a preferred church, the Church of England. When the war began, Virginia abolished most aspects of the arrangement. After the war, traditionalists sought to reinstate public financing of religion, this time in a non-discriminatory way. The mechanism was to be something like the arrangement that I described a few moments ago.

The proposal evoked strenuous opposition which succeeded, first in delaying its adoption, and then in causing it to be rejected. Instead, the

Virginia legislature enacted a statute of religious freedom that prohibited all compulsory versions of the arrangement.³

In the last 200 years, this incident has become a landmark of our church-state relations, a part of our identity as a country. There are many reasons for this turn of events, including the following. The leader of the fight against the proposal was James Madison, who shortly gained national renown as the main author of the national constitution under which we still live, then as the main author of our present Bill of Rights, and later as the fourth president of our country. In the course of the fight, he published a remonstrance against the proposal, expressed in memorable Enlightenment rhetoric, that was widely publicized.⁴ His mentor in the fight was Thomas Jefferson, the author of our Declaration of Independence from England, the most renowned intellectual in our early history as a nation, the founder of the oldest of our present political parties, and the third president of the country. In their opposition to the proposal, moreover, Madison and Jefferson were joined by a very different group, ardent evangelical Protestants.⁵ The latter became the dominant religious force in my country in the next 50 years and thereby helped to popularize the incident.

In the late 1940s, this part of our history was further engrained in our consciousness when the national supreme court, in the course of deciding an important church-state case, officially designated the defeat of the Virginia proposal as an authentic expression of our church-state tradition and reprinted Madison's entire remonstrance with approval.⁶ In the forty years since, thousands of judges, lawyers, and law students have read the justices' opinions and imbibed their view of the incident as a milestone in the development of our church-state relations.

Needless to add, a country without this peculiar historical experience would have to have other reasons for rejecting what may be, under appropriate social circumstances, a mildly beneficial church-state arrangement.

III

Case number two: In many countries of the world, people regard it as improper for churches and clergy to take an active part in promoting political causes. I have in mind not only the rulers of most Marxist regimes, but people in many non-Marxist countries as well.

³ The story is told from the strict separationist point of view in *Everson v. Board of Educ.*, 330 U.S. 1, 34-38 (1947) (dissenting opinion).

⁴ Reprinted in *id.* at 63-72.

⁵ HOWE, *The Garden and the Wilderness*, 9, 19 (1965); SANDERS, *Protestant Concepts of Church and State*, 185-189 (1964).

⁶ EVERSON, *supra*, n. 3 at 11-13, 33-42, 63-72.

Now as long as *lay* religious believers are treated in the same way as non-believers, I do not think that excluding churches and clergy from a country's political life is necessarily a violation of religious freedom. Clerical involvement in politics may lead to unusually high social tensions against which the community may properly seek to protect itself. Indeed, from the viewpoint of a believer, I happen to think that churches and clergy do the most good when they concentrate on spiritual ends.

In my country, however, there has been almost no consistent opposition to the involvement of churches and clergy in political affairs. Indeed, many people, especially Catholics and mainline Protestants, have persistently defended the practice. The opposing view is espoused from time to time by secularists, liberal Protestants, and many Jews, and it used to be characteristic of evangelical Protestants in our southern states. Yet these groups have persistently welcomed church and clerical support for political causes to which they were especially committed.⁷

In practice, the political involvement of churches and clergy has been continuous and widespread. From the beginning of our history as a nation, they have had much to say about questions of war and peace and other international matters. Domestically, they have exerted influence on social and economic issues, such as racial equality, as well as on matters of personal morality, such as the consumption of alcohol. Indeed, they have even taken sides in partisan elections of candidates for public office.⁸

I must not overstate this point. The people of my country have some sense of limits, some feeling that it is possible for churches and clergy to go too far politically. But these limits are shadowy and rather remote.

Again, there are many reasons for this state of affairs in my country. I want to draw your attention to one that may be of particular concern to most of you.

In my country also, we had a terrible civil war. It took place in the 1860s between the northern and southern states. There were no assassinations to speak of during the war, but the battles were exceedingly bloody. Out of a total free population of 27 million, at least 600 thousand soldiers died. The war also consumed many billions of dollars of resources, and it devastated the southern region of the country, economically and socially as well as physically.

Religion played a large part in the hostilities that led to the war. The major cause of contention between the regions was slavery. Church groups and church leaders were in the forefront of the northern movement to abolish slavery. From them poured forth a flood of sermons, speeches, pamphlets, books, and petitions to the national legislature. These efforts

⁷ SMITH, «Religious Activism: The Historical Record», 27 *Wm. & Mary L. Rev.*, 1087, 1093-1094 (1986), and sources cited.

⁸ *Id.* at 1088-1092 and sources cited.

in turn provoked an ideological defense of slavery generated in large part by churches and clergy in the southern states.⁹

Yet religion itself was not an issue in the hostilities leading to the war. The country was not divided between believers and non-believers, between clericalists and anticlericalists. On the contrary, as I just stated, church groups and church leaders took an active part on both sides. Indeed, the country was not even divided on confessional lines. Leaders of the main Protestant denominations entered into joint ventures with each other, while Catholics largely stood aside. Most notably of all, the three largest and most energetic Protestant denominations of the time formally divided along regional lines over slavery and the war. It took the first of the denominations over 75 years to reunite, and another remains split to this day.¹⁰

When the war was over and slavery had been abolished, there was never a general inclination to regret that the northern states had fought and triumphed. Likewise, there was no widespread desire to reconsider the role of churches and clergy in bringing on the war. On the whole, we were content to allow them to continue their practice of active involvement in political affairs.¹¹ How differently we might have reacted if, in the bloodiest catastrophe in the life of the country, religion itself had been an issue.

IV

Case number three: In my country today there is a somewhat bitter and persistent church-state controversy relating to religion in the public schools. In the past 20 years or so, at least half of our state legislatures have enacted statutes providing for a period of silence for prayer or reflection at the start of the school day. Many of these statutes have been attacked in court, and some have been invalidated as a violation of the national constitution.¹² In a number of public schools in recent years, pupils have asked permission to hold their own prayer services at times when they are not required to be in class. Whether school officials have granted or denied these requests, some have been sued for violating constitutional rights. After a long debate, the national legislature enacted a statute requiring that the prayer services be allowed under specified circumstan-

⁹ AHLSTROM, *A Religious History of the American People*, 651-659, 668-669 (1972); 2 STOKES, *Church and State in the United States*, 142-156, 190-203 (1950).

¹⁰ AHLSTROM, *supra*, n. 9 at 659-668; STOKES, *supra*, n. 9 at 157-190; GAUSTAD, *Historical Atlas of Religion in America*, 57, 79, 81, 90 (1962).

¹¹ E. g., see SMITH, *supra*, n. 7 at 1089.

¹² «The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools», 96 *Harv. L. Rev.* 1874-75 (1983); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

ces.¹³ In 1984 the national legislature, after another long debate, also voted in favor of a constitutional amendment permitting certain school-sponsored spoken prayer, although not by the two-thirds margin needed to approve the amendment.¹⁴

That is only part of the story. Supporters of religion in the public schools, thwarted mainly by the courts, have attacked the secular school program as hostile to religion. In recent years, several state legislatures enacted statutes requiring that if Charles Darwin's account of the origin of human beings is taught by the public schools, they must also teach a non-theistic version of the biblical account. After strenuous litigation, the courts have invalidated these statutes.¹⁵ Supporters of religion in the public schools have also brought their own lawsuits, challenging the secular school program for instituting a competing non-theistic religion.¹⁶ Other evangelical Protestant parents have taken their children, nearly a million of them, out of the public schools altogether. This has both weakened the public school system and has heightened other church-state controversies concerning public aid to private religious schools and the public regulation of these schools.¹⁷

There are many reasons for this tense state of affairs. I will tell you about one, a pair of decisions by our national supreme court during the early 1960s. But before I describe the decisions, I must go back another century or so.

In my country, public schools began to develop in the middle of the 19th century. From the beginning, the widespread practice was to include in the school day a reading from the English Protestant version of the Bible and a recitation of the Protestant version of the *Pater Noster*, called by them the Lord's Prayer.

The first people to object to this practice were recent immigrants, Catholics and Jews. In response to their objections, it became common for school districts to excuse dissenting pupils from attending or participating in the ceremonies.

The next wave of opposition was aimed at removing Bible reading and prayer from the public schools altogether. In several states the practice was outlawed, and in many localities there was insufficient public support to initiate or continue the practice. In a large number of other states, the

¹³ «The Constitutional Dimension of Student-Initiated Religious Activity in Public High Schools», 92 *Yale L. J.*, 499, 503; GUNTHER, *Constitutional Law*, 61-62 (Supp. 1985).

¹⁴ GUNTHER, *supra*, n. 13 at 1491 n. 9 (11th ed. 1985).

¹⁵ «Freedom of Religion and Science Instruction in Public Schools», 87 *Yale L. J.*, 515-517, 555-556, 559-560 (1978); *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987).

¹⁶ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Smith v. Board of School Comm'rs*, 827 F.2d 684 (11th Cir. 1987).

¹⁷ COOPER, «Who Operates Private Schools?», *IFG Policy Perspectives* (Winter/Spring 1985); «The State and Sectarian Education: Regulation to Deregulation», 1980 *Duke L. J.*, 801-803, 818-828.

attacks backfired, causing the state legislatures to pass statutes requiring daily Bible reading in the public schools. The result was that at the start of the 1960s, about half of the school districts in the country continued to begin the school day with one or both of these religious observances.¹⁸

Thus matters stood when the national supreme court intervened. In two major decisions, the court ruled that all such practices violate the national constitution. It based its rulings on the sweeping principle that government has no business fostering religious belief or worship.¹⁹

Secularists, liberal Protestants, and many Jews applauded the decisions. However, the supreme court was bitterly criticized by many evangelical and other Protestants, and also by many Catholics, who by this time had become supporters of prayer in the public schools. At first there was widespread refusal to abide by the decisions in some regions of the country.²⁰ More recently the battle has been fought on the grounds described earlier.

Such strenuous opposition to the decisions was to be expected. Not only had the supreme court invalidated a widespread, longstanding, strongly supported national practice. It had done so on the basis of a principle —no government encouragement of religious belief or worship— endorsed by a part of the population but opposed by a much larger part.²¹

Let us assume that the supreme court was right to forbid school-sponsored Bible reading and spoken prayer. In any event, I think that it should have based its decisions on principles of religious liberty or equality that happen to be widely accepted in my country. It could have ruled that the practice unavoidably infringed on the freedom of young dissenters, who would feel strong informal pressures to participate in the ceremonies. Or it could have ruled that the practice inherently preferred certain religions —Protestantism, Christianity, or whatever— over other religions.

Had the supreme court based its rulings on these grounds, moreover, it might have been evident from the start that this widespread longstanding practice need not be swept away altogether. A period of silence at the start of the public school day, for example, ordinarily would not coerce anyone into prayer or treat religions unequally, except in some highly strained sense.

I return to my starting point. This case suggests that it is possible to do a community serious harm by seeking to impose an arrangement that

¹⁸ SMITH, «Relations Between Church and State in the United States, With Special Attention to the Schooling of Children», 35 *Am. J. Comp. L.*, 1, 27-29 (1987), and sources cited.

¹⁹ *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

²⁰ CHOPER, «Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights», 83 *Mich. L. Rev.*, 1, 78-79 (1984); MORGAN, *The Politics of Religious Conflict*, 76-77 (1968); YUDOF, KIRP, VAN GEEL & LEVIN, *Educational Policy and the Law*, 135-137 (2nd ed. 1982).

²¹ SMITH, *supra*, n. 18 at 10-14 and sources cited.

goes against the community's history and character. How much more likely is that to occur if the arrangement is imported from a very different community.

V

I will take my argument one step further. The cases that I have recited are not isolated incidents. They rest on the same underlying social conditions, and these conditions, too, may be peculiar to my country.

I will draw your attention to one of these conditions that seems to me particularly important. Our religious belief, although widespread, is predominantly this-worldly. As I wrote once before, «The main function of religion [in my country] is to promote this-worldly 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.»²²

The same comment applies to religious non-belief and even disbelief. In my country, secularists are not especially interested in debating the existence of God and related propositions. They, too, mainly judge beliefs by their impact on worldly affairs.²³

This characteristic of religious life in my country is reflected in each of the cases that I have recited. Recall that the third case centered on a pair of decisions by our national supreme court outlawing Bible reading and prayer in the public schools. One of my points was that the court should have overtly left some room for accommodating the very large number of our people who are deeply committed to daily religious observance in the schools.

This point implied that my countrymen are willing to settle for compromises in our national religious life. On the whole I think that we are. Our political system is based on deals, or if that is too harsh a word, on mutual accommodation. That is how we make our secular social arrangements. In this respect, as in many others, our convictions about how to handle secular affairs have permeated our religious life.

My second case shows even more clearly the this-worldliness of our religion. Recall that it concerned the involvement of church groups and church leaders in the hostilities over slavery that preceded our civil war. Within the two regions of our country, members of differing Protestant denominations readily came together in joint ventures to oppose or defend

²² *Id.* at 21.

²³ MORGAN, *supra*, n. 20 at 135.

slavery. Within individual denominations, the clergy and members were divided on regional lines.

This pattern strongly suggests that secular rather than religious commitments determined our people's position on the issue of slavery. Their religious beliefs may have predisposed them to take a strong stand, one way or the other, on this moral issue. Certainly their beliefs shaped the language in which they attacked or defended slavery. But at the root, regional secular commitments dictated the religious response, rather than the other way around.

I can imagine some of you thinking that these traits that I have ascribed to my country's religious life —permeation by secular outlooks, dedication to secular causes— are found in your countries as well. So be it. But we are dealing with matters of degree, and with that in mind, listen to the greatest European observer of my country, Alexis de Tocqueville, a French aristocrat who grew up in the aftermath of the French Revolution. He wrote, «Not only do 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.»²⁴

My first case, too, displays the this-worldly character of religion in my country, although less directly. Recall that the case concerned the defeat of a proposed tax arrangement in Virginia. The incident was later transformed, by our national supreme court among others, into a great founding event in our religious history, and this occurred in large part because the leading figures in the event were two of our patron saints, Thomas Jefferson and James Madison, and because one of them recorded his opposition to the arrangement in memorable prose.

Yet stripped of its legendary aura, the incident was an ordinary political fight over a rather ordinary piece of legislation. These patron saints of ours were politicians and political sages who died in bed. Madison's remonstrance was a not very extraordinary piece of political propaganda. There is little of the profound, and less of the other-worldly, in the incident.

I happen to have spent last weekend in Santiago de Compostela. As most of you know far better than I, the city was built upon a quite different national religious legend. The body of one of Jesus's most favored disciples is brought to the locale and buried there. Many centuries later his spirit appears and leads the army of a local king in a successful battle against the country's non-Christian invaders. He becomes the country's

²⁴ 2 TOCQUEVILLE, *Democracy in America*, 126-127 (Bradley ed. 1945).

patron saint and is credited with the eventual ouster of the invaders altogether.

Now I can imagine many of you thinking that we might all benefit from less monkishness of that sort and more ordinary worldly concern. Perhaps so, although I doubt it. In any event, my argument is that if a country's religious life is to a great extent other-worldly, church-state arrangements there must be substantially different than in my country.