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Religious Liberty: The Source of Freedom

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RELIGIOUS LIBERTY: THE SOURCE OF FREEDOM?

by

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THIS essay was begun as a review of Dean Merrimon Cuninggim's recently published *Freedom's Holy Light.*[1] The first reading of the book disclosed that the subject matter and its manner of treatment made it of sufficient interest to the lawyer of inquiring mind as to make the usual brief review unsuitable. Attempts to write a lengthier review ended in confusion. It became increasingly clear that what was needed was a good, long preface plus a review. It is here sought to supply that need.

In what follows it will be seen that the writer is in rather close agreement with Dean Cuninggim's thesis. At times it may be not entirely clear whether Cuninggim or Harding is speaking to a particular point. At such places the writer acknowledges his indebtedness to Dean Cuninggim for both clarity of thought and felicity of expression. It is hoped that the writer's responsibility has been made clear at all points of divergence and addenda.

The relationship between religious liberty, and human freedoms and liberties in other areas has been the subject of much writing. Many authors have explored the idea of religious liberty as the source of other freedoms. Much of this writing has been bad writing, compounded out of poor historical scholarship and a blinding loyalty to a particular religious sect or dogma. Sometimes books based upon careful and expert research go wide of the mark because the loyalties of the author deflect his movement to his conclusions. So A. Mervyn Davies in his most informative and interesting volume[2] concludes that the genius of American freedom can be found in Calvinism. The evidence so carefully marshalled seems to prove, however, that we are indebted principally to Arminian and other religious movements which were based in large part upon opposition to and resistance to Calvinist tenets. These things are mentioned to point up that Dean Cuninggim is more than usually free of this handicap. He is a

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[1] FREEDOM'S HOLY LIGHT. By Merrimon Cuninggim. New York: Harper and Brothers, 1955. Pp. xi, 192. $2.75. The author is Dean of the Perkins School of Theology of Southern Methodist University.

[2] DAVIES, FOUNDATION OF AMERICAN FREEDOM (1955), discussed at some length in 51 SOUTHWEST REVIEW 99 (1956).

theologian, and proudly so, but is a theologian who embraces philosophy and reason as aids to the ascertainment of truth.

A Philosophy of Man

In our growing concern to maintain individual liberties in an uneasy world, it is good that we be reminded that the basic issue of human liberty is essentially a religious issue, and that the basic individual human liberty is religious liberty.

The basic issue is a religious issue, since the measure of freedom of expression and action accorded the individual man must rest finally upon a conception as to the nature and qualities of man. This is the major problem of theology after theology has established the existence and nature of God. At one end of the scale are those deists who conceive of essentially a man-centered universe; who would find in man an innate desire to achieve the Good, together with a faculty of reason sufficient to enable him to know the Good and to recognize the means best suited to achieve it. At the other end of the scale, one would find those medievalists and early Protestants who carried their notion of original or Adamic sin to such an extent as to picture man as a totally depraved being, incapable by his own faculties to perceive Good, and with no particular desire to attain it. If such a man is to know Good, he must know it either directly from God through divine illumination or other mystic experience, or indirectly through those especially delegated by God to carry His message. If he is to attain the Good, it must be by the intervention of a divine Grace, acting either by chance or some, to mankind, wholly inscrutable divine plan or purpose.[3] If we assume either of these extreme philosophies of man, the problem of individual human liberty almost answers itself. In a community of god-like humans, the liberty of the individual human is the ultimate value. If questions of social good are injected, it must be assumed that the social good will be best assured by leaving individual man free to attain his own good. This, of course, was the assumption of the Utilitarians of the early Nineteenth Century, and a good deal of our current notions of individual liberty are built upon their doctrines.

If, on the other hand, we begin with the other extreme and regard man in his natural state as an inherently evil thing, then any notion of individual human liberty becomes impossible for the rea-

[3] Incisive treatment of the basic dilemma may be found in Gilson, Reason and Revelation in the Middle Ages (1938). See also Baker, The Dignity of Man 159-186 (1947); Harding, *A Reviving Natural Law*, in Natural Law and Natural Rights (1955).

son that the individual human is incapable of exercising it.[4] Such a man must be forced to order his life in accordance with the divine will or purpose. To this end he must be subordinated totally, either to a secular Prince ruling by Divine authority, or to a Church commissioned to bring the command of God to earth. Such, of course, would be the ethical justification for Machiavelli's Prince as well as for Geneva's theocracy. Marxist economic determinism, relegating to the irrelevant all notions of human good save the economic, leads to much the same conclusion.

Most people find each of these extreme positions to be untenable, on a basis of either religious belief or observed fact, or both. The very idea of God would require that man be posited in a condition short of God's perfection. On the other hand the principles of cause and purpose and order observed in all things in the universe save man, makes it incomprehensible that the seemingly rational God who created such a universe would exclude mankind from its scheme of order. It is of course perceived that man has a faculty of reason not shared by other living things, and it is assumed that this fact is related in some way to a divine plan or purpose. From here it is no great leap to some sort of Natural Law proposition to the effect that this faculty of reason enjoyed by man gives him an ability, not shared by other living things, to comprehend in part the divine plan or purpose of the universe.

At the same time observation of the world about us shows that all living things have a tremendous desire to live and to reproduce themselves, even against almost insuperable obstacles. Even more, all living things have in them a drive to bring themselves to their ultimate destiny, to their state of perfection. Is it possible, one then asks, to assume that man alone is without such drives; that man alone has no inner compulsion to bring himself to that state most in keeping with the divine plan? Does not the seemingly most debased of men exhibit in some particular manner, almost in spite of himself, such a drive or compulsion?[5]

And so one arrives at another concept of man. Man is not perfection; he is not god-like. Man does have in him an inclination to seek perfection; a desire to comprehend the god-like. Man has in his faculty of reason a tool by which he can comprehend in part his place in the divine order. Since he is, after all, Man and not God, his

[4] See BRUNNER, JUSTICE AND THE SOCIAL ORDER 4-10 (1945).

[5] Father Thomas E. Davitt makes this point concisely and clearly in his essay *St. Thomas Aquinas and the Natural Law,* in ORIGINS OF THE NATURAL LAW TRADITION (Harding ed. 1954).

faculty of reason will never permit a full participation in the divine reason, yet he may be expected to move closer and closer to such a participation as he gains in knowledge and experience.

Individual Human Liberty and Progress

At this point a doctrine of individual liberty begins to emerge. Individual human liberty becomes a major value since it enables individual man to use all his faculties to perfect himself. Individual freedom of belief, of inquiry, of action, is important because it enables man to increase his knowledge and experience essential bases for the fullest possible use of his faculty of reason. But such individual liberties are not absolute. They are rather to be exercised within the over-all limitations of a concept of the Good society as that concept can be discerned and established by human reason and observation.

This then is a religious concept of human liberty in human society. It is, moreover, believed to approximate the concept entertained by most persons in our society. It is, of course, strongly reinforced by a further consideration of faith. Even on a purely secular basis, we exhibit an almost overwhelming faith in the inevitability of progress of our society and its institutions. Approaching the problem of progress on a purely pragmatic basis, we know from experience that human liberty is the key to that progress. We know that every thing we now hold to be true was once dissent—that every majority opinion was once a minority opinion. We have never rushed to abandon old mistakes in order to embrace new truths. To the contrary, new truth has had to establish itself, not only against the force of social inertia but also against the force of the active opposition of those who believe Truth had already been attained.

The price of social progress is plain. Not only must we permit all men the greatest liberty to investigate, to learn, to believe, to communicate, and to argue; we must encourage and aid such activity, to the end that there may be the greatest possible increase in human knowledge and the greatest possible application of human reason to that knowledge. It is then the responsibility of all men in the society to seek carefully to test new assertions of fact, to strive continually to draw new learning, new conclusions, from new facts. The task is to discern in a welter of conflicting opinion and argument, the true, and to discard the mistaken and the false. So long as this is done, progress is possible. When this is stopped, only retrogression can ensue.

The Problem of the Reformation

Historically, the battle for human liberty was fought in the context of contention between Church and State. Human liberty as we now conceive it could not exist in a medieval society in which the secular state was thought to be established by God to direct men in accordance in God's will, and a particular concept of God's nature and will, as embodied in a human church, was established to guide and direct the Prince in the discharge of his duty. The Reformation of the 16th Century did not solve this problem.[6] It removed the secular Prince from the control of the Church, but it left the Prince free to become absolute ruler, as in Germany following Luther. While the restraint of the Church on the Prince was perhaps something less than might be desired, it was nonetheless far better than nothing. The proper relationship between the Prince and the new churches thus became the principal problem of the Protestant jurists,[7] as well as of the Roman jurists of the Counter-reformation.[8]

Church and State: English Doctrine

For English speaking people the task was undertaken late in the 16th Century by Richard Hooker, in his monumental *Of the Laws of Ecclesiastical Polity*. Catholic (but non-Roman) in his theology, Hooker deemed it unthinkable that men in a free society should be wholly subordinated to a religious hierachy, whether of Rome or of Geneva. Rather man should be conceived in an Aristotelian sense, basically desiring to live peacefully with his fellows in a good society, and with basic inclinations to bring himself to a state of individual perfection. The principal means in man's own nature by which he would comprehend his objectives and would select the means to attain them, would be his God-given faculty of reason. As further guidance was required to supplement human reason, man would find it in the scriptures and in the traditions and experience of his kind. Hooker differed from the Roman orthodoxy of St. Thomas Aquinas in that he did not find the essential supplementary guidance in the hierarchy of the Church. He differed from Calvin in that he

[6] See Friedmann, Legal Theory 35-37 (3d ed. 1953).

[7] Friedmann, *op. cit. supra* note 6, at 38-47; d'Entreves, Natural Law 48-62 (1951); Scott, Law, the State and the International Community, c. XXXI (1939). The name most commonly associated with this rationalist type of Natural Law is that of Grotius. It is from Grotius that the 17th and 18th century social compact doctrines were derived.

[8] This development is perhaps best exemplified in the writings of Francisco Suarez (1548-1617), the great Spanish theologian. Scott, *op. cit. supra* note 7, in c. XXXIII. See also 3 Copleston, A History of Philosophy, c. XXII and XXIII (1953).

did not find in the scriptures an immutable code of human conduct. He found in the scriptures the essentials of the relationship of man to God; all else was relative or historical. He found essential guidance in the church. The appeal was to the traditions and experience of the mass of believers.[9] To Hooker, then, the Natural Law which was to restrain the Prince, and was to define the liberties and responsibilities of the subject was to be drawn from human reason, based upon human tradition and experience, and reflecting the basic teaching of the New Testament Gospel. At the same time it was pointed out that the Prince did not rule by divine commission. Rather the secular state was established as an expedient and convenient thing, with its authority resting ultimately upon the continuing acquiescence or consent of the body of subjects.

In Hooker's scheme of things Church and State were at the same time quite independent and closely interdependent. Certainly the Prince was not formally subordinated to the Church, as in medieval and Calvinist thinking. At the same time the Church was to be independent of the Prince, save perhaps in a few administrative details required by its organization on national lines. Certainly Hooker would allow the Prince less authority than was claimed in the Elizabethan Settlement of 1559, so much less that it was found expedient to delay the formal publication of Book VIII of the Ecclesiastical Policy until the King had fallen before the Cromwellian Revolution.

While Church and State were thus formally independent, actual-

[9] Richard Hooker (1553-1600) wrote OF THE LAWS OF ECCLESIASTICAL POLITY between 1591 and 1600. Book I, which contains his legal theory, was published in 1593 or 1594. Book VIII, which is concerned with the problem of Church and State was not published until 1648. The sometimes disputed authorship of Book VIII appears to have been settled by the researches of Raymound Houk. See, HOUK, HOOKER'S ECCLESIASTICAL POLITY—BOOK VIII (1931). Houk's work is a part of a greatly revived interest in Hooker's doctrine. SISSON, THE JUDICIOUS MARRIAGE OF MR. HOOKER AND THE BIRTH OF THE LAWS OF ECCLESIASTICAL POLITY (1940); DAVIES, THE POLITICAL IDEAS OF RICHARD HOOKER (1946); MUNZ, THE PLACE OF HOOKER IN THE HISTORY OF THOUGHT (1952); SHIRLEY, RICHARD HOOKER AND CONTEMPORARY POLITICAL IDEAS (1949). The great effect of Hooker upon early American thinking was not so much through the Church as it was through other individuals. Examples would include Chief Justice Sir Edward Coke, whose constitutional disputations with James I reflected Hooker's teaching at the Temple. John Locke, whose SECOND TREATISE OF CIVIL GOVERNMENT (1690) provided the constitutional theory of the United States, made frequent acknowledgement of his indebtedness to "the judicious Hooker." That Locke's indebtedness to Hooker may be even greater than was acknowledged is indicated by his ESSAYS ON THE LAW OF NATURE, written in the early 1660's but first published in 1954. Hooker's theme is also prominent in the writings of James Wilson, the legal scholar of the American Revolution. Reference may be made to the journals of the Constitutional Convention, and to WILSON'S LAW LECTURES (Andrews ed. 1896). See also SMITH, JAMES WILSON, Chapters XXI and XXII (1956); OBERING, THE PHILOSOPHY OF LAW OF JAMES WILSON (1934?); Witherspoon, *Philosophy and The Law*, 33 TEXAS L. REV. 311 (1955).

ly they were closely dependent. The authority of the Prince was both established by and limited by the consent, the reason, the tradition, and the experience of the people of England. The common law of England drew its content from these same sources of reason, tradition, and experience.[10] But these same people were the body of the Church, and from their reason, experience and tradition, as well as from the Gospels, was religious truth to be known. That religious truth as perceived by the Body of the Church would restrain the Prince was clear. Also clear was that progress of the secular State was firmly bound to progress in the Church.

It was inevitable that Hooker's doctrine, so widely accepted in England, would lead to a toleration of widespread differences in religious belief.[11] It did, as soon as time healed the wounds and allayed the bitterness of the abortive Puritan Revolution. This development both added to and subtracted from the concept of human liberty. It added to human liberty in that the recognition of an increased religious liberty would require the recognition of added liberties of communication, assembly and action. It subtracted from human liberty in that it removed a part of the moral restraint upon the state, since there were now fewer areas of agreement in the Body of the Universal Church.

THE CURRENT CONTROVERSY

It is not unexpected that in a new crisis of human liberty, three centuries after Hooker, we find ourselves re-examining the problem of Church and State. In an American setting it becomes a legal problem, but fundamental philosophical doctrine cannot be excluded. As an aid to further determination, we have not only a series of warmly disputed constitutional decisions but something of a spate of printed argumentation from lawyers, theologians, and laymen, running the gamut from careful historical research and precise analysis, through hasty improvisation, to fictionalized history and doctrinal hatreds.

Dean Cuninggim contributes to this renewed debate, a careful, moderate, deferential discussion of the basic issues.[12] To these issues

[10] It should be noted that Coke fell into the error of sometimes assuming that since both Hooker's Natural Law and the English Common Law purported to be based upon reason, tradition and experience, they were equivalents. On occasion Coke tended to ascribe to Common Law the exalted authority which a more careful philosopher would have reserved for Natural Law.

[11] LOCKE, A LETTER CONCERNING TOLERATION (1685?) states the basic morality involved. Recent attempts to explain the whole thing on an economic basis, that Calvinism was the religion of the rising middle class, do not alter the fact that most thinking people appear to accept the moral basis.

[12] CUNINGGIM, *op. cit. supra* note 1.

he proposes definite though unspectacular answers of a marked common-sensical nature.

The Essentials of Religious Liberty

Dean Cuninggim echoes Hooker with the to-be-expected Arminian overtones, in presenting the problem of individual liberty as being a problem of the philosophy of man, a problem which is the contemporary American setting is resolved as a religious problem. Religious liberty is not just another freedom. It undergirds and supports the others. Religious liberty of course involves the essentials of human liberty: a freedom of expression; a freedom of action, that is, a freedom to associate, to assemble, and to urge one's convictions upon others; and a freedom of thought, including a power to decide. The corollaries of this essential freedom are said to be a freedom to consent, a right to join in the making of decisions; a freedom to dissent, to express one's beliefs and arguments though they be deemed in error; and an abiding concern for the common good.

If religious convictions underlies human freedom, it is fair to ask what specific convictions actually constitute the foundation stones of contemporary American notions of freedom. Dean Cuninggim finds four. First, is a recognition of the relatedness of men, that one is not neutral with respect to his fellows, but rather has in mind the good of each. Second is that the welfare of no one person is to have precedence over the welfare of another; a recognition that however unequal men may be in capabilities and achievements, they are equal in essence, an equal in terms of creation, are all children of the same Father—God. Third is the consciousness that man is not supreme; that he is after all the creature of a Creator-Father. Fourth is the recognition of man's dualistic nature, in which man's capacity for goodness is linked firmly with his capacity to err, with his bent to sin. Freedom must reject both that coercion which implies that all men are sinners, and that full play of caprice which would assume all men are saints. Freedom must proceed upon a realistic view that all men are saints and sinners alike. Finally, freedom implies that man is not only free to decide, but must be free to exercise the choice he possesses. The freedom of will which man has must be not only possessed, it must be used.

Supremacy of Conscience

Following these premises, Dean Cuninggim moves to a discussion of the religious doctrine of supremacy of conscience and follows the doctrine into its encounters with the Supreme Court of the United

States. The applicable decisions are presented lucidly and the author's comment is incisive. This writer must, however, express some lingering fear that Dean Cuninggim derives a little too much comfort from certain recent decisions.

Conscience, Dean Cuninggim remarks, is a "slippery" term for use in philosophical discussion. In his discussion he uses the word in what is believed to be the common or popular meaning. This meaning embraces not only a consciousness of error or wrongdoing, but also an affirmative obligation to confess what is wrong and to embrace what is right. Obviously the forces of the political state cannot be employed to interfere with freedom of conscience in its first aspect. One who believes in God cannot be prevented from forming value judgments based upon what he receives as God's revealed or communicated will. Legal issues may be presented in the second aspect. Can the force of the political state be employed to prevent one from doing that which he believes God to require of him, or to compel the believer to do that which he believes is opposed to God's will? Most of us are uneasy in the face of this question. The areas of possible conflict are greatly minimized in the United States by the substantial assimilation of the prevailing Hebrew-Christian morality into our legal institutions, but the problem does present itself from time to time. Historical examples would include the early Mormon doctrine of polygamy, and the religious protests against compulsory vaccination. Of more recent memory are the cases involving somewhat unusual doctrines of Jehovah's Witnesses.[13] It is significant that in the cases in which the legal doctrine has prevailed as against unorthodox religious belief, the judges have felt impelled to rest the argument not so much upon the superior power of the State, but upon some form of Natural Law argument.

In its most recent form this problem is presented in connection with the naturalization of aliens who express themselves, on the basis of religious belief, as being unwilling to bear arms in defense of the United States. In the *Macintosh* and *Schwimmer* cases[14] the Supreme Court of the United States held that such persons could not properly take the statutory naturalization oath to support and defend the

[13] Minersville School District v. Gobitis, 310 U.S. 586 (1940), compulsory flag salute; Niemotko v. Maryland, 340 U.S. 268 (1951), solicitation of funds; Jones v. City of Opelika, 319 U.S. 103 (1941), sale of religious literature; Cantwell v. Connecticut, 310 U.S. 296 (1940), use of sound truck for religious disputation; West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), more flag salute. The list seems almost endless.

[14] United States v. Macintosh, 283 U.S. 605 (1931); United States v. Schwimmer, 279 U.S. 644 (1929).

Constitution of the United States against all enemies, foreign and domestic. It was found that Congress intended an obligation to bear arms to be included in the oath, and was held that Congress had the right to deny citizenship to those who would not assume such a duty.[15] In 1946 came the case of *Girouard*[16] who was willing to take the prescribed oath and was willing to serve in the armed forces in a noncombatant capacity, but was unwilling on grounds of conscience to bear arms. This time it was held that the applicant might properly take the oath, that the Congress did not intend to bar such persons from naturalization. The reasoning was based upon the "traditions" of the country and upon the record of Congress in providing for conscientious objectors in World War II. The *Schwimmer* and *Macintosh* cases were overruled.

Seemingly Dean Cuninggim reads the *Girouard* case as vindicating the dictates of the individual conscience, at least so long as and so far as it remains within the general orbit of the Hebrew-Christian tradition, as against the force of the State. This conclusion is highly debatable. Mr. Justice Douglas in his majority opinion emphasizes that the issue is one of statutory construction: the Act of Congress nowhere expressly imposes a requirement of a commitment to bear arms upon applicants for naturalization; were the *Macintosh* and *Schwimmer* cases correct in implying it? The majority hold that Congress had not imposed such a requirement. Quite carefully and properly the majority refrained from any sort of holding as to whether the Congress has power to make such a requirement express.[17]

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[15] That no Justice believed a constitutional issue to be involved in the *Macintosh* case is made clear by an examination of the capable dissent of Mr. Chief Justice Hughes. He states at the outset of the opinion that there was no question of the "authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization," and then proceeds to the question of statutory interpretation. 283 U.S. at 627. Chief Justice Stone, who as an Associate Justice had joined in Hughes' dissent in the *Macintosh* case, also dissented in the *Girouard* case on the ground that what he had regarded as a seriously doubtful matter of Congressional purpose in *Macintosh* had since been clarified by Congressional action prior to the *Girouard* case.

[16] Girouard v. United States, 328 U.S. 61 (1946).

[17] Congress has since agreed with the argument of the *Girouard* case, and the present Immigration and Nationality Act authorizes the naturalization of certain conscientious objectors and provides an alternative oath for those who are opposed to bearing arms by reason of religious training and belief. 8 U.S.C. § 1448. Note however that Congress is asserting its power to determine when this particular liberty of conscience will be recognized. Note, 56 COLUM. L. REV. 1233 (1956). Seemingly, religious belief is no defense to a criminal prosecution for counseling failure to register for selective service. Warren v. United States, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950); Gara v. United States, 178 F.2d 38 (6th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 857 (1950). Also pertinent is the decision upholding denial of admission to the bar of one who is unwilling to profess willingness to serve in the militia. *In re* Summers, 325 U.S. 561 (1945).

CHURCH AND STATE IN AMERICA

The author now reaches his main thesis, the relationship of Church and State. Putting aside generalities he moves directly into the current area of conflict. As a careful scholar he recognizes that the conflict is badly muddled in semantics. The proponents of a particular doctrine have been able to gain a great advantage in discussion by getting the question stated in a question-begging phrase: "the separation of Church and State." The repeated use of this phrase implies somehow that separation is the desideratum, and discussion tends to turn on means and upon practical considerations.

The basic issue however is whether there should be separation. If there should be, then how is it to be accomplished. But if separation is not the objective, then the problem is the nature of the relationship to be maintained.

Dean Cuninggim reiterates what every student of constitutional history knows, but which not all will admit; that the First Amendment to the Constitution was not designed to outlaw religion from the secular state.[18] That "Congress shall make no law respecting an establishment of religion" means simply that there shall be a religious liberty, an equality of religious faiths before the law, that there shall be no established church such as the Church of England. That Jefferson used the phrase "wall of separation" in a letter written years after his retirement to a religious assembly, does not make a "wall of separation" a constitutional mandate. Strangely, however, Jefferson's letter did attain the status of a constitutional limitation upon State power in a puzzling opinion by Mr. Justice Rutledge.[19]

[18] For a statement such as this, which inevitably is to be challenged, one may cite a scholar of unquestioned authority in the field of constitutional history. Edward S. Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949). Professor Corwin employs uncharacteristically vigorous language in denouncing the claim that the First Amendment was intended historically to establish the "separation" of Church and State. "The eager crusaders on the Court," he suggests, as "selling a bill of goods." If the "wall of separation" is to be sold as a constitutional doctrine, it should be sold on its merits and not on a falsification of history.

[19] Dissenting opinion in Everson v. Board of Education, 330 U.S. 1 (1947). In the hands of Mr. Justice Black, this dissent became the majority opinion in McCollum v. Board of Education, 333 U.S. 203 (1948). Mr. Justice Rutledge relied upon Madison's Remonstrance and upon Jefferson's Danbury letter. Whether the writings of Madison actually will support such a thesis is open to question. The Jefferson letter will. It seems proper to add that it is uncommonly bad judicial interpretation to seek the meaning of the Bill of Rights in the writings of Madison (who was chairman of the Congressional drafting committee) or of Jefferson (who had little to do with it). The ultimate authority as to the intent embodied in constitutional amendments is to be found, not in Congressional sources, but in the meaning of the words to those who ratified them. In the case of the Bill of Rights we should add the purposes of those who exacted a promise for the submission of the amendments as a condition to the ratification of the Constitution itself. Finally, we want to know what the people thought. If individual sources are

The majority of the Court now recognizes this as error.[20] If a "wall of separation" is to be established, it must be because reason and experience show it to be desirable, not because the Constitution requires it.

History supports those who would argue that Church and State should coordinate their effects in certain areas of social activity. The testimony of history opposes those who would build the wall of separation. History teaches that the issue as presented involves at least a three-way choice: a Church-dominated State afer the pattern of the medieval Empire; a State-dominated established Church; and a type of organically disconnected but actually coordinated Church-State relationship. One may question the full intellectual frankness of those who would present the issue as involving a choice between only the first two.

The history of the disestablishment movement in the American colonies at about the time of the Revolution, and the adoption of the First Amendment, establishes a firm constitutional starting point: the equality of the various religious sects before the law. Indeed, the result could not be otherwise in a United States where no single sect encompassed a popular majority. These steps were taken not by men who opposed the Church and would deny its influence upon the State. Rather they were taken by men of firm religious faith, of pride in their sect, who sought to assure that their own faith and their own sect would receive due recognition in affairs of state. Disestablishment was designed for the benefit of the nonconformist sects; was designed to increase their influence and prestige. Had the nonconformists not desired it for these reasons, there would have been no disestablishment.

Firm establishment of the proposition that the state can favor no single church, merely leads to the next problem: may the state properly recognize individual religion or organized religion as a whole. That in our history the state has been willing to give aid to religion, and, just as importantly, to receive aid from religion, is clear. Harking back to Hooker, one may wonder whether history in a democratic society could have been written any other way.

The legal issues of recent years have been presented in terms of relationship between the State and religious education. To say that

to be considered, the writings of George Mason would appear more pertinent than those of Madison or Jefferson. The trouble is that the writings of Madison and Jefferson are well indexed and widely published. Given the same ease of access, we might well be sifting the phrases of Thaddeus Stevens and his Radical company in interpreting the Fourteenth Amendment.

[20] Zorach v. Clauson, 343 U.S. 306 (1952).

the decisions create confusion is charitable. Always with at least a dissenting opinion, sometime with special concurrences, sometimes with divergent dissents, the Supreme Court of the United States has held that the State of New Jersey may pay bus fares for children in parochial schools;[21] that the State of Louisiana may furnish free textbooks to students in parochial schools;[22] that the State of Illinois could not permit religious instruction in public school buildings, during "released time" even at the formal request of parents;[23] and that the State of New York could release public school pupils for religious instruction on "school time" if the instruction were not conducted in the public school buildings.[24] A more difficult group of judicial opinions would be hard to assemble. Sometimes the reasoning appears right and the results wrong. Again it may seem that the result is right for the wrong reason. Certainly the justices appear to be reading the histories of entirely different countries.

This confusion thrice-confounded at the summit certainly invites the reopening of old arguments and the advancing of strange ideas. Some Roman Catholic writers have sought to find in the confusion a basis for greater public assistance to the mountingly expensive parochial school system. Others would seek greater separation of Church and State to dislodge what are considered excessive Protestant influences upon the present State. On the other hand a strongly anti-Roman faction is so fearful of a growth of Roman influence that it would push separation almost to the point of governmental hostility to all religion. The bias and distortions of these not-disinterested classes of advocates tends to introduce bitterness into the argument, and certainly adds to the confusion. Fortunately this clamor is subsiding, and we begin to hear the voices of those who seek the good of America, not the good of a sect.[25] Be it noted that these new voices are by no means drawn from any particular religious group. While

[21] Everson v. Board of Education, 330 U.S. 1 (1947).

[22] Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).

[23] McCollum v. Board of Education, 333 U.S. 203 (1948).

[24] Zorach v. Clauson, 343 U.S. 306 (1952).

[25] This is not the place in which to attempt a classification and evaluation of the immense Church and State literature, or that relating specifically to the State and religious education. Reference however should be made to the definitive treatise of ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES (1950), embodying the careful research without which many of the other books would never have been written. A most capable lawyer-like presentation of the "wall of separation" thesis may be found in PFEFFER, CHURCH, STATE, AND FREEDOM (1953). Mr. Pfeffer was of losing counsel in the *Zorach* case. Among the other writings that can be recommended are Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306 (1949); BATES, RELIGIOUS LIBERTY: AN INQUIRY (1945); BROWN, CHURCH AND STATE IN CONTEMPORARY AMERICA (1936); GREENE, RELIGION AND THE STATE (1941).

the establishment of religious liberty historically was a Protestant achievement, Protestants today are not its sole protectors.

In choosing the middle way, Dean Cuninggim stresses that a proper Church-State relationship must be found to have two aspects. One is the restrictive aspect of organic disconnection. The other is the permissive aspect of impartial association with religious groups to achieve those ends which the secular state and religion hold in common. This view is not greatly different from that expressed in Mr. Justice Douglas' majority opinion in the *Zorach* case[26] which seeks to correct some of the contradictions of the other cases just preceding.

There is a type of religious faith which regards religion as a means by which one endures an essentially evil world while preparing one's soul for a state of blessedness in a world to come. For such, a "wall of separation" would appear good. But most do not share so limited a concept of man's role on earth. A Catholic believer, whether he be Roman, Anglican or Eastern, believes his duty to his God requires him to strive to establish on earth God's laws of Love, Justice, and Mercy. It is not only his duty to do these things in ordering his own life, but also his right to associate with others to bring closer a state of perfection in human society. Our Jewish citizens place perhaps an even greater stress on this wordly aspect of religious faith and action. Arminian Protestantism is similarly inclined. The Federal Council of Churches, when criticized for intruding into what was claimed to be a matter of political and not religions concern, quite properly asked whether there could be an issue of right or justice which is of purely secular concern. One is tempted to ask also whether the erection of a "wall of separation," so as to restrict religious action to preparing one's soul for another world and to perhaps a Buddha-like contemplation, would not be a flagrant governmental establishment of a particular minority religious doctrine. Those whose religious beliefs embrace this world as well as another must defend their own religious liberty by resisting the building of the wall.

But, we are reminded, there are certain cautions to be observed. We must remember that freedom calls for adjustment, for the assertion of the rights of others as well as of our own, for the ability to

[26] The legal implications of Dean Cuninggim's thesis may perhaps be best understood by an examination of Professor Paul G. Kauper's extended review of Pfeffer's work in *Church, State and Freedom: A Review*, 52 MICH. L. REV. 829 (1954), and the ensuing interchange of views between reviewer and author in 53 MICH. L. REV. 91 and 233 (1954).

live with others in peace and good will. We must remember that our concern with and possible competence in certain basic issues of man's common life does not make us expert in all the details of man's relationships with his fellows. We must be humble in the face of the divisiveness of religious beliefs in the world; and not lightly assume that we and we alone are divinely commissioned to bring God's truth to errant mankind. We must, in other words, seek to know what *sectarianism* is so that it may not be permitted to intrude into the secular state. In so doing, of course, we also identify the truly essential values which will aid the secular state in the discharge of its obligation to advance the good society.[27]

In concluding this somewhat mixed analysis of Dean Cuninggim's thesis and statement of this writer's own ideas as to the underlying issues, a thought recurs which appeared at almost every step. Is it possible to exercise religion from the State, so long as the State rests upon the mass of men, and not upon the tyranny of a mad Prince? Would not the erection of a towering and impregnable "wall of separation" destroy, not religion, but the democratic state? Can the State survive without some sort of religious ethic? Perhaps the entire matter was disposed of in a bare fifteen words by an eminent Englishman, Sir Alfred Denning, Lord Justice of the Court of Appeal, when he wrote:[27]

"Without religion there can be no morality; and without morality there can be no law."

[27] SIR ALFRED DENNING, THE CHANGING LAW 99 (1953).

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