

USING THE CONSTITUTION
TO DEFEND RELIGIOUS RIGHTS

by

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In order to address the question of the impact of law on religious expression and freedom, it is appropriate to begin with the meaning of *law*. Webster defines it as "the whole body of . . . customs, practices, or rules constituting the organic rule prescribing the nature and conditions of existence of a state or other organized community." This "organic rule" allocates the rights, duties, freedoms and privileges in the state or other organized community. The key word here is *right*, for we are concerned with the rightful expression of religion in society.

The civilization of the West is the heir of the Roman law definition of right, viz. *suum cuique tribuere*, to render to each his due. But what is one's due? To what does one have a right? What is a just claim which, by way of the public legal system, one can expect society to meet? Questions like these are asked each day by politicians and parliamentarians, by theorists and theologians, but particularly by the poor, the prisoners, the persecuted. Answers are not nearly as numerous as the questions. Nonetheless, an-

swers are constantly given in the way societies distribute resources and in the philosophies of the world's great thinkers. Aristotle argued that persons have a natural right to an equal share of society's wealth—though he immediately made distinctions between proportionate and numerical equality.¹ John Locke asserted that one has a right to what he has worked for. And Karl Marx stated that one has a right to what he needs.

All of these conceptions of justice contain an element of truth. We intuitively sense that equality, merit and need are basic components of justice. But the singling out of one component as the key factor in justice illustrates the dependence of these conceptions on different world views. How, then, should the Christian deal with conceptions of justice in the context of non-Christian patterns of life and thought? I believe that the partial insights of both pagan and secular thinkers can be meaningful in the development of a view of justice built on the biblical world view. The Bible pictures the world as God's good creation, fallen into sin, and now in the cosmic process of redemptive restoration because of Christ's substitutionary death and the Spirit's regenerative work in the hearts of men and women. A biblical conception of justice reflects this threefold picture of creation, fall, and redemption.² It begins by taking seriously the biblical teachings on creation. Here Emil Brunner is helpful.

The Christian conception of justice . . . is determined by the conception of God's order of creation. What corresponds to the Creator's ordinance is just—to that ordinance which bestows on every creature, with its being, the law of its being and its relationships to other creatures. The "primal order" to which every one refers in using the words "just" or "unjust," the "due" which is rendered to each man, is the order of creation, which is the will of the Creator made manifest.³

H. G. Stoker, the South African Christian philosopher, goes a step beyond Brunner and pointedly relates justice to the status which God has given men and women in the creation.

God's Word revelation sheds an even keener light on the status of man. Viewed in its divine context and in religious perspective we note the following concerning man's status. Man alone is created as God's image. Man has been given a calling which he must fulfill, for which he is responsible and for which he must give an account. Man has an *appointment*. He has been appointed as *mandator dei*, as a creaturely *vicegerent* of God to act as ruler within the cosmos in the name of the Lord. He has been appointed as ambassador of the Most High. And as such he is entrusted with an *office* to contribute, as a creaturely means in the hands of God, to the realization of God's council and plan in and with the cosmos. In all this man is responsible to God. In other words, with reference to all this, including the function and purpose of his status, man has been given a special *mandate*. He is called to be a child of the King and in his royal status he is at the same time a servant of God. All of this is characteristic of his appointment and the mandate that goes with it, presented to him as man. Must we not find human justice and law here, that is, human rights, legal norms and the legal order?⁴

In this light one can say that *human beings have a right to fulfill the calling God gives them. All creatures are God's servants (Psalm 119:91)*. Every creature has a right to be servant of God, to fulfill its particular office for His glory. In the most fundamental link between creatures and Creator—which is the link of the covenant⁵—the Creator speaks His Word and the creature is called upon to do that Word.⁶ Creatures have the right to do the words of God. Here the correlation between rights and duties is clear. Creatures differ, and thus their respective rights, because God made them “after their kind.” He addresses differing words to them; their callings and offices are thus distinct. The entire creation story in the book of Genesis is filled with a description of callings, of divine assignments. God set the sun and the moon in the firmament of the heavens, the greater light to rule the day and the lesser light to rule the night. He created plants to yield seed and fruit trees to bear fruit upon the earth in order to feed mankind. And he created mankind, male and female, to till and keep the garden of Eden, to fill the earth and subdue it, to love God

above all and neighbor as self. Indeed, the very meaning of creatureliness lies in service, in being subject to divine ordinances which are the pointers to blessing, shalom, the life that is good. Creatures have the *right* to perform these divine assignments. They have a right to the institutions and the resources needed to carry them out.

(1) The legal framework in a society like ours consists fundamentally of three types of rights—the rights of persons, of institutions and associations, and of the state. First, personal rights. The norm of justice requires a social order in which men and women can express themselves as God's imagers. To put it another way, justice requires social space for human personality. By personality I mean the human self whose calling lies in love of God and love of fellowman. It is at this point that one can again see clearly the correlation between rights and duties. The duty to love God is ineradicable from the covenantal bond between God and humans; sin does not eliminate that duty. At the same time, the right to love God is inalienable. We cannot surrender it because it defines our very existence, our humanness, our creatureliness as male and female.

In the revelation of Christ, the Word made flesh, we know what love is. But at this point we are also confronted with what is perhaps the most difficult problem in the history of human rights. Because of sin, the gods men love are many, and for centuries the lovers of God have denied the right of others to love their god. If *in Christ* we know what it means to love God, do persons who claim to love God as revealed by Buddha or Mohammed have a right to the fulfillment of their claim? And what about persons who claim that the god they are called upon to love is human personality itself? A just society may not discriminate between one religion and another. The wheat and the tares are allowed to coexist until God's final day of judgment. This does not mean that the social order is neutral with respect to religions. Societal orders ought to be so

structured that a multiplicity of religions can flourish side by side. This will be of increasing import when we will see a rapid growth of interchange among the world's civilizations and cultures. Religion is the prime factor not only in the value systems of persons but also in the fabric of cultures and civilizations. If the society of the future will be one of peace and justice, it must be one where the right to freedom of religion is accorded preeminence, where there are no laws "respecting an establishment of religion, or prohibiting the free exercise thereof." (First Amendment, U.S. Constitution)

The rights of persons to fulfill their callings implies *the right to be*, the right to life itself, the right to be unharmed. Again we are reminded of our dependence on the Roman law.

*Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*⁷

The precepts of law are these: to live honestly, not to harm another, to render to each his due.

This right to be is not merely that of the human species. It belongs to every individual human life, from the beginning of its existence at conception to its end at death. Human life on earth always exists in bodies of flesh and blood and bones. These individual bodies have a right to remain whole, not to be harmed, aborted, maimed, tortured, molested, placed in hostage, terrorized. The basic needs of individual bodies to food, nurture, shelter and care are implicit in the right to life. The biblical message pointedly indicates that the fulfillment of such needs is not a matter of charity but of justice, and is therefore a matter of the structure of the public order. Justice requires such an allocation of material and cultural goods that human life is made possible, is protected, enhanced, and enabled to carry on a multiplicity of tasks in history. The building of cultures and societies entails the use of "nature" and its resources. Again, this is not a right of the human species or

the human community. The earth is the Lord's; and *persons* have the right to a stewardly possession and use of it. In this sense, the right to private property is as essential as the right to privacy in a developed, highly differentiated society like ours.⁸

(2) The second category of rights is that of institutions. I employ the word "institution" here in a specific sense to refer to communities and associations of which persons are members. Typical communities are marriages, families, churches and states. Associations are generally dependent upon the principle of voluntary joining and leaving on the part of their members.⁹ These include schools, universities, industrial enterprises, philanthropic and artistic organizations, political parties, labor unions, social clubs, the media, and the hundreds of freely established associations characteristic of modern democratic societies.

Communities and associations have an identity that is directly dependent upon their office, the service they render society. Their rights are correlative with their office. The right of an institution is its authority to make legally binding decisions for its members pertinent to its office.¹⁰

(3) A society is genuinely free when both persons and institutions can exercise their rights in this sense, without interference by external powers. With reference to the question of the impact of law on religious expression and freedom, we have to address the issue of whether religious freedom is primarily a matter of personal rights and the right of churches or whether that freedom is also essential for non-church institutions. But first let's consider the third category of rights—those of the state. Since the state is also an institution, its rights do not in principle need separate attention. However, since the impact of *its* "law" on religious freedom is our focus, practical considerations justify this in the present context. The state has rights peculiar to it because it has a unique office. That office is of divine origin: it is God's servant for our good. (Cf. Ro-

mans 13:4.) Its distinctive office is to establish and maintain a public realm in which the rights of persons and institutions are recognized, protected, and guaranteed. The state does not create these rights; instead, it must acknowledge divinely sanctioned and given rights, and establish spheres of freedom within which persons and institutions can exercise rights for the fulfillment of their respective offices, callings, and responsibilities.

The "good" which the state is called upon to establish is the *salus publica*, the public good. This has a variety of implications. In the first place, it means that the state's administration of justice must protect each person within its realm, irrespective of belief, race, class, or sex. Each person must be deemed equal before the law of the land. In the second place, the state is a public institution in that its membership—citizenship—must be open to everyone born within its borders. Under no circumstances is the state allowed to annul the citizenship of its members. In the third place, the state is public in that the legal order which it establishes ought to be one in which the spheres of freedom for the nonpolitical institutions and associations are guaranteed and protected from external interference. It must do that in such a way that no person or institution exploits, usurps, or abuses another. The state is called upon to guarantee peace for the commonwealth so that communities and associations domiciled within its territory can develop the "inner law of their being," the specific mandate for which the Creator called them into being through the historical deeds of men and women in time. In the fourth place, the state is a public institution because it has the calling—with other states—to establish an international framework of law which maintains peace and justice among nations and among multinational powers. Finally, states are public because they have the right to exercise "the power of the sword" within the entire territory over which their jurisdiction extends. Only states can

have a monopoly of that power; as soon as they lose that monopoly they cease to be states. Though that power is immense, it is limited both in kind ("sword") and in use (public justice). Acquisition of different kinds of power results in tyranny at home and imperialism abroad.

Along with the biblical setting and the legal framework, we must also consider the constitutional structure. After all, when we speak of the impact of law on religious expression and freedom, we are in the final analysis speaking of *constitutional law* because legislative stipulations and administrative regulations affecting religion will, if challenged, have to pass the test of constitutionality.

A constitution is the body of fundamental rules which determines "the exercise of the sovereign power in the state"¹¹ and guarantees certain rights to the people. Two questions must be distinguished here. First, does the U.S. Constitution contain provisions which adequately protect the people's rights of religious expression and freedom? Second, has the U.S. Supreme Court properly interpreted these provisions? I will focus primarily on the first question because, in my view, the public debate concerning it leaves a great deal to be desired.

We are not in the habit of critiquing the provisions of the Constitution because we stand in awe of this document. And rightly so. The Constitution, along with the English Bill of Rights of 1689 and the French Declaration of the Rights of Man and of the Citizen of 1789, is one of the most significant and influential political documents of the modern age. The Constitution has withstood the test of time. Though formulated by representatives from thirteen thinly populated former colonies of diverse cultural and religious leanings, it provided the base for 200 years of development of the United States into the most powerful nation on earth. It was one of the most formative powers that kept this body politic together and could, at times of crisis, be amended to meet new needs. A political docu-

ment of such stature has an aura of invincible splendor that humbles the student of constitutional law.

Moreover, the clauses affecting religion in the First Amendment—“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”—have exercised a benignant impact on American society. The establishment clause prevented the legal primacy of any denomination so that the equality of each citizen before the law became a reality, at least from a formal point of view. The fact that membership in the traditional Anglo-Saxon denominations carried with it definite social, economic and even political advantages must be attributed more to the cultural moorings of American civilization than to its legal structure. And the free exercise clause eliminated potential legal obstacles in the way of the stunning diversity of ecclesiastical life in the United States—a diversity unique in the modern age.

Nonetheless, these outstanding features of the Constitution should not blind us to its shortcomings that today not only contribute to confusion in the relation between religion and the public realm but also hinder the proper expression of religious freedom in American society. These shortcomings are related to the biblical underpinnings of human rights and the threefold societal diversity of rights.

The Constitution is an embodiment of the eighteenth-century Enlightenment in its moderate form.¹² The Enlightenment marked the unfolding of humanism, the religion which idolizes the self-realization of human personality. In its radicality, humanism views the autonomy of the human will as the final source of “values” for ethics. Since the eighteenth century, humanism considered technical rationality in science as the most fitting instrument in extracting nature’s resources in industrial production. And humanism, in its late bourgeois phase, viewed the acquisition of material abundance for our bodily needs as the goal

of progressive history.¹³ Humanism is the post-Christian religion of the West. In its most radical forms it *negates* the relevance of God's existence, the light of biblical revelation, the created structure of natural and social entities, the spiritual essence of human nature, the openness of human beings toward God, and the rootedness of cultural traditions and social institutions in the Christian foundations of Western civilization. Humanism is a secularized version of the Christian religion: it places the transcendent spiritual realities of the Christian faith within the confines of an immanent historical process subject to the control of the autonomous human will.¹⁴

Immanentized spiritual movements as a rule express themselves historically in three dialectically interrelated ways: radicalism, moderation, conservatism. (The political movements that parallel these expressions are generally referred to as the left, the center, and the right.) In the modern age, France was the center of radicalism, England of moderation, and Germany of conservatism. Moderate humanism took into consideration the importance of continuity in cultural and social change, and it accommodated itself politically to the Christian religion by making the public realm secular and by confining religion to the private spheres of home and church. John Locke (1632-1704) was the political philosopher who most clearly articulated the political accommodation between the Christian religion and modern, individualist humanism. Because of Locke's influence on the Founding Fathers, it is essential that we understand his position on the relation between religion and society. One doesn't have to deny Locke's personal commitment as a Christian to be aware of his basic post-Christian stance in sociopolitical matters which he shared with Thomas Hobbes.

Both men began with a common point of departure, the assumption that man is a product of his experience and that his nature is rooted in material reality rather than in divine

ordination. The assumption was revolutionary; it swept away the belief in providence that underlay medieval society and instead pointed to man's potential for ordering society as he saw fit.¹⁵

In distinction from Hobbes, the radical, Locke searched for a moderate political accommodation with the Christian religion. He did this perhaps most clearly in *A Letter Concerning Toleration*, published in 1689. Here Locke first presents his view of the state. It is a radically secular, even materialist conception. It is best to quote his own words.

The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing of their own civil interests.

Civil interests I call life, liberty, health and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.

It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general, and to every one of his subjects in particular, the just possession of these things belonging to this life.¹⁶

After thus reducing the scope of government to "secular interests"¹⁷ which in effect amounts to "the preservation of property,"¹⁸ Locke defines the church.

A church, then, I take to be a voluntary society of men, joining themselves together of their own accord in order to the public worshiping of God in such manner as they judge acceptable to Him, and effectual to the salvation of their souls.¹⁹

After this speedy reduction of religion to the pursuit of soul salvation, Locke turns to the question of the relation between state and church. He makes two points. "The only business of the church is the salvation of souls, and it no ways concerns the commonwealth."²⁰ But he is aware that in certain circumstances the interests of the church may collide with the interests of the state. In that case the

church must give in to the state. "But those things that are prejudicial to the commonweal of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rights."²¹

With this defense of toleration, Locke in effect provided the basis for secular society in its moderate, liberal form. This basis comprised several elements, two of which are indispensable: first, the state is secular, governed by the rational consent of the governed; and second, religion is a matter of the salvation of the soul, best achieved in the church of one's choice. The First Amendment of the Constitution embodies these principles. The establishment clause severs the link between the state and church, and, in an ever increasing manner, the link between the state and religion. Further, the free exercise clause guarantees the individual's religious freedom in whatever church he seeks to express it.

There is one additional complication. The conception of society, both in Locke and in the Founding Fathers, was individualistic. This meant that societal relationships were viewed in terms of the wills of the individual persons comprising these relationships. In the realm of law, it meant that the rights of individuals are protected in the Bill of Rights while the rights of communities and associations are not mentioned except indirectly in the Third Amendment, where the privacy of the family is protected ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner. . .").

With this background, it should come as no surprise that with reference to the expression of religious freedom we are in a constitutional bind. The two centuries of American history have witnessed an amazing proliferation of communities and associations in the form of churches, schools, colleges, universities, industries, labor unions, charitable organizations, and, especially in recent decades,

caring institutions for the very young and the very old, for the disabled and the handicapped. The expression of religious freedom is guaranteed in the churches. But it is of the very nature of religion to express itself also in these "mediating structures"²² that fill society between the individual and the state. Precisely because they are mediating structures, they inevitably have links with individuals, who are their members, and with the state, which must acknowledge, protect and guarantee the rights peculiar to their nature, identity, and office. These mediating structures are established by ordinary people for a great variety of reasons—profits of money, pleasures of the body, and praise of God. I suspect that the latter reason is still foremost. How then can we have a free society when the rights of the mediating structures organized for the praise of God are not constitutionally protected? From the schools parents expect for their children an education that is in tune with their basic world view. From the colleges and universities we expect the development of the mind. From the caring institutions we expect legal adoption arrangement for children, medical care for the sick, assistance for the physically and mentally disabled, protection for the elderly. These concerns overlap with those of the state. But does this overlap mean that the religious character of these mediating structures must be eradicated as soon as the state becomes involved, especially when public funds are used? If that is the meaning of the establishment clause, its effect is "the establishment of a religion of secularism," as Justice Potter Stewart hinted in his dissent in the *Schempp* case.²³ The U.S. Supreme Court has indeed interpreted the establishment clause in this way, especially since the *Everson* case.²⁴ In view of this, we are today faced with the compelling need for "Disestablishment a Second Time."²⁵

The disestablishment we need today is not a severing of the link between the state and its established church, as in the eighteenth century, but rather a severing of the links

between the state and the secularism established and imposed in mediating structures that are closely connected with the state, especially in the areas of health, education, and welfare. I am not advocating a universal severance of the links between the state and the mediating structures operating in these areas. I am not advocating a medical, educational, or social laissez-faire policy (although a cutting back of governmental bureaucracy and an increase in personal and institutional responsibilities in these areas ought to be welcomed). Nor am I advocating a states' rights solution to these problems (as if local and state governments are inherently less secular than the federal government). The solution I am advocating is the disestablishment of secularism in the mediating structures on the part of every level of government and the equal protection of the free exercise of religion in these structures. In the area of education, for example, governments are legitimately involved because without education citizens cannot assume political responsibilities in a democracy. But parents are equally interested in education. The interests of the government and the interests of the parents can be met in a system of governmentally certified and funded schools religiously differentiated according to the religious convictions of the parents whether they be secular, Jewish, or Christian. Similar solutions are possible in the areas of health and welfare.

I am aware that what I am advocating involves a fundamental restructuring of the American legal system. I dare to defend this proposition since I am convinced that the establishment of secularism is a tyranny that prohibits free exercise of both personal and institutional rights.

Does a restructuring of the legal system require constitutional reform? I would like to answer this question first by pointing out that there is a major example of juridical reflection that better covers this area than the U.S. Constitution, and secondly, by suggesting that the U.S. Con-

stitution can serve as the legal basis for expanding the free exercise of both personal and institutional rights. The documents to which I refer are the Charter of the United Nations adopted on June 26, 1945, and the Universal Declaration of Human Rights, drafted by the United Nations Commission on Human Rights under the chairpersonship of Eleanor Roosevelt and adopted by the General Assembly on December 10, 1948. The Charter sets out the internal structure of the United Nations; the Declaration is in effect a universal Bill of Rights. This Declaration is a document born within the civilization of the West, revealing the impact of both humanism and Christianity. It displays many weaknesses, but it is the most adequate statement of rights the civilized world has formulated, even if it has not managed to live up to its demands. It is important because it has gone beyond the individualism of the Enlightenment world view reflected in the U.S. Bill of Rights. The personal rights recognized in the U.S. Bill of Rights are incorporated in the Declaration, but in addition there is a surprising list of institutional rights which has not received the attention it deserves. Here are the relevant articles.

Article 16. 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. . . .

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion in teaching, practice, worship and observance.

Article 20. 1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 26. 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. . . .

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 29. 1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

As its Preamble states, the Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nations "as a common standard of achievement for all people and nations." It is not binding law in any state, but serves as an excellent model for constitutional reform because it recognizes the rights of such institutions as marriage and family, the freedom of association (including the indispensable corollary—the freedom *not* to belong to an association), and the freedom without distinction of any kind to manifest one's belief, either alone or in community.

It is singularly unfortunate that Canada, which is going through the most significant constitutional reform in its entire history, has not benefited from the common standard contained in the Universal Declaration. The Canadian Charter of Rights and Freedoms, which is Part I of the proposed Constitution, declares the following Fundamental Freedoms in article 2:

freedom of conscience and religion

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

freedom of peaceful assembly

freedom of association²⁶

There is little here that goes beyond the First Amendment of the U.S. Constitution, and one can therefore predict that in fifty years the Supreme Court of Canada will be entangled in a legal labyrinth with respect to the religious rights of the mediating structures as confusing as the chaos we now face in the United States.²⁷

The United States is not going through a period of constitutional reform, and amendments do not readily receive the required support, as the history of both the proposed Equal Rights Amendment and the Anti-Abortion Amendment shows. How then can the disestablishment of secularism be legally achieved? How can the free exercise of religion without discrimination in the health, education, and welfare institutions be guaranteed? I believe that within the present constitutional framework there are three available avenues. First, there is ample historical evidence that the establishment clause was included in the First Amendment to disestablish churches.²⁸ The question of religious freedom *in schools* is not properly a matter of the establishment clause (except when the state uses schools to establish the religion it prefers). Constitutional lawyers should argue this strict interpretation of the clause.

In the second place, the nature, content and scope of religion is not defined in the First Amendment.²⁹ The rights pertinent to the free exercise thereof can only be defined by its adherents, and the exercise of these rights should not be prohibited unless such exercise conflicts with the legitimate demands of the public realm itself. (For example, the refusal of parents, on religious grounds, to permit the administration of blood transfusion to save the life of their child would—in my view—constitute an offense against the public realm.) In recent decades the Supreme Court has begun to acknowledge that the free

exercise of religion cannot possibly be confined to personal belief and ecclesiastical practice. It has protected the free exercise of religion even when this collided with the interests of the state, as in the conscientious objectors cases.³⁰ Constitutional lawyers will have to pursue this argument further, to extend to the expression of religious freedoms in the various spheres outside of the church. The Constitution itself does not prohibit such an extension.

In the third place, there are three amendments to the Constitution whose provisions can be properly used to defend a relation between religion and the state radically different from the "absolute separation" imposed on American society by the Supreme Court on the basis of a misinterpretation of the establishment clause. The Fourteenth Amendment, in part, reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In my view, any state which funds secular public schools while refusing to fund independent private schools abridges the privileges of the citizens who support the private schools, deprives them of property without due process, and denies them the equal protection of the laws. The same argument holds for similar discrimination in the areas of health and welfare.

And then there is the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Founding Fathers established a nontotalitarian state. This means that the state does not have a monopoly of power in society. Other sectors have powers of their own. We acknowledge a plurality of power when we defend free enterprise in the economic sector. There is no constitutional prohibition of a

defense of a plurality of power in the cultural sectors, whose powers today are increasingly absorbed into the political system.

Finally, the Ninth Amendment reads: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The rights of the people to the free exercise of religion in the nonchurch spheres of society are today both denied and disparaged. As a rule, rights have to be fought for; they don't come on a golden platter. The Ninth Amendment provides a constitutional base for this battle.

By suggesting that religious rights should be dealt with in the light of these three amendments I am really saying that the future battle should be fought much more in terms of *rights*, which the courts are called upon to defend, rather than in terms of *religion*, which the courts are not legally competent to define. The disestablishment of the religion of secularism must be achieved by getting the combatants out of the prison of the Supreme Court's interpretation of the First Amendment's establishment clause, which is largely irrelevant to the issues at stake. The establishment clause cut America off from the Constantinian entanglement of church and state, and did so properly. The Bill of Rights as a whole laid the basis for a free society, including the expression of the rights of religion. Let's then bring the entire Bill of Rights into the picture!

At the beginning of the modern era the societies of western Europe were torn by the wars of religion. The colonies along the eastern seaboard and later the independent United States were havens for those driven from their homelands because of religious persecution. The Constitution established channels for a society of toleration. Today we realize that these channels are partly blocked because secularism has become the religion of the public realm. The establishment of this religion brings with it both injustice and discrimination, and thus the danger for new

wars of religion, undoubtedly fought with different weapons. This danger can be averted. Let us openly and honestly recognize that the American citizenry is religiously divided. And then let us avail ourselves of the constitutional weapons so that the legitimate rights of each religious segment in the citizenry are properly acknowledged, not only in the private spheres of life but also in the public realm.

NOTES

¹Aristotle, *The Politics of Aristotle*, translated by Ernest Barker (London: Oxford University Press, 1946), p. 65n.

²Here it should be kept in mind that the Bible presents a fundamental antithesis between the sin of mankind and the work of God in creation and redemption. It does not present an antithesis between creation and redemption. Redemption is the restoration of creation by divine grace. Christian world views which proceed from the (relative) autonomy of creation lead to a natural law conception of justice, dominant in classical Roman Catholic thought. See John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed & Ward, 1960); and its Protestant parallel, Carl F.H. Henry, *Aspects of Christian Social Ethics* (Grand Rapids: Eerdmans, 1964). Christian world views which (tend to) isolate redemption from creation lead to a Christomonistic conception of justice. Because of the eclipse of the doctrine of creation in modern Christian thought, such Christomonistic conceptions are dominant. See Karl Barth, *Community, State and Church* (New York: Doubleday, 1960); Jacques Ellul, *Le fondement théologique du droit* (1946); and John Howard Yoder, *The Christian Witness to the State* (Newton, Kansas: Faith and Life Press, 1964). Finally, Christian world views that take as their point of departure the fall into sin tend to reject the inherent goodness of creation and perceive redemption as entirely innovative, often implying the elimination of the existing (sinful) order. In certain types of dispensationalism—made popular by the writings of Hal Lindsey—this annihilation of the existing order will occur when Christ returns in the eschaton. In certain types of liberation theology, Christians are called upon to engage in the destruction of the sinful, existing capitalist order. See José Miranda, *Marx and the Bible: A Critique of the Philosophy of Oppression* (Maryknoll: Orbis Books, 1974). These various Christian world views have their counterparts in post-Christian secular thought, such as modern natural law, Marxism, and the radical wing of the counterculture from Rousseau to Roszak.

³Emil Brunner, *Justice and the Social Order* (New York, 1945), p. 83.

- ⁴H. G. Stoker, *Die aard en die rol van die reg* [The Nature and Role of Law] (Johannesburg, 1970), p. 15. My own translation.
- ⁵For a treatment of the history of biblical revelation in the light of the covenant, see S. G. de Graaf, *Promise and Deliverance*, 4 vols. (St. Catharines, Ontario: Paideia, 1977 seq.), and H. E. Runner's "Translator's Introduction" to vol. 3, pp. 11-21.
- ⁶Cf. Bernard Zylstra, "Thy Word Our Life," in James H. Olthuis, et al., *Will All The King's Men?* (Toronto: Wedge, 1972), pp. 153-221.
- ⁷Justinian, *Institutiones* I.1.3.
- ⁸Cf. Hannah Arendt, *Crises of the Republic* (New York: Harcourt Brace Jovanovich, 1972), pp. 211f.
- ⁹Herman Dooyeweerd's sociological distinctions of the various kinds of human relations in a differentiated society are helpful. For a quick survey, see L. Kalsbeek, *Contours of a Christian Philosophy: An Introduction to Herman Dooyeweerd's Thought* (Toronto: Wedge, 1975), pp. 196-268.
- ¹⁰This matter of the authority and rights of institutions outside of the state is being given increasing attention in sociology of law. F. W. Maitland's Introduction to Otto Gierke's *Political Theories of the Middle Age* (Cambridge University Press, 1900, pp. vii-xlv) is a classic statement of the issue by a legal historian. Herman Dooyeweerd's doctrine of sphere sovereignty deals with this question; cf. his *Roots of Western Culture* (Toronto: Wedge, 1979), pp. 40-60. For an introduction to the relevant literature, especially European, see Bernard Zylstra, *From Pluralism to Collectivism: The Development of Harold Laski's Political Thought* (Assen: Van Gorcum, 1968), pp. 206-220; and James W. Skillen, "The Development of Calvinistic Political Theory in The Netherlands, with Particular Reference to the Thought of Herman Dooyeweerd." Ph.D. dissertation, Duke University, 1973. See also H. Evan Runner, "Sphere Sovereignty," in *The Relation of the Bible to Learning* (Toronto: Wedge, second edition, 1981), Lecture V.
- ¹¹Cf. A. V. Dicey, *The Law of the Constitution* (London: MacMillan, 1959), p. 23.
- ¹²Cf. Henry F. May, *The Enlightenment in America* (New York: Oxford University Press, 1976), p. 96f; Carl Becker, *The Heavenly City of the Eighteenth-Century Philosophers* (New Haven: Yale University Press, 1932); and Hannah Arendt, *On Revolution* (New York: Viking, 1963).
- ¹³Cf. Bob Goudzwaard, *Capitalism and Progress* (Toronto: Wedge; Grand Rapids: Eerdmans, 1979), especially Part One.
- ¹⁴For a more extensive discussion of the development of secular humanism, see Bernard Zylstra, "Modernity and the American Empire," *International Reformed Bulletin*, first and second quarter, No. 68/69, 1977, pp. 3-19, and the literature cited there.
- ¹⁵James Laxer and Robert Laxer, *The Liberal Idea of Canada: Pierre Trudeau and the Question of Canada's Survival* (Toronto: James Lorimer, 1977), p. 80.

- ¹⁶John Locke, *A Letter Concerning Toleration* (Indianapolis: Bobbs-Merrill, 1950), p. 17.
- ¹⁷*Ibid.*, p. 19.
- ¹⁸John Locke, *The Second Treatise of Government* (1690), par. 94.
- ¹⁹Locke, *A Letter Concerning Toleration*, p. 20.
- ²⁰*Ibid.*, p. 36.
- ²¹*Ibid.*, p. 40. Though Francis Schaeffer recognizes that Locke secularized the Christian religion, he nonetheless stresses his dependence on it, especially the Presbyterian tradition. See *How Should We Then Live?* (Old Tappan, New Jersey: Fleming H. Revell, 1976), p. 109.
- ²²This term is from Peter Berger. Cf. his essay, "In Praise of Particularity: The Concept of Mediating Structures," in *Facing up to Modernity: Excursions in Society, Politics, and Religion* (New York: Basic Books, 1977), pp. 130-141.
- ²³*Abington School District v. Schempp*, 374 U.S. 203 (1963) at 226.
- ²⁴*Everson v. Board of Education*, 310 U.S. 1 (1947).
- ²⁵See Rockne McCarthy, James W. Skillen, and William A. Harper, *Disestablishment a Second Time: Public Justice for American Schools* (Grand Rapids: Christian University Press). Forthcoming. See also Gordon Spykman, *Society, State, and Schools: A Case for Structural and Confessional Pluralism* (Grand Rapids, Mich.: Eerdmans, 1981).
- ²⁶See "Consolidation of proposed constitutional resolution tabled by the Minister of Justice in the House of Commons on February 13, 1981 with the amendments approved by the House of Commons on April 23, 1981 and by the Senate on April 24, 1981." Issued by the Department of Justice in Ottawa. The amendments to the proposed Constitution for Canada, sent to the British Parliament in November 1981, do not affect the wording of Article 2.
- ²⁷This could have been avoided if the submissions to the constitutional committee of Parliament by Roman Catholic, Mennonite, and relevant Reformed institutions had been paid attention to. See, for instance, the brief presented by the Committee for Justice and Liberty (CJL), a Toronto-based Christian public interest group, to the Special Joint Committee of the Senate and the House of Commons on the Constitution. For an overall assessment, see Paul Marshall, "Reflections on the Constitutional Package," *Catalyst* (publication of the CJL), June 1981, p. 8f.
- ²⁸See Anson Phelps Stokes, *Church and State in the United States*, 3 vols. (New York: Harper, 1950), vol. 1, pp. 64-654.
- ²⁹See Sharon L. Worthing, "'Religion' and 'Religious Institutions' under the First Amendment," *Pepperdine Law Review*, vol. 7 (1980), pp. 313-354.
- ³⁰See, for instance, *United States v. Seeger*, 380 U.S. 163 (1965).