Introduction

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When I started on a countdown to retirement last year, I began looking over some of my articles, published here and there, to see whether any of them could be usefully put out in book form. These four pieces on church and state came out between 1963 and 1979.[1] A good many of our most important church-state cases have come down since then, so there is a question whether anything I said then can still be useful now. Looking the pieces over, I decided, perhaps self-servingly, that there are a few points. The first, I believe, is my starting point. Rather than asking what religious institutions or practices are consistent with the U.S. Constitution, as prevailing scholarship on the subject tends to do, religious believers should begin by asking what attitude toward the Constitution is consistent with their religion. It is the same with the rest of the law as it is with the Constitution. There is no religiously neutral principle against which the legal claims of religion can be weighed. A person who tells us he must obey God rather than man is not adequately answered by insisting that he must obey man rather than God. To gainsay him, we must have and support a different view of what God wants him to do.

From this starting point, religious freedom becomes a religious principle.[2] After loving God, the first thing my religion asks of me is to love my neighbor. In today's society my neighbors include people of many different religions. Loving them requires making room for them to live out their several religious commitments comfortably and in friendship with other people. Doing that requires listening to them carefully before deciding what our government should allow them to do, what it should subsidize them in doing, what it should forbid them to do.

Love of neighbor is, I believe, either a revealed doctrine or a raw intuition. I do not think it can be arrived at in its fullness through philosophical reflection. But it is a better basis for church-state relations than any philosophical doctrine. It commends itself intuitively even to people who know nothing of philosophy. It also provides a bridge between people who differ

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1 Essay 1: *Sub Deo et Lege: A Study of Free Exercise*, 4 Religion & Pub. Ord. 3 (1968); Essay 2: *The Passing of Nonsectarianism: Reflections on the School Prayer Case,* 38 Notre Dame L. Rev. 115 (1963); Essay 3: *Thje Last Days of Erastianism; Forms in the American Church-State Nexus*, 62 Harv. Theol. Rev. 301 (1969); Essay 4: *Pluralist Christendom and the Christian Civil Magistrate*, 8 Cap. U. L. Rev. 413 (1979) and 9 Communio 321 (1982). (Many of Professor Rodes' writings can be found at the following SSRN link: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=431258).

2 On the belated recognition of this principle in the official teaching of the Roman Catholic Church, see John T. Noonan, Jr., The Lustre of Our Country 331–53 (1998). Noonan stresses the role of American prelates and theologians, particularly John Courtney Murray, S.J. (1904–67), drawing on their national experience to put this recognition through the Second Vatican Council.

as widely in their philosophies as they do in their religions. I have tried here to treat the constitutional protection of religion, the statutory accommodation of religion, the ceremonial recognition, and the public support of religion as all ancillary to love of neighbor. Rather than seeking lowest common denominators and trying to avoid divisiveness, we should respect the convictions and practices of our neighbors, and seek ways to make them comfortable living together with us.

A second point is historical. Drawing on work I have done in English church history, I have tried to bring out in the American church-state nexus its important elements of continuity with its English antecedents, and thence with medieval Christendom. In many places in the world, including most places on the continent of Europe, religious pluralism has emerged from interactions, confrontations, and, often enough, wars between defined faith communities. But the English pluralism that is the ancestor of our own arose primarily from the response of a single faith community to the unwillingness of ordinary people to persecute their neighbors.[3] Beginning with the Act of Toleration of 1689, the embodiment of English national Christianity within the ancient national church was cut into by statutory concessions made to one group after another because it seemed right to make them. And any intolerance remaining in the written law was mitigated by the formidable ability of the local magistrates to look the other way when they chose to do so. During the sixteenth and seventeenth centuries, there had been persecutions, there had been martyrdoms, and there had been a civil war in which questions of how to run the church had figured together with questions of how to run the state. But when the smoke had cleared away, there alongside the same old monarchy was the same old church, shaken and chastened but institutionally intact, formal in its liturgy but eclectic in its doctrine, and ruefully gentle with those who chose to find their spiritual nourishment elsewhere.

A peculiarity of the resulting pluralism was that denominational lines were mostly blurred.[4] Until the end of the eighteenth century, only the Roman Catholics had a fully articulated organization distinct from that of the national church. Some groups were identified by particular practices—Quakers by not taking oaths, Baptists by not baptizing infants—but most others were identified only by worshiping together in their own way. Because of the broad sweep of acceptable doctrine within the Church of England, dissident congregations were not often defined by their doctrines. In the main doctrinal controversies of the seventeenth, eighteenth, and nineteenth centuries, there were few positions that did not have as many adherents within the Church of England as outside it. By the mid-nineteenth century, therefore, the general understanding in England was that there was a broad

3 *See* Robert E. Rodes, Jr., Law and Modernization in the Church of England 93–95 (1991).

4 *Id.* at 85–93.

common national Christianity traditionally embodied in the institutional and liturgical forms of the national church, but not defined by them. Those who chose to adopt other institutional and liturgical forms were free to do so.

Except as regards the national church, that understanding was duplicated on this side of the Atlantic. Some colonies made moves toward having an "established church" as the mother country did, but they were all abandoned, the last of them in 1833.[5] So Americans of all denominations were like "dissenters" in England—followers of a broad common Christianity with no privileged institutional or liturgical embodiment. But immigration and expansion brought into the mix Roman Catholics, who could not separate their Christianity from its institutional and liturgical embodiment, and Jews and others who were not Christians at all. The need to include these people within the fraternal union enjoined upon us by our Christian heritage provides a backdrop to these essays.

A third point is this: in three of these essays, I have used extensively the concept of Erastianism, and in two of them I have contrasted it with the concept of High Churchmanship. I got these concepts from the English material I have worked with, but I have used them in my own way. I think the best definition of the terms as I have used them is the one I put in the Introduction to a work on the Church of England:

> Erastianism is an emphasis on the church as one of a number of institutions through which society conforms itself as far as possible to the prevailing understanding of God's will. High Churchmanship is an emphasis on the church as an expression of the divine transcendence, and of the divine judgment under which every social order lies because it is not the Kingdom of God. Erastianism is not inherently committed to subjecting the church to the state, but it is compatible with the state exercising a good deal of control over the church, as it does over the other important institutions of society. By the same token, High Churchmanship is not inherently hostile to the higher aspirations of the state, but the rulers of the state are apt to think it is. I believe the two emphases reflect inherent tensions in the Christian Revelation, and that no version of institutional Christianity can prosper unless both emphases are present in it.[6]

These concepts and the dialectical tension between them have not yet found a significant place in American church-state scholarship. Perhaps it is a matter of what one takes as a starting point. If you see the church-state relation as one between a specific state and a generic church, the internal tensions of the church may escape your notice. But there are no generic churches, just as there are no generic people. If one approaches this subject, as I have suggested, by considering how particular churches, particular faith communities, especially one's own, can live, do their work, and bear their witness in a particular state, this internal tension becomes important.

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5 1 Anson Phelps Stokes, Church and State in the United States 366 –446 (1950).

6 Rodes, *supra* note 3, at xii.

Since these essays first came out, there have been a number of important developments in their subject matter. *Employment Division v. Smith*[7] has come down, and the Religious Freedom Restoration Act[8] has come and partly gone. *Jones v. Wolf*[9] has come down to clarify (or obfuscate) the resolution of intrachurch disputes. Some forms of state support for parochial schools have been upheld over Establishment Clause objections.[10] A largely new topic, church autonomy, has arisen, beginning with Bob Jones University losing its tax exemption by forbidding interracial dating[11] and continuing down to the present with the debate over whether Catholic universities and hospitals can be required to buy contraceptives for their employees.[12] Various developments, especially increased legal protection for homosexuals, have led to significant (and often unsuccessful) Free Exercise Clause claims by members of mainstream religious bodies, whereas it was for the most part only members of splinter groups that had raised such claims in the past.[13] The latest example (in October 2013) is the losing claim of a Christian professional photographer who was had up before the New Mexico Civil Rights Commission for refusing to take pictures at a same-sex commitment ceremony.[14]

I was tempted to disregard all these developments and publish the essays as they stood, leaving to the reader the task of extricating the still valid insights, as I believed them to be, from obsolete examples and reflections on obsolete authorities. But I decided instead to do some updating. The result is a little like an old face that has been injected with something to smooth out the wrinkles. It still looks its age albeit not as obviously as before. But I hope that the points I wanted, and still want, to make can be found in the essays without the distraction of blatant anachronism.

In the updating, I have paid more attention to cases than to books and articles, partly because I am of a generation that was schooled to give primary attention to primary sources.[15] My starting point excludes me from participation in the vigorous ongoing debate about the philosophical basis for freedom of religion. And my conclusion distances me from a growing body of work arguing that the time has come for Christians to accept being marginal-

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7 494 U.S. 872 (1990).

8 42 U.S.C. § 2000bb (2012), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

9 443 U.S. 595 (1979).

10 Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

11 Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

12 *See* Catholic Charities of Sacramento v. Superior Court, 85 P.3d 87 (Cal. 2004); Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006).

13 *See* Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407 (2011).

14 Elane Photography, LLC v. Willock, 309 P.2d 53 (N.M. 2013).

15 A litle while ago, I had a student run a sample of law review footnotes at ten-year intervals from 1955–56 through 2005–06. It turned out that in the former year only twelve percent of the items cited were secondaries. In the latter year, it was forty-six percent.

ized or countercultural. For me, Christianity is in the mainstream and freedom of religion is one of its tenets.

I have taken for a title *Hosea* 1:9, where the prophet is ordered to give his newborn son a name signifying the Lord's estrangement from His people. But the estrangement is only temporary. In the next chapter (2:23), we are told that those who were not His people will be called His people again.