European Journal of Science and Theology, *April 2014, Vol.10, No.2, 67-77*

LAW, PUBLIC POLICY AND THE SECULAR STATE[†]

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(Received 23 September 2013)

Abstract

Since the 1950s, United States Supreme Court holdings have transformed the United States from a polity in which there was a soft establishment of Christianity to a polity in which there is now the establishment of a strong laicism. This essay begins with a brief review of some of the steps through which this transformation occurred in the United States through Supreme Court decisions beginning in the late. This paper demonstrates that the United States have moved beyond a separation of Church and State to an established secular state that establishes policies and laws that are hostile to religious commitments. Such a state is not neutral with respect to religion. This paper demonstrates the extent to which the attempt to be neutral with respect to religion has led to non-neutral policies that privilege ways of life and conceptions of the good that reject religion.

Keywords: bioethics, laicism, separation, church, state

1. Introduction

The west for centuries was shaped by Constantine's establishment of Christianity in the Roman Empire [1]. Christian influence lessened over many centuries, but arguably in the west the understanding of Christianity as the norm began to crumble through the work of Enlightenment thinkers such as Kant, Rousseau, Hume and others. A radical rupture occurred with the French Revolution, and the Christian state collapsed with the establishment of the French First Republic on September 22, 1792. The west saw in the French First Republic the use of physical force and violence to rout out Christianity. For example, Roman Catholic priests were systematically executed and others were found guilty of acts such as saying the rosary or attending a secret mass [2, 3]. One way to examine this secularization in the US is through Supreme Court cases that reflect a radical shift in the role and treatment of religion in public life. The result is not a neutral polity but one that generally privileges the secular and is hostile to religion [4].

[†] A previous version of this article was published in *Altarul Reîntregirii Journal*, supplement, Reintregirea, Alba Iulia, 2013.

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The essay explores the extent to which there has been a far from soft establishment of a laicist secularity in the United States through Supreme Court decisions beginning in the late 1940s and extending to the present. Since the 1940s, United States Supreme Court holdings have transformed the United States from a polity in which there was a soft establishment of Christianity to a polity in which there is now the establishment of a strong laicism. The United States have traded the soft establishment of religion for the hard establishment of a secular ideology. This essay begins with a brief review of some of the steps through which this transformation occurred in the United States through Supreme Court decisions beginning in the late 1940s that removed the obligation to acknowledge the existence of God when serving in public office, eliminated prayers in public schools, and then secularized the public space by, among other things, prohibiting Christian symbols (e.g., the Ten Commandments) from public buildings, thus secularizing the public forum, public education, and the public space. The most drastic was the clearing away of Christian sexual morality through *Griswold v. Connecticut* (1965) [381 U.S. 479] and *Eisenstadt v. Baird* (1972) [405 U.S. 438], and finally the decision of *Roe v. Wade* (1973) [410 U.S. 113], which in 1973 effectively abolished the prior establishment of traditional Christian morality. This paper demonstrates that the United States have moved beyond a separation of church and state to a secular state that establishes policies and laws that are hostile to religious commitments. The attempt to be neutral with respect to religion has led to non-neutral policies that privilege ways of life and conceptions of the good that reject religion. It is, indeed, a secular fundamentalist state, one in which the term 'secular', meaning separate from religion, has become confused with 'secularism', meaning in opposition to religion [4]. The phrase: "secular fundamentalist state" has been used to describe "a policy that seeks to exclude from the public forum and even from public discourse any but a secular ideology" [1, p. 76].

The United States for about a century and half recognized Christian morality as the background against which we lived freely and without a state mandated or enforced religion. Laws and policies reflected a soft establishment of Christianity. The founding documents of the nation had, after all, been written with the assumption that this was a Christian people, united under God. Beginning in the 1940s, this began to change and today the United States have been fully transformed from a polity in which there was a soft establishment of Christianity to one in which there is the establishment of a strong laicism. Contributing to this change have been multiple Supreme Court decisions, typically involving claims about the right to the Free Exercise or the Establishment Clause, both found in the first amendment to the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" [*United States Constitution*, available online at http://www.senate.gov/civics/constitution_item/constitution.htm, accessed February 3, 2013].

The remainder of this essay explores some of the decisions that have secularized public schools, the public space, and the moral norms that form the backdrop to law and public policy. The essay concludes with a broader discussion of the differences between neutrality and secularism and argues that attempts to develop neutral policies that are indifferent to religion in fact have led to the development of laicist policies that are hostile to religious commitments.

2. The United States Supreme Court and the secularization of education

A number of Supreme Court cases led to the removal of traces of Christianity or any religion in public schools. In *Everson v. Board of Education* (1947) [330 U.S. 1], the Court held that states, just like the federal government, were bound by the Establishment Clause. At the time, New Jersey had a program that reimbursed parents for public transportation costs associated with sending their children to school, whether the school was public or private (including religious schools). A taxpayer sued the schools arguing that such reimbursement constituted state support of religion and was unconstitutional. The Court ruled that the program was permissible because the purpose of the reimbursement was "separate and so indisputably marked off from the religious function", but the ruling made clear that there was to be a strong separation (a 'wall') between state governments and religion.

In 1948, the U.S. Supreme Court decided the case of *McCollum v. Board of Education* (1948) [333 U.S. 203]. The Champaign County Board of Education had a program that allowed non-school personnel who were paid by private third parties to use public school property to provide religious instruction to those students whose parents wanted them to receive such instruction. The Court ruled that this program violated the Establishment Clause and that to allow such instruction was to promote religion inappropriately through the public schools. Although no one was forced to participate in religious instruction, the Court held that merely allowing such groups to meet at the school was problematic.

In *Engel v. Vitale* (1962) [370 U.S. 421] the court ushered in the elimination of prayer in public schools, a topic that would be revisited in future cases. The Court ruled that the use of a voluntary, non-denominational prayer approved by the New York Board of Regents in public schools was unconstitutional.

In *School District of Abington Township v. Schempp* (1963) [374 U.S. 203] the Court held that the school district's practice of voluntary morning Bible-reading and prayer was unconstitutional because it violated the Free Exercise and Establishment Clauses.

In the 1971 case of *Lemon v. Kurtzman*, (1971) [403 U.S. 602], the Court considered whether Pennsylvania and Rhode Island laws that gave state funds to non-public schools (including religious schools) to support teacher salaries, textbooks and other materials pertaining only to secular subjects were constitutional. The decision described a three-part test to evaluate violations of

the Establishment Clause. To be permissible, a law must have "a secular legal purpose", "its principal or primary effect must be one that neither advances nor inhibits religion," and it must not foster "an excessive government entanglement with religion". The Pennsylvania and Rhode Island statutes failed the test and were deemed unconstitutional.

In *Wallace v. Jaffree* (1985) [427 U.S. 38], the Supreme Court ruled Alabama's law permitting one minute for prayer or meditation in schools was unconstitutional. In *Lee v. Weisman* (1992) [505 U.S. 577] the practice of inviting a local religious leader to speak at graduation ceremonies and deliver invocations or benedictions at school ceremonies was deemed unconstitutional because it violated the Establishment Clause. The Court ruled in *Santa Fe v. Doe* (2000) [530 U.S. 290] that a policy permitting student-led prayers at school events, even when the prayers were initiated by a student vote and delivered by a student-elected chaplain, was unconstitutional because it violated the Establishment Clause.

Finally, *Locke v. Davey* (2004) [540 U.S. 712] upheld a Washington policy that prohibited the use of Promise Scholarships (a state-funded scholarship program) to pursue degrees in 'devotional theology'. The Supreme Court held that the law did not violate the Free Exercise Clause and Washington could disallow the use of money for religious instruction. The Court also held that the prohibition did not reflect 'animus toward religion'.

3. The United States Supreme Court and the secularization of public spaces

In addition to secularizing schools, a number of cases led to the removal of any mention or reference to religion in public spaces. *Torcaso v. Watkins* (1961) [367 U.S. 488] concerned the requirement in the state of Maryland that anyone holding public office attest to their belief in God. Torcaso had been appointed a notary, but as an atheist, did not want to attest to a belief in God. The Court held that the Maryland requirement set up an unconstitutional religious test.

The 1989 case of *County of Allegheny v. American Civil Liberties Union* (1989) [492 U.S. 573] established that some public displays of religious expressions might be sufficiently secular to be permissible, but other displays violate the Establishment Clause. Two holiday displays on public property in Pittsburgh were contested: a nativity scene in the County Courthouse and a large menorah displayed outside a public building next to a large Christmas tree. The nativity scene was held to violate the Establishment Clause because it endorsed Christianity but the menorah was not because, given its setting, the Court held that it did not endorse a religion. *McCreary County v. ACLU of Kentucky* (2005) [545 U.S. 844] also involved religious displays in public space. In this case, at issue was a display of the Ten Commandments in a county courthouse. The Court ruled the display unconstitutional because it violated the Establishment Clause. The Court also ruled on the question of whether the purpose of the display mattered. If a display of religious symbols had a secular purpose it might

be legitimate whereas one with a religious purpose was unconstitutional. The Court ruled that the purpose of the display mattered and, because in this case the purpose was to advance religion, it was unconstitutional. It is worth noting that the purpose of the display was significant in *Van Orden v. Perry* (2005) [545 U.S. 677], where the Court ruled that a display of the Ten Commandments on a monument at the Texas Capitol did not violate the Establishment Clause. In this display, the purpose was to recognize the Ten Commandments as part of a national tradition and had an historical purpose. It was not meant to advance religion.

4. The United States Supreme Court on traditional Christian morality

A series of Supreme Court Cases in the 1960s and 1970s eliminated reliance on a series of traditional moral norms that had long served as a backdrop for legislation and public policy in the U.S. First, *Griswold v. Connecticut* (1965) [381 U.S. 479] introduced the language of a constitutional right to privacy, which would be significant in future cases. The Court ruled unconstitutional a Connecticut law prohibiting contraception as a violation of 'marital privacy'.

Later, in *Eisenstadt v. Baird* (1972) [405 U.S. 438], the Court ruled unconstitutional a Massachusetts law that prohibited individuals from providing unmarried persons with access to contraceptives. The Court ruled that this violated the Equal Protection clause of the Constitution, which appears in the fourteenth amendment: States may "not deny to any person within its jurisdiction the equal protection of the laws". Finally, in *Roe v. Wade* (1973) [410 U.S. 113] the Supreme Court used the previously established right to privacy to find that prohibiting women from obtaining abortions, at least during the first trimester, is a violation of her right to privacy.

5. Neutrality

The secularization experienced in the United States through Supreme Court cases such as those examined above appears to promote neutrality with respect to religion. In some cases the Court pointed out that it did not see itself as demonstrating "animus toward religion" (see *Locke v. Davey* (2004) [540 U.S. 712]. The states and the federal government, the Court has held, must not promote or obstruct religion. They should be, as the dictionary definition of neutrality suggests, "not engaged on either side; specifically: not aligned with a political or ideological grouping" [*Merriam-Webster Dictionary*, www.m-w.com, accessed February 1, 2013]. Neutrality appears to have been operationalized in terms of secularity, leading to a state of affairs that is not neutral. This phenomenon is present in much of the social and political philosophy literature of the twentieth century, where we see a strong commitment to relying only on neutral reasons or justifications, but the result is hostility toward religion. A variety of definitions of neutrality have been

offered, all related to the dictionary definition. Neutrality, according to Kymlicka, refers to the state "not tak[ing] a stand on which ways of life are most worth living" and not "help[ing] one way of life or another" [5]. For Arneson, neutrality "requires that any policies pursued by the state…be justified independently of any appeal to the supposed superiority of one way of life or conception of the good over another" [6]. For Ackerman, reasons are neutral when they do not require "the power holder to assert: (a) that his conception of the good is better than that asserted by any of his fellow citizens, or (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens" [7]. Furthermore, he defends the view that only secular and rational reasons may be used as justifications in the liberal society. Regardless of the definition, the overall point is that we ought to rely on commitments disclosed by reason alone and as such available to all rational persons, rather than sectarian commitments.

The emphasis on non-sectarian reasoning shaped John Rawls' well-known and highly influential *A Theory of Justice* [8], which forbade consideration of a wide range of factors and beliefs when choosing the principles of justice that should govern society. Such principles should be identified in the original position, a critical feature of which is the veil ignorance. This veil precludes the hypothetical decision making from knowing "his place in society, his class position or social status … his fortune in the distribution of natural assets and abilities, his intelligence and strength … his conception of the good, the particulars of his rational life plan, or even the special features of his psychology... the particular circumstances of [his] own society … [the] generation [to which he belongs]" [8, p. 137]. This list of exclusions implicitly disallows knowledge and consideration of religious views in dismissing conceptions of the good.

In Rawls' later work, *Political Liberalism*, a distinction appears between public and nonpublic reason. When citizens "engage in political advocacy in the public form" and when citizens "vote in elections when constitutional essentials and matters of basic justice are at stake", Rawls argues that only public reason may be used [9]. Such reason is public in that that it is "given by the ideals and principles expressed by a society's conception of political justice" [9, p. 213]. Comprehensive doctrines, which may or may not be religious, are excluded from the public sphere: "In discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines — to what we as individuals or members of associations see as the whole truth — nor to elaborate economic theories of general equilibrium, say, if these are in dispute. As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally." [9, p. 224-225]

Another important example of the theoretical defence of admitting only secular reasoning to the public square in the contemporary literature is the work of Amy Gutmann and D. Thompson, who hold that "[t]he guiding principle of

deliberative democracy on which we base the standards [by which health care policy decisions should be made and judged] is reciprocity: citizens and their accountable representatives seek to give one another mutually acceptable reasons to justify the laws and policies they adopt" [10]. To meet the reciprocity requirement, reasons must be, among other things, 'accessible'. To be accessible, the reasons cannot be religious: "[t]he justification [offered], if it is to be mutual, is irrelevant if those to whom it is addressed cannot understand its essential content. Simply citing a revelatory source therefore has no reciprocal value, but making an accessible argument that *includes* citing a revelatory sources is not ruled out by this criteria." [10, p. 144] They contrast such appeals to appeals to scientific authority and expertise, which they claim are accessible even if they are difficult to understand for some people because they can be expressed in accessible terms [10, p. 145-146]. In making this claim, Gutmann and Thompson seem not to worry that scientific authority and the values and rules of evidence used by scientists are not necessarily accessible. Christian Scientists, for example, will not be persuaded by scientific studies that support medical treatment as necessary. They share neither the rules of evidence used to defend science nor the scientific conclusions drawn nor the premise that medical treatment is a licit means to restore health is not shared. In addition to valuing reciprocity for apparently instrumentalist reasons, elsewhere Gutmann defends the value of tolerance and argues for the importance of teaching all children the value of tolerance: "Civic education should educate all children to appreciate the public value of toleration" [10, p. 559]. Moreover, "[t]he basic principles of liberalism, those necessary to protect every person's basic liberties and opportunities, place substantial limits on social diversity" even though such limits will "undermine or at least impede some traditional ways of life" [10, p. 559]. In short, not only must activity in the public forum be restricted to appeals that meet the reciprocity requirement and hence be accessible, which requires that they be secular, but to sustain such a forum also requires limiting the diversity permitted in society overall.

A third example is Bruce Ackerman's work. In *Social Justice and the Liberal State*, Ackerman stipulates three principles that govern the use and allocation of social power and then argues that a particular concept of the liberal state with specific policies on a wide range of social and legal issues (such as abortion and the distribution of wealth) is required. These three principles are:

- Rationality: Whenever anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is [7, p. 4];
- Consistency: The reason advanced by a power wielder on one occasion must not be inconsistent with the reasons he advances to justify his other claims to power [7, p. 7];
- Neutrality: No reason is a good reason if it requires the power holder to assert: (a) that his conception of the good is better than that asserted by any of his fellow citizens, or (b) that, regardless of his conception of the good, he

is intrinsically superior to one or more of his fellow citizens [7, p. 11].

The emphasis on secular reason as shared, accessible, reciprocal or the object of an overlapping consensus and hence as neutral and legitimate fails to recognize the extent to which such appeals rely on views about human morality, assumptions about the right and the good and who has the authority to make judgments about them, and conformity to some views and rejection of others without the benefit of a universally available or accessible justificatory framework. (These concerns are particularly poignant in discussions of state efforts to promote particular concepts of health through the coercive use of state force [11].) To accept these one must grant some assumptions and reject others, one must adopt a particular view of the rational or the reasonable, and one must recognize that any overlapping consensus that might exist is not necessarily normative because to judge that overlapping consensus as morally superior to others is to presuppose an independent basis for making such an evaluation [12].

Several examples demonstrate some of the ways in which public policies allegedly meet the requirements of neutrality but are not neutral. (For an additional example concerning required institutional participation in euthanasia, see [13]). In fact, choosing policies based only on reasons allegedly available to all rational agents has at times led to substantial violations of certain commitments. Using reasons that are, one thinks, available to all rational agents ignores not only the fact that these decisions presuppose particular views of rationality and of what is reasonable but also the fact that some of those commitments require that individuals act as if they did not have substantive moral commitments. One cannot simultaneously hold some positive beliefs allegedly given to us by reason and certain religious beliefs such that requiring persons to live by the allegedly reasonable account of morality requires that they suspend their religious commitments or violate them. To be sure in some cases, legal measures have been applied to accommodate certain views, and sometimes accommodation has been offered on a case-by-case basis. For example, all states in the United States recognize 'brain death' (death determined by neurological criteria), and cardio-respiratory death (death determined by the permanent and irreversible cessation of respiration and circulation) as death. Some Orthodox Jews do not accept brain death criteria as a permissible way to declare a patient dead, yet physicians do not need permission to declare death [14]. A patient who meets the legal criteria for death is dead regardless of his commitments. The 1991 New Jersey Declaration of Death Act includes a conscience clause (Section 5) that allows death to be decided using solely cardiorespiratory criteria, not neurological criteria, when the religious exemption is invoked [15]. Even in states in which such an accommodation is not legally guaranteed, health care professionals and institutions may accommodate specific patients and families, though there is no guarantee that they will do so [16]. Some conflicts between those who reject brain death and particular institutions have become quite public (see, for example, the case of Motl Brody in 2008). Persons with particular substantive religious commitments find the application of the allegedly neutral law that allows physicians to declare death when patients

meet either of two sets of criteria deeply problematic. To accept the allegedly neutral law as licit requires that Orthodox Jews suspend their religious commitments.

A less-often discussed example of ways in which public policy regarding issues in bioethics has evolved that might appear neutral but that is hostile to certain kinds of religious or other commitments is the shift toward allowing children more authority over their health care decisions. Policy and legal changes that grant minors greater authority to make (some of) their own health care decisions, particularly with respect to contraception and abortion, appear neutral but in fact are not. They appear neutral in that they often are defended based on data that adolescents are able to make decisions comparable to those of adults [17], or they are based on public health priorities such as arguments about the need to allow teens to access contraception without parental involvement so as to reduce the teen pregnancy rate. To hold that the observation (which has been challenged [18]) that adolescents are approximately as good as adults at making certain kinds of decisions already is to assume that the ability to decide either is the reason for granting adults authority over themselves or is more important than parental authority. Or, to assume that allowing adolescents to make their own decisions advances public health goals and that that justifies granting them this authority is to assume (1) that the ends justify the means (means which some consider illicit) or (2) that certain conceptions of what is good, namely those adopted by public health officials, are more important than other conceptions of the good, such as those held by traditional religious believers who recognize the authority of parents over their children as more important. Policies that appear neutral and are defended based on secular reasons rest on assumptions that one way of life (e.g., a way of life that promotes personal rather than family-oriented decision making or a way of life that decreases teen pregnancy based on contraception rather than the exercise of parental authority over teens) is better. They privilege one way of life over others by making policies and practices that assume certain ways of making decisions are better than others, and they assume certain conceptions of the good. Changing policies in the United States and in much of the west regarding adolescent decision making reflect values expressed in the United Nations Convention on the Rights of the Child (1989/1990) [United Nations (UN) *Convention on the Rights of the Child*, 1989/1990] and in the American Academy of Pediatrics guidelines on informed consent and children [19]. They reflect particular views of children and families that conflict with particular understandings of parental responsibility and authority [20].

The commitment to relying only on neutral reasons which generally includes a commitment to relying only on secular reasons, results in policies and practices that are not neutral. Allegedly neutral reasons may not be accessible to all rational agents unless and until some of them agree to dismiss particular religious or philosophical commitments. It is sometimes impossible to accept so-called neutral (secular) reasons until one suspends belief in God. Any set of reasons that requires individuals to suspend their religious or philosophical

commitments in order to accept those reasons constitutes a form of sectarian belief. They require, just as religious commitments require, that one grant certain assumptions about the world and accept particular views while rejecting others. The claim that some reasons 'seem' more plausible to some people is not a justification for imposing them uniformly or for declaring that they in fact are reasonable. Once one asks people to suspend their belief or their disbelief, one has moved beyond the neutral. Neutral policies and practices may not be neutral because they in fact privilege a particular way of life or set of secular beliefs, privileging those who reject religious commitments.

The U.S. has experienced a non-neutral separation of Church and State from the 1940s onward in part through a variety of Supreme Court decisions that have ushered in policies and laws that are secularist. Many of these cases interpreted and applied the Free Exercise Clause and the Establishment Clause of the first amendment of the U.S. Constitution in ways that are not indifferent to religion but rather that privileged the secular [21]. Yet pursuit of neutrality through secularity is a failure [22]. Views espoused as neutral or as grounded in reason alone are not in fact neutral in the sense of not being "engaged on either side [or] aligned with a political or ideological grouping" [*Merriam-Webster Dictionary*]. Interpretations of the law that purport to require neutrality with respect to religion are not neutral in the sense of "not tak[ing] a stand on which ways of life are most worth living" and not "help[ing] one way of life or another" [5]. They are not neutral in the sense described by Arneson, for whom neutrality "requires that any policies pursued by the state…be justified independently of any appeal to the supposed superiority of one way of life or conception of the good over another" [6, p. 195]. Finally, they are not neutral in the way required by Ackerman. According to Ackerman, reasons are neutral when they do not require "the power holder to assert: (a) that his conception of the good is better than that asserted by any of his fellow citizens, or (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens" [7]. Allegedly neutral secular reasons rest on moral presuppositions grounded in particular worldviews, including views that require one explicitly to reject other moral positions, accept particular conceptions of the good or recognize the superiority of some ways of life. In instituting secularist laws and policies that are hostile to religion, the U.S. has moved beyond the separation of church and state to a marginalization of religion.

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