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## The American church/state quagmire: A major cause and a proposed solution

Mary Fleming Morton  
*University of Nevada, Las Vegas*

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**THE AMERICAN CHURCH/STATE QUAGMIRE:  
A MAJOR CAUSE AND A PROPOSED SOLUTION**

by

Mary Fleming Morton

A thesis submitted in partial fulfillment  
of the requirements for the degree of

Master of Arts

in

Ethics and Policy Studies

Institute for Ethics and Policy Studies  
University of Nevada, Las Vegas  
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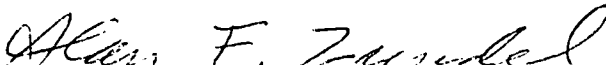
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The Thesis of Mary Fleming Morton for the degree of Masters of Arts  
in Ethics and Policy Studies is approved.

  
Chairperson, Alan F. Zundel, Ph.D.

  
Examining Committee Member, Vernon E. Mattson, Ph.D.

  
Examining Committee Member, Jerry L. Simich, Ph.D.

  
Graduate Faculty Representative, Barbara Brents, Ph.D.

  
Dean of the Graduate College, Ronald W. Smith, Ph.D.

University of Nevada, Las Vegas  
May, 1996

## **ABSTRACT**

### **THE AMERICAN CHURCH/STATE QUAGMIRE: A MAJOR CAUSE AND A PROPOSED SOLUTION**

The primary purpose of this thesis is to clarify possible legitimate interactions between churches and government bodies in America. Finding that the present interpretation of the First Amendment has actually precipitated much of the current controversy, evidence is presented of its lack of validity. Instead an alternative interpretation is offered that clearly shows that the American colonists had come to recognize an entirely new manner in which to organize a society. This new manner of organization gave sovereignty to the individual in two major societal systems: the political and the religious. The consequence of this was the recognition that churches and governments are simply institutions organized by people. Each of which has its own responsibilities within society. There was no need to separate the two into autonomous spheres. They both were recognized as two distinct institutions of the same body of people, who held sovereignty over them. It is after a presentation of these facts that the concluding chapter suggests a new configuration for church/state interaction that would give more clarity to future contacts between the religious and political institutions of American society.



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## ACKNOWLEDGEMENTS

I clearly owe a great debt of gratitude to the University of Nevada for establishing the Institute of Ethics and Policy Studies. The Institute allows the student freedom to explore and combine knowledge and ideas from different academic disciplines around a present-day concern. The goal is to give the student an environment in which to develop a more comprehensive understanding through integration, rather than division. Thus I was given the freedom to explore and synthesize ideas and information from the viewpoints of many academic disciplines (political science, sociology, history, philosophy, religion and anthropology) around the concern of present-day church and state relations in America.

Knowing the lack of control that freedom offers, the members of my thesis committee deserve a great deal of recognition for the patience and counsel they gave me as I struggled through the maze surrounding church/state interaction. Each of them, Alan Zundel, Vernon Mattson and Jerry Simich, gave me gentle counsel, strong guidance and helpful encouragement that continually brought me back on track. Another source of positive energy for me during these last four years is my dear friend, Julia Catanzarite. She provided me with the time and resources I needed in order to spend the last four years primarily on this journey, for which I am immensely grateful.

## CHAPTER I

### INTRODUCTION TO THE PROBLEM

In reviewing the literature regarding religious freedom and church/state interaction in America, I found a great deal of controversy. Though the nation appears to celebrate freedom of religion as the most important liberty offered by our society, the "issues involving government and religion are among the most contentious confronting us as a nation."<sup>1</sup> Seeking to understand why there is such discord in the area of government and religion interaction, I uncovered a major hindrance to ever resolving the situation. The primary difficulty originates with the accepted, traditional way of interpreting the First Amendment of the Constitution. This interpretation maintains that, within what are called its religious clauses, there exists not only the provision of religious freedom for individuals, but also a requirement for a separation of church and state. However, there is no agreement as to the exact meaning of "separation of church and state." Instead, as Martin E. Marty noted, it is "recognized by many that the constitutional tradition addresses many different interests and, therefore, interpretations are ample, competitive, and tangled."<sup>2</sup>

This continual demand for a separation, as well as for a definition of the proper means of providing it, is a hotly debated

topic, which appears irresolvable.<sup>3</sup> However, since it is believed to be the Constitution that requires separation, at least one very clear, consequence has been produced. Our government, in attempting to show its separation from churches, has maintained a hands-off approach toward them. The result of this behavior is the implication that the Constitution itself guarantees special, unique rights to churches, which sets them apart from government authority. This creates the impression that there are two authorities within American society, each with its own autonomous domain.

The fact that this perception has become so thoroughly recognized by our society can be seen in this comment by Milton R. Konvitz. "When we speak of freedom of religion, we tend to think of freedom of churches, freedom of organized, institutional religions."<sup>4</sup> It is apparent that, because of the present interpretation of the First Amendment, there has occurred a bestowing of an independent freedom upon the churches. This, in turn, has created an area of our society in which government appears to have no authority. This situation is a major component in the current church/state controversy.

The following two citations demonstrate the truth of the assertion that the present traditional interpretation of the First Amendment has resulted in placing churches outside the jurisdiction of government. The first one comes from a discussion at a Symposium on the Attorney General's Task Force on Violent Crime,

reported in The Journal of Criminal Law and Criminology, Fall, 1982. This discussion concerned how government might be able to detect the criminal diversion of church funds to personal use. The obstacle of the present interpretation of the First Amendment was noted:

The excessive entanglement test as refined in Lemon v. Kurtzman and Tilton v. Richardson limits the ability of the state and federal governments to detect fiscal wrongdoing in churches. In effect, the first amendment will always stand as a major obstacle to the government's goal of protecting the public from fraud and corruption occurring in connection with church funds.<sup>5</sup>

The article continued by pointing to another indicator of this "supposed constitutional barrier" that has been erected in the relationship between government and the churches. It involved the government's inability to require any type of financial reporting from religious institutions. By direction from Congress, the Internal Revenue Code has exempted all tax-exempt religious organizations from filing Form 990, the annual information return required of all other tax-exempt organizations. The rationale cited here is the need to demonstrate the required separation by having as little surveillance as possible.<sup>6</sup> Nevertheless, the article concludes with a very real concern regarding the need for the government to be able to speak to churches. This final quote demonstrates that concern.

Most people would probably agree that the state should not interfere in church affairs. But the concern

there is with bona fide religious organizations. However, increasingly, there are reports of churches being founded as vehicles to enrich private individuals in the form of tax savings or profits generated from fraudulent solicitations, although the extent of the problem is not known. The government should discourage the misuse of churches... Still, the fear that the government is intruding into a sphere of sovereignty where it does not belong can cause considerable resistance to state legislation and enforcement proceedings.<sup>7</sup>

This phrase, "sphere of sovereignty," clearly points to the idea that the churches have a presumed, independent sovereignty free from any supervision by public authority.

The second citation comes from Alan Ware's book, Between Profit and State: Intermediate Organizations in Britain and the United States. It is very important to be aware of the different ways England and the United States have dealt with religion and churches. English law, particularly since the nineteenth century, has fully recognized the religious freedom of the people living there. However, there are several important differences between the English treatment of churches and the American one. Note the impact that present Constitutional interpretation has had on the American response.

In England, religious organizations are held to be legally charitable entities, which means that they are tax-exempt. This legal concept of charity is substantially the one established in the sixteenth century and codified in the famous Elizabethan Statute of Charitable Uses of 1601.<sup>8</sup> It holds that the advancement of religion is a charitable activity. Since this status

provides tax exemption, the English acknowledge that an "important indirect" aid is received by religious bodies being entitled to it.<sup>9</sup> In recognizing this benefit, English law has provided some restrictions as to what types of groups are granted religious charitable status. In order to be classified as a religion, there "must involve some form of worship of a deity, so that bodies merely advancing ethical principles are not considered charitable."<sup>10</sup> The other restriction is that the activities of the charitable body must benefit the public at large, therefore not all activities of religious organizations are given charitable status.<sup>11</sup> So here we have a country which provides religious freedom to all within its borders, but whose government still has the authority to speak to its religious bodies.

How does this differ from the treatment in the United States? We, too, designate our religious organizations as charitable bodies, which comes from our own acceptance of the same 1601 Statute of Charitable Uses. But there the similarities almost totally cease to exist. Ware continues his discussion by describing U.S. behavior:

The prohibition in the Constitution of the establishment of religion has actually been interpreted by government agencies, and indeed by the courts, to limit any investigation they might carry out to determine whether an organization is religious and how the organization operates. American courts have also held that nontheistic organizations are entitled to tax exemption, if this is available to theistic groups. Nor has the Internal Revenue Service, federal income tax legislation, nor any U.S. Treasury regulation, ever defined the terms 'religious' or 'religion.' Moreover, since it is laws

on non-profit organizations, rather than laws relating to charitable trusts, which are the ones most affecting religious groups, there has been a tendency towards a much more liberal interpretation of what can be registered as a religious group. For example Oleck notes that:

in early 1970, atheist Madelyn Murray O'Hair, well known for her opposition to all religion, said in Austin, Texas, that she and her husband, Richard, had organized the Poor Richard's... Church for tax evasion purposes. She said, 'From here on we're going to take every exemption.'

Oleck goes on to observe that there have also been advertisements in newspapers explaining how people can 'turn themselves' into churches. Like federal legislation, state legislation has been unconcerned with religion: non-profit laws have rarely addressed the question of what is to constitute a religion, and this has permitted religion to become a broad category in non-profit legislation.<sup>12</sup>

From both citations, it can clearly be seen that by making the authority of the Constitution the grounding for a required separation between churches and the government, American government bodies have been very reluctant to speak directly to the churches. This reluctance is shown by the failure to define the terms "religion" or "religious." The term "church" can also be added to the list of words that legislation has never explained, though all three terms are used extensively in it, particularly in regards to the tax-exempt status of churches and other religious entities.<sup>13</sup> The resulting effect of this lack of definition is greater confusion in arriving at any acceptable solutions to issues involving government and religion.

Even the terminology, "church/state," adds confusion to the



discussion. Although it can be very useful as a shortcut and as a symbol of current problems, it suffers from weaknesses and inadequacies. Here is a good explanation of one inadequacy:

Church-state terminology comes to us from Europe and recalls a background which is quite unlike the American scene. It has its origin in a time when the church was indeed a single monolithic Church and governmental power was centered in a single ruler. It is inadequate to describe the American situation because of both the multitude of churches in this country and the dispersion of governmental power among the federal government, the states, and the local communities.

In our situation, it is more illuminating to call them problems of the interrelationship of the civil and religious communities. This phrase at least makes clear that we are discussing communities that embrace in part a common membership.<sup>14</sup>

It was after extensive probing to understand the causes of this existing controversy regarding how to separate these two communities, that I arrived at the conclusion that our continual holding up of the Constitution as the defining ground for separation had actually precipitated the controversy. Seeking to demonstrate that this supposed Constitutionally required separation is being honored, government bodies have maintained a hands-off approach toward churches. This behavior has created the impression that churches are set apart from government and its authority, thus giving the churches the appearance of having their own domain of sovereignty within American society. Even the American people have come to view this as a clear requirement of the Constitution. Paul J. Weber has asserted that:

The term "separation of church and state," although never appearing in the Constitution, has become so embedded in American consciousness that it seems to sum up what is meant by the First Amendment religion clauses.<sup>16</sup>

After recognizing that much of the problem comes from this one source, the traditional interpretation of the First Amendment, the need became to find a means to move past it. From further research, I have concluded that the present accepted interpretation lacks evidence to substantiate its claim of validity. Instead, I offer an alternative interpretation that is much more consistent with the historical facts. It basically holds that the American colonists had come to view the relationship between individuals, government, and churches in an entirely new manner that caused separation to naturally occur between these two major institutions of society. There was an entirely new manner for organizing a society. For the first time, individuals held sovereignty over their own political and religious lives. In this new ordering of a society, all needed to work together politically but religiously each was individually responsible for self. A major concern at that time was involved with integrating these two dimensions of life, rather than separating them into two distinct arenas of living.

Yet, today, the issue is not on how individuals should integrate the political and the religious areas of their lives, but rather on how the relationship of the institutions of these two spheres of life, churches and government, should be separated.

It is a situation that calls for clarity. A necessity clearly articulated by Stephen V. Monsma in his discussion of what he calls "the church-state conundrum."

U.S. society and legal theory alike support the separation of church and state, yet the two, as vital forces in society, cannot be kept in hermetically sealed compartments. However, there are no agreed-on principles to guide when and how the two are to intersect. That this conundrum is likely to grow increasingly serious is indicated by the expanding vitality, diversity, and political and social activism of religion and the expanding role of government in modern society. There are many points at which religion and government intersect, and those points of intersection are becoming more, not less, numerous and more, not less, intense.<sup>16</sup>

The need is for an expanded conversation on possible legitimate interaction. A means by which to achieve this is in exposing the incorrect idea that the Constitution has defined the form this separation is to take. This currently accepted interpretation maintains that churches are separated from government by setting them outside the authority of government. After removing that barrier, the hope is that new, clearer relationships might be explored and established. The first step in this process is to provide proof that this conclusion is true and to suggest at least one possible new opening.

I have organized my argument into five basic chapters. Each one deals with an independent part of the argument to discredit this traditional interpretation. Chapter II begins with a discussion of basic sociological understandings of the components of a society. It includes a section on the development of a new way to

organize a society that began during the Colonial period. Chapter III looks closer at the historical background from which the federal government emerged. It will seek to show that the Constitution and its Bill of Rights, as defining instruments of the federal government, were simply removing the political ability at the federal level to establish any correct, normative religious thought. In addition, the First Amendment established a responsibility for the federal government. It was to preserve an environment in which all individuals were free to seek their own religious understandings. The writers of the Constitution and members of the First Congress were not concerned with churches; that was a province under the supervision of state governments. Chapter IV deals with the behavior of the Protestant churches to the environment of America. It is important to understand the manner in which churches reacted to the continuing deregulation of religion from government control after the Revolutionary War. Looking for a specific area in which to seek new clarification, Chapter V takes up the subject of how our present tax system currently deals with religious groups. And finally, Chapter VI, armed with clearer understandings regarding the facts of the situation, contains some specific suggestions for a new, interactive configuration between the federal government and our churches.

By challenging the validity of the currently held interpretation of the First Amendment, my hope is to remove the supposed

constitutional barrier that limits discussion of the role of religious freedom to the narrow idea that the act of separating the institutions of church and state comprises its primary intent. My major objective throughout this research is to expand the discussion not only by adding new considerations of possible legitimate interaction between religious institutions and our public authority, but also by encouraging a fuller discussion regarding the meaning of religious freedom for all citizens.

## ENDNOTES

1. Robert A. Goldwin and Art Kaufman, eds., "Preface," How Does the Constituion Protect Religious Freedom? (Washington, D.C., 1987), p. xiii.
2. Martin E. Marty, "Foreword," Paul J. Weber, ed., Equal Separation: Understanding the Religion Clauses of the First Amendment (New York, 1990), p. viii.
3. The call for some sort of separation has at least five possible interpretations. As Paul J. Weber explains in his essay, "Neutrality and First Amendment Interpretation," contained in the book he edited, Equal Separation: Understanding the Religion Clauses of the First Amendment (New York, 1990), pp. 2-3, they are:
  - (1) The most fundamental is structural separation, i.e., separate organizational structures and personnel, also independent ownership of property.
  - (2) Absolute separation, usually considered in terms of financial separation, i.e., no aid of any kind.
  - (3) Transvaluing separation, the purpose of government being "to secularize the political culture of the nation, that is, to reject as politically illegitimate the use of all religious symbols, or the appeals to religious values, motivations, or policy objectives in the political arena."
  - (4) Accommodating or supportive separation, where the need for structural separation is acknowledged, but not transvaluing separation. Rather it is respecting the religious nature of our people by favoring aid and support of religion in general, but not one religion over another.
  - (5) Equal separation rejects all political or economic privilege, coercion, or disability based on religious affiliation, belief or practice, or lack thereof. Instead it guarantees to religiously motivated or affiliated individuals or organizations the same rights and privileges extended to other similarly situated individuals and organizations.
4. Milton R. Konvitz, Religious Liberty and Conscience (New York, 1968), p. 87.
5. Symposium on the Attorney General's Task Force on Violent Crime, "Diversion of Church Funds to Personal Use: State, Federal and Private Sanctions," reported in The Journal of Criminal Law and Criminology, Vol. 73, No. 3 (Fall, 1982), p. 1232.

6. Ibid., p. 1233.
7. Ibid., p. 1235.
8. Alan Ware, Between Profit and State: Intermediate Organizations in Britain and the United States (Princeton, New Jersey, 1989) p. 77.
9. Ibid., p. 179.
10. Ibid.
11. Ibid.
12. Ibid., pp. 179-180. Also cited was Howard L. Oleck, Nonprofit Corporations, Organizations and Associations, 3rd edn (Prentice-Hall, Englewood Cliffs, NJ, 1974), p. 44.
13. Form 990, General Instruction B lists organizations not required to file it. Such bodies include: a church, an interchurch organization, a convention or associations of churches, an integrated auxiliary of a church (such as mission society, men's or women's organization, religious school, or youth group), church-controlled organization, a school below college level affiliated with a church or operated by a religious order and an exclusively religious activity of any religious order. Other than the listing, there is no definition of exactly what the listing means. What exactly is a church or a religious order? What does exclusively religious activity involve?
14. Paul G. Kauper, Religion and the Constitution (Baton Rouge, Louisiana, 1964), pp. 3-4. Cited by Sidney E. Mead, "Reinterpretation in American Church History," Jerald C. Brauer, ed., Reinterpretation in American Church History (Chicago, 1968), p. 188.
15. Paul J. Weber, "Neutrality and First Amendment Interpretation," Paul J. Weber, ed., Equal Separation: Understanding the Religion Clauses of the First Amendment (New York, 1990), p. 2.
16. Stephen V. Monsma, Positive Neutrality: Letting Religious Freedom Ring (Westport, Connecticut, 1993), p. 12.

## CHAPTER II

### A SOCIETY AND ITS SYSTEMS

In researching something that is reported to be a known fact, one needs to look for the grounds that must exist to substantiate this claim. As already noted, there is a persistent claim that one of the clearest things our Constitution did was require a separation between church and state. The manner in which this has been achieved is to set them apart into two independent arenas. It is easy to find examples justifying this behavior in the literature. For example, William Lee Miller holds:

But the unique liberty in which the American nation was "conceived" included more than personal religious liberty, as it would be understood worldwide; it includes also the full institutional independence of the federal union from all churches and of those churches from the federal state. The mother country, and some other democracies, would come in time to have a religious liberty equal to, perhaps in some informal ways surpassing, that in the United States, but without this constitutional separation.<sup>1</sup> [Emphasis mine.]

Richard Vetterli and Gary Bryner in their book, In Search of the Republic, maintain that, "[o]ne of the most radical innovations in the founding of America was the formal, constitutional separation of church and state."<sup>2</sup> The frequency with which one reads such certainty confirms that this view of an existing, constitutionally



required separation has taken on the characteristics of being an established fact. But is it? What grounds exist to substantiate that this claim is truly an actual fact?

The first question that needs to be asked is: is it possible to have a "full, institutional independence of the federal union from all churches and of those churches from the federal union?" This idea completely violates basic sociological logic. As Monsma noted: "the two, as vital forces in society, cannot be kept in hermetically sealed compartments."<sup>3</sup> When sociologists look at a society, they believe that they are looking at a humanly-organized entity that consists of various integrated systems. There are basically five systems expected to be found: economic, political, social, cultural and religious. One of the frequent goals is to see how these various systems interact with one another. It is never expected that any two of the them could be completely isolated from the other. The explanation for a complete rejection of any possible isolation or complete independence of any of the systems is that the individuals involved in all five systems are the same group of people. The systems simply consist of different configurations of the same group of individuals around diverse core needs of human society.

These diverse core needs of a society require the creation of different, specialized institutions to deal with them. In this case, the two specific systems under consideration, are the political system and the religious one. The basic institutional

unit used by the political system is government; for the religious system, it is the church or churches, in our case. Since each institution is concerned with different specific needs of the society, they each have uniquely different functions. The primary function of government is to provide order and security for all citizens, while the church's primary function involves the provision of an organized means to meet the human need for religion. In explaining "the need for religion," the following description is being used:

Religion is not just a belief that some mysterious being exists. It is, on the contrary, a complex network of beliefs concerning morality, the purpose of life, the nature of the individual, and the ultimate explanation of things. Our rational, scientific experience of the world is fragmented and incomplete, and religion attempts to bring these fragments together to form a coherent, meaningful image of the whole.<sup>4</sup>

In America, all citizens together comprise the constituency of the societal systems in various configurations. The most inclusive of the different configurations is the federal governmental system. It includes all of the citizens, as compared to other political groupings at the state, county and local levels, which have smaller constituencies of citizens. Traditionally, our society's religious system is viewed as including all of our churches; but here, as in the political system, the churches simply have different groupings of citizens. This collection of individual churches----some large, some small; some independent.

others organized into large corporate bodies: some local in character. while others are international----represent a large portion of our society's organized corporate life.

If one of the primary functions of government is to provide order, can government be completely without any power to supervise such an important segment of our society? It would be a complete negligence of duty, if this were so. If this is true, the Constitution of the United States, as the instrument that designed our federal system, could not have placed churches into a separate, isolated realm, set apart from the federal government and its authority to supervise. At the same time, the religious system of a society, which has the responsibility to provide meaning to existence for the people, must be able to interact with all the other systems of the society. Churches, as its main institution, must be able to share their understandings with the society at large. It is completely impossible to expect full, institutional independence to exist between these two systems, each of which serve different, basic needs of the same group of people. By discrediting this current belief that it is the First Amendment which mandated that separation exist between these institutions, possible new dimensions of legitimate interaction between the religious and the political systems could develop and be explored.

Historically, the idea for the need to separate church and state came to us from European experience with established

churches after the Reformation. From the Egyptians up to events in eighteenth century Europe, the accepted policy was committed to having an official or established religion in each country. This was based on a belief that for civic order, the state (government) that controlled a specific geographic area had to be united with the religion of the citizens of that area. Therefore, only one religion could be allowed. This understanding is very clearly shown in this quote:

For over a thousand years prior to the settlement of America, the Old World had lived under the belief that the unity of church and state was necessary for the maintenance of civil order....The great fear of the state had always been disorder and disunion, and religion was seen as a unifying, legitimizing force to perpetuate civil life.<sup>5</sup>

This belief that there needed to be unity of church and state was further emphasized after the Reformation. Each of the individual European states emerged as minature realms, each with its own state religion, each holding to the recognized truth of that day that only one religion should be accepted by the state. As Sidney Mead maintains:

Each Established church that resulted made for its place in its nation the same sort of claims that the universal Catholic Church had made for its ubiquitous transnational authority....In this situation no substantive difference was made between church and commonwealth. Both were merely ways of looking at the same body of people. This was evidenced in the legal structure by the merging of monarch into God, legitimated by some forms of the doctrine of the divine rights of kings."<sup>6</sup>

It was uniformity that was felt to be essential to maintaining

national unity and internal power. And so, during the two centuries following the disruptive forces of the Reformation within the European religious world, we can see each of the various rulers adhering to what was then currently accepted wisdom. Each determined which church was sanctioned in the realm as the official one and then persecuted or tolerated the others as he choose. And "yet in attempting to enforce this uniformity, sixteenth- and seventeenth-century Europe was engulfed in religious wars and persecutions."<sup>7</sup> Rather than establishing order, the establishing of a particular church resulted in chaos. This Americans had both seen and felt, many of them having immigrated to the Colonies because of government persecution due only to their own personally-held religious beliefs.

It is from this history of persecution by governments for personally-held religious beliefs, that the tradition maintains that one of the clearest intents of the writers of our Constitution was to firmly separate church and state. However, the validity of this conjecture is not upheld by research. Rather, by the time of the writing of the Constitution, it had clearly been recognized that the strength of government was not dependent on a single religious belief system. This new understanding had come from several sources.

First, from England there had come the new realization that religious thinking could not be controlled by force. In 1689, one hundred years prior to the writing of the Constitution, England

had passed the Toleration Act, which ended for all time the judicial persecution of her citizens simply because of religious belief. In fact, it was becoming recognized that by allowing the individual to have freedom in religious belief, the stability of the government was enhanced. However, questions remained regarding this new freedom, for as Gerald R. Cragg noted: it was then held that it "might still be restricted, but the attempt to organize the religious life of the nation", in either England or the American colonies, "according to a single pattern was abandoned" by the early eighteenth-century.<sup>8</sup> However, he continued, a new societal problem surfaced at this time. It involved the rivalry between freedom and authority: exactly what is the source of authority and how do we define freedom.<sup>9</sup> This is a rivalry with which society is still struggling. In fact, it is probably the major problem that is not being addressed in the discussion involving legitimate interaction between our political and religious systems. How do we balance authority and freedom between individuals and institutions, and between institutions?

Another source of evidence, confirming that the old belief that it was necessary for church and state to be united in order to provide civic order, had already been rejected in the American colonies, is found in viewing the behavior of the colonists themselves. Their experience had shown them, over the first seventy-five years of the eighteenth century (1700-1775), that uniformity in religious thought was not a requirement for unity within the

civic realm. They had witnessed men of different religious persuasions working together in developing the commerce and in increasing the growth of business within the colonies. They continued to witness great cooperation between people from different churches and religious faiths during the years of the Revolutionary War. The belief that men could not work together economically or politically unless united under one church creed had been completely discredited.<sup>10</sup> But that did not mean that the importance of religion or religious thinking was discarded. There continued to be a wide acknowledgement that religious thinking was of great value and absolutely necessary for the nation's new government to be able to govern well. This understanding that the citizens needed to be concerned and involved in religious thinking was what John Adams was observing when he wrote: "Our Constituion was made only for a moral and a religious people. It is wholly inadequate to the government of any other."<sup>11</sup> This data validates that beginning early in the eighteenth century, the knowledge that religious diversity was not detrimental to civil order had been recognized. Consequently, it seems very unlikely that there was any urgent call to provide a constitutional separation between church and state, for separation was occurring naturally.

Instead, the men who designed this new form of government were instituting new ideas that did not rest upon what had previously been considered necessary for government to exist.

(T)hey were designing political institutions with a differing ground and beginning point than those of the past. They did not begin with an explicit and formal affirmation of the nation's theistic foundations, as in some sense the nations of the Old Order had done...; but they also did not begin the state with the repudiation of that foundation, as revolutionary nations to come would do. As we have already said, James Madison and his colleagues came to the position --a new one in the political thought of the West--that in this republic all of the parts and pieces of the complicated governmental machinery shall rest, in the end, upon the whole and undivided people.<sup>12</sup>

But from where did the grounding or root for this new understanding about government come? The Constitution had declared the federal government to be neither a covenant with God nor the result of an authorization from God. At the same time, it clearly rejected the idea that there was no God for it took great care in providing for religion and religious belief. Instead, it instituted the new idea that the source of authority for government came directly from the people. It was "the whole and undivided people," who established government and who were responsible for its good ordering. A concept this revolutionary in human understanding could not have suddenly appeared and been accepted. There must have been an evolutionary development, which can be traced, for this to have so clearly occurred. By more fully understanding this evolution in thought regarding the basis for government, a clearer perception of the total extent of the changes in the relationship of the systems of a society can be gained. It was this new ordering of the systems that changed old relationships, particularly the one between the institutions of



government and churches.

In looking for the ground from which these new ideas had originated, one finds a major portion of it involved a developing differentiation between the responsibilities or spheres of concern that institutions such as churches and governments had on the lives of individuals. This setting apart of governmental and religious concerns was a major development that had been brought to the American colonies by various dissenting Protestant Christian groups.

This division of responsibilities began almost immediately in our history. An example of this can be seen in the Mayflower Compact of 1620. The Pilgrims had come as a religious Christian body, but prior to landing, they recognized the need for a means under which to live together. The earliest source of the text explained the situation in this manner:

This day, before we came to harbor, observing some not well affected to unity and concord, but gave some appearance of faction, it was thought good there should be an association and agreement that we should combine together in one body, and to submit to such government and governors as we should by common consent agree to make and choose, and set our hands to this that follows word for word.<sup>13</sup>

Having acknowledged this need, they combined themselves together "into a civil body politic," for their own better ordering and preservation by being able "to enact, constitute, and frame such just and equal laws... for the general good of the colony."<sup>14</sup> This was the first sign of a new understanding that departed from

the historical wisdom of how to organize the systems of a society. In this new wisdom, government, the body politic, was made up of the people involved. And this body of people as individuals were responsible for the preservation of good ordering together. However, by recognizing individuals as the responsible parties for government, what now was the role of religion in corporate life? Being able to give answer to this question is very important. It is by understanding how the people who settled America came to view the importance of religion in their individual lives and their own individual responsibility for the proper ordering of community life, that a clearer comprehension of the new ideas regarding the relationship between political and religious thinking can be seen.

Other evidence that confirms that these Christian colonists were developing new understandings regarding how government was to work and how it was to be related to churches in their lives can be seen in additional historical facts. Charles A. Barker in his book, American Convictions: Cycles of Public Thought 1600-1850, cites four major traditions that have comprised the foundation of our national thought. The one relevant to this discussion is the tradition of the "reformist religious thought, which, to the middle of the eighteenth century contributed more than any other set of ideas to change the way church and state related to one another."<sup>15</sup> This historical process, in which the writing of the Constitution and its Bill of Rights was a climactic event,

began back in England and was brought to the Colonies by the Free Church movement of Christian groups such as: the Anabaptists, the English Separatists, and the Quakers.

Roger Williams (1603-83) is listed as one of the first in America to articulate this new comprehension that churches and public authority needed to be fully separated from one another in their organization. Edmund S. Morgan, after a careful reading of the complete works of Williams, came to recognize that this man's new comprehension of relationships was always "consistent with an almost systematic set of ideas about church and state that he was developing."<sup>16</sup> His story, therefore, is an account of a progressive unfolding of a logic that continued to be accepted by many others over the next century. These ideas became one of the major components in the grounding for a new kind of differentiation between the two institutions of church and state. But it also clearly included a role for the individual citizen. James E. Ernst in his book, The Political Thought of Roger Williams, first published in 1929, pointed out in his concluding remarks, that:

In his whole-hearted devotion to discovering a new basis for social life, he left no system or theory of state unchallenged. Although the cast of his thought was social rather than theological, he eventually realized that the establishment of a new system of relationship between church and state and individual was the only key to a new social order. [Emphasis mine.]<sup>17</sup>

Here is a thumbnail sketch of Williams' most important views. In regards to "the church," the final position of this man of

extremely devout faith, as reported by Morgan, was:

Williams continued to explore his own orthodox assumptions....He finally arrived at the position that there was no true church in the world and therefore every man needed to serve God by himself alone, without any church at all.<sup>18</sup>

Thus he withdrew from the Baptist church he had founded and declared himself to be a "seeker," that is, one who accepts the fundamental beliefs of Christianity but does not profess a particular creed. This continual searching for true understanding was to consume Williams all of his life and it led him into questions not only regarding ecclesiastical life but also civil life.<sup>19</sup>

In the founding of Providence, Rhode Island, Williams began applying the principles his thinking was generating. Here he laid down a definite sphere of action for both the church and the state, giving each their own particular domain, and he made the state a servant to the individual man. Ernst describes this new organizational structure in these words:

Liberty of conscience and religious liberty is made a recognized principle of constitutional law. The church and state are held separate and distinct in the essential nature and object of each. And the church is made a civil corporation with only corporation rights and subject to state control in its civil corporate activities which the state is required to protect and regulate. Membership in the church body, like that of any other civil corporation, neither increases nor diminishes any of the rights and privileges of a citizen. [Emphasis mine.]<sup>20</sup>

This new organizational arrangement was necessary from the changed relationship that Williams believed was now true between humans and God. Morgan pointed out, "Williams demanded the separation of the state not merely from the church but from God.... Williams believed that with the coming of Christ, God had dissolved the combination of state and church as a single holy institution."<sup>21</sup> God no longer had a covenant with any of the nations of humankind as He had had with the nation of Israel. "No subsequent government had His sponsorship, none was authorized to act in His behalf."<sup>22</sup> Thus, Roger Williams' theological logic removed any religious powers from the civil government of any group of people, as he had done earlier with the churches. (There no longer was a true church in the world. Therefore, every man needed to serve God by himself alone, without any church at all.) But that did not mean that government was no longer necessary.

It did not follow that Christians needed no governments. Governments there must be and Christians must join other men in establishing them and submitting to them. But no government should expect the divine assistance, guidance, and authority that God had given to Israel....A government could have only the powers of the people who created it, and no people was now invested with religious power.<sup>23</sup>

Thus, Williams' ultimate position was a complete differentiation between church and state. Both were simply institutions devised by men to met their own needs. By ruling out government's responsibility for the spiritual welfare of its citizens, Williams still contended that government was responsible for the protection of

its citizens' bodies and their goods, which, in turn required the enforcement of precepts that we would describe as moral.<sup>24</sup> These precepts he believed to be the second table of the moral code delivered by Moses (commandments five through ten), which he held had actually been given to all people of every nation and religion through each person's individual conscience. Here begins the new understanding regarding the wisdom of an individual's conscience.

God's creatures, wherever they might live and whatever might be their destination in the world to come, had generally been able to recognize right from wrong in the affairs of this world, because God had endowed all men with conscience to guide their conduct. [Emphasis mine.]<sup>25</sup>

Williams found no unique talents among Christians or their churches for enforcing moral behavior. All men had been given the means to do right by God Himself in the form of their own individual consciences. It was the presence of conscience in all that would allow people to govern themselves rightly. Thus the function of government was to establish the right means to live together well; it had no role in establishing or dictating the right way to believe religiously. This was the responsibility of each individual, who was to seek knowledge of God and His desires for right behavior on an individual basis.

In regards to churches, "Roger Williams said frankly that they are made by man and are as subject to rewriting as is any other contract."<sup>26</sup> God no longer made covenants with churches

or groups of people; God was now relating only to individuals. Churches were simply voluntary associations of individuals seeking an understanding and knowledge of God together. Hugh Spurgin in his concluding remarks credited Williams with having synthesized ideas borrowed from others in order to lay a logical groundwork for new approaches to God and to government that profoundly influenced both American governmental organization and the spiritual understanding of its citizens.<sup>27</sup> The importance of Roger Williams and his thinking becomes apparent with the recognition that it represents major, new understandings regarding the relationship of individuals to God, to churches, and to government that, over the next century of our history, became accepted knowledge among the people.

One consequence of this new thinking about government and its responsibilities was to relieve it from the pressure of having to contain an element of divinity.<sup>28</sup> Government no longer had a direct relationship with God, that was a province controlled by individuals. The implication of this belief is that responsibility for correct living resides with each individual living in the community. Each person possessed a God-given conscience, that he/she was to draw upon for guidance to do that which is right in conduct with others and away from that which is wrong. Religion was not removed from the concerns of life. It provided the needed guidance to living, while government was involved with seeking to live well together. Both the individual's desire for proper and

just government and the individual's religious desire to have a right relationship with God were tied together. Harold J. Berman's essay, "Religious Freedom and the Challenge of the Modern State," confirms this understanding of the integrated behavior of people living in the eighteenth-century.

"A person's relationship to God was understood to involve his active participation in the life of the community. More than that, religion was understood to be not only a matter of personal faith and personal morality but also a matter of collective responsibility and collective identity."<sup>29</sup>

The evidence given in this chapter indicates that American colonists had begun to accept new relational arrangements between the necessary systems of a society. One of the principal changes involved the position of individuals. Individuals were no longer viewed as the controlled. This new freedom was visible in both the political and the religious systems. The resulting change within the political system of society was the relocation of authority for legitimating government to that of the individuals involved. With the writing of the Constitution, this authority was recognized to be "the whole and undivided people."

At the same time, though the principal authority within the religious system remained with God, individuals were now recognized to be free to pursue their own personal relationship with God. There no longer was a need for any church's guidance in order to seek God and His way to live. This change came from the eventual conclusion reached by the "reformist religious thought"



embraced by dissenting Christian groups. Responsibility was placed directly upon the individual "to serve God alone." Each individual, by using their God-given conscience in making decisions for their own behavior and for the general good of all, would clearly serve God. There was no outside force that could either control the freedom to decide for self or relieve the duty to decide for self.

One of the consequences of this conclusion was that churches became recognized as human-organized institutions, i.e., voluntary associations of individuals seeking an understanding and knowledge of God together. The fact that there were differences in their various creeds led to a realization that no one could dictate a singular, correct manner for religious thought. It is the need to maintain this freedom for which government became responsible. However, by allowing this freedom to be universal, the authority and control possessed by church bodies was clearly threatened.

The next chapter will look closer at evidence that confirms this conclusion regarding the eighteenth-century position of churches within the American society. In addition, it explains the purpose for the inclusion of the word "religion" in the Constitution and its Bill of Rights. Here the concern was to clarify that the federal government fully recognized its lack of authority to declare a specific, normative religious thought. It was absolutely necessary on the national level to demonstrate that all individual religious faith was protected. One purpose was

clearly to gain the support of a majority of the people for the new Constitutional government.<sup>30</sup>

## ENDNOTES

1. William Lee Miller, The First Liberty: Religion and the American Republic (New York, 1986), p. vii.
2. Richard Vetterli and Gary Bryner, In Search of the Republic: Public Virtue and the Roots of American Government (New York, 1987), p. 121. [Emphasis mine.]
3. Stephen V. Monsma quoted in Chapter I, p. 8.
4. Arthur J. Minton and Thomas A. Shipka, Philosophy: Paradox and Discovery (New York, 1990), p. 23.
5. Vetterli and Bryner, In Search of the Republic, p. 122.
6. Sidney E. Mead, "Christendom, Enlightenment, and the Revolution," Jerald C. Brauer, ed., Religion and the American Revolution (Philadelphia, 1976), p. 47.
7. Vetterli and Bryner, In Search of the Republic, p. 122.
8. Gerald R. Cragg, Freedom and Authority: A Study of English Thought in the Early Seventeenth Century (Philadelphia, 1975), p. 298.
9. Ibid., pp. 298-301.
10. Though discredited, this belief of a political need for one unifying religion or belief system is still alive today. We see it in the argument that we are still united, or that we should be, by only one religion, the civil religion. A sampling of the pros and cons of recognizing such a unifying force is seen in:

Bellah, Robert N., The Broken Covenant, American Civil Religion in Time of Trial (New York, 1975).

Cady, Linell Elizabeth, Religion, Theology and American Public Life, (New York, 1993).

Wood, Ralph C. and John E. Collins, eds., Civil Religion and Transcendent Experience: Studies in Theology and History, Psychology and Mysticism (Mason, Georgia, 1988).

Wuthrow, Robert, Producing the Sacred: An Essay on Public Religion, (Chicago, 1994).

11. Charles W. Meister, The Founding Fathers (Jefferson, North Carolina, 1987), p. 27.
12. William Lee Miller, The Business of May Next: James Madison and the Founding (Charlottesville, Virginia, 1992), p. 109.
13. The Annals of America, Volume 1 (1493-1754) Discovering a New World, The Mayflower Compact, p. 64.
14. Ibid.
15. Charles A. Barker, American Convictions: Cycles of Public Thought, 1600-1850 (New York, 1970), p. xi.
16. Edmund S. Morgan, Roger Williams: The Church and the State (New York, 1967), p. 26.
17. James E. Ernst, The Political Thought of Roger Williams (Port Washington, N.Y., 1966), p. 205. (First published in 1929.)
18. Morgan, Roger Williams: The Church and The State, pp. 50-53.
19. Hugh Spurgin, Roger Williams and Puritan Radicalism in the English Separatist Tradition [Volume 34: Studies in American Religion] (New York: 1989), p. ix.
20. Ernst, The Political Thought of Roger Williams, p.203.
21. Morgan, Roger Williams: The Church and The State, p. 92.
22. Ibid., p. 93.
23. Ibid., p. 94.
24. Ibid., p. 127.
25. Ibid.
26. Ibid.
27. Spurgin, Roger Williams and Puritan Radicalism, p. 145.
28. Morgan, Roger Williams: The Church and The State, p. 120.
29. Harold J. Berman, "Religious Freedom and the Challenge of the Modern State," James Davison Hunter and Os Guinness, eds., Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy (Washington, D.C., 1990), p. 42.

30. This need was not so urgent on the state level, for people could move. The truth was that much of the country's growth had resulted from the movement of dissatisfied religious groups. And it did not stop with the adoption of the Constitution. An example of this is the movement of the Mormons from one state to another, until finally seeking freedom in the federal territory of Utah.

## CHAPTER III

### HISTORICAL CIRCUMSTANCES

Evidence of the continuing acceptance among a large number of American colonists regarding these new understandings concerning individuals, religion and churches, is provided by the rhetoric used and the behavior displayed during the Great Awakening of the 1730s and 1740s. This was an event that touched all the colonies. In fact, this general revival of evangelical religion has been cited as "the first movement that gave the colonies any sense of common identity."<sup>1</sup> It also severely challenged the controlling authority of organized church bodies, both established and dissenting ones, over the freedom of individuals. This challenge to authority was felt by many of the opponents of the Awakening to pose a threat not only to churches, but also to the political and social stability of American society.<sup>2</sup> William G. McLoughlin described the impact of this wide-spread event:

The forces set in motion during the Awakening broke the undisputed power of religious establishments from Georgia to the District of Maine, but more than that, the Awakening constituted a watershed in the self-image and conceptualization of what it meant to be an American. The old assumptions about social order and authority that underlay colonial political economy and produced cultural cohesion dissolved. The corporate and hierarchical ideal of society began to yield to an individualistic and egalitarian one. While the

medieval concept of a Christian commonwealth lingered, its social foundations crumbled.<sup>3</sup>

The historical sources describing the Great Awakening are very biased, for this was an issue which deeply divided the colonists. "One was either for it or opposed to it; almost no one--except, perhaps, Benjamin Franklin--remained indifferent."<sup>4</sup>

The major idea being suggested was that "God in America was working outside the accustomed forms."<sup>5</sup> He was providing new ways to come to Him. It was here in the debating of what were appropriate means by which individuals could come to know God, that "the participants touched the crucial question of the use of Old World institutions, as well as the continuance of Old World customs in the New World."<sup>6</sup> "Although the revival was not an explicitly political movement, it had profound political implications."<sup>7</sup> For as this debate continued to expand, by the time of the Revolutionary War, it did, indeed, include social and political institutions, practices, and traditions as well.

One of the major personalities in the Awakening was an English traveling evangelist, George Whitefield, who carried the message from Philadelphia to New York and then all the way to Georgia and back. In total, he made four evangelistic tours of the colonies, the last one in 1770.<sup>8</sup> As a traveling minister, he would preach in open fields and village squares, "lambasting the clergy of the mainline churches, calling them unconverted and strangers to Christ."<sup>9</sup> His message encouraged rank amateurs

into the field, who challenged the need for a college education or for proper ordination in order to preach the Gospel, instead they insisted grace and faith were all that were needed.<sup>10</sup> This had a leveling effect on privileged position, and was certainly a powerful democratic force. "Anyone could have his say. No single person, priest, class of people, or institution could be considered the sole oracle of truth."<sup>11</sup>

David S. Lovejoy, in his review of original documents of the period, came to the conclusion that:

What many religious leaders actually did was to convince a large segment of the colonial population that not only was America different from the Old World, but religion itself was different in America. They held that a vital relationship demanded a "vital religion," and that a vital religion was an experimental religion which affected the hearts or emotions of the people. In fact, the emotions or "affections" were a vehicle for the new religion. This was a radical breakthrough for the colonial clergy who participated, "for previously emotions had been carefully controlled, lest they be misdirected and lead to enthusiasm."<sup>12</sup>

A major outcome of this Awakening was the emergence of the layman as a central and dominant figure in the American Christian community. Upon experiencing a conversion, the person became changed and now was prepared to judge all people and all authority in terms of the presence of the Spirit. This heightened sense of the ability to make decisions gave individuals a greater degree of self-consciousness concerning their own position in society, allowing them to question everything that had previously been considered authority.<sup>13</sup>



The new ability to question authority impacted the organized religious institutions forever in American society. From this point forward, no church, particularly those within the Protestant Christian sector, was ever again immune from being split into factions. The Presbyterian Church at the time split into two groups, Old Sides and New Sides; for the Congregationalists, there were the New Lights and Old Lights. And separating from these were the Baptists. All were on "a quest for spiritual purity, indeed for a more fervent and personal relationship with God" than was presently being offered by any of the existing organized churches.<sup>14</sup> This constant searching for the "one true church" continued to impact the entire Protestant community to such a point that by the time of the American Revolution, though the religious composition of the nation was 98.4 percent Protestant, as many as 75 percent of that group are reported to have been dissenting congregations from whatever was the established church of the colony.<sup>15</sup> All the dissenting churches "were stressing the individual's personal relationship with God, unbrokered by human institutions whether political or religious."<sup>16</sup>

The nation was inundated with this new, individual sovereignty to seek and decide for one's self the correct way to serve God. This was clearly one of the major circumstances impacting how "religion" was being experienced throughout all thirteen colonies. The importance of it to the political organization of American society was not lost on the men who wrote the Constitution or sat

in the First Congress. But even with this widely-held recognition of individual sovereignty in regards to religious thought, a new development emerged during the Revolutionary War that could have impacted this new freedom, if it had ever become enforced on the national level.

This new development involved the manner in which some of the original states were dealing with religion. A good example is the Constitution written in 1778 for the state of South Carolina. Written five years before the end of the Revolutionary War, it has been called by one writer: "one of the most remarkable documents in the protracted effort of the former English colonies, now by their own declaration independent, to straighten out their religious life."<sup>17</sup> This "remarkable document" had made Protestant Christianity--not any one church or denomination, but the entire group--the established religion of the state.

It did this by first declaring that only Protestants could sit in either of the two houses of the state legislature. "Then it put the point as forth-rightly as anyone could ask: 'The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of the State.'<sup>18</sup> Thus, one of the new American States dealt with its own religious diversity by allowing the dominant group to define what the necessary, normative religious outlook must be in order to politically participate in the state government.

However, the ramification of this type of response to the

majority religious outlook did not end with South Carolina. The state of Virginia was also trying to deal with its own religious communities. In 1779, one year after South Carolina had written its constitution, a select committee on religion of the Virginia House of Delegates not only looked at it as a model; they actually followed it almost word for word.<sup>19</sup>

There were only two basic differences. First, they dropped the word "Protestant," for them it was simply the Christian religion that they wanted establish as Virginia's religion. Second, they added a general tax on all citizens for the support of all Christian ministers.<sup>20</sup> This General Assessment Bill was then introduced to the State Legislature. In it, following the guidelines from South Carolina, a group could become a recognized established Church of this hoped for newly Established Christian Religion, by having any fifteen or more male persons, not under twenty-one years of age, unite to form a Christian religious body. By giving themselves a name, the group could then become a Church of the Established Religion of Virginia, thus allowing them to participate in the general tax for their group's minister's benefit.<sup>21</sup>

However, in Virginia, an alternative plan for dealing with its religious communities was introduced at the same time. In 1779, Thomas Jefferson proposed, for the first time, his own Bill for Establishing Religious Freedom in the State of Virginia. There could not have been two more opposite views of how to

deal with religion at the state level than these two. Peterson calls Jefferson's position "a root-and-branch rejection of any civic authority in matters of religion and an affirmation of complete freedom of belief and worship."<sup>22</sup> But neither plan could command a majority of the General Assembly in 1779 or for several years thereafter. It was five years later in 1784, a time when Jefferson was in France, that the whole controversy resurfaced.

Of the two bills first introduced in 1779, now in 1784 (five years later) only the General Assessment Bill was discussed. Jefferson's bill for Establishing Religious Freedom was not even on the table and Jefferson was out of the country. James Madison became the leader of the opposition against the entire idea of a state established religion and for a tax on all the citizens to support it.

The assessment plan now had the title "A Bill for Establishing a Provision for Teachers of the Christian Religion," and it had the backing of churchmen--those friends of the longtime establishment now reorganized as the Protestant Episcopal Church....The famed Hanover Presytery, which had opposed a general tax, would cease to do so as long as the revenue was distributed fairly to all denominations....But for their suspicion that the bill's primary purpose was to prop up the Episcopalians, the Methodists, too, though never the Baptists, would have supported it. The bill made steady progress in the house. Madison waged a desperate delaying action. Finally, as the session drew to a close, he got the delegates to agree to postpone the vote on the bill until November of 1785.<sup>23</sup>

In the spring of 1785, Madison wrote his famous "Remonstrance

Against Religious Assessments." Believing that if the bill became armed with the sanction of law it would be a dangerous abuse of power, Madison presented his argument. There were fifteen major elements to it. The one most relevant to this argument is summarized in Madison's question: "Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects?"<sup>24</sup> This document was then printed and distributed widely throughout the state. Madison reported in one of his letters that it had been "so extensively signed by the people of every religious denomination," that at the November session of the legislature the projected measure was completely abandoned.<sup>25</sup>

The fact was, the General Assembly had received more than a hundred petitions on religion. "Only eleven supported the assessment plan; many others, with some 11,000 signatures, were copies of the Memorial and Remonstrance."<sup>26</sup> Considering that five years later the 1790 Official Census, which counted men, women, children and slaves, had determined the population of Virginia to be 69,200,<sup>27</sup> 11,000 signatures on the petitions must have represented an overwhelming percentage of the voting population. It was only after support for a plural establishment had completely disappeared, that James Madison reintroduced Jefferson's Bill for Establishing Religious Freedom. The bill passed easily and became law on January 16, 1786.

And so, in the year 1785, three years after the end of the Revolutionary War and one year prior to the calling of the Constitutional Convention, the men of Virginia had taken a stand regarding their state's ability to dictate a singular, normative religious viewpoint for its citizens. They had clearly declared that it was not within its powers, passing legislation to confirm that fact for all time. This was becoming a recognized American conviction not only for men like Jefferson and Madison, two of the leading voices, but for the 11,000 others, who had signed the petitions, and many others who, throughout this newly created country, had followed the debate. Government could not take a position regarding what was the correct way to believe religiously that was a sphere of decision-making that belonged to the individual citizen alone. Theirs was a recognition that everyone has the right to seek their own religious outlook and this included the freedom to be wrong; there was no government power or authority to either promote or restrict in this regard.

This had become the religious climate of the new nation as its leading citizens gathered in Philadelphia. How did they deal with it? Was there any debate regarding religion or the practice of religious beliefs? The evidence on the deliberations show that they discussed neither religion nor churches. But concern about religious freedom did not go unnoticed, for it was acknowledged to be an extremely important individual freedom for many. Therefore, in Article VI, Clause 3, which deals with the requirement that

all senators and representatives of both federal and state legislatures, plus all executive and judicial officers of all these governmental bodies:

shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The choice of either "by oath or affirmation" can only be viewed as a recognition of the needs of religious groups such as the Quakers, who completely rejected taking oaths but willingly would affirm their own behavior.<sup>28</sup> But it was the final prohibition that allowed many who would not have supported ratification of the Constitution to do so. The prohibiting of the possibility that there could ever be a required religious testing, in order to participate in the federal government either as an elected officer or an employee, did two things. First, it clearly showed that the federal government would never declare a national religious position, as some states were doing. Second, it allowed men, such as Isaac Backus, to give their full support to ratification.

Isaac Backus was one of the most influential of the Baptist clergymen among the dissenting Baptists congregations, which were present throughout all of the newly proclaimed thirteen states. This prohibition of any type of religious test allowed him not only to support ratification of the Constitution in Massachusetts, but also to urge his fellow Baptists and other Dissenters to do likewise in other states.<sup>29</sup> Therefore, the prohibition that was established in Article VI was no small thing. By its

presence, the voices of the many concerned about religious freedom were gained in support of ratification. Remember, in Virginia alone, there were 11,000 such concerned men. By clearly denying the federal government an ability to require a religious test, the Constitution was able to gain support from this active segment of the population, the size of which allowed it not only to become ratified, but also to become accepted as the law of the land. This kind of understanding gives credence to the perception that in both recognizing and accepting the country's religious diversity, men of different religious persuasions had firmly come together to work on civic matters. Religious thinking and its accepted worth have clearly played a major role in the establishment of our form of government.<sup>30</sup>

But even as the Constitution was being ratified, there was grumbling among the people regarding the lack of a Bill of Rights. Therefore, when the first U.S. Congress convened on March 4, 1789, it immediately took under consideration amendments to the Constitution. Of the many that were submitted, Congress reduced them to twelve, which were submitted to the States. Two failed of ratification; the others became the first ten amendments. Known as the Bill of Rights, they were ratified on December 15, 1791, fifteen years after our Declaration of Independence.

It is in the First Amendment to the Constitution that the supposed call for a separation of church and state resides. These are the words of that amendment:



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.

It is interesting how the first two phrases have come to be called the religious clauses and, therefore, have been separated from the remainder of the amendment, as if they were something different from the other freedoms. This separating has resulted from the incorporation of the idea that in some manner these clauses include a required separation of church and state. However, the evidence does not support such an incorporation. There was no concern at the federal level in regards to how to deal with the institution of churches. This was a concern that was delegated to the states.

Yet, as earlier shown, there was a concern about the possibility that some day there might be a national call to establish Christianity as the nation's religion. It certainly was the normative, dominant religion of the people and it had been established in several states. The people wanted it clearly declared that the new federal government did not have this particular authority or any other authority to interfere with a citizen's freedom to decide for him/herself what was the correct religious belief to hold.

This conclusion is extremely important to accept, for upon it hangs much of this argument. If it is agreed that it was no oversight or mistake on the part of the writers' that they clearly

used the word "religion" rather than "church," because they recognized the difference between the two, than the belief that the Constitution itself established a required separation between the institutions of church and state can be fundamentally questioned. By removing the incorporation of the word "church" from any reading of the First Amendment, its entire interpretation becomes involved with the concept of individual sovereignty and the removal of government control over it.

By acknowledging that religion resides in an area controlled totally by individual sovereignty, the purpose of the First Amendment can then be seen as an entire unit. Its purpose was to declare special areas of life completely outside the authority of government. It totally denies Congress the power or powers to establish any laws that would:

- (a) establish a national religious belief system for all citizens<sup>31</sup>;
- (b) prohibit the free exercise by individuals to decide for themselves what to believe religiously as being correct or true;
- (c) abridge the freedom of an individual to say what he/she believed to be the truth;
- (d) abridge the freedom of the press within the public community;
- (e) abridge the right of the people to peacefully assemble; and
- (f) abridge the right of the people to petition the government for a redress of grievances.

The first three clauses are concerned with individual freedoms; the last three deal with communal freedoms of the people. All six

simply limit the use of government power against citizens, either as individuals or in a group. In addition, note that the three group or communal freedoms have nothing to do with churches, instead they point to areas of group communications (press, assembly, petition). By accepting this interpretation of the First Amendment, the idea of a required constitutional separation between the institutions of churches and government is removed, thus allowing for an entirely new discussion of legitimate ways that churches and the government might interact.

The Constitution established a new form of government, one which included new, revolutionary ideas regarding how government should work. First, the new federal government of this nation was a limited state. There were definitely some powers that it did not possess. One was that it could not disallow any citizen from participation in government due to religious beliefs. There could never be a religious test to define a person's ability to participate imposed. In addition, it could neither declare a national religious outlook for all the citizens to hold nor could it limit anyone's liberty to seek religious understanding or to hold a particular religious belief.

Second this meant that the federal government was to exercise its allowed powers and functions without having any authoritative identification with God. This is the separation of government from religion. The government's powers came solely from the people who had established it and who were willing to continue to

live under its authority. This was a major change in the manner in which a society had traditionally been politically organized. Historically, governments had depended on the support of God in order to possess legitimate power to control the people. Within European history, the divine right of kings had always connected God with the government. And even within our own Colonial period, many believed that they were making a covenant with God as they established their own civic governing bodies.<sup>32</sup> But this new government received its power and authority from the people and it was the people themselves who gave it the power to govern them. This new form of governing had come to acknowledge that God was not the authority authorizing its existence, that authority came directly from the people. The conclusion that Americans had come to accept was that they alone were responsible for governing themselves. But, this recognition in no way removed a need for God or for religious thinking from their individual lives.

This interpretation is upheld by others. Harold J. Berman in his essay, "Religious Freedom and the Challenge of the Modern State," noted that the framers of the American federal and state constitutions chose at the federal level a new idea; not only did persons, individually and in groups, have the right to exercise their religion free of any restraint by government, but also the duty of government was to exercise its powers and functions without identification with the authority of God.<sup>33</sup>

This new understanding of the limited powers of government

held other elements. Fellman, in discussing the American concept of the limited state, pointed out that by accepting such an idea, an acknowledgment was made that "many important activities and interests of a complex society are outside its [the government's] scope."<sup>34</sup> It is outside the sphere of direct government control that the religious system of our society exists. But this system exists along with the other major societal systems, i.e., the economic, social, and cultural. All of which interact with the political system and its institution of governments. The religious system, with its institution of churches, is no different in the organization of society than the economic system, with its institution of business enterprises. Government is limited in not being able to enter into business, as it is limited from offering religion. However, there is no Constitutional limitation on the government's ability to speak to either set of institutions.

With the establishment of the United States, a fuller realization of the many dimensions of societal life had become recognized. Government's role in it was that of maintaining order and providing justice. Religion or religious thinking was the means that individual citizens were to use to decide how best to participate not only in it but in all the other dimensions of societal life. "(T)he fact that religion and government were to be free of each other's control was not understood to exclude their reciprocal influence on each other."<sup>35</sup>

The question now becomes exactly how did this new understanding of limited government and its removal from the supporting of churches actual unfold, for political independence had confronted the American churches with a whole cluster of new pressures.

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3. William G. McLoughlin, "The Role of Religion in the Revolution: Liberty of Conscience and Cultural Cohesion in the New Nation," Stephen G. Kurtz and James H. Hutson, eds., Essays on the American Revolution (New York, 1973), pp. 198-199.
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5. Ibid., p. 7.
6. Ratner, "Editor's Foreword," p. vi.
7. Benjamin Hart, "The Wall That Protestantism Built: The Religious Reasons for the Separation of Church and State," Policy Review, No. 46 (Fall, 1988), p. 48.
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10. Lovejoy, Religious Enthusiasm, p. 12.
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12. Lovejoy, Religious Enthusiasm, p.6-7.
13. Brauer, "Puritanism, Revivalism, and the Revolution," p. 21-26.
14. Hart, "The Wall That Protestantism Built," p.49.
15. Ibid., p.44.
16. Ibid.
17. Miller, The First Liberty, p. 19.

18. Ibid. [Added note: The South Carolina Constitution was revised twelve years later in 1790 and this article was dropped from it at that time.]
19. Ibid., p. 20.
20. Merrill D. Peterson, "Jefferson and Religious Freedom," The Atlantic Monthly, Vol. 274 (December, 1994), p. 119.
21. Miller, The First Liberty, pp. 19-20.
22. Peterson, "Jefferson and Religious Freedom," p. 119.
23. Ibid., p. 120.
24. The Annals of America, Vol. 3, 1784-1796: Organizing the New Nation, p. 17.
25. Ibid., p. 16. Source: Madison Letters, I, pp.162-169.
26. Peterson, "Jefferson and Religious Freedom," p. 120.
27. The World Almanac and Book of Facts, 1995 (Mahwah, New Jersey, 1994) U.S. Population by Official Census, 1790-1990, p. 376.
28. See Dean Freiday, ed., Barclay's Apology in Modern English (United States, 1980), pp. 414-424, for the historical explanation by the early Quakers for their position against swearing or the taking of oaths. For a more current explanation, Howard H. Brinton, Friends for 300 Years (Wallingford, Pennsylvania, 1994), p. 141, explains: "The Quaker refused to swear for at least two reasons: (1) swearing was contrary to the command of Christ--"Swear not at all." (Matt. 5:34)--and of James--"But above all things, my brethren, swear not" (James 5:12); (2) it also set up a double standard of truth, one in the courtroom and one outside it, with the implication that untruth would be uttered in the absence of an oath."
29. William Lee Miller, The Business of May Next: James Madison and the Founding (Virginia, 1992), p. 110.
30. In fact, Miller continues with his assertion of how important this prohibition against religious tests actually was by stating on page 111:

"Surely the actual and symbolic meaning of the prohibition against religious tests must have played a large role in the decisions made by millions of Europeans in the nineteenth and early part of the twentieth centuries---from Ireland, Italy, Poland, Russia, and every country of Europe---to make the



ardous journey across the Atlantic to settle in this new 'empire of liberty'."

In no way can this type of assertion be based on the idea that freedom came from the separating of the institutions of church and state. It was the knowledge that one's religion would not be a tool of persecution by the government or a restriction against the ability to be politically active to which Miller is referring. This is an individual liberty, not involved with institutional relationships.

31. This was a very real present need at the time, as seen from the restrictive activity that had been witnessed on the state level in the preceding ten years (1779-1789). The lack of such a permanent restriction might have allowed a majority to establish a singular, normative religious outlook at the national level, thus restricting others' personal individual freedom.
32. The Mayflower Compact agreed to on November 11, 1620 is the earliest example of such a document. Though establishing a "civil body politic," they looked upon it as making a covenant with God.
33. Harold J. Berman, "Religious Freedom and the Challenge of the Modern State," James Davison Hunter and Os Guinness, eds., Articles of Faith. Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy (Washington, D.C., 1990), p. 41.
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## CHAPTER IV

### THE RESPONSE OF AMERICAN CHURCHES TO A NEW ENVIRONMENT

Many of the first settlements in the American colonies were established by religious bodies, primarily different denominations of Protestant Christianity. Denominationalism has been explained to mean that there is no monopoly on the Christian faith, only a right to compete for adherents.<sup>1</sup> As a result, there has never been a single, controlling church body on American soil; even during the colonial period with its established churches, dissenters to them were always present. The American environment has always been both challenging and competitive for churches and, after the establishment of the new government, this certainly did not change. In fact, it became more visible.

One of the initial challenges to the churches came directly from the theology of Protestant Christianity itself. By pursuing the religious thought that had initially started with the Reformation, many American theologians had come to hold that it was each individual's responsibility to relate directly with God. There no longer was a need for intermediaries. For example, the Baptists, who formed independent, autonomous churches throughout all of the thirteen colonies and later throughout all of the states:

prided themselves on their belief that the individual believer has a personal and dynamic relationship with God, one that does not need the intermediary of a clergy or a hierarchy or, least of all, an official interpretation of Scripture....Foremost among Baptist convictions---the reason for so much of the dissent that has marked Baptist history---is the right of the individual to follow the dictates of his or her conscience, free from the oppression of an overraching authority, secular or ecclesiastical.<sup>2</sup>

If carried to its logical end, this understanding makes the organized church body no longer necessary for individuals to come to know God or to understand the right behavior desired by God. James Madison had declared, first and foremost in his famous argument against religious assessments, that:

Because we hold it for a fundamental and undeniable truth, "that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The religion, then, of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.<sup>3</sup>

The impact of this conviction that individuals have a duty, as well as an ability to decide, was causing major changes in the organization of society. Its influence on the form of government ultimately established in America was paramount. This recognized ability to seek and understand God was grounded in the belief that all persons had been given a conscience that could differentiate right from wrong. This is the foundation for trust in our democratic form of government. It is the idea that "We the People" will work together for the benefit not only of self and

family, but also for all others. As Roger Williams had noted a century earlier, with the gift of conscience from God, individual citizens were now responsible for governing themselves together, in a right manner. No one was exempted from this duty of working for the right ordering of government.<sup>4</sup>

All of this was dynamic, revolutionary thinking, not just for government, but for churches and social relationships as well. It totally challenged accepted wisdoms of the day. First, it separated government from religion. The government of men was no longer dependent on having a religious element in order to have legitimacy. Government came into being from the desires of the people for just and equal laws and possessed only the powers given to it by the people. The reason that this would work was the widely-held belief, at that time, that all persons could come to know God and seek only right behavior. Second, the religious need of people was not dependent upon the sponsorship of government or a declared creed or dogma. Religion resided within each person in the form of conscience. It was the source of wisdom to decide how to rightly and justly behave. It was an inner source of knowledge and could be experienced by all.

It was after this evolutionary and revolutionary religious thought had been taken to all thirteen colonies by men such as George Whitefield during the Great Awakening, that the colonies entered their Revolutionary War with England. From this conflict, the colonies emerged independent with a new form of government.

This new form on a national level declared religious freedom for all within its boundaries. But what effect did these political changes have on churches? Would the idea of liberating the churches from government power free them "from the contagious corruptions of worldly ambition" prove true?<sup>5</sup>

The Revolutionary War disrupted church life in a variety of ways. For the presently established churches, it ultimately meant disestablishment, a fact clearly acknowledged by history.

Between the Declaration of Independence in 1778 and the inauguration of the Constitution in 1789 many states disestablished their churches and granted full or partial religious freedom within their boundaries. The rest kept their establishment for varying periods of time.<sup>6</sup>

The last vestige of the established churches were the Congregationalist churches of New England, which remained until finally disestablished in Connecticut (1818) and in Massachusetts (1833).<sup>7</sup>

Of all the disestablished church bodies, the Anglican or Church of England in the Southern colonies had the greatest problem. They had to find a way out of the stigma of loyalism that was attached to their churches because of the earlier relationship to the Crown. It is from the Anglican or Church of England that is seen the first new American way of creating a church. From the one, two new churches actually emerged. The first came in 1784, when the Methodist segment completely reorganized itself independent of the Church of England, as well as

from the English Wesleyans, and created a totally new American denominational organization. Then in 1785, the Protestant Episcopal Church of the United States was organized. It followed more the established Anglican pattern of organization.<sup>8</sup>

Other major American church hierarchies (Congregationalists, Presbyterians, Baptists, Lutherans, and Quakers), though needing no independence from a European mother church, for none had ever existed, or they had already achieved it by the time of the Revolution, still "took advantage of the prevailing ferment of reorganization to reconstitute" themselves.<sup>9</sup> These additional church bodies, though having different concerns than the Anglicans, followed the accepted American pattern of attempting clear organizational design by writing for themselves a Constitution.

American ecclesiasticism, like the American political estate, stamped itself with the contract theory of government, with the doctrines of the separation of powers, and with the ideal of the consent of the governed.<sup>10</sup>

From this activity of the major churches it becomes apparent that they are only human-organized institutions, which as Roger Williams had pointed out "are made by man and are, as subject to rewriting as is any other contract."<sup>11</sup>

Another immediate challenge experienced by these groups was finding ground for their own authority, particularly the newly disestablished ones. "Forced to rely upon authority other than

the seal of state approval, each body restated its raison d'être in increasingly exclusive terms."<sup>12</sup> However, along with giving the reasons for its own authority, the church administrations had to deal with the new American demand for more laity involvement within the organization of the church. The response given to this demand from the laity, which some of the churches were more inclined to meet than others, presented one of the first demonstrations of a church's responsiveness to a marketplace, for the type of response given later affected membership numbers.

Upon review of this behavior, it becomes apparent that the American environment, which was now provided by a new limited government with its provision for freedom of religion, was clearly producing a new major element within this society. This element consisted of the American churches, which were organizing themselves into becoming the representative of religion for the people. It was this organization that became the sales force for religion in the United States. Kelly Olds, in his article "Privatizing the Church," noted:

The disestablishment of the church in the United States has been the most significant privatization in American history. At no time, before or after, has any important economic sector so dominated by the government been turned over so completely to private enterprise. Many scholars believe that the privatization of religion is one of the main reasons that the religious services sector in America is so much larger than that in Europe today.<sup>13</sup>

William Lee Miller concurred, stating that by "ending established

churches in the states, the early American leaders deregulated the religion market."<sup>14</sup>

This deregulated market has extensive marketing opportunities for it deals not only with human emotions and desires, but with all of the ultimate questions regarding human existence and purpose. Religion is one of the basic components of human reality. But in its corporate form as an organized church, its market takes on the characteristics of a service industry. And as Olds states, "(t)he services provided by religious institutions are widely considered to possess externalities that affect (all) the social, economic, and political systems" of society.<sup>15</sup> And in this new system of limited government, it had become accepted knowledge that government was no longer responsible for "many important activities and interests of a complex society."<sup>16</sup> Therefore, this new societal element, which contained the churches, became more than simply the representative of the religious system that was now separated from the political system. It encompassed much more, for it became part of other societal systems as well, particularly the social and the economic.

So the situation unfolds. Government is no longer in charge of the spiritual welfare of its citizens. Each citizen now holds that responsibility within his/her own sovereignty. And "(t)he church, the clergy, and Christian belief were all thrown out into the great sea of public discourse, to sink or swim altogether on their own, without any safety net whatsoever in the nation's



fundamental law."<sup>17</sup> But they were not "altogether," they were divided up into many different Denominations, all of which were in competition with one another for adherents. I will not deal with the consequences of the Protestant Denominations' contest within the American marketplace, that is simply outside the scope of this thesis. Instead, I want only to point out how corporate activity early influenced this sector of our society. It is here that our nation has failed to understand the difference between religion with its sovereignty given to the individual and religion represented by churches within their organized structures.

The corollary of religious freedom, as been suggested, is the voluntary church. Theologically the churches might still regard themselves as divinely constituted, but from a legal point of view they were no more than voluntary associations of private citizens. This voluntary status had revolutionary implications for the whole life and outlook of the churches.<sup>18</sup>

The idea that "religious freedom" is demonstrated in our society by the provision of "voluntary churches," i.e., churches that no one is required by law to attend, has created an additional major problem to the one I am trying to unravel. For this idea has helped to place churches outside of the law, by implying that they represent "the essence of religious freedom," which cannot be regulated. It is this assumption which has helped encourage the incorrect manner of interpreting the First Amendment. This current interpretation implies that this sector of our society, containing all organized religious bodies, is outside the super-

vision of government because of the freedom of religion. The only means to discredit this interpretation regarding the status of churches is to look more fully at their behavior. Is there any reason to believe that the "churches" are "religion itself" and, therefore, possess their own sovereign freedom from government control?

Robert Wuthnow in discussing churches as organizations pointed out that all organizations exist in the first place to manage resources and to plan for uncertainty, in order to perpetuate their own existence.<sup>19</sup> It is with these basic organizational concerns that the churches concentrated much of their activity at the end of the eighteenth- and into the early nineteenth-century. First, they declared their own independent existence by having a written constitution, which established their organizational system. They also included with it their own religious dogma as to what was the correct way to God. This was the authorization for their own divine formation, which they had to declare to justify their individual existence.

Second, they needed to establish a legal existence, in order to retain control over any assets that had been or would become the property of their body. Legal standing is an area controlled by the individual states. As a result, the churches turned to the state legislatures, concerned principally about property. First, would disestablishment mean that title to church property was to be returned to the public? It was unanimously decided by state

legislatures that it did not.<sup>20</sup> Second, how, then, should they hold title? Again help was offered by the state legislatures.

The American state legislatures, for their part, assisted the churches by passing laws for the protection of their property. At first they provided individual acts of incorporation in response to an application from any denomination, but by the 1860s all the states except Rhode Island and South Carolina had enacted general incorporation statutes. During the 1870s many states went further, and created different classes of general incorporation, one suitable for each of the leading types of denominational structure. These were especially satisfactory, since they recognized the differences of internal government in the various bodies. And in 1871, the Supreme Court of the United States, in Watson v. Jones--a case arising out of a Presbyterian dispute in Kentucky--ruled that the obligations incurred by members of churches as a result of their internal rules and disciplines, and the judgments of church tribunals on their own members, should be upheld as law.<sup>21</sup>

This use of general incorporation statutes for religious congregations implemented a governmental policy of denominational equality by offering the advantages of incorporation to all religious groups without discrimination.<sup>22</sup> This was the first attempt to deal with an even hand among the church organizations. However, there were also controls applied. In the case of the state of New York:

Initially, a mortmain clause, limiting the amount of land a congregation could own was added to prevent the accumulation of real property in immobile corporate hands....In order to enforce this policy, all congregations had to submit a triennial financial report to the Chancellor or local judge....The law became a dead letter after 1798 and did not receive much attention until 1850, when the arrears of triennial reports were forgiven and further reports were required only from those congregations with annual investment incomes in excess of \$6,000.<sup>23</sup>

This concern regarding finances is frequently an area that is considered appropriate for government involvement. From this historical overview of the churches need for government authorization to establish their independent existence, the idea that these institutions operate in an independent domain is shown to be false. The simple fact is churches need government to provide the means for them to establish their legal existence. This demonstrates government's accepted authority by churches, at least in this area. Government did not need any authorization from the churches for this authority. This authority is given to it by the citizens of the state. In looking for the seats of authority in America, it always returns to authorization from the people. And for over the first one hundred years of our history, there was never any doubt that authorization to regulate church bodies had been given to the government by the people.

Third, they needed to financially provide for their own existence. Thus, at the very beginning of the disestablishment of churches and the removal of public financing, the clergy of the churches turned to developing new means for fund-raising. The initial three methods most commonly used were: auctioning off pews or permanent marketable rights to pews, having members make annual pledges to the church, and the development of the permanent fund from one-time gifts and large donations from wealthy church members. It was "the permanent fund" that all churches sought to establish, so that they could continue to survive on the income it

would generate.<sup>24</sup> This was the fund that the New York state legislature wanted to be kept informed about.

At the same time, the organized religious element of American society wanted to increase its presence in society-at-large. The basic method used to do this was to organize voluntary societies. An advantage of the voluntary society was that they clearly provided "a means of bypassing denominational differences in the interest of united effort."<sup>25</sup> A definite benefit was that the societies circumvented the need to delay action until a majority within a church could be persuaded to act; for societies were defined in terms of purpose, not of creed. Their names explained their purpose: American Bible Society, American Sunday School Union, and American Home Missionary Society.

John Mason Peck, a Baptist missionary to the city of St. Louis, made a suggestion in New York that changed the way these societies were used to religiously organize the new territories. In 1826, at an organizational meeting of the American Home Missionary Society, he suggested that:

(T)he missionaries of any one of the societies could easily act for them all, as he himself had been doing, thus multiplying their effectiveness. Each agent, as opportunity offered, could sell Bibles, distribute tracts, establish Sunday schools, organize churches, promote educational interest, and form local auxiliaries of each of the national societies, and in so doing, augment his income and solve the problem of support.<sup>26</sup>

The suggestion received immediate approval. Thus, the new

religious sector created a national sales force with a well-organized distribution system for its merchandise.

In recognizing this nineteenth-century business activity in the religious sector, one can see that "religion" became only one of the elements of churches. It was the product being sold. One of the consequences of this type of behavior has been an internal division within many of the Protestant churches. This internal division results in two separate ruling structures that compete for control. Mark Chaves found in his 1993 study of Protestant Denominations that organizationally they have developed a dual structure, which consists of two parallel systems. They contain both a religious authority structure and an agency structure.<sup>27</sup> And in today's world, he discovered the agency structure worth fighting over. "It employs hundreds of people and has budgets in the tens of millions of dollars."<sup>28</sup>

There is also evidence that churches behave no differently than any other organization that compete with others in some sort of market environment. Verification of this opinion is offered by Robert Wuthnow in his 1994 book, Producing the Sacred: An Essay on Public Religion. Here he pointed out that church organizations share the same elements or process as any other human-created organization. Looking at three major characteristics shared by church organizations, he found that they simply did not differ from any other corporate entity:

- (1) Churches demonstrate selective adaptation, which is a market mechanism involved with competing for customers. They mark themselves off as different, offering something exclusive or unique.
- (2) They show isomorphism, the coming to resemble one another in form and substance, which helps identify self with a set and signals conformity with larger norms.
- (3) And they have specialization, which is the opposite of isomorphism and can be a source of cooperation, minimizing competition to some extent.<sup>29</sup>

Questions continue to remain: Exactly where do churches fit into American society? Do they represent the entire religious sector of our societal life? Do they represent major players in the American economy? How are they different from other business enterprises? And how would arriving at answers to this type of questioning affect the present interpretation of the First Amendment?

A major area that illustrates how differently churches are treated by government, compared to other business groups, is seen in the taxation system of the nation. Perhaps here new understandings, as well as possibilities, might develop. This leads into the next chapter dealing with churches, tax exemption and their role in society.

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## CHAPTER V

### THE TAX EXEMPT STATUS OF CHURCHES

In seeking to provide financially for their organizations, the church bodies continued to expect the previous tax-exempt status to be applied to their properties. Within the history of the American colonies, there has been a consistent granting of tax exemption to church property.<sup>1</sup> This is not surprising, for as Robert T. Miller and Ronald B. Flowers noted in their discussion of Tax Exemption to Religious Institutions:

Tax exemption for religious institutions and leaders is an ancient and virtually universal concept, nearly always to be found wherever an establishment of religion has existed. Consequently, tax exemption for the established church was found in all but a few of the early American colonies. When the First Amendment was ratified, most states continued to grant tax exemption to religious institutions.<sup>2</sup>

This continued tax exemption was now offered to all churches. Again upholding the idea of government fairness by offering equal treatment to all.

A major justification for this practice at the time was the belief that churches performed a valuable service to the community in promoting a moral ideology so necessary for a stable society.<sup>3</sup> In one citation, it was noted that:

They have internal structures of authority to punish parishioners guilty of immorality. Such moral discipline is "probably of as much value to society, in keeping the peace and preserving the rights of property, as the most elaborate and expensive police system."...Churches foster democratic principles and practices. They inspire citizens to vote for candidates and to participate in the political process.<sup>4</sup>

It is from this ground that we see the historical American acceptance of a belief that churches deserve to be tax exempt. In fact, Leo Pfeffer has asserted, that church immunity from taxation is in the nature of a universal value.<sup>5</sup>

At the same time, there was a further reinforcing of the idea that churches ought to be exempt from taxation. It came from a statement first articulated by Chief Justice John Marshall in McCulloch v. Maryland (1819) that the power to tax includes the power to destroy. This idea has led many to believe that to honor the concept of separation of church and state, it demands that churches be held tax exempt, as a form of protection for them.<sup>6</sup>

It was probably to this belief, that Chief Justice Burger was referring when in the Supreme Court's decision for Walz v. Tax Commission (1970), he established a new test in regard to taxes and churches.

But then the Chief Justice went on to introduce a new test of his own: to escape the interdict of the establishment clause, a law must not produce "an excessive government entanglement with religion." Exemption of the churches from taxation, Burger found, "occasions some degree of involvement with religion." But "elimination of exemption would tend to expand the involvement of government" by creating the relationship of tax collector to taxpayer. Exemption, therefore, passes the test.<sup>7</sup>

It is because of these two developments, (1) a historical custom that believes churches deserve to be tax exempt because of the benefits they offer society and (2) a desire by the judicial branch of our government to occasion as few entanglements with religion as possible for government as a whole, that the churches' tax exemption is accepted as vital for the right ordering of our society.

However, both of these reasons have created another problem, particularly since the Walz decision. Ever since it was given, Reichley reported, some church representatives, such as Dean Kelley, director of the Commission on Religious Liberty of the National Council of Churches, have continued to argue that "the legislature cannot constitutionally tax churches."<sup>8</sup> Again, the barrier of the present interpretation stands in the way of full discussion. For, by insisting "cannot," implies there is no authority to do so, making it extremely difficult to change what appears to be only an accepted tradition. If this were held to be true, that government has no authority to do so, churches would definitely be in a completely autonomous sphere of our society separated from government authority.

Exactly what are the areas of taxation from which churches are exempt? Basically, they are exempt from all taxes, plus being able to receive tax deductible contributions from donors. There are a total of five areas of taxation involved. The first two involve tax payment at the local and state level. At the local

level, they are given exemption from the payment of property taxes on both land and buildings they own. This was the exemption that the Supreme Court upheld in its decision of Walz v. Tax Commission of the City of New York, decided May 4, 1970. It is also the area that has been traditionally exempt in this country. The second area is the exemption from payment of state sales tax. This exemption has arisen out of the fact that churches have been included in the group known as the charitable sector of our society, i.e., groups which have been identified as 501(c)(3) organizations by the Internal Revenue Service.

The third area is the exemption from paying any form of income tax. It comes from the inclusion of churches in the large group of organizations which have become known as the nonprofit sector. The IRS identifies these organizations in Section 501 of the Internal Revenue Code. There are many types of organizations within our society that are listed in Section 501 of the Internal Revenue Code. All of them are exempted from paying income tax. Yet, all, except churches, are required to file an informational tax return, Form 990, every year with the IRS, so there is communication between the government and the organization on an annual basis regarding its purpose, activities, and the areas in which funds are spent. This exception from any kind of financial reporting to a public authority is one of the most unique privileges given to churches.

The total 501 nonprofit sector includes such diverse groups

as: real estate boards, business leagues, chambers of commerce; social clubs operated for pleasure, recreation and other nonprofit purposes; local teacher retirement fund associations; and instrumentalities of the United States organized by act of Congress and tax exempt by such act (examples would be Federal Reserve Banks, the National Farm Loan Association, Public Housing Administrations). The section 501 of the Internal Revenue Code lists some twenty-six different purposes for organizations recognized by the Federal Government as exempt from paying income taxes, because they are nonprofit.

Churches are included as one of these nonprofit organizations. However, they are not singled out into a single separate category. Instead, they have been incorporated into the Section 501(c)(3). This section exempts a special sub-set of nonprofit groups, which are regarded as our nation's charitable sector. This charitable sector holds all the organizations that are considered to be benevolent in character. They are identified by the nature of their activities, which are described as religious, educational, scientific, and cultural. This ruling refers back to the 1601 Elizabethan Statute of Charitable Uses. The inclusion of religion was part of the wisdom of that day. In 1601, as earlier pointed out, it was believed that religion, in the form of the church, brought social stability to society, which was a benevolent act. This inclusion in Section 501(c)(3) gives churches a fourth area of tax advantage. It is only organizations declared

by the IRS to have 501(c)(3) classification, that donations given to them may, then, be deducted on the donor's own tax return.

Here the situation becomes more complex, because of several additional questions and their apparent answers. What are the factors that have created, as well as justified, the existence of nonprofit organizations? What justifies placing churches into this sub-set of the economy, i.e., as nonprofit organizations? Do all the activities of churches meet the description of being benevolent in character, thus validating their designation as 501(c)(3) organizations? (Being "benevolent" requires doing good for all, having no discriminating elements as regards to race, gender, or religion.) Are churches treated the same as every other group within the designation of 501(c)(3)? Or are they given special or different treatment? If the treatment is different, what justifies the differences?

First, what are the reasons given to justify an entire sector of the economy being labeled nonprofit? It is an area that has required its own rationale for existence. E.C. Lasbrooke, Jr., in his book, Tax Exempt Organizations, attempted to explain the underlying rationale for tax exemption given to groups declared nonprofit. His goal was to find the common thread running through this patchwork of nonprofit organizational groups, if indeed there is such a thread. One major idea used to explain this phenomenon is that since this group of organizations cannot reasonably be expected to generate meaningful income and that the purpose of the

tax code is to provide a set of rules whereby the gains or profits generated by businesses are determined and taxed, they are removed from the taxable universe as inappropriate objects for taxation. This results in their identification as not-for-profit or nonprofit entities.<sup>9</sup>

This idea's explanation has generated the tax-base rationale. It explains the nonprofit sector by declaring that not all the entities within a society are taxed because of the fact that all taxes inevitable exempt someone or something. Boris I. Bittker argued that:

There is no way to tax everything; a legislative body, no matter how avid for revenue, can do no more than pick out from the universe of people, entities, and events over which it has jurisdiction those that, in its view, are appropriate objects of taxation.<sup>10</sup>

This inability to tax everything results in the acceptance that some entities that do make profits are not taxed, for none of the essential characteristics of being labeled a nonprofit enterprise require that it not make a profit. The only restriction is that all are barred from distributing any of their net earnings or profit to individuals who exercise control over them, such as members, officers, directors, or trustees.

It should be noted that a nonprofit organization is not barred from earning a profit. Many nonprofits in fact consistently show an annual accounting surplus. It is only the distribution of the profits that is prohibited. Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide.<sup>11</sup>



This information is confirmed by another citation. Non-profits, charitable or otherwise, are not subject to some constraints that are commonly believed to exist. "Most notably, they are not restricted in the amount of profit they may make; restrictions apply only to what they may do with the profits."<sup>12</sup> All they are required to do is use the additional funds to purchase more resources for the organization, in order to achieve its purpose.

But, how does this coordinate with the tax-base rationale that is used to justify the existence of nonprofits? This rationale contends that nonprofit organizations are not taxed and cannot be included in the tax base because they are not felt capable of earning a profit. Dean M. Kelley cited an article written by Boris I. Bittker titled, "The Exemption of Nonprofit Organizations from Federal Income Taxation," which appeared in the Yale Law Journal, Vol. 85 (1976). In it Bittker stated:

The exemption of nonprofit organizations from federal income taxation is neither a special privilege nor a hidden subsidy. Rather, it reflects that application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit.<sup>13</sup>

However, can it be said that churches as corporations do not seek profit? Kelley points out that "charitable organization do not constitute consumption or wealth accumulation."<sup>14</sup> Yet, it was early recognized in our history that churches wanted to develop permanent funds in order to guarantee their own continuing existence, by having enough capital in a permanent fund in order to

live off of its interest.<sup>15</sup>

There exists a second rationale for this idea of nonprofit groups. In trying to explain why nonprofit organizations are given tax exempt status, Congress began in 1939 to base tax exemption on a public welfare theory. The theory holds that tax exempt organizations perform services that the government would otherwise have to perform in their absence. Therefore, any loss of revenue resulting from tax exemption is more than offset by shifting the financial burden for providing those services from the federal treasury to the tax exempt organizations.<sup>16</sup>

This theory of tax exemption is generally explained on the base of quid pro quo or tax-expenditure rationale: the exemptee (hospital, library, school, etc.) relieves the state of a financial burden it would otherwise bear, and in return the state relieves it of tax liability. But this cannot be true for churches. If the church did not provide religious worship, the state would not and could not constitutionally do so; even Leo Pfeffer asserted, there can be no quid for the quo here.<sup>17</sup> And Dean M. Kelley concurred with that statement.<sup>18</sup>

Moving past the rationales for nonprofits and returning to facts, are churches treated any different in the 501(c)(3) class than any other agency. The answer is a definite "yes." First, churches are not required to file an application for such a status with the government, as all other agencies are. This is considered to be a unique benefit given only to churches.<sup>19</sup> The application

requires an explanation of the purpose and activities of the organization. The objective is to discern whether the organization does meet the criteria of having a charitable purpose. But at Congressional hearings in 1987, which dealt primarily with the financial dealings of television ministries, there was concern voiced regarding this lack of requirement for churches.

During the hearings, the commissioner and his aides pointed to the severe limits on the ability of the IRS to monitor churches, particularly the lack of any requirement for them to seek an initial determination of tax-exempt status. Testimony was presented suggesting that certain religious organizations should be subjected to expanded reporting requirements. Several church representatives indicated agreement, but others raised objections on constitutional grounds. The general sense of the hearings was that a number of members of Congress would be willing to reconsider the propriety of the current broad exemption of religious organizations from the regulatory process.<sup>20</sup>

Nevertheless, even though not required, many do apply for the status in order to assure their contributors of the deductibility of their donations and to more easily obtain special mailing rates which are offered to nonprofits.<sup>21</sup> That these donations are a very meaningful source of income for churches is validated by simply recognizing that "churches are the largest single part of the social sector in the United States, receiving almost half the money given to charitable institutions."<sup>22</sup>

Another unique special handling of churches, as 501(c)(3) organizations, is that Congress has mandated that they are exempt from filing Form 990, as earlier noted. Form 990 is an annual

information return required of all tax exempt organizations that have Section 501 designation. It asks for information in nine basic areas.

Part I requires a Summary of Revenue, Expenses and Changes in Net Assets or Fund Balances. Part II is a Statement of Functional Expenses. It shows the percentage of funds spent in three major areas of activity of the organization, i.e., program expenses, cost of management and fundraising expenditures. Part III is a Statement of Program Service Accomplishments. Part IV asks for the Balance Sheets for the beginning of the year and the ending. Part V requires a List of Officials, Directors, Trustees and Key Employees. Part VI consists of several yes/no questions, while Part VII asks for an Analysis of Income-Producing Activities. Part VIII wants an explanation of the Relationship of Activities to the Accomplishment of Exempt Purposes and Part IX wants Information Regarding Taxable Subsidiaries. The purpose of this required reporting is to provide visible disclosure of activities to a public authority, thus creating a means to hold an organization accountable to its stated goals.

This type of reporting became mandatory for all 501 organizations in 1958, but churches have always been held exempt from compliance. "In 1969, the U.S. Senate continued the exemption of churches from filing information returns 'in view of the traditional separation of church and state'."<sup>23</sup> Vaino cites the Senate Committee on Finance, 91st Cong., 1st Sess., Tax Reform Act

of 1969, Compilation of Decisions Reached in Executive Session 53 (Comm. Print 1969) as her source.<sup>24</sup> This ruling is currently upheld by Revenue Procedure 86-23, 1986-1, Section 6033 (a)(2)(A), which provides certain mandatory exception from the filing requirement of Form 990, Return of Organization Exempt from Income Tax. There are three mandatory exceptions given in this section of the Code and they are the only ones given to any organization. It reads as follows:

- (2) Exceptions from filing--
  - (A) Mandatory exceptions. --Paragraph (1) shall not apply to --
    - (i) churches, their integrated auxiliaries, and conventions or associations of churches
    - (ii) any organization (other than a private foundation, as defined in section 509(a) described in subparagraph (C), the gross receipts of which in each taxable year are normally not more than \$5000, or
    - (iii) the exclusively religious activities of any religious order.<sup>25</sup>

A fifth area of exemption is also completely unique to churches. Form 8274 allows churches to elect exemption from both paying the employer's share of Social Security and Medicare taxes and submitting the employee's contribution to the IRS. Simply by filing two copies of this form certifying that the church is "opposed for religious reasons to the payment of Social Security and Medicare taxes," it "may elect exemption from the payment of the employer's share of these taxes by filing Form 8274."<sup>26</sup> But this does not mean that the employer's share goes unpaid.

Instead, the employees themselves are held responsible for paying this 7.65% share, plus their own contribution of 7.65%, by having to file Schedule SE with their own individual federal tax return.

Employees (except ministers of a church or members of religious orders) who receive wages of \$108.28 or more in a year from an electing church or qualified church-controlled organization are subject to self-employment tax on earnings. They will be considered employees for all other purposes of the Internal Revenue Code, including income tax withholding.<sup>27</sup>

The reason for the exception of Ministers and members of religious orders is that "this election **does not** apply to the services as ministers of a church, members of a religious order," according to Form 8274.<sup>28</sup> (The bold letters are on the form.) The result of this is that the churches that make this election still pay these taxes for the ministers, but not for the choir director or for the custodian.

From this information, it can clearly be seen that churches receive many special, unique considerations in the area of taxation. The Congress has placed them into the sector of nonprofit organizations, plus allowed them to automatically be listed in the special 501(c)(3) sub-set without having to apply. Churches are exempt from reporting any financial information to public authority. They pay no taxes to any government level. Locally, they are exempt from property taxes. At the state level, they are exempt from paying both sales tax and income tax. Nationally,

they are exempt from paying income tax. In addition, they can elect to not pay Social Security and Medicare taxes for many of their employees by simply citing religious reasons. Recognizing this information, one sees how totally different churches are treated than all other nonprofit organizations. They definitely do appear to reside outside of government authority, whether there is a constitutional restriction that requires such distancing or not.

However some churches show a discomfort with their inclusion in the 501(c)(3) classification, since they are held to the same criteria for eligibility. What does it mean to be held to the same eligibility criteria? This criteria has four conditions that are written in the language of restrictions listed in the section 501(c)(3) of the Internal Revenue Code. A common way of describing them is: (1) the organization is organized and operated "exclusively" for nonprofit purposes; (2) no net earnings inure to the benefit of private parties; (3) no "substantial" part of the organization's activities are devoted to attempts to influence legislation; and (4) "participation" or "intervention" in political campaigns on behalf of candidates is prohibited.<sup>28</sup>

The first two restrictions really have little impact on churches. They appear to firmly believe that they are organized and operate "exclusively" for charitable, benevolent purposes. The second restriction limiting distribution of earnings does not limit their ability to accumulate, as already noted. And they are

completely exempt from being held to any financial accountability for their actions, outside of their own organization.

It is the last two conditions required for 501(c)(3) status that concern many present-day religious leaders. Derek Davis asserted that these last two requirements, "commonly called the 'lobbying' clause (enacted in 1934) and the 'electioneering' clause (enacted in 1954)" limit the possible political activity of churches and, therefore, have created serious, and yet unresolved constitutional questions.<sup>30</sup> James E. Wood, Jr. maintained that any attempt to regulate religious groups' abilities to lobby has "a seriously inhibiting effect on their work and witness in public affairs."<sup>31</sup> To clarify the extent of this inhibiting effect, he addresses some basic questions:

Does government have the right to restrict the work and witness of those religious bodies which are involved in public affairs from speaking out on public policy issues and defending human values according to the insights of their own religious traditions?

If the involvement of religious groups in public affairs is regarded by them as integral to their faith and mission, is this role of religion not integral to their "free exercise of religion?"

Should not the prophetic role of religion in public places be recognized as essential not only to a free church but also to a free society?<sup>32</sup>

But apart from debates about the constitutionality or wisdom of the 501(c)(3) restrictions placed on the political activity of churches, there are two other major issues that have plagued the analysis and implementation of them upon churches, according to religious leaders.



First, regarding the lobbying clause, there is little clarity as to when an organization has jeopardized its tax exemption by engaging in "substantial" lobbying. The acceptable percentage of a organization's total expenditures spent for lobbying seems to fall somewhere in a range between 5 percent to 20 percent, but the lack of a standard method of measurement causes ongoing concern for all organizations engaged in legislative activities. Second, regarding the electioneering clause, it remains uncertain as to when an organization has "participated" or "intervened" in a political campaign, an event that also triggers the loss of an organization's tax exemption.<sup>33</sup>

Remember, it is the ability to receive tax-deductible contributions that the churches are concerned about here. It represents a major part of their income and the loss of the 501(c)(3) classification, they believe, would curtail such giving greatly. Yet, it does not make much sense to place them into a category and then exempt them from all the requirements that determine placement in that category (application and annual reporting of information), while simultaneously applying restrictions that could result in loss of their position there.

Looking at these findings clearly exposes the need to provide another way to handle churches and their tax exempt status. There is a confusion created by placing churches into this classification of 501(c)(3) organizations and then exempt them from all requirements imposed on those in the classification. Our society clearly needs to review this rationale. Perhaps a new category for churches alone needs to be defined. By seeking such a redefinition of church tax exempt status within the Internal Revenue Code, a whole host of important areas needing clarification would

become visible.

This would move the debate closer to the conclusion Derek Davis arrived at in his essay, "The Supreme Court, Public Policy, and the Advocacy Rights of Churches," published in 1991:

In light of these facts, it is best in these days for the churches to look upon the section 501(c)(3) restrictions as a fair price to pay for the benefits of tax exemption and deductibility of the contributions they receive....Most violations of the restrictions are overlooked entirely. The churches will do well to familiarize themselves with the section 501(c)(3) restrictions, the restrictions and rulings issued pursuant thereto, and the court decisions interpreting this growing body of law. A recognition of the parameters of lawful advocacy will make the political involvement of the churches more effective and more respected. Where the parameters are still unclear, churches need to act prudently in the light of their religious obligations and their duty to uphold the law. Government's part is to sort through the panoply of policy considerations and chart a course that both serves the interest of democratic government and protects the right of churches to the free exercise of their religious mission.<sup>34</sup>

I totally agree with Davis. "Government's part is to sort through the panoply of policy considerations and chart a course that both serves the interest of democratic government and protects the right of churches to the free exercise of their religious mission." But there is also a need to sort through the covering that has been provided by traditional words and behavior.

A clear way to begin this sorting could be simply giving churches their own separate classification within the IRS Code. This classification could clarify many nebulous features of the present relationship of churches to the tax system, perhaps to the

total economy. There could be some illuminating questions and concerns addressed by this kind of redefining of the tax relationship between church and state, for currently a relationship clearly exists, whether tax dollars or accountability are part of it or not.

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## CHAPTER VI

### A NEW CONFIGURATION FOR CHURCH/STATE INTERACTION

In any discussion of church/state interaction in America, it should not be portrayed as if all contacts are controversial. There is a substantial consensus on many subjects which should not be ignored or minimized. Yet, it is fully recognized that many of the "issues involving government and religion are among the most contentious confronting us as a nation."<sup>1</sup> In seeking to more fully understand the reasons for this contention, I observed that a major element comes directly from the dominating, traditional way of interpreting the First Amendment. This interpretation maintains that, within what are called its religious clauses, there exists not only the provision for personal religious freedom, but also a requirement for "the separation of church and state."<sup>2</sup> It is this traditionally-held requirement that causes discord, for there is no agreement as to the form this assumed "separation" is to take. This disruptive element has taken on the characteristics of a device or maneuver to derail discussion from areas that need clarification, but are filled with too many vested and diversified interests to allow for full deliberation.

Simply by citing this supposed First Amendment requirement or suggesting that constitutional concerns exist in a particular

problem area, the conversation becomes automatically limited to dealing with this assumed constitutional requirement before any other substantial matters regarding the present difficulty can be defined, reviewed, discussed and, hopefully, resolved. An important component in this maneuver is that neither side, church or state, is seen to have the needed authority for directing the necessary decision-making process. Thus, the entire matter becomes a part of an ever increasing quagmire.

An example of this is shown in the quote regarding the 1987 Congressional hearings held on the financial dealings of television ministries, presented on page 81. Though several church representatives indicated agreement with the suggestion that expanded reporting requirements would be appropriate, "others raised objections on constitutional grounds."<sup>3</sup> When this type of objection is raised, i.e., the citing of possible inability or inappropriateness due to constitutional grounds, no evidence is required. Instead, one of the theories regarding the necessary elements of this "separation" is given as both the evidence and the authority.<sup>4</sup> However, by citing a theory, the discussion moves from the present concern back to a discussion of the meaning of "the separation of church and state." This is truly circular reasoning with no end in sight. I have concluded that only by removing this traditional view, which places a "constitutional barrier" in front of unclear encounters between our churches and governments, can any clarity be achieved in determining legitimate



interactions between the two systems and their institutions.

In order to validate this removal, I sought evidence that would clearly show that the Constitution is not referring to the institutions of churches in any way, and that it clearly does not limit the federal government or any other level of government from interacting with churches on issues that have been established to be the province of government, i.e., the areas in our societal life where government is recognized as the authority with decision-making power.

The first step taken was to explain the impact that this tradition has actually had on church/state interaction in today's environment. Here, it was shown that a political environment had been created in which government is reluctant to speak directly to the churches, even to the point of not defining such words as church, religion or religious, though using them extensively in legislation and court cases. This lack of definition has compounded the confusion surrounding what might be appropriate interaction, for it provides no boundaries for any discussion.

The fact is, that in seeking to show that the government is honoring this assumed constitutional requirement for separation, it has clearly maintained a hands-off approach toward churches. This is demonstrated fully by looking at the way the federal tax system, through the IRS Code, deals with churches and their financial activities. By a review of the manner in which churches are dealt with, one sees that they have been granted tax exemption

from virtually all taxes, and are given the ability to accept tax deductible contributions, plus they are exempted from having to do any kind of financial reporting. Since taxation and the ability to require fiscal reporting is clearly an accepted province of government, churches have certainly been placed into a separate and independent sphere outside the normal boundaries of government jurisdiction.

The result of this "separation" is the impression that churches exist in their own sphere of sovereignty within American society. By comprehending the impact of this belief and realizing that it is the root of many current problems between religion and government, the need is to move beyond it. The method used to accomplish this consisted of seeking a clearer understanding of the roots of the new thinking which had established totally new relationships between individuals, churches and the government in American society. It was not just knowledge of the forces that had ultimately removed government support for churches or the forces that had developed a new form of a limited government that was sought. Rather, it was knowledge of the actual ground from which these ideas had originated and grown, plus proof that they had become accepted within a major portion of society, that was needed.

Therefore the next step in the research was to review historical information regarding the American development of a new way to organize the relationships of the systems of a society.

Realizing that the writing of the Constitution was only the culmination of developed thought, the need was to locate the key elements from which these understandings had emerged.

The primary elements had developed during the Colonial period, principally through the thinking that had been brought by dissenting Protestant groups to the colonies and expanded upon in the new American milieu. Men such as Roger Williams had arrived at a totally new understanding for the ordering of a society. They had come to hold that sovereignty resided within each individual. It was individuals, together, who authorized governments and it was individuals, alone, who were responsible for their own personal relationship to God, the Creator. This new ordering in the society required an entirely new understanding regarding the relationship and interaction between two of its historically most powerful institutions: the church and the state. For, in the new American Thought, individuals had become the ultimate holders of control over both churches and government. In this new understanding, each person held individual sovereignty over their own religious life as well as their own political life. Within the political system of society, all needed to work together for justice and peace, the goal being the good or betterment of all. Within religious life, each person was individually free to seek his/her own relationship with God and individually responsible for doing so.

Thus, by the time the Constitution was written, there was a

majority consensus that government was no longer responsible for religion or its institution, the churches. Since individuals were responsible for their own religion, they were also responsible for their own churches. Churches were seen only as corporate entities or associations of individuals. Thomas Paine wrote:

I do not believe in the creed professed by the Jewish church, by the Roman church, by the Greek church, by the Turkish church, by the Protestant church, nor by any church that I know of. My own mind is my own church.<sup>5</sup>

There was nothing divine about churches themselves, they were simply institutions that existed within the confines of human-created society. Therefore, it was not churches, but "religion" in its totality that was discussed.

(I)n the extensive public discussions that were carried on in the late eighteenth and early nineteenth centuries concerning the religious liberty clauses of both the federal and the state constitutions, reference was rarely made to relations between church and state, debate centered, rather, on the extent to which "religion" and "government" should be free from each other's control.<sup>6</sup>

This continuing concern for the separation of religion from the control of government is illustrated by the action of the men of Virginia in 1785. They rejected the idea that government had any authority to define a singular, normative religious viewpoint for all its citizens, even though the suggested viewpoint was held by a majority of them.

It was also a reaction to this concern, that the Constitution

clearly states that nationally there could never be a required religious testing in order to participate in the federal government either as an elected official or as an employee. And by including religious liberty in the First Amendment, the people required the federal government to reiterate that it would neither declare a national religious outlook nor limit any individual's liberty to seek religious understanding or hold a particular religious belief.

Never in the research was there found any indication that the people, in placing limitations on the federal government in regard to religion, had limited its ability to have authorized authority over the institution of churches. It was publicly acknowledged that churches were established by groups, who wrote constitutions for themselves and became incorporated under state government guidelines. These churches competed, as well as worked together, with one another in the new religious marketplace. They were clearly human-created institutions.

What the Constitution of the United States clearly did was establish the totally new idea of a limited form of government. A major element of this idea is the recognition that "many important activities and interests of a complex society are outside its [the government's] scope. The state, with us, is neither omniscient nor omniscient."<sup>7</sup> This limited government placed the religious system with its churches outside the sphere of its direct control. It exists along with the other societal systems that are also not

directly controlled by government, i.e., the economic, the social, and the cultural. The religious system with its churches is no different than the economic system with its businesses. Government is not to enter into business or curtail the types of businesses that are conceived and founded by the citizens. However, government does have authority to protect, control and tax businesses for the well-being of society.

There is no reason to believe that the same governmental powers do not exist in regards to the religious sector with its churches. Government is not to establish a prescribed religious viewpoint for citizens to hold and it cannot limit individual religious ideas. But that does not mean that it has no authority in regards to dealing directly with the institutions of churches, for the well-being of society. The conclusion of this research is that the present belief that the First Amendment requires some sort of specific "separation between church and state" is in error, and must be discarded. Instead, recognition is given to the realization that religious liberty does not equate to freedom of the churches from public authority. This certainly does not remove the restrictions that the Constitution has clearly placed on government in regards to religion. However, it does open new avenues for dialogue in many different arenas. No longer will there be "the wall" to hid behind, which stops discussion of possible interaction by imposing a barrier that must first be surmounted.

Let's assume that this conclusion is accepted. There no longer is an implied constitutional barrier that stands in front of any interaction, requiring first an answer to the question: how is the "separation between church and state" being satisfied? What might the new configuration of church/state interaction look like? There is now a full recognition of the authority of government in the area of accountability to society by all the spheres of societal life. There is also the recognition that churches are the corporate participants from the religious sphere of societal life. They visibly represent one of the major societal systems, the one which deals with the ultimate questions of life, of human existence.<sup>8</sup> How can churches and government now legitimately interact with one another?

An easy area to begin experimenting with new ideas involving the relationships between the two is the tax system itself. Here churches have been placed into the nonprofit 501 sector, and then into the smaller 501(c)(3) charitable group sector, with no guidelines on exactly what defines a "church." And with the churches themselves being uncomfortable with this placement, due to restrictions that they believe inhibit them from providing their public witness. There is also concern regarding the rationale for their own tax exemption. My recommendation is to declare all the churches a special type of institution, which requires its own distinct tax classification either within the 503 sector or in an entirely new sector created for churches alone, thus giving them

full identification as a necessary and vital component of our communal life that deserves to be independently validated.

I believe that this would be welcomed by many in the American public today. Most citizens celebrate the freedom of religion and the ability to attend any church they wish, but they have concerns about churches. There are some within the general public who are not fully convinced that all churches are completely charitable organizations. Alan Ware pointed to this concern when he noted that with:

The blurring of the boundaries between market, state, and IOs [Intermediate Organizations, of which churches represent the majority] has helped to focus public attention on the inadequacy of many of the mechanisms for regulating the affairs of IOs.<sup>9</sup>

What appears to be happening is that public support is weakening for the additional privileges churches have enjoyed over other charities in America.<sup>10</sup> At the same time, many within the public believe that proper respect is not given either to churches or to religious belief in our society. Stephen L. Carter's book, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion, is an illustration of this type of belief. By fully recognizing churches as a distinct group whose major concern is with religious thought, a clearer understanding can be given to the public.

In addition, another public concern has recently surfaced regarding how our society defines a church. The 1992 Religious



Bodies in the United States: A Directory, which provided "a comprehensive listing of each religious group known to be operating in the United States in the summer of 1991,"<sup>11</sup> included not only the traditional religious faiths: Christianity, Buddhism, Hinduism, Islam, Judaism, Latter-Day Saints, Metaphysical/Ancient Wisdom/New Age, Shinto, and Taoism; but also the Unclassified Religious Groups. This group included:

not only a number of unique perspectives to religion, but a variety of "non-religious" organizations for whom atheism functions much as religion does for believers. [Plus] A number of mail order churches, those which offer ordination through the mail for a small fee to any who ask, which have little or no doctrinal position.<sup>12</sup>

One of these churches listed is the "Freedom from Religion" Foundation. It was founded in 1978 by Anne Nicoi Gaylor and other former members of American Atheists, Inc.<sup>13</sup> The American public is confused when such groups are legally recognized as churches and automatically receive charitable status with its tax benefits, and yet appear to have no recognized components of religion in them. For religion does have some clearly accepted, recognized components.

It is not unusual for the development of American public dissatisfaction or concern to create a climate that leads to change. As Konvitz has noted: "Americans are constantly changing their views about the proper province of the state.... limits on the legitimate powers of government are not frozen."<sup>14</sup>

Frequently, the American public has been the catalyst to major changes within the organization of our society. As controversy over church/state interaction continues, dissatisfaction among the public continues to grow. There is a great need to begin to look for a way through this difficulty. How might the country begin to handle these concerns? The need is to provide a means for both more clarity for the public in general and a clearer comprehension of the specific needs of the churches.

I have proposed that it begin with the establishment of a new classification within the IRS Tax Code, developed for churches alone. In order to proceed with this idea, there needs to be established an accepted definition of what constitutes a "church." Since churches are accepted as the major visible representative of religion and religious thought in society, it is vital that they contain elements that are generally accepted as being components of religion. Therefore, the definition needs to distinguish between what is religion and nonreligion.

Any definition of religion that failed to distinguish religion from nonreligion would empty the religion clauses of their fundamental meaning and elevate to the status of religion every conceivable set of ideas or philosophy that any individual claimed to be central to his or her life.<sup>15</sup>

But where would we go to for such a definition? I recognize this is an area that frightens everyone. How can we define religion without offending someone? We probably can't, but we can truly try not to do so. An example of one way to do this is given in a

study conducted by the Search Institute in the late 1970s. It involved seeking an understanding of the religious positions that members of the United States Congress held. In the study, titled Religion on Capitol Hill: Myths and Realities, the first step was to discover what is basically accepted as the contents of the word "religion." The staff did this by going directly to the world of religious knowledge.

Beginning with positions papers from noted scholars regarding their own definition of religion, a symposium was held and the definition was debated, the goal being to develop comprehensive understanding of the components of "religion." This information, together with reading done by the staff, resulted in the formulation of criteria for a definition of religion and religious belief that could serve as a foundation for the research proposed.<sup>18</sup> After several more carefully devised steps, they arrived at the following definitions of religion and religious beliefs. Notice that this definition clearly places religion on an individual level, where American Thought has also placed it.

Religion (at the individual level) is the cognitions (values, beliefs, thoughts), affect (feelings, attitudes), and behaviors involved in apprehending and responding to a reality (a supernatural being or beings, force, energy, principle, absolute consciousness) that is affirmed to exist. This reality must have the following characteristics:

1. It is a reality than which nothing greater can be conceived.
2. It is not dependent on human life for its existence.
3. It is, to some degree, beyond human voluntary control.
4. It is ultimate reality in the sense that it stands behind, sustains, controls, energizes, or holds together the diverse phenomena of the natural/physical/material world.

Religious beliefs are the truth-claims one makes in apprehending and responding to his or her concept of the Religious Reality. This includes the claims made about the nature of this reality and those made about cosmos, nature, self, people, society, and history which have been shaped by the affirmation and apprehension of this reality.<sup>17</sup>

From these definitions, the group then searched to discover the various belief categories common to all religious traditions, "whether these be formal, institutionalized religions like Judaism; or modern religious movements like Hare Krishna; or private, personal religions that have no name."<sup>18</sup> Here they found seven ultimate Religious Reality categories that they determined to convey the scope of religious territory.

What I am suggesting is that Congress needs to work directly with the religious communities of our society to define this necessary area of our communal life. There is already an example of Congress working with religious groups to produce a consensus for passage of legislation that helped clarify an issue that had dominated the legislative church-state agenda for some time. The resulting legislation was the Equal Access Act of 1984, PL 98-377, which helped define national policy with respect to religious observance in the schools. Allen D. Hertzke's book, Representing God in Washington, contains an entire chapter describing the coalition that worked to put this piece of legislation together.<sup>19</sup>

It is my belief that only by putting the political and religious systems of our society back into their own proper

domains of working together (rather than separately) can the individuals of our society begin to work together for the improvement of all of our lives. The continual use of the phrase "separation of church and state" suggests that there are two distinct bodies set apart from each other in contrast if not in conflict. This idea needs to be eliminated, for "church and state" are simply us, we the people, in different configurations. In the book, Rights Talk, Mary Ann Glendon argued that:

(T)he "moral core" of our public order is a commitment to public justification, that is, to an ongoing process of demanding, offering, and testing public moral arguments and reasons. Such a commitment, it must be acknowledged assumes that men and women are capable of giving and accepting the kinds of reasons which are not mere references to narrow interests, but which can survive critical examination and be widely seen to be good.<sup>20</sup>

I see "religious thinking" clearly having a role in this kind of discourse. Alan D. Hertzke has suggested, in his study of the role religious lobbies play in American politics, that they broaden the representativeness of the entire system, force the elites to address unarticulated needs and values of the general public and, thus, are a generally healthy development.<sup>21</sup>

By providing a separate classification for churches within the federal tax system, there will be less confusion regarding what constitutes a church. It would also provide an autonomous arena in which the churches would be incorporated into a major political sector of our society, the tax system. By having a

totally separate classification, the necessary explanation for other social, economic and political characteristics possessed by churches could be addressed.

Is it valuable to our society as a whole for churches to remain totally tax exempt?

Do churches have a corporate responsibility to their own individual communities to participate in the payment for services received, i.e., fire and police protection?

Why should churches be the only corporate institutions that do not have to financially report to any public authority?

Should churches be expected to pay taxes on any profit they make?

What kind of corporate responsibility should society expect to see exhibited by churches?

What about "the mantle of religion" that has been placed on churches to be the representative of "seeking the good" together?

In regards to this last question, concern has been voiced that perhaps this voice has been lost. Harold J. Berman asserted that:

In short, religion has lost most of its importance as a way of addressing publicly the major social problems of our society. It has become increasingly a matter of the private relationship between the believer and God.<sup>22</sup>

By placing all of our churches together into their own separate sphere within the tax system, they could begin to regain a public voice. Working together, drawing upon the teachings of all the world's great religious traditions, they might help the American people reunite our love of individual freedom with our sense of a community for which we all accept and share common responsibility.

The necessary first step in this opening process is to refute the idea that the Constitution itself has limited the authority of government to enact laws dealing with churches by requiring that a separation exist between the two that limits the ability of each to speak directly to the other in their own areas of accepted concern and responsibility.

## ENDNOTES

1. Robert A. Goldwin and Art Kaufman, eds., How Does the Constitution Protect Religious Freedom? (Washington, D.C., 1987), p. viii.
2. However, it is fully acknowledged that the words "church," "state," and "separation" never appear in the First Amendment. It is only from an interpretation of the words that are there that this belief has grown, i.e., that "the separation of church and state" has been constitutionally established.
3. Marion R. Fremont-Smith, "Trends in Accountability and Regulation of Nonprofits," Virginia A. Hodgkinson and Richard W. Lyman and Associates, The Future of the Nonprofit Sector: Challenge, Changes and Policy Considerations (San Francisco, 1989), p. 84.
4. A listing of the five major theories presently being cited on what should comprise such "separation" was given in Endnote 3 of Chapter I, page 11.
5. Milton R. Konvitz, Religious Liberty and Conscience (New York, 1968), p. 84. Quoted from Paine's The Age of Reason.
6. Harold J. Berman, "Religious Freedom and the Challenge of the Modern State," James Davison Hunter and Os Guinness, eds., Articles of Faith. Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy (Washington, D.C., 1990), p.40.
7. David Fellman, Religion in American Public Law, (Boston, 1965), p. 8.
8. There is speculation that "religion" itself is an element of our human consciousness. Here are four examples of this type of speculation.
  - A) Mircea Eliade's insistence that religious thinking is actually "an element in the structure of human consciousness, not a stage in the history of consciousness." He maintained that religion offers a true fullness to living, to life: "to be --or, rather, to become--a man means to be "religious," pp. vi-vii.

Mircea Eliade, The Quest: History and Meaning of



Religion (Chicago, 1969).

- B) Kenneth Wald asserts that the simple "durability of religion" appears to be rooted in human nature, p. 12.

Kenneth D. Wald, Religion and Politics in the United States (New York, 1987).

- C) Michael Oakeshott defined "religion" as "life itself."

Religion, then, is not, as some would persuade us, an interest attached to life, a subsidiary activity; nor is it a power which governs life from the outside with a, no doubt divine, but certainly incomprehensible, sanction for its authority. It is simply life itself, life dominated by the belief that its value is in the present, not merely the past or the future, that if we lose ourselves we lose all. (p. 34)

Fuller, Timothy, ed., Religion, Politics, and the Moral Life: Micheal Oakeshott (New Haven, 1993). This collection of Oakeshott's writings was published after his death.

- D) John Hick declares that research into all of the great world faiths shows that there is total agreement that ultimately there is only one Reality (God, force, energy, or absolute consciousness).

It therefore seems evident that this one God is somehow being encountered in different ways within these different traditions....all of which reinforced the realization that our very different religious traditions constitute alternative human contexts of response to the one ultimate transcendent divine Reality. (p. 141)  
[Emphasis mine.]

John Hick, Disputed Questions in Theology and the Philosophy of Religion (New Haven, 1993).

9. Alan Ware, Between Profit and State: Intermediate Organizations in Britain and the United States (Princeton, New Jersey), p. 201.
10. Ibid., p. 200.
11. J. Gordon Melton, Religious Bodies in the United States: A Directory (New York, 1992), p. vii.

12. Ibid., p. 269.
13. Ibid., p. 271.
14. Konvitz, Religious Liberty and Conscience, pp. vii-viii.
15. Derek Davis, "The Courts and the Meaning of "Religion": A History and Critique, James E. Wood, Jr. and Derek Davis, eds., The Role of Government in Monitoring and Regulating Religion in Public Life (Waco, Texas, 1993), p. 115.
16. Peter L. Benson and Dorothy L. Williams, Religion on Capitol Hill: Myths and Realities (San Francisco, 1982), pp.9-10.
17. Ibid., pp. 12-13.
18. Ibid.
19. Allen D. Hertzke, Representing God in Washington. The Role of Religious Lobbies in the American Polity (Knoxville, Tennessee, 1988), pp. 161-198.
20. Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (New York, 1991), p. 176.
21. Hertzke, Representing God in Washington, p. 206.
22. Berman, "Religious Freedom and the Challenge of the Modern State," p. 50.

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