CHAPTER VI

RELIGION, CULTURE, ETHNICITY AND INTER-GROUP TENSION: Meeting the Challenges of Nation Building Through a Legal Policy of Non-Discrimination

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INTRODUCTION

The perspective I bring to these comments is derived from several sources. At the most basic level, I approach the topic as an attorney who has spent many years working on cases in which the charge is discrimination on the basis of religion and/or national origin. I was able to supplement that practical legal experience with a more policy-oriented perspective when I served for six years as a member of the United States Commission on Civil Rights, an agency charged by federal law[1] with the task of "[a]pprais[ing] Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, national origin, or in the administration ofjustice,"[2] and of keeping track of social and legal developments which may "constitut[e] discrimination or a denial of equal protection of the laws under the Constitution, because of race, color, religion, sex, age, handicap, or national origin or in the administration ofjustice".[3] Now that I am engaged full-time in teaching and scholarship as the director of our University's Law and Religion Program, I have begun the task of exploring the manner in which American law deals with the complex relationships among religion, ethnicity and the rights of citizens and other legal residents of the United States.

It seems fair to state at the outset that religion and ethnicity are topics which are not well-understood in American law. Because of our Nation's experience with Black slavery, "race" is the issue which commands not only the most extensive treatment in the academic literature of equal rights, but also the undivided attention of policy-makers at the State and federal levels. In other nations, including Russia, Ireland and the United Kingdom, the issues of religion and ethnicity are more clearly drawn. In South Africa, like in

the United States, "race" appears to be the primary issue, but closer examination of the situation discloses that a complex web of racial, religious, and ethnic factors serves to make an already-difficult situation even more volatile.

Thus, my comments today will be focused on one primary concern: the need for clear thinking about the relationship between religion, culture and ethnicity. Without clear-headed realism about not only the importance of these topics in their own right, but also the manner in which they complicate the task of building a nation committed to equal citizenship, the law will be either muddled (as in the United States), or implicitly hostile (as the current draft amendment to Articles 11 and 18 of the Russian Federation Law on Freedom of Conscience[4] appear to be).

Surprisingly, one of the more interesting approaches to the topic has been taken in a country which has been forced to think clearly about such issues: South Africa.[5]

But before I get more deeply into my topic, let me take a moment to define a few terms.[6]

Culture: A "simple" definition of culture might be summarized as "how a people views itself in relation to the rest of the world." At a more philosophical and theological level "[d]ifferent cultures are basically different ways of facing the question of the meaning of personal existence."

Religion: The term can be defined in two ways:

- "Substantively" by reference to the sacred; or
- 'Functionally" by reference to its role in individual and social existence.

Ethnicity: A combination of national, religious, racial, and cultural factors leading to a shared identity. (Not all factors are present in every case.)

Nationality: Affinity acquired by virtue of a legal relationship to a particular nation-state.

BUILDING OR MAINTAINING A "NATIONAL" IDENTITY: COMMUNITIES

Types of Communities

The primary *external* task of a nation-state is to define and

maintain a distinct identity in relation to its neighbors and the rest of the world. Its primary *internal* task is to define a domestic, political, and social community which is cohesive enough to maintain the external indicators of nationhood (physical, economic and political), while at the same time building a domestic community which is committed to both individual freedom and the "common good."

When a nation-state is ethnically, religiously, and culturally homogeneous, the task of defining not only the relevant community, but also the "common good" and the nature of social duty is easier than it is in a pluralistic society. The more diverse the society becomes, the more difficult the task of defining the "community"; for, in the end, the manner in which the community defines itself will inevitably shape the policies which govern the place of individuals, their beliefs, and cultures, in that community.[9] It is, for example, quite obvious that those proposing amendments to the Russian Federation Law on Freedom of Conscience view "foreign" religions (i.e. those that have a headquarters outside Russia) as "non-Russian," even were it to be proven that *only* Russians had real influence over the activities of that church in Russia.

The usual starting place for such discussions is at what might be termed the "legal status" level. And, interestingly enough, that is precisely where the Russian debate appears to be centered today. But while "citizenship" or the status of a legally recognized juridical "person" defines one's status in the *political* community, there are many other relevant "communities" in a nation. Each of these is defined by its own sub-culture, and each, in turn, has its own, largely unwritten, way of dealing with those it considers to be "outsiders". Thus, it is important to distinguish among several of the most important types of communities, and to distinguish as well among the types of devices or strategies used to maintain their internal and external cohesiveness *(e.g.* charitable work, community organizing, membership requirements [including oaths and creeds], and the support and maintenance of educational programs and institutions).

Cultural Communities In the United States, these are often described as "sub-cultures" which can be defined by reference to geographic, cultural, ethnic, racial or economic factors. Prominent examples are: "inner-city, rural, Black, Puerto Rican, and the Northeastern WASP [White Anglo-Saxon Protestants] establishment. The same is clearly true in other countries as well (e.g., the "guest workers" of the Federal Republic of Germany).

Business Communities—Such communities can be defined

not only by reference to the type and size of the business *(e.g.* the "small business" community, or the "banking" sector), but also by reference to the ethnic, cultural or religious identity of those who own, manage or work in the organization. In the United States, for example, the wholesale (and for many years, perfectly legal) practice of hiring of family members in both small and large business entities had the intended effect of carrying on the cultural, ethnic and religious identity of the original owners. Discrimination in employment on the basis of religion and national origin accounted for many ethnically and religiously identifiable businesses, including law firms and banks: Jewish, Italian, Catholic, and Protestant. And the bloody periods of labor unrest during the late Ninetheenth and early Twentieth Century were traceable to the clash of two very different cultures: those of the workers and those of management.

Another illustration of this principle is one of the most famous "business" sub-cultures of all is the "Mafia"—a term which, in the United States carries both ethnic and criminal meanings, and refers to a particular subculture of organized crime involving both legal and illegal business ventures. In Russia, by contrast, the term "mafia" has a much different meaning, and is largely devoid of an ethnic component. The "gang" cultures of America's central cities in the 1990s is also a reflection of this tendency.[10]

Religious Communities—can be defined in many ways. The most common reference is "confessional" *(e.g.,* Catholic, Jewish, Islamic, Baptist), but the experience in the United States (and elsewhere, including Russia) is that religious identity can also track "national" identity *(i.e.* Is "Jewish" a religion, or a nationality?[11]) there is considerable evidence that such communities can also be defined by reference to a continuum which runs from religious orthodoxy to religious "progressivism,"[12] and that such religious communities (so defined) have considerable impact on the content and conduct of contemporary political debates in the United States.

Political Communities—Includes both "citizenship" (the political community at large) and what James Madison described in *The Federalist,* No. 10 as "factions."

Determining Who Is a Member of the Community and Who is an "Outsider"

The task of building a community begins with persons. As social beings, each individual has a need to belong to a community

not only for physical support, but as an essential component of the task of self-identification. That process begins with family and faith—the essential transmitters of religion and culture. American constitutional law recognizes this point:

> 'Under the doctrine of *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. *625,* 67 LEd. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act of 1922 unreasonably nterferes with the liberty of parents and guardians to direct the upbringing and-education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 U.S., at *534—535,* 45 S.Ct., at 57314

Thus it falls first to family and religion to shape the initial identity of the child—a position equally supported by international human rights principles.[15] But once the child leaves home and seeks to enter the political, educational, and business communities and their relevant subcultures, the identity shaping devices and structures which define those groups is a fertile ground for inter-ethnic and religious tension. Under this rubric arise the issues of

- Assimilation (overt and informal)
- Cultural Expropriation
- The Need of Sub-Cultures to Maintain their Identity in a Plural Culture
- The Need of the Larger Society to Create and Maintain a Cohesive, yet Plural Culture

Given its heritage as a nation of immigrants, Native

Americans and slaves brought here involuntarily, the American experience is at once unique, and uniquely useful as a model of the problems which arise when a community sets out to define itself. Let's refer to a few select examples:

1. Membership in the Political Community: citizenship. This was the issue over which the United States fought its Civil War, and it remains the source of constant tension in the American body politic. Defined in legal terms the issue of the mid-1850s was a simple one: should persons of Black-African descent be permitted to attain the status of "citizen," and, if so, whose law (federal , the State of origin, or the state of residence and labor) would determine the issue. In *Dred Scott v. Sandford*[16] The United States Supreme Court held that the answer to the question "Is a person of Black-African descent held in slavery in both Missouri and Illinois a citizen of the State of Illinois entitled to file suit for his freedom in a federal court where his 'master' is a citizen of the State of Missouri [his 'master']?" The Court answered the question in the negative, relying on a perverted reading of both natural law and private international law. What is interesting about the case from a legal perspective is the degree to which membership in one community was held (in true Apartheid-think style) to determine—for all other political communities in the United States—a person's ultimate "status" as "insider" or "outsider." And it did so from an explicitly cultural perspective. Justice Roger Taney wrote:

> They [persons of Black African descent] had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.. . . [They] were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

> [A]nd it is hardly consistent ... to suppose that they [the people of the states] regarded at that time, as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; . . . upon whom they had impressed such deep and enduring marks of inferiority and degradation; . . . to include them in the provisions. . . .for the security and protection of the liberties and rights of their citizens."[17]

In short, Black Africans could *only* be "outsiders."

This was the holding explicitly overturned by the Citizenship Clause of the Fourteenth Amendment.[18] ("MI persons born or naturalized in the United States are citizens of the United States and of the State in which they reside"), and because there was a real fear that the States did not share the integrationist culture of the Radical Republicans of the Reconstruction Congress, the federal legislature was given explicit authority to police the "civil rights" laws and practices of the States—and to impose them when necessary.

The important point to draw from this is that what most Americans now take for granted is a "protected" legal status. But it is not really defined by an immutable characteristic such as "race" or "gender" (as most people seem to think), but upon a *legal status:* "citizenship." The law is quite explicit, and seeks (or, it might be more appropriate to say "sought") to create a seamless web of legal protection for those who have attained either "citizenship" or "legal resident" status. This was accomplished by three constitutional devices, two of which rarely get much attention in modern American law. The best known is the Equal Protection Clause of the Fourteenth Amendment (". . . nor shall any State deny to any person within its jurisdiction the Equal Protection of the Laws.")[19] The others are the Interstate Privileges and Immunities Clause of Article IV[20] ('The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the Several States") which protects citizens of one State from discrimination on the basis of State citizenship, and the Privileges and Immunities Clause of the Fourteenth Amendment.[21]

Another provision of the Constitution which receives very little attention, but which is critical to the task of integrating diverse cultural and religious groups into the mainstream political community is the Religious Test Clause of Article VI.[22] In fact the only mention

of religion in the original text of the Constitution of the United States is this express prohibition of religious discrimination in the selection of candidates for appointive public office: "no religious test shall ever be required as a Qualification to *any* Office or public Trust under the United States."

The significance of the Test Clause is thus both structural and normative. Its language and structure differentiates between the powers of the newly-created federal government and those of the States, and foreshadows the structural limits contained in the First Amendment.[23] Article VI, clause 3 requires an oath or affirmation in support of the Constitution from all officials and legislators, both State and federal, but only the federal government was prohibited from utilizing the religious tests to determine fitness for public office. The states, by contrast, commonly applied such tests to those seeking State offices,[24] and at least one—Tennessee—felt free to do so as late as 1977![25]

Given that structure, the Federalists "drew a non-establishment sum from the lack of federal jurisdiction over religion plus the test ban," and asserted that, "since the oath requirement was the only plausible power one sect might use to gain the upper hand"[26] and use it to define religion as the *sine qua non* of "insider" status, Article VI was "enough [of a religious liberty guarantee] for a federal government of specific enumerated powers."[27] But this was not enough for either the anti-Federalists (many of whom viewed the Test and Supremacy Clauses as threats to religious liberty)[28] or the States; for it did not state explicitly that the federal government had no enumerated power either to vex religious liberty directly or to set national policy on the subject. That guarantee would have to await the ratification of the First Amendment. But the first steps had been taken, and the Test Clause was presented for ratification as a guarantee that the appointment powers granted the federal government—the powers which could be abused with the greatest ease—would not be turned against entire classes of the citizenry.[29]

At the normative level, the Test Clause prohibits the most personal kind of imposition on one's religious liberty which can occur at the hands of the federal government[30]—overt discrimination in federal appointment, employment and in the enjoyment of the public trust.[31] Whether targeted on classes of believers or aimed at non~believers,[32] the imposition of a religious test or oath is one of the purest examples of intentional discrimination on religious grounds; for it involves inquiry into the substance of personal religious belief

and practice itself

Viewed more broadly, the Test Clause is one of the most critical of the religious freedom guarantees: an express prohibition of religious discrimination, clearly tied in spirit, if not in function, to the equal citizenship provisions of Article IV, which were themselves later echoed in the Privileges and Immunities Clause of the Fourteenth Amendment. The Test Clause thus underscores at the personal level that which the First Amendment later made reasonably explicit at the institutional one: federal attempts to assure what might now be termed "religiously-correct" patterns of speech, thought and institutional preference are forbidden.

2. Cultural Communities: The Problem of Assimilation. The issue of cultural, linguistic, religious, and ethnic assimilation are alive and well in the contemporary United States. Issues of multi-culturalism and linguistic identity are "hot" topics in American public education; and the issue of prayer and religion in the public schools is never too far from the surface. The United States Supreme Court will, in fact, decide three cases this term (ending July 1, 1993) which will give important insights into its current thinking about the relationship of law, religion, ethnicity, and cultural assimilation. The three cases are:

- *Church of Lukumi Babalue Aye, Inc. v. City of Hialeah, Florida*[33] (whether the City of Hialeah may ban the ritual slaughter of animals—a law aimed at Caribbean immigrants who practice the Santeria religion);
- *Lamb's Chapel v. Center Moriches Union Free School Dist.*,[34]—whether or not a public school board may ban the use of public school auditoriums during non-school hours for public discussion of religious perspectives on social issues, when the same auditorium could be used by other members of the community for discussion of the same issues from a non-religious perspective;
- *Zobrest v. Catalina Foothills School Dist.*[35]—whether or not federal law mandating the provision of special services to children with disabilities (in this case a deaf child who needs a sign language interpreter to attend school) is constitutional if it permits the interpreter to work on the premises of the Catholic High School in which the child's parents enrolled him.

Without getting too deeply into the specifics of these cases,

they are nevertheless useful to demonstrate that in one of the most religiously" free" countries in the world, issues of religious, cultural and ethnic identity still cause conflict. The conflict, however, takes place in a courtroom, not in the street, but only as long as the affected communities perceive that they are getting a fair hearing. And it is simply a fact that, today, many religious groups in the United States do not feel that they are getting a "fair" hearing in Court. They have, as a result, exercised their right to petition Congress to enact what has been dubbed "The Religious Freedom Restoration Act."

This is so because American law simply does not "know how to deal with" either religion or its cultural manifestations or supports—including those contained in the Constitution itself.[36] A brief history of what has been termed the "schools question" from at least the early 1800s will illustrate the implications nicely—with the caveat that if it continues to be this hard in the United States (which claims to be committed to cultural pluralism), it will be next to impossible in countries, such as the Islamic nations of the Middle East, to make rapid strides without very careful planning and implementation.

A Brief History of the "Schools Question"

In 1790, Catholics in the United States numbered only about 35,000 out of a total population of over four million, and together, Catholics and Jews amounted to only about 0.1 percent of the population.[37] "The great Atlantic migration," first of the Irish, later of Germans and Scandinavians, and finally of Eastern and Southern Europeans, brought in over 40 million immigrants, including large numbers of Catholics with "foreign" ways, languages, and loyalties. For many, this was not a welcome development.

The Rev. Lyman Beecher of Boston saw immigration as containing the seeds of "the conflict which is to decide the destiny of the West" and that it "will be a conflict of institutions for the education of her sons, for the purposes of superstition, or evangelical light; of despotism or liberty."[38] Catholics, because of their faith commitments, were not fit to be called "Americans" because they "are considered lower in the scale of mental cultivation and refinement than the Protestant . . . due to their being deprived of the Bible by their priesthood."[39]

To men like Beecher, it was clear that *something,* obviously,

had to be done promptly. The logical answer was to "educate" them:

> If we do not provide the schools which are requisite for the cheap and effectual education of the children of the nation, it is perfectly certain that the Catholic powers of Europe intend to make up the deficiency, and there is no reason to doubt that they will do it, until, by immigration and Catholic education, we become to such an extent a Catholic nation, that with their peculiar power of acting as one body, they will become the dominant power of the nation.[40]

But there was, already, "cheap and effectual education" being provided at public expense by church-related schools and the newly-established public schools. The problem, from the Catholic perspective, was that the newly-established public schools "tended to be close copies of the Protestant schools they replaced." When they were unsuccessful in their attempts "to remove Protestant sectarianism from the public schools,"[41] Catholics began to request their fair share of the tax moneys allocated to the schools of other religious organizations under the 1813 statute. The result was a change in the law of New York which denied funds to any school which taught "sectarian doctrine." (i.e. Catholicism).[42]

One of the striking things about the contemporary politics of pluralism respecting religion, culture and language in schools is how little it changes over the years, and how consistent the fear that democracy and community will not survive if parents may freely choose among educational alternatives. Even though it was an article of faith in the early years of the republic that "schools and the means of education shall be forever encouraged" because "religion, morality and knowledge" were thought "necessary to good government and the happiness of mankind,"[43] the impression grew that *certain* religious beliefs are inimical to the common good and should not be taught in the public schools.

To some in positions of political power, including Congressman James Blame and President Ulysses S. Grant, Catholicism, and to a lesser extent other minority religions, fit that description. Other "sectarian" practices, such as Bible reading and organized prayer however, continued in the public schools until well into the 20th Century.[44]

When the laws designed, in the words of the infamous Paul

Blanshard, to prevent "[the capture of a public educational system" by the "Catholic hierarchy" for their sundry nefarious purposes[45] came to be used by Catholics and Jews to protect their own children enrolled in the public schools from proselytization and training in Protestant traditions, the fact that public schools "tended to be close copies of the Protestant schools they replaced" was forgotten. Such attempts proved, as it were, the un-American nature of those who objected; for their valid religious concerns were cast aside by Blanshard and others as attacks on both Christianity itself[46] and "America's most treasured institution"[47] (the public school).

Anti-Catholicism, the official policy of all colonies but Pennsylvania (which required religious oaths for public office abhorrent to Catholics) and Rhode Island (where no Catholics were known to have lived),[48] was thus yoked together with nativism, and fed fears that the immigrants would wreak havoc upon the economic and political life of those already here.[49] Educational choice simply had to be curtailed—or eliminated[50]—to guarantee that alien cultures and ideas would not survive the assimilation process. The Official Ballot Summary printed by the State of Oregon in preparation for the 1922 initiative which sought to eliminate all private schooling makes the point quite clearly.

> What is the purpose of our public schools, . . .? Because they are the creators of true citizens by common education which teaches the ideals and standards upon which our government rests. ... Mix those with prejudices for a few years while their minds are plastic, and finally bring out the finished product—a true American. . . . Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught.[51]

It is a story which those of us whom the writers of that pamphlet would believe have "absorb[ed] the narrow views of life, as . . . taught" by our parents and clergy are tired of hearing. Yet we hear the same old arguments today, dressed up to look a bit more inclusive, compassionate, and less xenophobic for the evening news. Americans who desire to maintain a distinctive cultural or religious identity are just as much "true Americans" as those who

do not or cannot.[52] Most immigrants, including my own grandparents, who make the effort to reach these shores (or cross the Southern border) are choosing to join the American experiment *because* it is *different* from that which they left behind. The threat to pluralism does not arise simply because they bring cultural, religious and linguistic baggage to their new home, but because well-intentioned xenophobes and, more recently, hard-line advocates of cultural diversity do not know how to deal with them. A pluralistic democracy is a rich amalgam of different peoples, each with a unique cultural and religious heritage, contributing to the constant renewal of culture and freedom. Without them, the "American" culture we know today would not have been possible.

CONCLUSION

The task of nation building is a difficult task in any case. Where societies such as Russia and the other nations of the former Soviet Union undertake to define themselves as "democracies," the task is even more difficult. Russia is a distinctive nation and culture with a strong historical, religio-cultural identity, and yet it has undergone seventy years of enforced secularization. The task facing them is how to integrate diverse religious, ethnic and cultural groups into a relatively homogenous nation. The choices are basically three:

- Assimilation (no diversity, or diversity on the State's terms)
- Pluralism (a multi-ethnic society characterized by equal citizenship and non-discrimination)
- Pure Individualism (no community).

The United States has tried assimilation, and it has (for the most part) "worked," but it is rapidly coming apart at the seams in the face of unprecedented legal and illegal immigration from Latin America, the Caribbean and Asia. The courts have responded by taking a "pure individualism" approach, but that doesn't work either: Note the Supreme Court's decision in *R.A.V. v. City of St. Paul, Minnesota,*[53] voiding, on free speech grounds, a St. Paul Minnesota "hate speech" ordinance as applied to a cross-burning on the lawn of a Black family.

NOTES

1. The powers and duties of the United States Commission on Civil Rights are set out in 42 U.S.C. Section 1975c. In addition, the Chairman of the Commission is a designated member of an inter-agency panel which monitors the fairness of the administration and conduct of the Immigration Reform and Control Act of 1986 [IRCAJ, which contains specific provisions designed to prevent discrimination on the basis of ethnicity and national origin.

2. 42 U.S.C. Section *1975c(3).*

3. 42 U.S.C. Section *1975c(2).*

4. Law of the Russian Soviet Federative Socialist Republic on Freedom of Religion (1990), Article 11, "State Control Over Observance of Legislation on Freedom of Conscience and Religion in the Russian Federation," would permit law enforcement agencies to "have the right to receive essential information from religious associations and attend events sponsored by religious associations and connected with their activities as legal entities." Article 18 draws a distinction between domestic and "foreign" religious organizations. "Foreign" religious organizations (defined as having their 'leadership" outside the Russian Federation) are subject to registration with *both* the Ministry of Justice (to attain recognition as a "juridical person") and with the Ministry of Foreign Affairs. Notably there are no standards which govern the discretion of the foreign ministry.

5. See Draft Declaration on the Rights and Responsibilities of Religious People, drawn up under the auspices of WCRP-SA (World Conference on Religion and Peace, South Africa). A final draft was due out in November 1992, but I have yet to receive a copy. It can be obtained by writing to WCRP-SA, P.O. Box 19354, Peoria West 0117.

6. Several of the definitions utilized in the following section were derived from a very useful and informative paper presented by Professor Vassil Prodanov, Director of the Institute of Philosophy of the Bulgarian Academy of Sciences, entitled *Ethnic and Religious Revival: Religion as* a *Ground of Ethnic and National Identity.* The paper was presented in Washington D.C. at the "Religion in Public Life" Seminar of the Council for Research in Values and Philosophy, on March 12, 1993.

7. Pope John Paul II, *Centessimus Annus* 24.

8. Interestingly the United States Supreme Court utilizes both types of definition. Though there is but one "Religion Clause"

in the First Amendment to the Constitution of the United States, "*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ,*" the Court employs a categorical form of analysis and divides the clause into two components: a "non-establishment" guarantee which prohibits government sponsorship, support, or preference for religion, and a "free exercise" guarantee, which guarantees the right to practice the religion of one's choice (including none at all). The non-establishment guarantee utilizes a 'substantive' definition, thus limiting its impact to government support of things which are of a "recognizable" religious character. When the issue is individual freedom, however, the Court employs the much broader "functional" definition. Needless to say, the existence of a "dual" definition for a term which is used only once in the text of the Amendment is a matter of great controversy. The Court however, seems content to simply ignore both the religious and cultural implications of its decisions in the field. That discussion, however, is beyond the scope of this paper.

9. For an interesting discussion of this phenomenon in the contemporary American academic setting, see Stanley Fish, "There's No Such Thing as Free Speech and It's a Good Thing, Too," in *Debating P.C.: The Controversy Over Political Correctness on College Campuses* (Paul Berman, ed. 1992). Professor Gerard Bradley's discussion of the debates over the Religious Test Clause of Article VI in the American Constitutional Convention of 1787 also make useful reading on this point. *See* Gerard V. Bradley, "he No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself," *Case Western Reserve Law Review*, 4 (1987).

10. See "Gangs and Civil Rights," in D. Monti and S. Cummings, editors, *Gangs* (S.U.N.Y. Press, forthcoming).

11. See Shaare Tefila Congregation v. Cobb,—U.S.—, 107 S.Ct. 2019, 202 1-22 (1987) (is discrimination against persons of Jewish descent "race discrimination" as that term is used in 42 U.S.C. Sections 1981-1982? The Court held that it was). See also St. Francis College v. Al-Khazraji,—U.S.—, 107 S.Ct. 2022, 2028 (1987) (definition of "race discrimination" under 42 U.S.C. Section 1981, as applied to persons of Arab descent) (it is).

12. *Culture Wars: The Struggle to Define America* (Basic Books, 1991).

13. A. Hamilton, I. Madison, J. Jay, *The Federalist,* No. 10

(1787-1788). Madison wrote that:

> By a faction. I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or the permanent and aggregate interests of the community.

14. Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1973).

15. See, e.g., The International Covenant on Civil and Political Rights, Article 18 (1966); The Helsinki Final Act (1975) (Baskets VI & VIII); United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief(1981). Concluding Document of the Vienna Meeting in 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, held on the Basis of the Provisions of the Final Act Relating to the Helsinki Conference (1989).

16. 60 U.S. (19 How.) 393 (1856).

17. *Id.* at 407, 410, 416.

18. U.S. Const. Amend. XIV-1(1868).

19. U.S. Const. Amend. XIV §1, cl. 3(1868).

20. U.S. Const. Art. IV-2, ci. 1(1787).

21. U.S. Const. Amend. XIV §1, cI. 2. (1868) ("No State shall make or enforce any law which shall abridge the privileges and immunities of Citizens of the United States.")

22. The only mention of religion in the Constitution itself is an express prohibition of religious discrimination: the Test Clause of Article VI.

23. Professor Bradley notes that just "as in the voter qualifications actually left to state law by article I, the Framers could have cut into the comparatively 'illiberal' state orders [supporting state-established religions] had they wanted to. Put differently and largely as a matter of legal analysis and not political wisdom, an incision at this point could certainly have been justified as a necessary, limited protection of the federal regime, and not as a wholesale invasion of state autonomy. This reticence and the overall sparseness of the record at least plausibly confirm Pinckney's proposal as a matter of observation, both about the completed legal framework and the Framers intentions: Congress should not regulate the "subject

of religion." Bradley, *supra* note 9 at 693.

24. William G. Torpey, *Judicial Doctrines of Religious Rights in America* (Chapel Hill:Univ. of North Carolina Press, 1948). Quoting Sanford H. Cobb, The Rise of Religious Liberty in America (New York: MacMillan, 1902) and (compiling statistics "relative to religious qualifications for officeholders in the first thirteen state constitutions), pp. 16, 510.

25. McDaniel v. Paty, 435 U.S. 618 (1978), *rev'g,* Paty v. McDaniel, 547 S.W.2d 897 (Tenn., 1977).

26. See Bradley, *supra* note 9 at 708-709, quoting IV *Elliot's Debates on the Federal Constitution* at 196 (speech of James Iredell). This is a significant point, especially in light of the current Court's understanding of the Fist Amendment's guarantees of freedom of speech, press, religion, peaceable assembly and petition for redress of grievances. It seems to have been forgotten in contemporary church-state jurisprudence that an "establishment of religion" was a many faceted enterprise which included, in addition to the *preferential* treatment of and support for identifiable religious groups, there were also legal mechanisms designed to enforce the political and civil *subordination* of the disfavored religions and their adherents. Among these were test oaths, requirements of church membership and worship, and other civil disabilities. See generally William A. Blakely, ed. & The Religious Liberty Ass'n, *American State Papers and Related Documents on Freedom in Religion* (*Review and Herald*: Washington, D.C., 1949) 17-92.

27. Bradley, *supra* note 9 at 709.

28. *Id.* at 694-11.

29. Federalist, No. 52, 57 (Madison). See generally *id.*, No. 10, 51. Professor Bradley writes that "[the no-test clause was sold as a constitutionalized Golden Rule with a Machiavellian spin to it: "Constrain yourself as you would constrain others." Madison's views on the role factions should play in the protection of all forms of liberty are thus clearly in evidence here. Bradley, *supra* note 9 at 702-707.

30. This statement presumes action by those exercising governmental authority derived from the federal constitution. At the time of the Convention in 1787, "'non-Christians' could not hold public office anywhere in the states, except perhaps in Virginia, and there is no record of *that* actually occurring . . . [and Catholics], the only non-Protestant Christians around, . . . were clearly eligible in Pennsylvania, Delaware and Maryland. Elsewhere *only*

Protestants could hold office." Bradley, *The No Religious Test Clause, supra* note 9 at 68 1-87 (emphasis in the original).

31. There are only a few sources which shed light on the content of the phrase "any Office or public Trust under the United States." The first part—"office. . . under the United States"—is relatively clear given the language of Article I § 6 (Incompatibility Clause) and Art, II, § 1, 2. It is arguable, though not by any means settled, that all persons who hold elective offices, federal appointments, or who perform a federal function of any sort, including members of the Armed Services and presidential Electors, are protected by the Test Clause. See 5 U.S.C. § 2104 (defining as an "officer" all Justices and judges, as well as appointees of the President, the courts, heads of executive branch and military departments and agencies, or any other person "engaged in the performance of a Federal function under authority of law or an Executive act"). This would arguably include federal civil servants; for even if they are not "inferior officers" under Article II, Congress has explicitly recognized that they are indeed officers, 5 U.S.C. § 2104, and "individuals holding an office of trust or profit or discharging an official function under or in connection with the United States". See 5 U.S.C. § 2105 (West 1992) ("employee" includes "officers" and civil service appointees).

The more interesting question is what constitutes a "public Trust under the United States." The phrase appears to be broader than the term "office," a construction supported by the phrase "office of trust or profit under the United States" which appears in the incompatibility clause of Article II, as well as by Congress' own distinction between individuals "holding an office of trust or profit" and those who may be "discharging an official function *under or in connection with* the United States". 5 U.S.C. § 2 105(d) (emphasis added).

Federal case law sheds very little light on this question, but there are a number of State cases construing the phrases "office or public Trust" and "Office of Trust or Profit" which do provide some guidance on the meaning of the term "office of public trust or profit". Those terms are commonly found in the incompatibility provisions of state constitutions and do shed some light on the present inquiry. See, e.g., Commonwealth of Pennsylvania v. Dallas, 4 DalL 229, 4 U.S. 229, 3 Yeates 300, 1 LEd. 812 (Pa., Sept. Term 1801) (U.S. Attorney and Recorder of City of Philadelphia); Begich v. Jefferson, 441 P. 2d 27 (Alaska, 1968) (position as state or federal legislator is

incompatible with superintendent or teaching positions in state operated school districts); Commonwealth *ex rel* Hancock v. Clark, 506 S.W.2d 503 (Ky., 1974) (postmaster of a fourth class post office was not exercising an office of trust or profit under the United States ineligible to hold or exercise any office of trust or profit under the Kentucky Constitution and so could serve as a member of a county school board); Brown v. Lillard, 814 P.2d 1040 (Okla. 1991) [position of state judge (an office) is incompatible with compensated full or part-time teaching at a state institution (a position of"profit"); State v. Turner, 168 Wis. 170, 169 NW. 304 (1918) (acceptance by circuit court commissioner of the office of United States commissioner operated to vacate ipso facto his office of circuit court commissioner under Wisconsin Const., Art. 13, § 3). For a more generalized discussion of the term "public Trust" as the term was coniniony used in the Eighteenth Century, *see* Lucaites, *supra.*

Given the advent of the modern administrative state and laws which require federal contractors and grantees of federal funding to comply with federal law in their dealings with the public, *see, e.g.,* 42 U.S.C. §2000d (Title *Vt* of the Civil Rights Act of 1964); Civil Rights Restoration Act of 1987, Pub. L. 100-259, Mar. 22, 1988, 102 Stat. 28. 20 U.S.C. §~ 1681 note, 1687, 1687 notes, 1688, 1688 note; 29 U.S.C. §sS 706, 794; 42 U.S.C. §~ 2000d-4a, 6107, it is arguable that the explicit non-discrimination norm of the Test Clause applies not only to federal employment, but also to federal contracting aid grant-eligibility considerations as well. *Cf* Bowen v. Kendrick, 484 U.S. 942 (1987); Walz v. Tax Conun'n, 397 U.S. 664 (1970). Compare Bob Jones University v. United States, 461 U.S. 574 (1983).

There is not much federal case law on the topic, but that which does exist seems to support a broad reading of the term. The Claims Court has stated that "Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct." Refine Construction Co. v. United States, 12 Cl. Ct. 56, 63 (1987) (government contracts). Environmental Protection Agency grants for the construction of certain public works projects also constitute a public trust. See 40 C.F.R. §~ 30.120, 33.300; Town of Fallsburg v. United States, 22 Cl. Ct. 633, 641 (1991). And finally, the grantee of broadcasting license is considered to be a public trustee, who must serve the broad goals of the public interest convenience and necessity. Red Lion Broadcasting v. F.C.C., *395* U.S. 367, 383 (1969); Office of

Communication of the United-Church of Christ v. F.C.C., 707 F.2d 1413, 1427-28 D.C. Cir. 1983). This question is discussed at greater length in a forthcoming article.

32. See McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961).

33. 936 F.2d 586(11th Cir. 1991), cert. granted No. 91-948, -*- S.Ct. -"'-, 60 U.S.L.W. 3652 (March 23, 1992).

34. 959 F.2d 381 (2nd Cir. 1992) cert. granted, 60 U.S.L.W. 3881 (U.S., Oct. 5, 1992) (No. 91-2024).

35. 963 F.2d 1190 (9th Cir. 1992); cert. granted 61 U.S.L.W. 3061 (U.S., Oct. 5, 1992) (No. 92-94).

36. See Mark V. Tushnet, *The Constitution of Religion,* 18 Conn. L. Rev. 701, 702 (1986). Mary Ann Glendon & Raul F. Yanes have observed that "This unusual awkwardness on the part of legal elites with regard to issues of great moment to the overwhelming majority of our country's citizens seems partially explainable in relation to the hierarchy of constitutional values and... assumptions that religion is a private matter. American church-state law also has been deeply affected, however, by a cognitive problem that is pervasive in contemporary legal culture.
Religion Clause jurisprudence is a veritable museum of the inability of a conceptual apparatus geared only to the individual, the state and the market to take account of the social dimensions of human personhood, and of the social environments that individual human beings require in order to fully develop their potential." Mary Ann Glendon & Paul F. Yanes, *Structural Free Exercise,* 90 Mich. L.Rev. 477, 546 (1991)

37. Rev. H.A. Buetow, J.D., Ph.D. "A History of United States Catholic Schooling" 13 (National Catholic Education Assn., Keynote Series #2, 1985).

38. Rev. Lyman Beecher, *A Plea For the West,* (Cincinnati: Truman & Smith, 2d ed. 1835) 20.

39. Sr. M. E. Thomas, *Nativism in the Old Northwest* (1936), doctoral dissertation on file at Mullen Library of The Catholic University of America, Washington, D.C. p. *53.*

40. *Id.* at 182.

41. W.G. Katz, *Religion and the American Constitutions* (Chicago:Northwestern Univ. Press, 1964) p. 63.

42. W.O. Bourne, *History of the Public School Society of the City of New York,* (1870) at 7, 31, 45, quoted in P. A. Fisher, *op. cit.*

43. Northwest Ordinance of 1787, as adopted by Congress, Statutes of 1789, c. 8 (August 7, 1789) ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.")

44. See Board of Education v. Minor, 23 Ohio St. 211 (1872) (attempt to compel the Cincinnati Board of Education to mandate reading of the King James Bible over the objection of Catholic parents).

45. P. Blanshard, *American Freedom and Catholic Power* (Boston: Beacon Press, 1949) pp. 74-85.

46. See generally, People ex rel Ring v. Board of Education of District 24, 245 Ill. 334, 92 N.E. 251 (1910) (school prayers: objection of Catholic parents); Board of Education v. Minor, 23 Ohio St. 211(1872) (Bible reading: objection of Catholic parents to use of King James Version).

47. P. Blanshard, *op. cit.*, p. 80.

48. O'Neill, *op. cit.*, at 7-8.

49. S.F.B. Morse, *Imminent Dangers to the Free Institutions of the United States through Foreign Immigration and the Present State of the Naturalization Laws: A Series of Numbers Originally Published in the New York Journal of Commerce by An American* (New York: E.B. Clayton, 1835) [New York: Arno Press & The New York Times, The American Immigration Collection, 19691, p. 8-9 (emphasis in the original):

> Yes; these Foreign despots are suddenly stirred up to combine and promote the greater activity of Popery in this country; and this too, just after they had been convinced of the truth . . . that *Popery is utterly opposed to Republican liberty.* These are the facts in the case. Americans, explain them in your own way. . . [T]hese crowned heads have.. . sent Jesuits as their almoners, and ship-loads of Roman Catholic emigrants, and for the sole purpose of converting us to the *religion* of Popery, and without political design, credat Judaeus Appella, non ego.

50. See e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 466 (1925): Meyer v. Nebraska, 262

U.S. 390 (1923).

51. Brief of Appellee, Pierce v. Society of Sisters, 286 U.S. 466 (1925) at 97, quoting the Official Oregon Ballot Summary.

52. Compare J. M. Cuddihy, *No Offense: Civil Religion and Protestant Taste* (New York: Seabury Press, 1978).

53. 112 S. Ct. 2538 (1992).

CHAPTER VII

CULTURE, VALUE, AND LIFESTYLE: THE POLITICAL DILEMMA

CHARLES R. DECHERT

"PHILOSOPHIA PERENNIS"

My major professor, Msgr. John K. Ryan, was wont to affirm: "Philosophers are more likely to be correct in what they affirm than in what they deny." It is a big, complicated world out there; "There are more things in heaven and earth than you dream of in your philosophy, Horatio." It is my premise today that both the philosopher and the natural scientist are alike in their pursuit of "truth." That both rely on abstraction from and the simplified expression of "reality," things, events, relations, institutions, actions and interactions, even notions and symbolizations. In this pursuit men are so constituted that they filter their perceptions and apprehensions; they select and simplify; they combine and recombine such abstracted elements into patterns—models that purport to describe or explain what is or might be; models that provide some analog of another reality to which they have a limited equivalence [*See C. Dechert, "Cybernetics and the Human Person," *Intl.Phil.Qtly,* V, 1 (Feb 1965), 5-36].

Such models, of course, are expected to be internally coherent, non-contradictory. When carried to their logical conclusion, the results should not be absurd. The Heavyside Equations, once the basis of electrical power engineering, were never acceptable to scientific purists for this reason-and gave way to Laplace Transforms applicable to the whole range of electromagnetic frequencies rather than the narrow spectrum to which the Heavyside formulations provided an adequate fit.

Both scientific and philosophic models may be subject to the pragmatic test. Does the model predict forms and behaviors, structures and activities (functions)? Can it be employed to manipulate or manage operative outcomes? Do behaviors and decisions guided by the model prove beneficial, life-enhancing to one guided by it, or the contrary? The pragmatic test of ethical and