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ABSTRACT

The question implies that the First Amendment's "separation of church and state," as interpreted by the Supreme Court, is an insufficient solution to the old conflict between American democracy and Catholicism. Catholicism has become unsafe in contemporary American democracy in ways that the original constitutional arrangement, of which the First Amendment was only a part, does not help. The contemporary danger is rooted partly in the old conflict between classical liberalism and revealed religion as such. But the more proximate danger is the secular "civil liberties" regime that has been instituted by the Supreme Court since 1940. That regime permits Catholics to follow their religion in public affairs only insofar as it is in agreement with the secularism which the "civil liberties" regime both instituted and understands liberal democracy to require.

> "The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism."
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> —John Courtney Murray, S.J. (1960)(FN1)

THE TRADITIONAL VIEW THAT CATHOLICISM IS NOT SAFE FOR AMERICAN DEMOCRACY

The idea that Catholicism is not safe for American democracy already appears in the constitutional ratification debates (1787-89). Several reasons are given. Catholics "acknowledge a foreign hand, who can relieve them from the obligation of an oath."(FN2) Congress's Treaty power would allow the Catholic religion to be established in the United States "which would prevent people from worshiping God according to their own consciences."(FN3) And "no man is fit to be a ruler of [P]rotestants without he can honestly profess to be of the [P]rotestant religion."(FN4)

A century later the Blaine amendment, which had been proposed to deal with the problem posed by Catholics, came within one vote of passing Congress.(FN5) More particularly, the amendment was introduced because the growing Catholic population was succeeding in obtaining public money for its own schools. That Catholics were the particular aim of this amendment was made explicit in the debates.(FN6) The amendment sought to stop the spending of public money for "sectarian" schools which it defined as schools not under public control. Thus schools controlled by public bodies were permitted to read the King James Bible and teach Protestant ideas of conscience.

Twentieth-century formulations maintained that the Catholic Church is dangerous to

“Puritanism ... was almost as much a political theory as a religious doctrine. ... Most of English America ... brought to the New World a Christianity which I can only describe as democratic and republican.”(FN13) In contrast, from Constantine until the twentieth century, Catholicism was associated with monarchy. Whether there are decisive theoretical reasons for this historical connection, it seems historically plausible that Protestantism is somehow akin to democracy in a way that Catholicism is not.

Furthermore, the Encyclicals of Pius IX (Syllabus of Errors 1864), of Leo XIII

found most relevantly for us in John Locke's Letter Concerning Toleration (1689), James Madison's "Memorial and Remonstrance Against Religious Assessments" (1785) and Thomas Jefferson's "Statute on Religious Freedom" (1785). In this thought, Catholicism's "foreign allegiance," that is, its understanding of conscience as subject to Church and ultimately papal instruction, is incompatible with American democracy's dissenting Protestant assumption that there is no higher source of guidance in matters of faith and morals than individual conscience. With democracy so understood, how can Catholicism be safe unless it adopts this view of conscience and thereby ceases to be historic Catholicism?

THE TRANSITION FROM CIVIL LIBERTY TO CIVIL LIBERTIES

In the 1940s, while Father Ryan was both restating the Church's traditional objections to the secular liberal state and arguing that they could be prudentially accommodated to American democracy, the Supreme Court began intensively to secularize American democracy. The rubric was a new reading of the establishment clause which in principle, and eventually in practice, rendered all revealed religions, including the Protestantism which it partially resembled but which it displaced, incompatible with any significant place in public life. By "secularism," we understand "the doctrine that morality should be based solely on regard to the well-being of mankind in the present life, to the exclusion of all considerations drawn from belief in God or in a future state."(FN23) This is today thought to require excluding public support from religious schools and prohibiting both religious practices in public contexts and moral teachings based on revelation when those teachings cross secular morality or secular ideas of freedom. Post-1940s democracy, thus authoritatively articulated and fashioned by the Court, appears to regard secularism as the sine qua non of liberal democracy.

We argue this mandatory public secularism is part of a new constitutional regime which the Court instituted at this time. The new regime is verbally indicated by the Court's introducing, for the first time in our constitutional history, "civil liberties" in c contrast to the traditional "civil liberty."(FN24)

"Civil liberty" is the language of Blackstone, common law and The Federalist. The latter speaks of it in the context of the problem of maintaining "the order of society."(FN25) WESTLAW first finds "civil liberty" in a Supreme Court opinion in Marbury (1803),(FN26) but not until the Slaughterhouse Cases (1872) is it given explicit judicial definition. There, Justice Field refers approvingly to Blackstone's definition, given by Senator Trumbull in the debate on the Civil Rights Bill of 1866. "Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public."(FN27) Field quotes Blackstone's editor's gloss on this definition: "that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws."(FN28) Thus, "civil liberty" did not privilege individual power to the extent of requiring the laws to grant it as much latitude as possible. The laws only had to be "equal, just and impartial," thereby giving as much emphasis to the restraints of such laws on an individual's power as to his license to exercise that power. The modern idea that "rights are trump" is alien to "civil liberty" but is the cutting edge of the new "civil liberties" regime.

Under the old "civil liberty regime," religion was permitted in public life, including ritual public prayer, which survives to this day in the opening of each day of Congress and the Court, and the public school Baccalaureate Service and graduation prayer, found unconstitutional as late as Lee v. Weisman (1992).

The grounds for the old 'civil liberty' regime's solution to the problem of the relation of religion and government was publicly advocated at the Founding by James Madison.

> In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.(FN29)

This Madisonian regime publicly assumed that "religious rights" included influencing public policy through truck and bargaining among the multiplicity of sects. Speaking for the Constitution's advocates, he argued that this system would so limit any particular sect's influence as generally to produce "justice and the general good."(FN30)

This public religious pluralism permitted legislatures to work out pragmatically the relation between religious belief, churches, and government without conforming to a constitutional theory of what the outcome should be.(FN31) This regime, constitutionally in place from 1789 until the 1940s, also permitted public schools to have a character forming function which warranted "impartial governmental assistance of all

Court's language. In the first case (1892),(FN40) it is part of a 1701 quotation from William Penn. In the second case (1904),(FN41) it occurs in a military order which was part of the evidence in the case.

"Civil liberties," as it developed after 1940, differs decisively from traditional "civil liberty" by intensified license to individual choices and desires as against other constitutional goods. "Civil liberty" had privileged "the general advantage of the public" (Justice Field [1872] citing Senator Trumbull [1866] quoting Blackstone [1776]) or "justice and the general good" (Federalist, No. 51 [1788]). "Civil liberties" privileges individual rights and that probably generates constitutional secularism. "Civil liberty" permitted governmental support for religion and relied on the competition between, and compromise among, the multiplicity of sects to prevent injustice. It did not define justice as requiring constitutional equality between religion and nonreligion. When the Court instituted that equality in Everson (1947), it redefined injustice to something like exposing an individual to government supported religious activities with which that individual did not agree. Thus one atheist's right not to have to listen to the traditional Baccalaureate prayer is constitutionally superior to the community's determination that such prayer is for the "general advantage of the public" (Lee v. Weisman, 1992). If an individual's choice constitutionally trumps the legislatively determined "general good," then public secularism apparently, or at least plausibly, follows.(FN42)

Secularism may even more sharply contrast "civil liberties" with "civil liberty" than does the intensified individualism from which it springs. For while Professor Tribe thought "extraordinary" Clarence Thomas's reasoning politically on the basis of the Declaration's theological content, under the "civil liberty" regime even Jefferson thought it proper to state for America that we are "endowed" with rights "by our Creator." And elsewhere he asked "can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?" And because slavery violates them "I tremble for my country when I reflect that God is just; that his justice cannot sleep for ever. ... The Almighty has no attribute which can take side with us in such a contest."(FN43) Nor did Lincoln think the Declaration's theological argument "extraordinary." Indeed, at Gettysburg he declared that America was dedicated to the Declaration's proposition "under God."(FN44) Similarly, Frederick Douglas cited the Declaration and quoted Psalm 137 "By the rivers of Babylon ...," declaring "The existence of slavery in this country brands your republicanism as a sham, your humanity as a base pretense, and your Christianity as a lie."(FN45)

The "civil liberties" regime transformed secularism from at most a common social opinion(FN46) into a constitutionally obligatory theory.(FN47) Tocqueville had foreseen that, as equality becomes more absolute," trust in common opinion will become a sort of religion, with the majority as its prophet."(FN48) However, "Christian morality" was still the common American opinion of his day and still "the first of their political institutions." Yet he foresaw that if Christian morality ceased to be an "impediment, one would soon find among them the boldest [moral and political] innovators and the most implacable logicians in the world."(FN49) He did not foresee that the justices of the Supreme Court would become the hierarchy of the new equality-inspired religion,(FN50) or so far mimic Catholicism as to claim "infallibility" in teaching doctrine. "We are not final because we are infallible, but we are infallible only because we are final."(FN51) Tocqueville may have foreseen better than he knew in finding Catholicism even more compatible with American democracy than is Protestantism.(FN52) Catholics' faith in papal infallibility need only be transferred to faith in the infallibility of "common social opinion" and the Supreme Court.

By 1960 the original Madisonian regime had not yet been completely overthrown by the new judicially created secular regime. The Court, in particular, had backed off from

its 1947 McCollum decision under attack from many religious sectors, and even the New York Times. It did so in 1953 by finding constitutional an ever so slightly different plan for public encouragement of religious instruction.(FN53) However, the subsequent bans on governmental encouragement of prayer (1962) and Bible reading (1963) in public schools visibly established public secularism as authoritative. Public secularism's exclusion of religious practices as such from a place in public life has now worked its way through a score of subsequent cases.

CONTEMPORARY LIBERAL THEORY ON THE PERMISSIBILITY OF RELIGIOUSLY GROUNDED ARGUMENTS IN THE PUBLIC SPHERE

Originally, the Court's new secular regime excluded only such practices from public support as public school religious instruction, public prayer and Bible reading. Recent liberal theory goes further in excluding religiously grounded moral arguments from political discourse. John Rawls, for instance, who discusses religion under the rubric of "comprehensive doctrines," thinks some comprehensive doctrines are unreasonable, and hence morally objectionable. Unreasonable comprehensive doctrines, according to Rawls, are those "that cannot support a reasonable balance of political values."(FN54) While he is ginger about identifying contemporary examples of such doctrines, he so identifies (albeit in a footnote) an opinion which excludes the right to abortion in the first trimester.(FN55) Adherents of such doctrines would seem to be required "to submerge or to set aside their comprehensive [i.e., revelation based] doctrines when entering the public sphere."(FN56) Thus Rawls would morally exclude some revelation based beliefs from having political consequence. He can even be plausibly understood as meaning that voting on the basis of such revelation based beliefs is "illegitimate."(FN57)

We acknowledge Rawls's subtlety on this matter. In particular, he would not exclude all religiously grounded opinions from political discourse, but merely unreasonable ones. However, Goerner accurately captures the drift of what religious views Rawls excludes as unreasonable, namely those that do not provide "support for a Rawlsian liberal regime," which Goerner thinks excludes at least some views of "most religious believers." Rawls would apparently include only those religious views that support liberal policies, such as Rev. Martin Luther King Jr.'s Civil Rights movement, Abraham Lincoln's Thanksgiving and Fast Day proclamations and (quoting Rawls) Lincoln's "Second Inaugural with its prophetic (Old Testament) interpretation of the Civil War as God's punishment for the sin [of] slavery."(FN58) Thus Rawls can be defended against the charge of excluding religious opinions as such because he excludes only non-liberal religious opinions, such as opposition to abortion in the first trimester.(FN59)

The connection between "civil liberties" democracy and secularism is made explicit by Robert Audi, who thinks democracy requires "a principle of secular rationale" which denies a right to "advocate or support any law or public policy that restricts human conduct unless one has ... adequate secular reason." And a secular reason is "one whose ... status ... does not (evidentially) depend on the existence of God, ... or on theological considerations, ... or on the pronouncements of a person or institution qua religious authority."(FN60) Paul J. Weithman superficially disagrees with Audi, but on the basis of a more fundamental agreement, by following Rawls in permitting revelation-based arguments that support "economic justice and racial equality."(FN61) Thus there is a dispute within contemporary liberal theory whether democracy requires secularism simply or whether secularism is required only so far as necessary to prohibit non-liberal, anti-civil libertarian, policies. This suggests that secular/civil liberties democracy might be safe for liberal Catholicism.

Of course, contemporary liberal political theory has not gone unchallenged in its effort to remove, to whatever extent, religiously grounded moral convictions from

political discourse. For example, Michael Perry has argued that to require a religious citizen to bracket her moral convictions in public discourse would “annihilate herself. And doing that would preclude her ... from engaging in moral discourse with other members of the society.”(FN62) Moreover, William Galston has argued that liberal society simply cannot sustain itself without religiously grounded morality, especially concerning the family and the raising of children.(FN63)

Why did the new “civil liberties” regime come to require public secularism? In general, “civil liberties” signifies intensified license to individual choices and desires as against other constitutional goods. Evidently the political interests of this new constitutional category are better served by a secular rather than revelation based public life. These political interests have sought to free individuals from many traditional, biblically rooted, legally enforced moral restraints: prohibitions against such speech as blasphemy, obscenity and pornography, libel and slander, and against such behavior as divorce, artificial birth control, abortion, adultery, sodomy, euthanasia and gambling.(FN64) Such traditional prohibitions were believed to support the kind of self-restraint which made political freedom compatible with order and, in particular,

when the former are inconsistent with their political interests. This seems to be what John Kennedy said and did. “There is an old saying in Boston that we get our religion from Rome and our politics at home, and that is the way most Catholics feel about it.”(FN69) Perhaps, understandably, he denied that he was “the Catholic candidate for President” but then further distanced himself from Catholicism by adding “I do not speak for the Catholic church on issues of public policy-and no one in that church speaks for me.”(FN70) By opposing the official Catholic Church side on the two “Catholic interests issues,” namely Federal aid to parochial schools and appointing an Ambassador to the Vatican,(FN71) he showed he spoke in earnest when he said,” the responsibility of the office-holder is to make decisions on these questions [public issues] on the basis of the general welfare as he sees it, even if such is not in accord with the prevailing Catholic opinion.”(FN72)

In 1984, then Governor Mario Cuomo went further in the direction pointed by Kennedy in severing his Catholic moral convictions from his political life by publicly supporting the legal right to abortion while saying that personally he believed abortion Kennedy Mario Cunt furargu dennacTj d

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restraint by civil law, and which the Church teaches is morally wrong and encourages civil law to reflect that view.

Secular democracy is dangerous for Catholicism because it prevents Catholics from acting in the public sphere when their views spring peculiarly from their faith. The theoretical rubric for this censorship is a particular interpretation of liberal democracy's teaching that government must refrain from interfering with the private sphere. The existence of a private sphere, which liberal governments exist to protect but not to penetrate and regulate, is surely necessary for both religious freedom and civil peace. However, is it legitimate to dispute, within a liberal order, exactly what aspects of human life should and should not be regarded as within the private sphere? Or to what extent should they be considered beyond public regulation? Or are these things decided in advance by liberalism, so as to preclude legitimate public controversy? The Kennedy-Cuomo syndrome suggests that the precise danger to the souls of Catholics is that secular democracy regards Catholicism's moral teaching, when it conflicts with secularism, as so "beyond the pale" as to be excluded from a place at the table in these debates. If so, then Catholics who try to live politically by their Church's moral teachings are politically marginalized.(FN77) The danger to their souls is the temptation to purchase entry into public life by leaving their Catholic views at the door. The danger to Catholicism is from a regime that excludes Catholic moral teachings from political influence.

CATHOLICISM'S NEW AND MORE FAVORABLE VIEW OF DEMOCRACY

After World War II, the Catholic Church came to a far more positive view of democracy than had been reflected in the encyclicals referred to earlier. A document of the Second Vatican Council praises the excellences of constitutional democracy.(FN78) Pope John Paul II has enthusiastically recommended constitutionally limited government, inalienable rights, and the free exchange of capital and goods, entrepreneurship, and participation in the "circle of productivity" within "a strong juridical framework," as most compatible with "the inherent dignity of the individual." He has stressed democratic capitalism as promoting the conditions which tend to foster the moral life for individuals, and justice and the common good for societies.(FN79)

John Paul II sees the constitutionally limited state as more compatible with the Catholic understanding of what is good for the human person than any available alternative. The state is to be limited by legally acknowledging the inalienable rights of human beings; and by the principle of subsidiarity(FN80) which, in the first instance, gives "primary responsibility" for securing economic rights and providing care for the needy "not to the State, but to individuals and to the various groups and associations that make up society."(FN81) Subsidiarity is partly a strategy for reminding Catholics that reducing the centralized state's economic functions requires them to provide more for those in need. His argument for decentralization of power and responsibility goes so far as to endorse, on pragmatic and experiential grounds, separation of powers as a means to the rule of law.

However, more recently the pope has begun to strongly criticize contemporary democracy's moral defects. In Evangelium Vitae (1995) he speks of a "more sinister character" to the "new cultural climate." "Broad sectors of public opinion justify certain crimes against life in the name of the rights of individual freedom."(FN82) "The very right to life is being denied or trampled upon, especially at ... the moment of birth and the moment of death."(FN83) While carefully refraining from explicitly identifying his target here as either contemporary "democracy" or "democratic countries," at what else could this warning about "a veritable culture of death" be directed?(FN84) In order to be speaking about anything other than contemporary Western democracies, one would

have to suppose that public opinion is as influential in other contemporary regimes (say China) as in Western democracies. Moreover, later in the encyclical he warns that "democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality ... democracy is a 'system' and as such is a means and not an end."(FN85)

Nor does the pope limit his criticism to corrupted "public opinion" and "culture," although these seem to be his preferred foci.(FN86) He also criticizes governments. In particular, he quotes Pope John XXIII: "any government which refused to recognize human rights or acted in violation of them, would not only fail in its duty; its decrees would be wholly lacking in binding force."(FN87) Though still not mentioning Western governments by name, in the context it is difficult to avoid the implication-but still and

In contrast, the new secular democracy excludes truth claims that conflict with its foundational religious and moral relativism.(FN92) It thus excludes Catholics qua Catholics as well as others whose religion rejects these relativisms. Thus, insofar as Catholics want to be good democrats now, they are required to act publicly like secularists, that is, to bracket, relativize, renounce or be silent about at least some of their Catholic truth claims. Thus secularism strongly induces them to accept, or at least not speak against, the goodness (not merely the inevitability) of the relativism of religion and morality. The inducements are not limited to having policies overturned by the judiciary if they support religion rather than secularism. The chief inducement is inclusion, the punishment exclusion, from respectability in the culture. These are democracy's means of control which so awed Tocqueville.

> You are free not to think as I do; you can keep your life and property and all; but from this day you are a stranger among us. You can keep your privileges in the township, but ... if you solicit your fellow citizens' votes, they will not give them to you, and if you only ask for their esteem, they will make excuses for refusing that ... when you approach your fellows, they will shun you as an impure being, and even those who believe in your innocence will abandon you too, lest they be shunned.(FN93)

Our thesis is not that Catholics cannot, in principle, be good democrats without becoming secularists. It is that contemporary American democracy, by constitutionally privileging secularism, offers Catholics in public life a strong inducement to abandon, relativize or remain silent about their moral beliefs when they conflict with secularism. Catholics have to act like, not necessarily be, secularists. That makes it spiritually and politically unsafe, not to say impossible, for Catholics to be democrats now.

ADDED MATERIAL

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FOOTNOTES

1. We Hold These Truths: Catholic Reflections on the American Proposition (New York: Sheed and Ward, 1960), pp. ix-x.
2. "David," Massachusetts Gazette, 7 March 1788 in The Complete Anti-Federalist, ed. Herbert J. Storing, 7 vols. (Chicago: University of Chicago Press, 1981), 4: 248. Major Lusk, in the Massachusetts Ratifying Convention, 4 February 1788, in The Debates in the Several State Conventions on the Adoption of the Federal Constitution, ed. Jonathan Elliott, 5 vols. (New York: Burt Franklin, 1888), 2: 148. Henry Abbott, in the North Carolina Ratifying Convention, 30 July 1788, Elliott, Debates, 4: 191-92. This criticism follows Locke who says "We cannot find any Sect that teaches expressly, and openly, that men are not obliged to keep their Promise; ... But nevertheless, we find those that say the same things, in other words.... [i.e.] that Faith is not to be kept with Hereticks? ... I say these have no right to be tolerated" (Locke's emphasis). Again "That Church can have no right to be tolerated by the Magistrate, which is constituted upon such a bottom, that all those who enter into it, do thereby, ipso facto, deliver themselves up to the Protection and Service of another Prince" (A Letter on Toleration, ed. James Tully [Indianapolis: Hackett, 1983], pp. 49-50).
3. Henry Abbott, North Carolina Ratifying Convention.
4. "A Friend to the Rights of the People," (New Hampshire), 8 February 1788, in Storing, Anti-Federalist, 4: 242. William Lancaster, in Elliot, Debates, 4: 215. Zachias Wilson, ibid., p. 212.
5. See Gerard V. Bradley, Church/State Relationships in America (New York: Greenwood Press, 1987), pp. 9 and 30, esp. note p. 64.

24. We set aside, as not immediately relevant here, two other major elements of this new order, namely the decreased constitutional protection afforded to property and the transfer of power from legislatures to courts.
25. See Jacob Cooke, ed., The Federalist Papers (Cleveland: World, 1965), No. 9, p. 51.
26. 5 U.S. 137 at 163. Marshall here quotes Blackstone concerning the "settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." In light of the important distinction we draw between "civil liberty" and "civil liberties," we note that Marshall does not imply that individual protection by the laws trumps other goods which the law may also properly protect. "Civil liberty" appears in 39 cases from Marbury (1803) to Gobitis (1940).
27. Congressional Globe, 1st Session, 39th Congress, Part 1, 29 January 1866, p. 474. See William Blackstone, Commentaries on the Laws of England, 1: 121. Trumbull follows Blackstone (and Locke's Second Treatise of Civil Government, chap. 4, para 22) in contrasting "civil liberty" to "natural liberty" which "consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature." Commentaries, p. 121.
28. 83 U.S. 36 (1872). Citing "1 Sharswood's Blackstone, 127, note 8" at 111 fn. 40.
29. Cooke, ed., The Federalist Papers, No. 51, pp. 351-52.
30. Ibid., p. 353.
31. "Religious pluralism" is the phrase Murray uses in We Hold These Truths (p. 15 ff). It does not mean that public schools were not predominately Protestant or that government was neutral between Protestants and Catholics. It means only that their situations were determined politically rather than constitutionally.
32. Defense counsel in McCollum v. Board of Education 333 U.S. 203 at 211 (1948).
33. Murray, We Hold These Truths, p. x.
34. Dissenting in Everson 330 U.S. 1 at 39 (1947), Justice Rutledge correctly finds this view in Madison's "Memorial and Remonstrance" (1785). But his argument that this view is required by the First Amendment is not persuasive. See Gary D. Glenn, "Forgotten Purposes of the First Amendment Religion Clauses," Review of Politics 49 (1987): 340-67.
35. 330 U.S. 1 at 15-16. We abstract here from the Court's having earlier (Gitlow v. U.S., 1925) assumed the First Amendment applied to the States.
36. 333 U.S. 203 at 211-212. Murray saw immediately both that McCollum's theory mandated public secularism, that this was wholly new, and that it went together with the Court's view of civil liberties and civil rights. "Law or Prepossessions"? in Law and Contemporary Problems 14 (Winter 1949): 1, 37, 39. The American Catholic Bishops described McCollum's understanding of church-state separation as a "novel interpretation of the First Amendment" and as "the shibboleth of doctrinaire secularism." "The Christian I Action," 21 November 1948 quoted in New York Times, 8 September 1960, pp. 1, 25.
37. 374 U.S. 203 and 370 U.S. 421. LEXIS finds "secular" or its cognates used 4 times in Engel and 55 times in Abington.
38. Minersville School District v. Gobitis 310 U.S. at 602 and 603.
39. Letter from Frankfurter to Chief Justice Stone, 27 April 1938, quoted in Walter F. Murphy, James E. Fleming, and William Harris, American Constitutional Interpretation (Mineola, NY: The Foundation Press, 1986), p. 491. As late as Niemotko v. Maryland (1951) Frankfurter (concurring) resisted the thought that "civil liberties" was a term of legal art. "Particularly within the area of due process colloquially called 'civil liberties' ..." 340 U.S. 268 at 288.
40. Holy Trinity Church v. U.S. 143 U.S. at 467 (1892).

Perry doubts that Greenawalt consistently maintains this view. See Perry, Love and Power: The Role of Religion and Morality in American Politics (New York: Oxford University Press, 1991), p. 22.
61. Weithman, "The Separation of Church and State: Some Questions for Professor Audi," Philosophy and Public Affairs 20 (1991): 58.
62. Perry, Morality, Politics and the Law: A Bicentennial Essay (New York: Oxford University Press, 1988), pp. 72-73. Emphasis in original.
63. Galston, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State (Cambridge: Cambridge University Press, 1991) esp. chap. 12. Harry Clor agrees, though on explicitly nontheological grounds. See his Public Morality and Liberal Society: Essays on Decency, Law, and Pornography (Notre Dame and London: University of Notre Dame Press, 1996), chap. 4.
64. Justice Potter Stewart noted (in dissent) that secularism replaces the biblical morality as the basis of public life when he that banning Bible reading establishes "the religion of secularism" (Abington v. Schempp 374 U.S. 203, 313 [1963]). This secularism is now so taken for granted by the Court that Richard John Neuhaus could plausibly say that Romer v. Evans 116 S.Ct. 1620 (1996), placed "religiously based virtue or moral judgment...beyond the pale of public discourse." See "Religion and the Shifting Center in American Politics," The Long Term View, Vol. 3, No. 3, (Boston: The Massachusetts School of Law, 1996), p. 77. We think it more precise to say that Romer so excludes from the public sphere only nonliberal religiously based moral judgments.
65. Clor, Public Morality and Liberal Society, chap. 2, esp. pp. 61-62. His argument in defense of traditional morality is wholly secular.
66. Democracy in America, p. 291.
67. Evangelium Vitae, chap. 1, #19.
68. "A Common Enemy, A Common Cause." Speech to an interfaith audience at Wilmington, Delaware, 3 May 1948. Printed in First Things, October 1992, p. 34 (emphasis added).
69. 1947 Congressional hearings on Federal Aid to parochial schools, quoted in Berton Dulce and Edward J. Richter, Religion and the Presidency (New York: Macmillan, 1962), p. 123.
70. Speech to the Society of Newspaper Editors, Washington, D.C., April 21, 1960 quoted ibid., p. 143.
71. New York Times, 8 September 1960, pp. 1, 25.
72. Quoted in Dulce and Richter, Religion and the Presidency, pp. 142, 130.
73. Speech at Notre Dame University, 13 September 1984, "The Confessions of a Public Man." Printed in full in Notre Dame Magazine, Autumn, 1984, pp. 21-30, esp. p. 25. Excerpts appeared in The Washington Post, Friday, 14 September 1984, p. A6.
74. As we argued in section two above (p. 13).
75. Matthew 12:25, Mark 3:24-25, Luke 11:18, Revelation 16:19.
76. Cuomo in Notre Dame Magazine, p. 24.
77. And even, incipiently, socially discriminated against. See Hadley Arkes's discussion of the potential employment consequences and legal vulnerabilities of Romer for those opposed to homosexual actions. "A Culture Corrupted" in The End of Democracy: The Judicial Usurpation of Politics? (Dallas: Spence, 1997), pp. 36-37.

82. Evangelium Vitae, Introduction, # 3. This emphasis on a broad-based corruption of popular and elite opinion on these life matters is a recurring theme. See chap. 1, #14 and #17.
83. Ibid., Ch. 1, #18.
84. Ibid., chap. 1, #12.
85. Ibid., chap. 3, #70.
86. George Weigel suggests that the pope thinks culture is more important than politics "as an engine of historical change." "John Paul II and the Priority of Culture," First Things, February 1998, p.19.
87. Evangelium Vitae, chap. 3, #71. Quoted from Pacem in Terris (1963) chap. 2, #61.
88. "Precisely in an age when inviolable rights of the person are solemnly proclaimed and the value of life publicly affirmed [i.e., by the Western democracies], the very right to life is being denied or trampled upon [by these Western democracies]" (Evangelium Vitae, chap. 1, #18).
89. In Evangelium Vitae, Introduction, #4, the pope distinguishes "[t]he basic principles of their Constitutions [i.e., of many countries] which protect the right to life," from modern legislation which makes legal some practices that are against life.
90. Ibid., chap. 1, #19.
91. Walter Berns correctly argues that the liberal American Constitution follows Locke on religious toleration and Adam Smith on the desirability of commerce and multiplicity of sects. And religious toleration "probably does depend on a way of life from which weakened belief follows as a consequence." That way of life, he says, is commerce. Taking the Constitution Seriously (Lanham, MD: Madison Books, (1987), pp. 180, 173 ff.
92. John Paul II takes note of "those who consider such relativism an essential condition of democracy, inasmuch as it alone is held to guarantee tolerance, mutual respect between people, and acceptance of decisions of the majority, whereas moral norms considered to be objective and binding are held to lead to authoritarianism and intolerance" (Evangelium Vitae, chap. 3, #70.
93. Democracy in America, pp. 255-56.