

1988

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Carol Weisbrod

University of Connecticut School of Law

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Weisbrod, Carol, "Family, Church and State: An Essay on Constitutionalism and Religious Authority" (1988). *Faculty Articles and Papers*. 146.

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FAMILY, CHURCH AND STATE: AN ESSAY ON CONSTITUTIONALISM AND RELIGIOUS AUTHORITY

By Carol Weisbrod*

I. INTRODUCTION

The following essay attempts a formal pluralist analysis of relations between church and state in the United States and suggests that such an analysis is useful in describing the role of religious and other non-state authority in the American context. The specific focus is on church-state interactions in relation to the family, and illustrative material is taken from the history of American family law. Part I of the paper is a statement of the general perspective and of two analytical models used in the discussion. Part II offers several applications of these two models as, in effect, short historical case studies. These case studies concern the nineteenth century debates over polygamy and divorce, and the nineteenth and twentieth century efforts of different religious groups to regulate child placement and adoption. The stress in Part II is on the role of rights claims by religious groups in the state system. The essay concludes in Part III with a brief discussion of con-

* Professor of Law, University of Connecticut.

An earlier version of this essay appeared as a working paper in the legal history series published by the Institute for Legal Studies of the Law School of the University of Wisconsin. The research has been done in connection with a program on the legal history of the family undertaken by the University of Wisconsin with support from the National Endowment for the Humanities. I would also like to thank the University of Connecticut for institutional support.

Many people have been helpful in connection with this work. I would like to thank participants in: The Wisconsin Legal History Seminars (1984, 1985 & 1986); the conference on constitutionalism sponsored by the *Journal of American History* (Nov. 1986); the Boston University Law School Legal History Group (fall 1986); the conference on "Groups, Rights and the American Constitution," Centre for American Studies, University of Western Ontario, London, Canada (May 1987); and the "Images of the Family" session of the Law and Society Association Meeting (June 1987).

I would also particularly like to thank the following individuals for their assistance: Dirk Hartog, Richard Kay, Stanley Kutler, Leon Lipson, Martha Minow, Carl Schneider, Aviam Soifer, William Marshall, and David Thelen.

This article is dedicated to the memory of Robert M. Cover.

stitutionalism and legal pluralism.¹ The paper is descriptive and attempts to provide a perspective and vocabulary. It does not address normative questions relating to the appropriateness or desirability of a particular response of either state or religious law to the issues discussed.² Nor does it suggest that there are specific consequences which must necessarily follow in the state system from the application of the labels used here.

II. OVERVIEW

Some initial observations on usage may be helpful. The term "sovereign" is ordinarily used in relation to nation states. It usually describes the single source of ultimate political authority, and the source of law. The typical assumption is that within a state there is only one sovereign. That view is challenged by another, often called "English"

¹ The present paper uses a "strong" version of pluralism recently described in Griffiths, *What is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM 1 (1986). On pluralism, see also Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. OF LEGAL PLURALISM 1 (1981); Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425 (1980).

For a discussion of constitutionalism derived from legal realist and pluralist ideas, see § IV. For another view, see Kay, *Pre-Constitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

² It should be noted that the idea "church" and the idea "state" are both problematic in the American context because of the diversity and complexity of both structures. See, e.g., Smith, *Relations Between Church and State in the United States*, 35 AM. J. COMP. L. 1 (1987).

Normative positions from a pluralist perspective are possible. Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91 (1953) (commenting on *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and suggesting that Maitland and Figgis would have approved of the decision). *Id.* at 92-93. Howe's discussion includes, as a normative proposition, the idea that it would be good if the state accommodated internal groups to the point appropriate (who decides this?) to their sovereign capacity. This formulation, perhaps, is too focused on, or addressed to, the state for the purposes of a legal pluralist analysis. The normative propositions of legal or political pluralism would seem to be that decentralization is in general a good thing, and that groups should recognize each other as sovereign.

The question may be analogized in the state system to problems of conflict of laws. This is indeed how the question is sometimes discussed by those treating similar questions in other countries. See, e.g., A. ALLOTT, *ESSAYS ON AFRICAN LAW* (1970). See also B. TER HAAR, *ADAT LAW IN INDONESIA* (1948) (with introductory essays by A. Hoebel and A. Schiller); Anderson, *Colonial Law in Tropical Africa: The Conflict between English, Islamic and Customary Law*, 35 IND. L.J. 433 (1960); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980).

The State is often said to have the "legitimate" monopoly on force, and this is often assumed to be entirely adequate to all cases. But, of course, one can also consider limits on the enforcement power of the state. The existence of polygamous marriage among fundamentalist Mormons more than one hundred years after *Reynolds v. United States*, 98 U.S. 145 (1878), which upheld a bigamy statute, is enough to raise this question. See also *The Indian Attempt to Eliminate Sutte*, N.Y. Times, Sept. 19, 1987, at 1, col. 2.

or "political" or "legal" pluralism, which asserts that it is arbitrary to confine the term "sovereignty" to aspects of the state and which argues that "sovereignty" can be located in groups other than the state. This meaning of the word "pluralism" (adopted here) must be distinguished from the idea of "cultural pluralism," which assumes the fact or desirability of cultural or social diversity within a single sovereign state, or the idea of interest group "pluralism," which focuses on the competition among inner associations and groups for favor from the central state.

Related to this usage of the term "pluralism"³ is a broad definition of law. We are accustomed to seeing law as "official," emanating from one source only, although that source may itself, as in a federated state, have various "official" levels within it, federal, state, and local. We are, in short, accustomed to a sharp distinction between "law" and "not law." This is true even though we may concede that not law may be "like" law in its formal aspects, and may concede also that "law" can accommodate particular elements of "not law." An alternative to this view is offered by those who see effective regulation emanating from any source as "law," though it may still be useful to label the source of law for descriptive purposes, as in "state law" or "church law," where the context fails to make the source clear.

This perspective, which rests on the idea of plural authorities and sources of law, is not only not new, it is quite old. Intellectual antecede-

³ As F. M. Barnard and R. A. Vernon noted:

In what is most commonly thought of as 'pluralism' today—that is, a more or less cohesive set of doctrines drawn from the 'interest-group' and 'mass-society' literature—intermediate groups are presented as instruments for bringing particularist pressures to bear, positively or negatively, in the shaping of public policy. This model of indirect participation has been vigorously challenged, in the last decade or so, by theorists of direct participation. In the (direct) 'participationist' model, groups are valued not as instruments of external pressure but as arenas for internal individual participation on the attainment of common ends.

Barnard & Vernon, *Pluralism Participation and Politics: Reflection on the Intermediate Group*, 3 POL. THEORY 180 (1975). "In denying that the state is a distinctive and unique form of association, the participationists echo the thought of the English pluralists, notably Harold Laski and G.D.H. Cole, for whom this denial was a fundamental *credo*." *Id.* at 182 (emphasis in original). See also D. NICHOLLS, *THREE VARIETIES OF PLURALISM* (1979).

For anthropological perspectives on pluralism, see S.F. MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978). The group is "semi-autonomous" in that "it can generate rules and customs and symbols internally" but is at the same time "vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded." *Id.* at 55. See also, Macaulay, *Private Government* in L. LIPSON & S. WHEELER, *LAW AND THE SOCIAL SCIENCES* 445 (1986).

ents can be found in the writing of English pluralists⁴ and American interest group theorists.⁵ Structural antecedents can be found in church-state arrangements in other countries over many centuries.⁶ A similar perspective is found in the work of legal anthropologists and lawyers interested in law and social science. The view offered here is also related in some ways to that of social historians who urge that one should look at outsiders as well as insiders, and consider the margin and the periphery as well as the core.⁷ The present framework perhaps

⁴ See, e.g., G. COLE, *SOCIAL THEORY* (1920); J. FIGGIS, *CHURCHES IN THE MODERN STATE* (1913).

⁵ See, e.g., R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

⁶ For example, the "millet" system of the Ottoman Empire permitted non-Muslim minorities a degree of judicial authority. See Rubenstein, *Law and Religion in Israel*, 2 ISRAEL L. REV. 384 (1967). The system also existed in the West. Thus, although the ecclesiastical courts in England regulated marriage and divorce until 1857, it is not altogether true that this was the only law of divorce in England since Jewish divorces were at times given within the Jewish community. See J. Bryce's essay titled *Marriage and Divorce in Roman and in English Law*, in 2 STUDIES IN HISTORY AND JURISPRUDENCE 437 (1901) (suggesting that the Jewish community operated under its own personal law). On France, see A. HERTZBERG, *THE FRENCH ENLIGHTENMENT AND THE JEWS* 207 (1968). (On Jewish divorce, see *Perl v. Perl*, 126 A.D.2d 91, 512 N.Y.S.2d 372 (1987).)

It may be useful to consider an old, statutory example of the system in America to see some of its assumptions. In 1798 Rhode Island passed a statute that explicitly exempted Jews from the operation of the state incest law. An Act Regulating Marriage and Divorce, 1798 R.I. PUB. LAWS § 7. The statute provided that marriage within certain prohibited degrees should be null and void, but these provisions did not apply to marriages among Jews within the degrees permitted by their religion. The general rule concerning out of state marriages is clear: A marriage valid where celebrated is valid (recognized) everywhere. But there is, of course, an exception which limits recognition to marriages that do not offend some strongly held public policy. The Rhode Island statute suggests that even as to incest there may have been a certain flexibility. This statute seems to indicate that, at least on the question of incest and uncle-niece marriages, the religious liberty idea was dominant. The Rhode Island statute assumes, without discussion, that there is a group called the Jews and that we know what the group is. Without detailed treatment of the question here, it should be clear that to us the question is, at the very least, problematic.

The question can come up directly in the context of adoption under religious matching statutes, discussed *infra* § III B. On Rhode Island's answer in the context of Sabbatarian exemptions to Sunday law, see R.I. GEN. LAWS § 11-40-4 (1956).

See generally Hartogensis, *Rhode Island and Consanguineous Jewish Marriages*, 20 PUBLICATIONS OF THE AM. JEWISH HIST. SOC'Y 137 (1911). A number of states accord special status to Jews, Quakers, and other religious groups in connection with requirements for solemnization. The Rhode Island incest statute is striking in that it goes far beyond the issue of the ceremony. See B. MEISLIN, *JEWISH LAW IN AMERICAN TRIBUNALS* 65 (1976). See generally Elazer & Goldstein, *The Legal Status of the American Jewish Community*, 1972 AM. JEWISH YEAR BOOK 3.

From the point of view of the state, these are instances of state legal system providing for a limited role for recognized group law. But what does this look like from the point of view of the group, particularly when the group is "multinational," internal and external to many states?

Plural legal systems may also result from class differences. Thus, wife sale might be seen as an English "law" of divorce (see E. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 410 n.3 (1964)), a law officially "illegal" under the state system.

⁷ See generally Moore, *Insiders and Outsiders in American Historical Narrative and Ameri-*

goes a step further in suggesting that the outsider may, from another perspective, be an insider and that the margin may, from another point of view, be a center. These alternate centers can be seen by an outside observer as sources of authority in the same way that the state is a source of authority. The social world is described rather as English pluralists or legal pluralists describe it, as filled with competing sovereignties and sources of law.

Finally, the paper uses the term "constitution" in a particular way. We are familiar with the idea that the term may mean "text," or "text plus interpretations of the Supreme Court," or "Bill of Rights," or even, somehow, [state] "law." The word "constitution" can also be used to mean the way things are and operate,⁸ and this usage is the one invoked here. This constitution is seen as the framework of the interaction of groups. Thus, we can say that issues of church and state are undoubtedly "constitutional," in the sense that there is something in the American constitutional document that addresses specifically the subject of religion and the state.⁹ The issues are also constitutional, however, in that the topic "church and state" must be treated as part of our society's "constitution," or fundamental framework.

The central point of this paper is that religious groups may view themselves as a source of authority at least equal to the state,¹⁰ and that they may see issues of the church and state as questions involving competing systems of law¹¹ or sovereignties. A Catholic discussion in

can History, 87 AM. HIST. REV. 390 (1982); R. MOORE, *INSIDERS AND OUTSIDERS IN AMERICAN HISTORY* (1986).

⁸ Arthur Bentley had said that "the Constitution is always what is." A. BENTLEY, *THE PROCESS OF GOVERNMENT* 296 (1908). Llewellyn referred to his article on the Constitution (Llewellyn, *The Constitution as an Institution* 34 COLUM. L. REV. 1 (1934)) as "A Rediscovery of Bentley."

⁹ The Federal Constitution provides that "congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," U.S. CONST. amend. 1, and that "no religious test shall ever be required as a qualification to any office or public trust . . ." *Id.* at art. VI, cl. 3.

¹⁰ A subsidiary theme relates to the role of rights claims in the interaction of religious groups and the state.

¹¹ The idea of multiple legal systems is recognized in various places. P. RYAN & D. GRANFIELD, *DOMESTIC RELATIONS: CIVIL AND CANON LAW* (1963). "Since this code of positive law, though ecclesiastical, affects some forty-three million American Catholics and, indirectly, many million non-Catholics who have married Catholics, it is justifiably treated in a casebook on Anglo-American law." *Id.* at xi. See also *Parkinson v. J & S Tool Co.*, 64 N.J. 159, 313 A.2d 609 (1974).

G. BAYLES, *WOMAN AND THE LAW* (1901) included a chapter on the plural marriage of the Mormons and on Mormon divorce, noting that "while polygamy is dying out as a social institu-

1959 on the issue of sovereignty in the context of the regulation of the family summarizes the history of the matter this way:

At first the Christian law of marriage could do no more than co-exist with that of the Pagan Roman State, but gradually, as the West was evangelized, the legislative and judicial competence of the Church in this field was acknowledged, at first in practice and then in principle, until, by the tenth century, she was in exclusive control. . . . Of the conflicting modern claimants to sovereignty in this field, therefore, it is the State rather than the Church that is the newcomer.¹³

The image of competing and parallel sovereignties is given solidity by recognition of the fact that churches, as well as states, attempt to regulate the lives of their citizens/members in many respects.¹³ Both church and state tax members and have things to say on issues ranging from family life to economics to foreign affairs. They both run legal systems, and both of these legal systems use serious sanctions.¹⁴ The

tion, it cannot be said to be extinct, and plural marriages are still legal factors in the lives of a number of women." *Id.* at 24. It is unnecessary to cite here material on religious legal systems. For an example of the formalism in some of these, see S. FORD, *THE AMERICAN LEGAL SYSTEM* (1970). One should note in relation to religious legal systems that the same distinctions between the living law, the law in action and the law in the books that can be made in relation to the state system, can also be made here. ("Living Law"—the law of internal associations—is to be distinguished from state law-in-action. See E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Moll trans. 1962).) Of course, "rights" can also be claimed under the religious system. See Folmer, *Promoting and Protecting Rights in the Church* 46 *THE JURIST* 1 (1986).

¹³ McReavy, *The Power of the Church in CATHOLICS AND DIVORCE* 76 (P. O'Mahoney ed. 1959).

¹⁴ For present purposes it is useful to view all religious groups as if they saw themselves the way the Devil Screwtape sees the Christian Church as "spread out through all time and space and rooted in Eternity, terrible as an army with banners." C.S. LEWIS, *THE SCREWTAPE LETTERS* 12 (1967). To pursue this objective, I have taken statements from various denominations over a large period of time and made those statements stand for a generalized religious view. Religious groups differ greatly from each other, even when they stand within the same broad religious tradition. Thus, Christian denominations take different positions on questions ranging from particular substantive issues to the general and pervasive questions of the role of the state in enforcing those substantive positions. Further, these orientations may, in fact, change over time (perhaps because of the influence of the state), a point that may be de-emphasized by the religious group by a stress on continuity. Any particular group may, in its history, emphasize different combinations of the co-option or separatist modes, and may switch from one to another in general or on a particular issue. Thus, one might say that Protestant churches in America started from a position stressing co-option of the state and moved, following disestablishment, to a position stressing the moral authority of the churches, at least over their own members, and then attempted (see prohibition, particularly) to reassert authority universally through state regulation. The effort here is not to provide a narrative history of any particular group's encounters with the state in terms of these modes, but simply to describe these modes in general.

¹⁴ The detailed ways in which church and state concern themselves with the subject of marriage are not, however, mirror images, and their sanctions are not identical. "The Church and the

problem for a pluralist analysis, then, is to explore points at which the two self-defined sovereignties touch each other and to consider the ways in which they have interacted over time. This essay uses the history of family law in America as a way of reaching this question.¹⁵ The piece suggests a view of the family as an entity that is subject to the overlapping authority of two legal orders, one described as secular and at least theoretically integrated, and the other described as religious and containing many individual subsystems. Two stylized models of church-state interaction are used. In the first (Mode I), the particular church tries to "co-opt" the state and persuade it to adopt and impose a religious norm as universal. In the second (Mode II) the group's particularism itself is defended. In this "separatist" interaction, the effort of the religious group is simply to preserve singularity and create space for its alternative.¹⁶

State are two organizations founded upon different principles," Dr. Hugh Davey Evans wrote in 1870, although both, as he saw it, had "divinely given authority." The Church and State, he said, might each have jurisdiction over all actions "when circumstances bring them within its sphere." The spheres relate, according to Evans, to the essential purposes of each: The one for the "eternal, the other for the temporal benefit of mankind." H. EVANS, A TREATISE ON THE CHRISTIAN DOCTRINE OF MARRIAGE 24, 25 (1870).

Expulsion is a primary group sanction. There are other church sanctions, for example, reprimand and suspension, that may also operate. In Adams, *Some Phases of Sexual Morality and Church Discipline in Colonial New England*, MASS. HIST. SOC'Y PROCEEDINGS, MASS. HIST. SOC'Y PAPERS 493-94 (June 1891), the author suggested that the threat of withholding baptism from infants in a community which believed in infant damnation operated as a sanction to coerce married adults, guilty of premarital intercourse which resulted in the birth of a child, into confession.

"Shunning" is a religious sanction that may also be a tort under state law. When a former member (what is the test of this?) sues the group, a defense to that tort may be asserted based on the first amendment free exercise clause. The group is looking for a state-recognized exemption for its own sanction (Mode I used to protect Mode II (see *infra* note 16 and accompanying text)) from the generally applicable law of torts. For shunning and the free exercise clause, see *Bear v. Reformed Mennonite*, 462 Pa. 330, 341 A.2d 105 (1975); *Paul v. Watchtower Bible and Tract Soc'y of New York*, 108 S. Ct. 289 (1987). See also the custody case, *Johnson v. Johnson*, 564 P.2d 71, 73 (Alaska 1977), in which an expelled Jehovah's Witness argued that "if he were denied custody of the children, he would have virtually no input into their lives because of his disfellowshipped status." The court believed that "liberal and specific visitation rights" would provide an adequate solution to this difficulty. *Id.*

¹⁵ For an overview of the historical changes in American Family Law, see M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1985). The family can, of course, also be viewed as an internal group, regulating individuals. The view taken here is of the family as a unit regulated by other groups.

¹⁶ This two part distinction parallels other familiar distinctions, for example between universal and particular (see R. MACIVER, *ON COMMUNITY, SOCIETY AND POWER* 78 (1970), where the author states (as to some religious groups) that "They would make universal, by coercion, their own moral particularism"); between church and sect as offered by Troeltsch (The church accepts the secular rule to some degree and "desires to cover the whole of humanity" where as the sects

The basic themes of the American interaction between these groups as they affect the family are the joint regulation of marriage and family by church and state, and the attempt of religious groups to influence state law as it relates to the family. The history of American family law reveals and has always revealed the two patterns called here Mode I (co-option) and Mode II (separatist).¹⁷ Both involve a religious influence on and use of the state legal system.¹⁸ Both, when the group is successful,¹⁹ result in an increased harmony²⁰ between the two systems. When the religious group attempts to have its norm incorporated

have "no desire to control and incorporate [other] forms of social life" but try to avoid them. E. TROELTSCH, *THE SOCIAL TEACHINGS OF THE CHRISTIAN CHURCHES* I 331ff (English trans. 1931)); and finally, between the two parts of the religion clauses of the first amendment. (The establishment clause focuses on Mode I problems, the free exercise clause on Mode II issues.)

¹⁷ These two religious approaches to the enforcement role of the state have a history of their own. See P. BROWN, *AUGUSTINE OF HIPPO* (1967) (describing a similar distinction in treating Augustine's controversy with the Donatists—a view of society as something that can be absorbed by the church as against a view of the Church that must be seen as an alternative to state/society).

¹⁸ The interactions described here are also familiar in general. Thus, Earl Latham remarked in 1952 that "self-expression and security are sought by the group member through control of the physical and social environment which surrounds each group and in the midst of which it dwells." Latham, *The Group Basis of Politics: Notes for a Theory* 46 AM. POL. SCI. REV. 386 (1952). See also MACIVER, *supra* note 16.

¹⁹ How does a religious group measure "success," by result or reason? This itself becomes a question for historical or contextual discussion.

²⁰ Sometimes a practical, harmonious solution is not reached. The state may refuse either to be co-opted or to permit the deviation, and the religious group may resist. The Russian Old Believers chose martyrdom by fire rather than submission to the power of the Tsar. Carrying the struggle to the spiritual realm, the state responded with a law that "tried to prove that self-willed martyrdom, a result of criminal and traitorous acts, was not true martyrdom and could not bring glory and salvation." Cherniavsky, *The Old Believers and the New Religion*, 25 SLAVIC REV. 18, 24 (1966).

More typically, where a state accommodation is not made, the group yields to superior force, although it may still underline the insistence of the group on its own ultimate authority. Thus, the 1890 Mormon declaration of submission to federal authority, after noting that the practice had been "established as a result of direct revelation" and describing the Mormon experience in the courts, said that the church discontinued its practice, "solemnly placing the responsibility for the change upon the nation by whose laws the renunciation had been forced." Quoted in L. PFEFFER, *CHURCH, STATE AND FREEDOM* 649 (1953).

See L. ARRINGTON & D. BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* 183-84 (1979). "Some local and national leaders found [the] statement incomplete. They would have preferred a renunciation of the principle of plurality, not just a resolution to abide by the law." *Id.* See also NELSON, *CHARTER OF LIBERTY* 97-98 (1987).

The Oneida Perfectionists gave up complex marriage "not as renouncing belief in the principles and prospective finality of that institution" but rather "in deference to the public sentiment which is evidently rising against it." AM. SOCIALIST, Aug. 28, 1879 at 276 (quoted in Weisbrod & Sheingorn, *Reynolds v. United States:—Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 849 n.114 (1978)).

directly into the larger legal structure as a universal norm, (Mode I) the case can be described (depending on historical conclusions) as one in which the church co-opts, persuades or influences the state, or alternatively, as a case in which state and religious norms happen to be, independently, identical. The separatist (Mode II) pattern—one in which the religious group has the more limited goal of creating space for its rule, without attempting to enforce it generally—can be described as a case of the state accommodating the internal religious group, though also setting the limits within which it operates, or, alternatively, as a case in which the state defers to and acknowledges—without creating—another source of authority.²¹ The attempt here is not to discuss the history or etiology of particular religious positions, which obviously may change over time,²² but rather to look at two strategies used by churches in relating to the state.

Looking at these strategies as alternative and distinct, one might suspect that the first, involving co-option of the state and a state adoption of religious norms, would be the strategy of large and influential religious groups—Protestants, for example—while the second, involving the preservation of singularity, might be used by minority or even marginal religious groups. This is not quite the factual pattern, however. The interaction between religious groups and the modern state,²³ in

²¹ The two strategies described here are similar to the political stances associated with religious groups whose tendencies are described (by historians, though not necessarily by theologians), as dominantly "liturgical" or "pietist." See R. JENSEN, *THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT 1888-1896* (1971); P. KLEPPNER, *THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900* (1970); D. THELEN, *PATHS OF RESISTANCE* (1986). In their attitudes toward state involvement in moral issues, "liturgicals" are said to favor pluralism, and state abstention. Moral issues are to be left to the churches. By contrast, in groups dominated by "pietist" thinking (some groups involve both styles or an indeterminate style) the effort is to achieve a major state enforcement role. Using this terminology, one might suggest that in relation to issues of the family, and particularly the question of liberal divorce laws, groups that might be seen as "liturgical" as evidenced by their position on temperance—for example, Catholics—will be seen as "pietist," as evidenced by their position on divorce. See also the statements from a variety of religious groups in Calhoun's chapter, *The Attitude of the Church* in 3 A. CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY* (1919).

The state has values of its own. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944). (Note, however, the exemptions for spiritual healing in state neglect statutes.) It also reserves certain functions. Consider the problem of capital punishment as a religious sanction. "[I]t may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

²² This would require studies of individual denominational histories.

²³ This is a result of the pervasive claims of the modern state. It may be that in the nine-

fact, tends to involve a combination of the two styles. The strict analytic categories suggested by the terms Mode I and Mode II immediately dissolve when we see first that the attainment of even a limited separatist objective (Mode II) tends now to require the collaboration of the state, which must recognize the objective as legitimate (Mode I),²⁴ and second, that the church's desire to co-opt the state (Mode I) may have as one of its prime sources the desire of that church to safeguard its own values (Mode II).²⁵

These points are illustrated in the short historical case studies that follow.

III. ILLUSTRATIONS

Let us take as the beginning of an American state law of the family the experience of the religiously-based New England colonies.²⁶ We

teenth century, a group might have operated in a separatist (Mode II) fashion without coming up against the state at all. Even the nineteenth century utopias, however, had their legal encounters. See C. WEISBROD, *THE BOUNDARIES OF UTOPIA* (1980). Noninteraction would be much less likely today, at least for any length of time. Further, one might raise the question whether this separatist noninteracting group was not actually itself "sovereign" so that perhaps one would think of this as a Mode I case. These distinctions are suggested not as watertight analytic models, but as a way of talking about things that are, broadly speaking, different in the way that the effort of religious groups to bar abortion is different from the effort of religious groups to keep their own children out of public schools.

²⁴ Another way to say this is that the Mode I strategy can operate at two levels. In one, the religious group co-opts the state in a way that achieves general enforcement of a religious value (i.e., everyone says prayers in the schools). At another level, Mode I operates so as to validate, as a general matter of state law, a religious group's particular value as applied within the group. This validation may involve an exemption from some state norm (see, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972)) or it may take the form of a state norm broad enough to give the religious group, among others, room for self-regulation. (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925).)

In this light, the flag salute cases involving the Jehovah's Witnesses (*West Virginia v. Barnette*, 319 U.S. 624 (1943); *Minersville v. Gobitis*, 310 U.S. 586 (1940)) appear as cases in which the goal of the religious group can be labelled Mode II, with Mode I used in order to protect the group. State recognition of the complexity of Mode I/Mode II interfaces can be seen in the question (raised in the vocabulary of state constitutional law) of whether the state's accommodation of a religious group or value through the free exercise clause violates the establishment clause.

²⁵ See T. WOOLSEY, *infra* note 51.

²⁶ See Flaherty, *Law and the Enforcement of Morals in LAW IN AMERICAN HISTORY* 209, 211 (Bailyn & Fleming eds. 1984). "The universal acceptance of Christianity in the American colonies inevitably made for a close association between church and state, but the accompanying harmoniousness of moral outlook made an official interlocking unnecessary. . . . The enforcement of the moral law became one of the primary obligations of colonial governments."

It may be in this world, dominated by Mode I in the sense of a direct universal application of religious norms, that one sees the Two Swords issue as it might have been understood, historically, in Europe. That is, church/state problems would be conflicts between two sets of officials in a single (Christian) society. (See J. FIGGIS, *CHURCHES IN THE MODERN STATE* (1913).)

notice in the seventeenth century not only an extensive involvement of the government with issues of the family, but also a high degree of direct involvement of government in other aspects of the private lives of individuals. This involvement went beyond setting out, through the criminal law, the boundaries of proper behavior and beyond establishing the limits of private contracting. The Puritans, Edmund Morgan wrote, "not only endeavored themselves to live a 'smooth, honest, civil life' but tried to force everyone within their power to do likewise."²⁷ Morgan notes, for example, that since for the Puritans, "marriage was an ordinance of God, and its duties commands of God, the Puritan courts enforced these duties not simply at the request of the injured party but on their own paternal initiative."²⁸ When we see as an aspect of life in Colonial New England the assumed power of government to direct that individuals must live in families,²⁹ as illustrated by the statutes against solitary living, we seem to be looking at a different understanding of the role of government in relation to private life from the contemporary understanding reflected in our modern "privacy" cases.³⁰ The early experience is, one might say, Mode I at its strongest in America. But perhaps this older understanding was not so different from what we see as the relation between religion, government, and the family through the late nineteenth century.

This observation may initially seem implausible on the theory that the New England colonies were theocratic while late nineteenth cen-

²⁷ E. MORGAN, *THE PURITAN FAMILY: RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND* 2 (1944). John Demos, in *A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY* 8 (1970) notes, after describing the governmental structure, that "equally central to the life of the local community was, of course, the church." The theme of control is, then, expressed through different agencies working together. *Id.* at 9. On religion, see particularly *id.* at 12-13. "Church and State were formally separate, but in practice they were everywhere intertwined."

²⁸ *Id.* at 39.

²⁹ That is, as Morgan suggests, in the seventeenth century one could choose the particular regime of family government to which one would be subject, but then one had to be subject to some regime. See Michael Grossberg's discussion of the seventeenth century family: "Fittingly, the community not only had a deep and abiding interest in family life, but armed its agents with extensive powers to prevent homes from becoming disorderly or ineffective . . ." M. GROSSBERG, *GOVERNING AND HEARTH, LAW AND FAMILY IN NINETEENTH CENTURY AMERICA* 4 (1985).

Puritan New England is taken here as the beginning of the story. Historians might want to examine family law in other English colonies, or, like Ahlstrom, look to Spanish settlements as the beginning of an American story (see S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* (1972)).

³⁰ See *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

tury America had already experienced many decades of disestablishment. This difference, it might be said, would make such comparisons almost impossible. But this is to assume that the change in form (disestablishment) involved an immediate, pervasive, and thorough-going change in substance. It seems, however, that the implications of disestablishment took much longer to be worked out, at least in the area of family law.

The particular American experience in relation to religion and religious groups involves, in fact, a central complication. Notwithstanding an insistence on separation of church and state, to the extent that the United States identified itself as part of Western Christendom,³¹ the state at times conceded a special role for Christianity. As Lawrence Friedman has suggested, the United States had for a long time a quasi-official religion.³² Even the religion clauses of the First Amendment, Mark De Wolfe Howe argued some time ago, can be read in relation to the religious ideas of Roger Williams as plausibly as in relation to the more secular ideas of Madison or Jefferson.³³ The formal separation of church and state at the federal level that came with the adoption of the Bill of Rights did not in any case impact directly on the states until the twentieth century.³⁴ In Massachusetts and Connecticut, disestablishment itself did not come for some time.³⁵ More importantly for present purposes, over time there was considerable sentiment to the effect that formal separation of church and state did not mean that the United States was no longer a "Christian Nation." It seems beyond dispute that even after the abandonment of official connections between church and state, there were many who believed that the links between religion and morals, and more particularly between Christian morals and the state were as important as ever.

It is widely understood in legal writing on the family that this link between Christianity and the law was particularly visible in the area of

³¹ It seems safe to say that despite, or within the context of separation of church and state, the United States remained generally attached through the nineteenth century to a diffuse conception of itself as a Christian nation. See M. BORDEN, *Jews, Turks and Infidels* (1984). The legal consequences of that conception are to some degree ambiguous.

³² Friedman, *Exposed Nerves: Some Thoughts on Our Changing Legal Culture*, 7 *SUFFOLK U.L. REV.* 529 (1983). See also L. FRIEDMAN, *TOTAL JUSTICE* (1986).

³³ M. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965).

³⁴ See *Everson v. Board of Education*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

³⁵ See Weisbrod, *The More Proof, The More Doubt*, 18 *CONN. L. REV.* 803 (1986).

family law. The comments of T.M. Cooley provide a clear nineteenth century example. Discussing the question whether Christianity was part of the law of the land, Cooley noted that this was, in a "certain sense and for certain purposes, true." While there was no attempt to enforce Christian precepts directly, the "best features of the common law," and "especially those which regard the family and social relations," if not derived from religion, "have at least been improved and strengthened by the prevailing religion and the teachings of its sacred Book"³⁶ The influence of religion on the state law of the family (Mode I) is symbolized by the fact that ministers were from an early time permitted to perform marriage ceremonies, even though marriage was conceived in the seventeenth century as a civil institution having civil consequences.³⁷ Seen in a pluralist context, however, the participation of ministers in the marriage ceremony takes on additional meaning. It is not merely a symbol of a historic concern of religious groups with marriage and the family, but also an illustration of the application by a religious legal system of its own standards (Mode II), imposed independently, above the standards of the civil authority.³⁸

A. *Marriage and Divorce*

One linkage between the family, Christianity and the law (from this paper's perspective, a Mode I interaction, i.e. a successful co-option of the state by the church) is revealed with particular clarity in the late nineteenth century controversies over marriage. The Christian form of monogamous marriage was viewed as the basis of the state. A standard statement of this position is found in the English case *Hyde v. Hyde*:

³⁶ 2 T. COOLEY, TREATISE ON CONSTITUTION LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 976 (8th ed. 1927). His examples were those laws which "compel the parent to support the child; the husband to support the wife; which make the marriage tie permanent and forbid polygamy." His conclusion was that Christianity was "not a part of the law of the land in any sense which entitles the courts to take notice of and base their judgments upon it, except so far as they can find that its precept and principles have been incorporated in and made a component part of the positive law of the State." *Id.*

On the formal side, the attempt to adopt Christian Nation Amendments to the Constitution was not successful.

Church attempts to impose their own norms as universal (Mode I) goals make possible a challenge to legislation on establishment clause grounds. See *Harris v. McRae*, 448 U.S. 297 (1980)(rejecting establishment clause attack).

³⁷ Freund, *Uniform Marriage and Divorce Legislation*, CASE AND COMMENT 7-8 (June 1914).

³⁸ This was plain to Richmond and Hall, who included in their 1929 study of the administration of the marriage laws in the United States several sections on religion and marriage, focusing on the marriage ceremony. M. RICHMOND & F. HALL, MARRIAGE AND THE STATE (1929).

Marriage was the "voluntary union of one man and one woman for life to the exclusion of all others."³⁹ This view was appropriate to the Christian state, in essence, because it was the view of the Christian Churches.

In the area of regulation of the family in particular, the two systems of authority were often seen as cooperative and connected. The comments of the nineteenth century church historian Philip Schaff may be taken as illustrative and exemplary. Schaff offered an explicit discussion of marriage as an area within the overlapping jurisdiction of church and state. In 1888, Schaff noted that [despite the disestablishment of churches in America] a total separation of Church and State was impossible, and that monogamy, the Christian Sabbath and the public schools were the "three interests and institutions which belong to both church and state" and which had to be "maintained and regulated by both." These were as he saw it, "connecting links between church and state." As to divorce, Schaff noted that since some of the states were too liberal on the question, a "reform of legislation in conformity to the law of Christ [was] highly necessary for the safety and prosperity of the family." As to monogamy, Schaff wrote that this form of marriage was "according to the unanimous sentiment of all Christian nations" the "one normal and legitimate form of marriage."⁴⁰ The consequences for the "new Mohammedanism of the Mormons" were obvious. In both the contexts of polygamy and divorce, the churches were not merely saying that the state should enforce morality in general, they were insisting more pointedly on a consonance between the state law and the Christian law of marriage as they saw it reflected in the New Testament.

The story of the Mormons and the story of divorce reform will be used here to illustrate Modes I and II in practice.⁴¹ One narrative of the Mormon encounters with the American legal system over the issue of polygamy begins in 1852, when the Mormons announced publicly

³⁹ *Hyde v. Hyde*, 1 L.R.P. & D. 130, 133 (1866). The case involved a Mormon apostate. See Cannon, *A Strange Encounter: The English Courts and Mormon Polygamy* 22(1) B.Y.U. STUDS. 3 (1982).

⁴⁰ P. SCHAFF, *CHURCH AND STATE IN THE UNITED STATES* 69 (1888 & reprint 1972). Impossible "unless we cease to be a Christian people." *Id.*

⁴¹ The Mormons litigated a free exercise problem, and asked for an exemption from the law. This would be a dominantly Mode II objective using Mode I as a means to that end, and it is, in effect, the general view of the Mormon cases. Emphasis can be placed on another Mode I aspect of the *Reynolds* case, the insistence of other religious groups that the state should enforce the Christian law of marriage on a universal basis.

that they were practicing plural marriage, and ends in 1890 when the triumph of the federal government was formally acknowledged by the Mormon Church. A critical moment in the narrative occurred in 1879, when the Supreme Court in *Reynolds v. United States*⁴² passed on the constitutionality of the 1862 Morrill antibigamy act, the first of several federal statutes directed against the Mormon marital institution. The Morrill Act provided that bigamy in the territories was a crime, punishable by fines and imprisonment. The constitutionality of the statute was challenged in the courts by George Reynolds, secretary to Brigham Young. Reynold's defense was that the First Amendment to the federal constitution protected the Mormon right to religiously-based polygamy.

The use of such a claim by a deviant religious group may itself be worth noting, because it is not to be assumed that religious groups will feel free under their own rules to invoke rights under the state system.⁴³ But the Mormons' sense that they were also a part of the larger

⁴² *Reynolds v. United States*, 98 U.S. 145 (1878). The Court's opinion was authored by Chief Justice Waite. John Noonan has suggested that Waite "sounded precisely like his contemporary, Pope Leo XIII." Noonan, *The Family and the Supreme Court*, 23 CATH. U.L. REV. 255 (1973). The link to Christianity is explicit in later Mormon cases.

"The organization of a community for the spread and practice of polygamy is, in a measure a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World . . ." The language itself is from: *Corporation of the Church of Jesus Christ of the Latter Day Saints v. United States*, 136 U.S. 1 (1889).

Significantly, in a sentence which includes a paraphrase of this language, C. ZOLLMANN, *AMERICAN CHURCH LAW* 41 (1933) cites the *Reynolds* case.

See also *Davis v. Beason*, 133 U.S. 333, 341-42 (1880), where the Court states that "[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries . . ." Justice Field was not even willing to call the advocacy of polygamy "a tenet of religion." *Id.* J.S. Mill suggested that one of the offenses of the polygamous Mormons was that they claimed to be a kind of Christian. Mill, *On Liberty*, in J. MILL, *THREE ESSAYS: ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJUGATION OF WOMEN* 112-13 (1859 & reprint 1975).

See generally Linford, *The Mormons and the Law: The Polygamy Cases—Part I*, 9 UTAH L. REV. 308 (1964); Linford, *The Mormons and the Law: The Polygamy Cases—Part II*, 9 UTAH L. REV. 543 (1965). For the Mormon view of the Constitution as inspired, see W. NELSON, *THE CHARTER OF LIBERTIES: THE INSPIRED DESIGN AND PROPHETIC DESTINY OF THE CONSTITUTION* (1987).

In J. DEVLIN, *THE ENFORCEMENT OF MORALS* 9 (1965), the author noted that monogamy got into the law because it was Christian and stayed there because it became part of the social structure. From this viewpoint, one could see *Reynolds* as a situation in which churches attempted to persuade the state to adopt monogamy as a norm (Mode I), while the state responded in terms of an identical rule understood in secular terms. (Who decides if this was a "successful" Mode I strategy?)

⁴³ That this concern has not been limited to marginal religious groups seems clear. Even Theodore Woolsey, in discussing rights in his work, 1 *POLITICAL SCIENCE* (1878), felt it necessary to treat the question of the tension between rights and Christianity. It has "sometimes been represented that there is opposition between the system of rights and the spirit of Christianity. The one

system was revealed not only by their use of test case litigation as a defense strategy but also by their repeated applications for statehood. The Mormon argument in litigation was not, of course, that the nation as a whole must become polygamous. It was simply that they had a right under the rules of the state system to practice their religion as they understood it.

In the *Reynolds* case, the claim of the group for an exemption was rejected in principle. The Court said that "the statute immediately under consideration [the antibigamy statute] is within the legislative power of Congress".⁴⁴ This being so, the only question that remained was, "whether those who make polygamy a part of their religion are excepted from the operation of the statute."⁴⁵ This idea had to be rejected because it "would be introducing a new element into criminal law." In short, the law provided that plural marriages would not be allowed, and the law applied to everyone. "Can a man excuse his practices to the contrary because of his religious belief?" Justice Waite asked. "To do this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."⁴⁶

is self-assertion, self-defense, the very spirit of selfishness; the other is self-renunciation, self-denial, giving way to others." *Id.* at 30. Conceding that the "two differ in their nature," Woolsey insisted that rights and Christianity were neither "antagonistic, nor mutually destructive." And a waiver of rights in the spirit of Christian self-renunciation means that one has rights to waive. (He also discussed "rights" and "honor.") One limit on the effective "rights" of religious groups is, therefore, self-imposed. *Id.* at 30-31.

⁴⁴ *Reynolds*, 98 U.S. at 166.

⁴⁵ *Id.*

⁴⁶ *Id.* at 166-67. A similar claim, though with a different response from the Supreme Court, was urged by the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), nearly one hundred years later. Here, the issue arose largely because of the expanded role of the state in relation to communities that are essentially separatist. Whatever one concludes as to the historical motivations of the compulsory education laws (see Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. ED. REV. 355 (1976) on the various understandings of this point), it seems clear that in relation to small communities, the law precipitated a crisis that took its shape from the active enforcement of compulsory education laws. The Amish sought an exemption from the compulsory education law of the state of Wisconsin. In this instance, the Court accepted the argument based on the right of the Amish to the free exercise of their religion. The tension, in law, between the two cases is obvious. And it is more than saying that the difference lies in a difference in the groups themselves or the state's perception of the groups. (Though here, it could be noted that while the Mormons were a large, growing group and widely perceived as a menace, the Amish were small, self-contained and understood as benign.) A major difference in the two cases lies in the state's understanding of the free exercise "right" itself. For the *Reynolds* Court, there would be no right to be exempt from the general secular law. For the *Yoder* Court, there could be, in the appropriate circumstances. For present purposes, the Mormon story and the

The *Reynolds* case is illustrative of both Modes I and II. The Mormons sought (unsuccessfully) an exemption from the state marriage law. This is a Mode II objective. The Mormons were invoking, however, a Mode I recognition of the rights claimed under federal law. This recognition was withheld by the Court on the basis of a Mode I understanding of the relations between Christianity and the state law of marriage. "Marriage," Chief Justice Waite said, "while from its very nature a sacred obligation, is nevertheless in most civilized nations a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social obligations and duties, with which government is necessarily required to deal."⁴⁷ If one emphasis in that familiar sentence is the "civil contract," another surely is the "sacred obligation." Marriage in America was to be ordinary Christian monogamy.

It should be noted that the Mormon rights claim was not the only one evident in the controversies over marriage. If the Mormons claimed a federal right to control marriage in Utah and a federal constitutional right to an exemption from compulsory monogamy imposed by the federal government, others claimed a general right to participate in the framing of a national standard on the issue.⁴⁸ In short, rights consciousness can also be illustrated not only by the Mormon litigation under the free exercise clause, but also by the assertion by adherents of other religions that as citizens with the right to participate fully in the American political process—a right that in some cases had to be won over time⁴⁹—members of religious groups had a right to participate in the framing of the standard to be applied universally. This aspect of the use of a rights claim by religious groups is most clearly visible in the controversies over divorce reform. A report to the Presbyterian

Amish story are both examples of Mode II attempts by religious groups to maintain their own institutions within a larger structure, without asking that structure to adopt the institution as a universal norm. In the Mormon case, the state's response was in large part based on the state's understanding of itself as part of a whole that included the majority Christian community committed to monogamy. By the time of *Yoder*, the state understood itself as primarily secular, an arbiter of the rights of internal groups that included religious groups like the Amish.

The issue of the state's regulation of private schools involves related questions. See R. MCCARTHY, D. OPPEWAL, W. PETERSON & G. SPYKMAN, *SOCIETY, STATE, & SCHOOLS: A CASE FOR STRUCTURAL AND CONFESSIONAL PLURALISM* (1981).

⁴⁷ *Reynolds*, 98 U.S. at 165.

⁴⁸ For a discussion of women's "rights" claims in relation to this issue, see Minow, *Underneath Everything That Grows*, 1985 Wis. L. Rev. 819 (1986). Note also the alternative views of morality urged by women's arguments favoring freer divorce.

⁴⁹ See M. BORDEN, *JEWS, TURKS AND INFIDELS* (1984).

General Assembly of 1905 illustrates the point:

Regarding the relations of the Church to the State . . . [t]he inter-church conference [on marriage and divorce] has made decided advancement. It assumes no authority, but does claim the right for its members, as citizens, to protest against legislation, or lack of legislation, that defiles citizenship, and that destroys the very foundations of society and righteous government.⁶⁰

But in this context also Modes I and II appear together. For example, in his work, *Divorce and Divorce Legislation*, Theodore Woolsey offered two arguments. He said that although he would not argue that the state had to do more than protect the legal rights of the church ("it goes actually beyond this to some extent"), still he thought that all "who believe that Christian faith and morals are necessary for the well-being of a State must feel that the purity of marriage demands every protection."⁶¹ Woolsey also, however, made plain that a part of the effort to enforce a universal standard was based on the need to protect the church itself, since the risk existed that the churches would themselves be corrupted by the looser state standard. The first argument from the present perspective involves Mode I, while the second uses Mode II.

Polygamy was legally defeated at roughly the same time that a different large scale deviant pattern based on divorce and subsequent remarriage—"serial" polygamy, as its opponents called it,⁶² was becoming familiar. It is almost as though Mormon polygamy, the clear case, the one on which everyone could agree, was handled with particular harshness exactly because the issue of divorce, equally an attack on the basic conception of monogamous marriage for life, was a case on which a widespread societal consensus no longer existed. But whether or not one accepts this relationship between the two issues, another relationship, a contrast, seems beyond dispute. While the forces of organized religion⁶³ would have counted their campaign against Mormon polygamy a success, their campaign against lax divorce laws was, with a

⁶⁰ A. Calhoun, quoting the Report to Presbyterian General Assembly 308 (1905).

⁶¹ T. WOOLSEY, *DIVORCE AND DIVORCE LEGISLATION* 262 (1882). See generally O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 50 (1967); Friedman & Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61 (1976).

⁶² O'NEILL, *supra* note 51, at 50.

⁶³ Obviously there were differences between Christian groups, particularly Catholic and Protestant, that impacted on this problem. See *Is Divorce Wrong?* 149 N. AM. REV. 513-38 (1889) on the debate over divorce and particularly the suggestion of the Catholic spokesman that the state create an official (reminiscent of the Canon law "defender of the marriage bond") to appear on the side of defendants in divorce actions.

few exceptions, a failure. As the history of divorce since the 1950's makes obvious, the effort represented by Woolsey and others in the nineteenth and twentieth century⁶⁴ was defeated in the political process that resulted in no-fault divorce.

The history of this change parallels the history of the changes in moral discourse in family law which Carl Schneider has recently described. Quoting J.S. Mill on the relation between toleration and religious indifference, Schneider notes that with the "waning influence of Christianity among the relatively affluent, educated elite" (and even with the limited counter tendency represented by the growth of fundamentalist christianity) one sees that law has itself changed.⁶⁵ "[B]ecause religious views are less strongly held universally, statements of moral aspirations linked to religion have slipped more readily from legal discourse."⁶⁶ The moral decision, he suggests, has been delegated to individuals. The decision of individuals to submit to other authorities would be viewed as essentially contractual. By the mid-twentieth century, the state, in short, did not view protection of specifically Christian ideas of marriage as one of its functions. The Mode I strategy of churches could no longer rely on the acknowledgment by the state of a cooperative role in the enforcement of Christian morals.

B. Children

The history of marriage and divorce in America provides one illustration of the state over time developing secular standards freed from historic connections not only to Christian morals but particularly to the Christian law of marriage. The law of child placement and adoption⁶⁷ similarly reveals the ways in which religious groups have used the state system to obtain universal recognition of a particular religious interest (Mode I used as a strategy to achieve a Mode II objective), and once again, a twentieth century change in the state's position as to the Mode I interaction. The new issue added in this context is the specific prob-

⁶⁴ For twentieth century arguments quite like Woolsey's, see 3 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 56-67 (1953).

⁶⁵ See Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1843, 1845 n.163 (1985).

⁶⁶ *Id.* at 1845.

⁶⁷ The history of adoption in America has been described several times. See Presser, *Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1972) (on religious motivation of nineteenth century child welfare reformers); Zainaldin, *Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 N.U.L. REV. 1038-89 (1979).

lem of a group⁵⁸ as against individual⁵⁹ rights claim.

Religious matching of children placed by the state in homes or in institutions has to some degree been a characteristic of the American legal system from an early period. But religious matching and religious matching statutes do not seem to be best understood as a vestige of the early religious establishments. Rather, some of the statutes were adopted as a response by immigrant groups to problems they faced in the American environment. Thus, in 1916, Lee Friedman noted in the *Harvard Law Review* that "[i]n recent years, as the minority religious groups have strengthened themselves they have more aggressively asserted a right to protect from proselytization the children of their faith who come before the courts for disposition usually as dependent, delinquent, or neglected children."⁶⁰

In fact, the issue went back some time. Writing in 1859, Orestes Brownson indicated some of the grievances of nineteenth century Catholics in America relating to the placement of children:

In our country although the Constitution and laws give no preference to any doctrine or form of worship, public prejudice prevails to such a degree, that the children of Catholics are very frequently withdrawn from their parents, if poor and destitute, and placed under Protestant influence in public institutions. . . . In most States, the magistrates can bind out such children, and in some places, as in St. Louis, preachers are employed as paid agents, to enter the houses of the poor, and snatch away their children in the name of the law. Their names are sometimes changed, and they are soon sent away and bound out far from the reach of their parents, whose natural rights are most unfeelingly disregarded.⁶¹

⁵⁸ The problems of defining groups are beyond the scope of this paper, although state approaches to membership in religious groups for purposes of adoption are discussed briefly below.

⁵⁹ Rights claims in the state system are associated with individuals. At the same time, there is in law and elsewhere a new interest in community, groups, and association. See Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 357 (1986). See also Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1002-03 (1983); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

⁶⁰ Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 HARV. L. REV. 485, 498 (1916). See generally Pfeffer *Religion in the Upbringing of Children*, 35 B.U.L. REV. 333, 341 (1955).

Some of the controversy over religious upbringing of children relates to the enforceability (in the state system) of contracts dealing with the issue.

⁶¹ *The Mortara Case*, 1859 BROWNSON'S Q. REV. 226, 230. Brownson was defending the position of the Pope in relation to the taking, in the Papal states, of the Jewish boy Edgar Mortara, who had been secretly baptized by a servant while ill. See generally B. KORN, *AMERICAN REACTION TO THE MORTARA CASE, 1858-1859* (1957).

Similarly, Levi Silliman Ives wrote in 1857 of the problem of Catholic children committed to private asylums run by Protestants.⁶² Like Brownson, Ives referred to a constitutional mandate of the state to ensure "the sacred rights of conscience," and claimed the protection of this mandate.

The interreligious tension over children has been clear to historians. Billington called his chapter on school issues in New York (in *The Protestant Crusade*) "Saving the Children for Protestantism."⁶³ O'Grady wrote that "The history of Catholic charities in the United States is almost a history of the struggle of the immigrant for the preservation of the faith of his children."⁶⁴ This struggle involved legislative and political activity. Statutes were adopted ranging from those that gave a strong weight to religious matching, to those that simply included religion among the possible factors, and, finally, those that asked for matching "when practicable."⁶⁵ The statutory patterns could reach not only adoption, custody, and guardianship, but even abrogation of adoption. Thus, a New York statute authorized suits to abrogate an adoption because of any "attempt to change or the actual making of a change or the failure to safeguard the religion of such child."⁶⁶

Judicial response to the issue of the religious group presence in individual adoption cases varied. In the 1907 Massachusetts case

⁶² Ives, *Against Sectarianism Partisanship in Public Institutions*, in AMERICAN CATHOLIC THOUGHT ON SOCIAL QUESTIONS 90-100 (A. Abell ed. 1968). Abell noted that Protestants proselytized Catholics with frenzied zeal from motives that were quite as much political and social as religious. Not sure that any Catholic children could grow up to be good citizens, the societies and missions, the better to isolate the destitute ones from the Church's influence, scurried off thousands of them to Protestant homes in the West.

A. ABELL, AMERICAN CATHOLICISM AND SOCIAL ACTION: A SEARCH FOR SOCIAL JUSTICE 20 (1960). The Letchworth Report makes plain that these institutions were founded in response to the inadequacy (on religious grounds) of existing institutions. W. LETCHWORTH, HOMES FOR HOMELESS CHILDREN (1903, reprint 1974). See also M. LANGSAM, CHILDREN WEST (1964).

⁶³ R. BILLINGTON, THE PROTESTANT CRUSADE, 1800-1860 142 (1938). The reformers, while often religiously oriented, did not necessarily feel committed to the family, either natural or reestablished. See P. BOYER, URBAN MASSES AND THE MORAL ORDER (1978) (discussion of Charles Loring Brace).

⁶⁴ J. O'GRADY, CATHOLIC CHARITIES IN THE UNITED STATES: HISTORY AND PROBLEMS 147 (1930).

⁶⁵ For a review of the statutes, see Note, *Religion as a Factor in Adoption Guardianship, and Custody*, 54 COLUM. L. REV. 396-403 (1914). On constitutionality, see *Sugarman v. Wilder*, 385 F. Supp. 1013 (S.D.N.Y. 1974); *Dickens v. Ernesto*, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346, appeal dismissed, 407 U.S. 917 (1972). See also, *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988); *Wilder v. Bernstein*, 449 F. Supp. 980 (S.D.N.Y. 1980).

⁶⁶ N.Y. DOM. REL. LAW § 118(a) (repealed 1974).

Purinton v. Jamrock,⁶⁷ the lower court referred to the presence of religious groups, but rejected their right to a leading role in the proceedings. The Roman Catholic Church and the Baptist Church were the institutions involved. "If members of either church have taken an interest in this case as sectarians and promoters of the interests of their church, they have no proper place before the court and will receive no recognition there."⁶⁸ (Other courts, sometimes in other contexts, have viewed the role of the group, and the law of the group, more sympathetically.⁶⁹) But a dominant role for sectarian placement agencies remained obvious in the adoption process as a whole. Thus, a symposium held in 1956 on adoption included separate papers on the attitudes toward adoption of Protestant, Catholic and Jewish groups.⁷⁰ At that time it could still be said that "there was no area in adoption practice that is more sensitive or more controversial" than the area concerning the "religious heritage" of the child. The "principal question" confronting agencies was this: "In which religion will a child be raised?" In deciding this issue, "agencies are bound by law and judicial precedents which in turn are products of the homes of the community and the influence of religious groups that make up our population."⁷¹ In the 1950s the possibility of religious groups using a state legislature as a vehicle still remained clear: "If a particular group feels that within the intellectual makeup of the men from which the judges in their community are drawn there will not necessarily be found an appreciation of the value of religious training similar to that which they may possess, they should have recourse to the legislature"⁷²

Although by the mid-1950s states often had statutes relating to the issue, the critical point in practice was not the language of the statute but rather judicial interpretation and agency operations.⁷³ As to this, Monrad Paulson noted that "Religion is employed as a criterion in adoption and child placement cases even where statutes are silent, as

⁶⁷ *Purinton v. Jamrock*, 195 Mass. 187, 8 N.E. 802 (1907).

⁶⁸ *Id.* at 196.

⁶⁹ See, e.g., *Ramon v. Ramon*, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).

⁷⁰ 1 M. SCHAPIRO, A STUDY OF ADOPTION PRACTICE 58 (1956).

⁷¹ *Id.*

⁷² Note, *Custody and Adoption of Children—Imposition of a Standard*, 33 NOTRE DAME L. REV. 457, 462 (1958).

⁷³ See, e.g., Broeder & Barrett, *Impact of Religious Factors in Nebraska Adoptions*, 38 NEB. L. REV. 641-91 (1959). On recent Catholic approaches, see 1 NEW CATHOLIC ENCYCLOPEDIA *Adoption* (U.S. Law of) 136 (1967). See also L. PFEFFER, CREEDS IN COMPETITION 127-31 (1958).

agency personnel are likely to match children and prospective guardians on a religious basis."⁷⁴ Writing in 1953, Leo Pfeffer suggested that while the law spoke in terms of right, status was involved and that judicial protection is sought not for the parent but for the religion.⁷⁵ A well-known case in the mid-1950s—*Petition of Goldman*—refused to allow an inter-religious adoption even on facts indicating that the mother had consented to the adoption.⁷⁶ Clearly, some idea of a group claim was involved.⁷⁷

But, there has been an interesting change in the nature of the discussion over time. By the mid-1950s,⁷⁸ the entire debate was seen to raise difficult questions regarding the definitions of group membership.⁷⁹ The *Goldman* court did not "attempt to discuss the philosophy

⁷⁴ M. PAULSEN, *Constitutional Problems of Utilizing a Religious Factor in Adoptions and Placement of Children*, in *THE WALL BETWEEN CHURCH AND STATE* (1963).

⁷⁵ L. PFEFFER, *CHURCH, STATE AND FREEDOM* 589 (1953).

⁷⁶ *Petitions of Goldman*, 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied*, 348 U.S. 942 (1955). The *Goldman* case involved twins born to a divorced Catholic mother, who had been privately placed with a Jewish couple. A guardian ad litem urged that the adoption violated the Massachusetts religious protection statute under which the twins, having the religion of their mother, had to be placed when practicable with Catholic parents. Since Catholic parents were available, the adoption was not permitted. The Goldmans left the state with the twins. (See L. PFEFFER, *CHURCH, STATE AND FREEDOM*, 711-12 (1967).)

The twins here were not baptized. The precise issue of the *Mortara* case, as Orestes Brownson saw it (relating to the authority of the church over the baptized) was not involved. See Brownson, *The Mortara Case*, 1859 BROWNSON'S Q. REV. 226-46. In the *Goldman* case, unlike the *Mortara* case, the religion of the natural parent (whether she was still a Catholic) was discussed.

⁷⁷ Both Pfeffer and Galanter suggest this. L. PFEFFER, *supra* note 76; Glanter, *Religious Freedoms in the United States: A Turning Point*, 1966 WIS. L. REV. 217, 229 n.69.

⁷⁸ That is, shortly after the end of the Second World War. Comment, *A Reconsideration of the Element in Adoption*, 560 CORNELL L. REV. 780 (1971). Note that genocide is by definition the violation of a group right.

⁷⁹ For a recent discussion of group membership issues, see M. GALANTER, *COMPETING EQUALITIES; LAW AND THE BACKWARD CLASSES IN INDIA* 305-26 (1984). See also B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1975).

On the history of Sunday Closing Laws, see *McGowan v. Maryland*, 366 U.S. 420, 484 (1961) (Frankfurter J., concurring); for a review of who is entitled to exemptions from those laws, see *id.* at 517.

Another context in which emphasis has shifted from groups to individuals is that of conscientious objection to military service. The 1917 statute exempted anyone belonging to a "well-recognized" religious sect or organization whose creed forbade members to participate in war in any form and whose religious convictions were against war or participation in it Selective Draft Act, ch. 15, 40 Stat. 76 (1916). The 1940 act exempted those who by "religious training and belief" were opposed to participation. Selective Training and Service Act, ch. 720, 54 Stat. 885 (1940). In 1948, exemption was defined so that religious training and belief meant "belief in relation to a Supreme Being and not 'essentially political, sociological or philosophical views or a merely personal moral code. . . .'" Military Selective Service Act, ch. 625, 62 Stat. 604 (1948).

Compare with religious adoption, issues of Indian adoptions. See *In re Adoption of Holloway*,

underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless, may have a religion."⁸⁰ But other commentators on the dramatic litigation of the 1950s did treat this sort of issue.⁸¹ By the mid-twentieth century, it was seen clearly that religious matching statutes require knowledge of the religion of the child and that of the birth and adoptive parents, and thus require some way of discovering what that religion is. It was understood that even for religious groups, the religion of adults (let alone children) might be difficult to determine. Problems of imputation of religion to children,⁸² so called multiple dedication⁸³ and adult lapses⁸⁴ and commitments were seen to be filled with complexity. Paul Ramsey's critical comment on testimony to the effect that a child had been "born a Presbyterian"⁸⁵—testimony that he said was fundamentally uninformed—raised important issues of the limits of judicial competence. This perception, whether understood as a constitutional limit or a general value of the nation, was reinforced by the argument that group and status issues are too difficult at too many levels for the American system to easily accommodate.⁸⁶ It seems that in this context within the state legal system, the "group right," if any, had really been acknowledged and had been incorporated in an individual right, and the state perceived itself in the role of supreme authority over altogether private, individual and

732 P.2d 962 (Utah 1987)(adoption under the Indian Child Welfare Act).

⁸⁰ Petitions of Goldman, 331 Mass. 647, 652, 121 N.E.2d 843, 846 (1954). See also *In re Adoption of E.*, 59 N.J. 36, 279 A.2d 785 (1971). A law review comment characterized the 1950 lawsuits as "cases that graphically demonstrated the basic disharmony between public temporal concerns and religious considerations in the adoptive process." Comment, *A Reconsideration of the Religious Element in Adoption*, 56 CORNELL L. REV. 780, 789 (1971).

⁸¹ See Ramsey, *infra* note 82.

⁸² Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 3 N.Y.U.L. REV. 649 (1959). See also *Religion in Adoption and Custody Cases* in 1 INSTITUTE OF CHURCH AND STATE, CONFERENCE PROCEEDINGS 56-114 (1957).

⁸³ Involved in the *Mortara* incident. See also *In re Glavas*, 203 Misc. 590, 121 N.Y.S.2d 12 (1953). Regarding "belief": does this standard raise the inquiry into actual belief in such a way that a Catholic's "belief" may be Protestant for purpose of matching statute? See *Religion and Adoption*, 56 CORNELL L. REV. 798 n.90 (1971).

⁸⁴ Petitions of Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954).

⁸⁵ Ramsey, *The Legal Imputation of Religion*, 34 N.Y.U.L. REV. 649, 654 (1959).

⁸⁶ See L. PFEFFER, CHURCH, STATE AND FREEDOM 709-10 (revised ed. 1967).

Then, too, there are the links to problems of prejudice and discrimination. Karl Llewellyn addressed this by saying: "[W]e misconceive group prejudice when we think of it as primarily a prejudice *against* some one or more particular groups. . . . It is instead at bottom a prejudice *in favor* of 'My Own Group' as against *all* others, 'pro-us' prejudice eternal, live, and waiting, ready to be focused and intensified against *Any Other Group*." K. LLEWELLYN, JURISPRUDENCE 452-53 (1962)(emphasis added). Those political systems that have most effectively differentiated between racial or religious groups may be those we least want to emulate.

non-sovereign interests. Thus revised statutes tend to focus not on status but on parental preference (contract) signals, if any, relating to religion.⁸⁷ While this can be explained on the basis of antagonism between ideas of religious status and ideas of separation of church and state in the American legal context, it also has something to do with a serious uncertainty about how issues of religious status are to be determined by secular courts. In this context, as is now true in the area of constitutional interpretation itself, epistemological issues that were once taken for granted have become, for the state legal system, very difficult.

Furthermore, as in the case of divorce, we see that something has changed in the state's perception of relations between church and state. A Mode I co-option of the state by the church must now be justified by the state in entirely secular terms. From the state's point of view, religion in this context has come to be considered as part of a general best interests test rather than as having an immensely significant independent value. A point made in an English journal in 1951 is relevant here: "It is perhaps a sign of the changing 'social philosophy' of our day that religion is looked at only as an element of welfare."⁸⁸ The best interest of the child may have some relation to membership in a religious group, but the group's "right" to its children is not a part of the calculation.⁸⁹

The suggestion here as to the historical change relating to children

⁸⁷ See discussion of New York law in *Religion and Adoption*, 56 CORNELL L. REV. 780, 791 nn.50-51.

⁸⁸ *Religion and Custody*, 95 SOLIC. J. 325 (1951).

⁸⁹ Compare the treatment of the return of the Dutch Jewish children in J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 107-08, (1973) with the approach taken in Fishman, *Jewish War Orphans in the Netherlands—The Guardianship Issue* 1945-50, 27 THE WIENER LIBRARY BULLETIN 31-36 (1973-74). See also the amplifying statement by Dr. Madzy Rood-de Boer, in the Dutch translation of *BEYOND THE BEST INTERESTS OF THE CHILD* (DE TOVERFORMULE: IN HET BELANG VAN HET KIND)(1979)(global translation on file with the Journal of Family Law).

When we consider the role of the sectarian adoption agency, however, the old pattern remains at least theoretically visible. Thus, Sanford Katz, writing in 1962, described the position of Catholic agencies as involving the idea that "any Catholic child being placed for adoption can have total needs met only in a Catholic adoptive home." Katz, *Judicial and Statutory Trends in the Law of Adoption*, 51 GEO. L.J. 64, 71 n. 26 (1962)(quoting Bowers, *The Child's Heritage—From a Catholic Point of View*, in 2 A STUDY OF ADOPTION PRACTICES 130 (Schapiro ed. 1956)). He noted also that the absence in the 1961 Model Adoption Act of a provision dealing with religious matching, relates to the fact that all placements under the statute are to be agency-authorized. Decisions regarding religious adoption would then be made at that level.

As a matter of state law, the question can be raised whether the use of religious criteria by state-licensed adoption agencies would be unconstitutional. C. FOOTE, R. LEVY, & S. SANDERS, *CASES AND MATERIALS ON FAMILY LAW* 309 (2d ed. 1976).

and religion, and more broadly, religion and the family, is not about the familiar though troublesome categories of public or private.⁹⁰ Nor is it about increases or decreases in state regulation. Arguments in these categories often do not take into account that religion, as an authority over the family, moved from the public (governmental) to the private (nongovernmental) side over time. The state law of the family in Colonial New England involved a strong religious value. The "privatizing"⁹¹ of religion means that a source of authority above the family that once was a coregulator of the family on the public side is now a parallel regulator of the family on the private side. It is not obvious, however, that regulation by churches results in a private (in the sense of autonomously regulated) family. We would have to know much more than we do about the historical patterns of the regulation of behavior by "private" groups to conclude anything on this point.

IV. CONSTITUTIONALISM AND PLURALISM

As Marc Galanter once noted, the field of church and state is the "locus classicus of thinking about the multiplicity of normative orders."⁹² This paper has suggested that a pluralist analysis that posits multiple authorities and then examines their interactions over time is useful in dealing with the history of American family law and, moreover, with the issue of religious authority in America's constitutional structure,⁹³ a structure that sees not merely "faction,"⁹⁴ but also multiple authorities.

⁹⁰ See Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135-81.

⁹¹ "The Modern Schism in America led to division along these lines; an outer, encompassing culture existed independently of an inner, sequestered, largely ecclesiastical religious culture within. It is possible to speak after these years of the privatizing of religion." M. MARTY, *THE MODERN SCHISM* 98 (1970).

⁹² Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 28 (1981).

⁹³ See Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1-40 (1934). For a discussion of the Realist movement in a historical context, see E. PURCELL, *CRISIS OF DEMOCRATIC THEORY* (1973). Llewellyn's ideas on institutions were influenced by the work of Walton Hamilton. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 93, 176-77 (1973); 5 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES, Institutions* (1937).

Llewellyn's major work was in the field of commercial law. See Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465-545 (1987). In this context also, Llewellyn was aware of group issues, and referred to the "vicious heritage" of viewing the parties to a deal as individuals. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 734 (1931).

⁹⁴ See *FEDERALIST*, No. 10. For a discussion of Madison and mediating institutions, see J. ADAMS, *VOLUNTARY ASSOCIATIONS* (1986).

To elaborate this point, we must ask again the question raised by Walton Hamilton on the occasion of the 150th anniversary of the American Constitution. "What," he asked, "is the constitution?"⁹⁵ His suggestions as to the answers were focused on contrasts between text and interpretation, and between rules and realities. One implication of Hamilton's ideas is that "constitutionalism" involves centrally not only the text but also the working framework of the society, understood to be "the constitution" itself, going beyond anything written down in a constitutional text or state-sponsored code.⁹⁶ Llewellyn, in 1934, saw the "constitution as an institution." It was "an institution of major size, [embracing] the interlocking ways and attitudes of different groups and classes in the community—*different* ways and attitudes of *different* groups and classes, but all coming together into a fairly well organized whole."⁹⁷

Today, as we have just marked the bicentennial of the American Constitution, many of our questions build on these ideas. Today's questions, to the extent that they focus on text, deal with the possibility not only of multiple meanings, but of multiple sources of meaning. The "meanings" of the Constitution as offered by groups⁹⁸ other than the state may be seen as entirely legitimate, as significant as the meaning as offered by the state.

Various examples can be given of the ways in which the formal state understandings of the constitution differ from other understandings. Arthur S. Miller argued, for example, that America's living Con-

⁹⁵ Hamilton, *1787 to 1937, Dr.* in THE CONSTITUTION RECONSIDERED XV (Read ed. 1938). What is The Constitution? "A writing set down on parchment in 1787 and some twenty-one times amended? Or a gloss of interpretation many times the size of the original page? Or a corpus of exposition with which the original text has been obscured? Or 'the supreme law of the land'-whatever the United States Supreme Court declares it to be? Or the voice of the people made articulate by a bench of judges? Or an arsenal to be drawn upon for sanction as the occasion demands? Or a piling up of the hearsay about its meaning in a long parade of precedents? Or a cluster of abiding usages which hold government to its orbit and impose direction upon public policy? Or a 'simple and obvious system of natural liberty' which even the national state must honor and obey? And is the Constitution embossed on parchment, set down in the United States Reports, or engraved in the folkways of a people? And last of all; has the United States a written or an unwritten Constitution?"

Id. at XV-XVI.

(Hamilton, an economist on the law faculty at Yale, was the coauthor, with Douglas Adair, of W. HAMILTON & D. ADAIR, *THE POWER TO GOVERN* (1937).)

⁹⁶ Llewellyn, *The Constitution as an Institution*, *supra* note 93, at 18-19.

⁹⁷ *Id.* at 18.

⁹⁸ However defined.

stitution involved a "Corporate State" with corporations having authority and power over the individual comparable to that of the political state.⁹⁹ Robert Cover noted that there was a significant difference between, for example, state and religious understandings of the free exercise clause. Although from the state's view point, "the free exercise clause's creation of small, dedicated, nomic refuges may appear to be merely an (unimportant) accommodation to religious autonomy," for religious groups like the Mennonites, "the clause is the axis on which the wheel of history turns."¹⁰⁰ The state's view was, however, not to be understood as the "real" meaning of the text. "[W]ithin the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning—if not in the domain of social control—the Mennonite community creates law as fully as does the judge." Cover granted no "privileged character" to the work of judges. He saw judges acting "in a world in which each of many communities acts out its nomos and is prepared to resist the work of the judges in many instances."¹⁰¹

Certainly this resistance is a possible outcome of the interactions described here. When codes cannot be reconciled, choices between codes will somehow be made.¹⁰² The interactive strategies outlined here in the context of a discussion of family, church and state often, however, result in conflict avoidance. Further, since they involve shaping

⁹⁹ A. MILLER, *THE MODERN CORPORATE STATE* (1976). On groups and law, see D. FUNK, *GROUP DYNAMIC LAW* (1982).

Corporations have their own ideas about what family life should look like. See W. WHYTE, *THE ORGANIZATION MAN* (1956); see also Lipson, *Review*, 66 *YALE L.J.* 1274 (1957) (a review of Whyte referring to Chester Barnard's version of pluralist regulation in C. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1938)).

¹⁰⁰ Cover, *Forward: Nomos and Narrative*, 97 *HARV. L. REV.* 30 n.85 (1983); Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U.L. REV.* 182 (1985).

The organized behavior of other groups and the commitments of actors within them have as sound a claim to the word 'law' as does the behavior of state officials.

The most important consequence of this radical relativization of law is that violence—a special problem in the analysis of any community's commitments to its future—must be viewed as problematic in much the same way whether it is being carried out by order of a federal district judge, a mafioso or a corporate vice president.

Id. Cover described his position as "very close to a classical anarchist one—with anarchy understood to mean the absence of rulers, not the absence of law." *Id.* at 181.

¹⁰¹ *Id.*

¹⁰² We are all hyphenated, as Laski wrote. Laski, *The Personality of Associations*, 29 *HARV. L. REV.* 404 (1915). See also J. NEWMAN, *A LETTER ADDRESSED TO HIS GRACE THE DUKE OF NORFOLK ON THE OCCASION OF MR. GLADSTONE'S RECENT EXPOSTULATIONS* (1875).

the state structure to preserve groups that are not the state, these strategies of decentralization are, it seems, closely related to the core political ideas of American Federalism.

V. CONCLUSION

Most of our legal discussions of church and state view the issues involved from the position of the state. Perhaps inevitably these discussions tend to assume state sovereignty and to see churches among other competing internal groups. This assertion of state sovereignty is fictional,¹⁰³ however, if understood to mean either that only the state claims sovereignty or that this claim of the state to sovereignty is unqualifiedly and universally accepted. This paper has attempted to offer a discussion of this issue not so much from the point of view of the church as from the point of view of an observer of the interaction of the several groups.

The paper began with the proposition that issues of church and state are "constitutional" because there is something about them in our documentary charter and because we understand them as touching the largest issues of our social ordering. By contrast, issues relating to the family, have often been conceived of by lawyers and others as relating to private law and local law.¹⁰⁴ The internal aspects of the family have sometimes been thought to be free of government regulation entirely. But if one looks at the litigated cases and the greatest cases in the field of church and state, it turns out that they often involve questions of the family, children, schools and marriage. It is this overlap that leads to the perspective outlined here. Issues commonly understood as small, private, daily or familial turn out to touch the largest questions of religion and the state, and religious and secular authority.

Emphasizing groups rather than individuals, the paper developed a distinction between the behavior of religious groups designed to co-opt the state, and behavior designed to create space within the state for the group's own regulation. An analysis of "rights" claims under state law was offered which saw such claims in the context of the interactive strategies. A historical change that focused on the state's response to

¹⁰³ On fictions, see Soifer, *Legal Fictions: Putting Words in Context*, 20 GA. L. REV. 871 (1986).

¹⁰⁴ Note the domestic relations exception to the diversity jurisdictions of the federal courts. On the current [state] understanding, see *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

the co-option (Mode I) strategy was outlined, and the suggestion was offered that the change occurred well into the twentieth century.

The justification for the presentation as a whole was not, again, its novelty. The ideas of English or legal pluralism are familiar. The thought was that this well-known perspective is worth examining in the context of current discussions of social and constitutional ordering. It is a perspective that allows us to connect disparate historical phenomena and, I suggest, permits us a better understanding of what is, or was, at stake in certain church-state interactions and certain ways of talking about rights, liberty and legal change.