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COMMENT: SEPARATION AND SCHOOLS

*Kent Greenawalt**

In commenting on these rich papers by Michel Troper¹ and Michael McConnell,² I first analyze the implications of legal and political theory for religious liberty and separation of church and state. I then turn to underlying premises of modern liberal theory about moral education and tolerance among citizens. Lastly, I concentrate on separation as it affects the schooling of children. Despite Professor Troper's emphasis on the uniqueness of French understanding and history,³ I was struck by how closely French problems about schooling, and their possible resolutions, resemble those in the United States.

I. POLITICAL THEORY AND CHURCH AND STATE

Professor Troper presents a complex set of definitions and categorizations of a sort not often found in Anglo-American legal scholarship. This powerful example of French conceptualization can lead an American reader into confusion if he is not careful. Troper moves from a theory of the state, or sovereignty, to political theory, concluding that church-state separation is merely a "policy" or "ideology." Such a theory of the state is too dogmatic about possibilities; even if it were accurate in full, church-state separation would not necessarily rank as merely a "policy" or "ideology," as those terms are understood in English.

According to Troper:

[L]aw—by which is meant the law of the State—is a norm-creating order that regulates the totality of human conduct in such a way that there is no behavior that is not commanded, forbidden, permitted or legislated by a legal norm. And there is no legitimate authority that is not exercised by virtue of a legal norm created by the State. Sociologists say the same thing when they define the State as the political authority possessing

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¹ Michel Troper, *French Secularism, or Laïcité*, 21 *CARDOZO L. REV.* 1267 (2000).

² Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 *CARDOZO L. REV.* 1243 (2000).

³ See Troper, *supra* note 1, at 1268-76.

a monopoly over the legitimate use of force.⁴

Thus a modern state “always governs religious conduct because the State commands it or at least permits it.”⁵

This sweeping notion of the authority of a state was familiar during the nineteenth century, but it seems strangely out of place as we enter the twenty-first century. International law sets a variety of limits on what national governments may authorize. They cannot authorize piracy, slavery, or genocide, and, under the United Nations Charter and other international treaties that may bind even nonsignatories, perhaps states may not restrict religious liberty in very drastic ways. If national governments contravene these norms, they commit violations *of law* according to international standards.⁶

Another possibility Troper does not address is a constitution with unamendable features. A nation-state may adopt a written constitution that forbids any legal authority from authorizing certain behavior. Troper can, of course, say that, in such a state, the unamendable rule has its authority because it is contained in the state’s constitution; but if a country has an unamendable constitution providing for religious liberty or church-state separation, no existing organ of government, or combination of organs, may legally take away what the constitution provides. In the United States, according to current dominant theory, the combination of bodies that can amend the Constitution could eliminate religious liberty and church-state separation. Given the difficulty of amendment, and shared understandings about central aspects of religious liberty and about the division of responsibilities between government and religious organizations, the legal formality that religious freedom could be eliminated has little reality for our social life.

Let us grant, for the sake of argument, that according to a proper theory of legal authority, separation of church and state and religious liberty exist at the sufferance of a national government that could eliminate them. Does it follow that church-state separation is merely a “policy” or “ideology,” to be compared with other policies or ideologies?⁷ If anything that the state “grants” becomes merely a “policy” or “ideology,” then, on

⁴ *Id.* at 1270.

⁵ *Id.* From another point of view, Troper says the modern state must have a separation of church and state, because such a state does not arise until political authority is secularized.

⁶ Troper might respond that according to *the law of a particular nation-state*, authorities could authorize such violations. That depends on what view of international legal obligations the law of any nation-state adopts.

⁷ See Troper, *supra* note 1, at 1271.

Troper's understanding, the principles that we should not have slavery and genocide, and murder and rape, are also "policies" or "ideologies."⁸ If any claims of fundamental rights can rise beyond being merely ideologies, then it is arguable that religious liberty and aspects of church-state separation might do so. That is, if one can reasonably believe that opposition to genocide and murder rises above "policy," then one might find convincing arguments that opposition to religious persecution also rises above policy. Whether fundamental human rights, and other aspects of state responsibilities, rest on anything more objective or secure than prevailing beliefs or shifting attitudes about desirable political arrangements is a subject of deep analysis and intense discussion. That issue certainly cannot be settled by a theory of the state that grants the state comprehensive legal authority.

As Michael McConnell explains, the dominant social philosophy in the United States has been that individuals have prepolitical moral rights of various kinds, and that the justification of the state lies in the protection of these rights.⁹ Whatever may be sound theory about the law and the state, members of a society may consistently embrace a political philosophy in which individual rights are crucial and thought to be more securely rooted than in "policy." French theorists have emphasized the ancient idea of the public freedom of a combined citizenry, but my reading suggests that ideas of individual rights have also exerted a substantial influence in France, as well as in the United States and elsewhere. I should be very surprised if some French authors have not viewed a secular state as an important component of individual religious liberty. In any event, the most vital questions about the proper grounding of church-state separation are not resolvable either by theories about state power or by references to how the dominant tradition in one country has viewed the subject.

II. LIBERTY OF CONSCIENCE, CHURCH-STATE SEPARATION, MORAL EDUCATION, AND TOLERANCE

Professor McConnell writes of a "two-kingdoms" theology of liberty of conscience and "competing authorities" of church and government that lies "at the heart of our First Amendment."¹⁰ McConnell goes on to suggest that America made an unusual and risky choice to leave religious belief and practice, and moral

⁸ I confess uncertainty as to how far these terms carry for Professor Troper some of the connotations they have for Americans.

⁹ See McConnell, *supra* note 2, at 1264.

¹⁰ *Id.* at 1246.

education, to nongovernmental institutions.¹¹ He expresses concern about a shift from the view that the government should be tolerant and egalitarian to a more modern notion that citizens should also exhibit these qualities in their private associations.¹²

I agree with a great deal in McConnell's illuminating account, but I believe that he greatly overstates the extent to which the country has been committed to the withdrawal of the state from moral education. And further, he oversimplifies the requisites necessary to sustain liberal democracy when he contrasts government attitudes and the attitudes of private citizens. Before I undertake those two topics, I make two less important criticisms about the "two-kingdoms" theology and the implications of a principle of liberty of conscience.

McConnell's treatment of a "two-kingdoms" theology of liberty of religious conscience claims a greater continuity between older and modern conceptions than is warranted. In the ancient Catholic tradition and in the original Calvinist understanding, the "two kingdoms" of church and state had separate functions but cooperated to achieve a set of unified objectives. The notion of separate, possibly competing, authorities, with religious truth being no business of the state, is more modern. That "two-kingdoms" view, which McConnell says lies "at the heart of our First Amendment,"¹³ is not to be found in fifth century papal teachings, or in those of Luther, Calvin, or the early Puritans.

McConnell apparently embraces the proposition that if coerced faith is unacceptable to God, it follows that the government should not promote any religious truth.¹⁴ But a principle of uncoerced conscience does not alone lead to the government's refraining from *teaching* what it believes to be the true religion. So long as people are free to dissent, government teaching need not coerce.¹⁵ A child is no more coerced to particular religious views if the government weakly sponsors the views than if her parents teach them and bring her, for fifteen years, to religious services in which these views are expressed to the exclusion of all others. There are powerful reasons for government not to teach religion, but such teaching, by itself, does not straightforwardly coerce conscience.

I now move from these two minor quibbles to matters that are

¹¹ See *id.* at 1261.

¹² See *id.* at 1259.

¹³ *Id.* at 1246.

¹⁴ See *id.* at 1250.

¹⁵ Indeed, even the government's silencing of public expression of false views might be justified as a way to remove clearly erroneous views from the field, so long as individuals are allowed to believe and practice as they are inclined to do.

much more important for a modern understanding of liberal democracy. In combination, Professors Troper and McConnell convey a somewhat misleading impression about dominant American theories concerning the state's responsibility for the teaching of morality. McConnell pointedly notes the choice at our country's founding to remove religion from government, despite a widespread belief that religious belief and practice was a crucial component of public virtue. McConnell indicates that our society, unlike almost every preceding one in human history, did not "concern itself with the moral and religious upbringing of its citizens."¹⁶ This way of putting our political philosophy fits Professor Troper's fourth model of secularism: "The Refusal to Propagate Values."¹⁷ Troper thinks this model, according to which the state "must not be 'the bearer of a conception of the common good,'"¹⁸ fits the United States reasonably well. Both Troper and McConnell suggest an understanding about the government's withdrawal from promoting values that is more extreme than that which anyone actually defends.

Among those who think about these matters, theorists are divided between those who think a liberal state should be neutral between conceptions of the good life and those who reject this counsel of neutrality. A great majority of both groups believes that public, state-supported education should continue, though many join McConnell in believing that greater competition from private alternatives would be healthy. No one thinks that the state should have *nothing* to do with moral education; no one thinks that public schools should steer entirely clear of moral education. Morality is not fully encompassed by conceptions of the good life. Morality includes principles of equality and mutual respect for others as citizens—the underpinnings of a just social order. No one thinks that the government should avoid teaching *these* aspects of morality.

Further, even among the theorists who argue that the state should, for adults, be neutral among conceptions of the good life, many accept public schools taking positions about some of these subjects.¹⁹ For example, they may believe schools should encourage students to think that appreciation of art and music, or

¹⁶ McConnell, *supra* note 2, at 1253.

¹⁷ Troper, *supra* note 1, at 1283.

¹⁸ *Id.*

¹⁹ I do not claim that the line between aspects of justice and conceptions of the good life is clear. One need not worry too much about the line in connection with schools, because the position that schools should avoid all issues of "the good life" is close to absurd. I draw the distinction to emphasize that no one thinks that either public schools, or the government more generally, should be value neutral across the board.

hard work, are aspects of a life well lived. Troper's fourth model of secularism does not reflect American attitudes. These attitudes are much more accurately captured by his third model, in which the state promotes secular values²⁰ (with many Americans favoring a closer connection of religion and government than that model envisions).

Professor McConnell draws an important distinction between government perspectives and those of private citizens. He writes of a shift from a view that the government should be neutral, tolerant, and egalitarian to a view that we should all exhibit these qualities in our private associations.²¹ Speaking from powerful religious belief, he complains that "the ideal of the liberal citizen thus conflicts with the ideal believer in religion or any other comprehensive faith or ideology."²² But McConnell fails to draw a crucial line between one's personal respect for others as equal citizens—entitled to participate in the political process and have their positions taken seriously—and one's respect for religious and other understandings about life that one is convinced are shot through with error. Any viable model of liberalism or liberal democracy must include citizens having a degree of mutual respect for each other as far as their joint social life is concerned. No doubt, people do not easily combine intolerance for opposed religious understandings with equal respect as citizens for those who hold benighted religious beliefs. Further, those on the receiving end of contempt for their religious faith (or lack thereof) will not feel fully comfortable if they happen to be a small minority that most of their fellow citizens believe is damned. But does McConnell suppose that government tolerance *alone* is enough? Does he suppose that well conceived liberalism has *nothing* to do with the attitudes of fellow citizens toward each other? I should be surprised. A well-conceived liberal democracy has some standards (however ill-defined) for the attitudes of fellow citizens toward each other.

III. CHURCH-STATE SEPARATION AND SCHOOLS

Finally, I address specific issues about school education. The vast majority of people in both France and the United States believe that public education is an important unifying force. In the United States, many people credit public schools with creating a modicum of national unity out of extraordinarily diverse ingredients and with offering many youngsters an opportunity to

²⁰ See Troper, *supra* note 1, at 1268.

²¹ See McConnell, *supra* note 2, at 1259.

²² *Id.*

rise above the educational achievements and class status of their parents. There is no doubt that public school education in the United States has some serious problems, especially in inner cities; but Americans are shortsighted indeed if they overlook all that public education has accomplished.

The United States Supreme Court has indicated that schools cannot teach the truth of religious, or antireligious, ideas. Religion is a domain that is left to other sectors of society. Some have accused the Supreme Court of encouraging a religion of secularism. Perhaps some teachers in public schools actually tell students that religion is foolish or unimportant; but that is rare, and certainly not permitted under controlling constitutional doctrine. The more realistic worry is that when a variety of subjects, including notions of morality and justice, is presented independently of religion, the approach implicitly teaches the unimportance of religion. That unspoken lesson is at odds with the understanding of those who conceive of religious truth as at the center of most aspects of life.

This concern is legitimate, but noninvolvement by the state is preferable to any alternative in a society as religiously divided as ours. The worry that schools will implicitly convey the assumption that religion is not significant can be countered to some degree by a fairer representation of religion's crucial place in history and in the modern life of many societies, including ours. The line between teaching about religion and teaching religious truth is very delicate, but attempts to observe that line respect religious liberty more than any other approach. In his presentation at the symposium, Professor McConnell commented that a secular school produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all. That was not my experience, nor has it been the experience of many others I know.

One of Professor McConnell's pleas is that students in public schools should be free to express their own religious opinions. He complains about "incidents in which evangelical students were reprimanded for wearing T-shirts with religious slogans."²³ Unlike McConnell, I think students conveying religious messages in public schools can be troublesome. Suppose a T-shirt said "Jews are condemned to Hell." I do not think Jews, or others, should have to study in an environment with that message staring them in the face, and I assume McConnell agrees that such hostile messages might be barred. Suppose the shirt says instead, "Salvation is

²³ *Id.* at 1262.

through Jesus Christ.” That message is more positive, but a reader may still suppose that the wearer believes that non-Christians are not saved. A shirt that says “Jesus Loves You” or “Believe in the Lord Jesus” has even less of a negative message for nonbelievers, but it may still trouble non-Christians.

Where is the line to be drawn? Symbols of religious identification—such as jewelry with a cross—should be allowed. Messages that are bound to seriously upset students of other beliefs should not be allowed. The difficult questions arise over messages that are mainly attempts to persuade others to a particular religious understanding. One view is that, unless the offense to others is great, students should be able to communicate what they choose about religion, and that indeed these expressions are constitutionally protected. The contrary view is that students should not inflict religious messages on unwilling fellows in the nonreligious school environment. Under this view, since even mild, positive messages by members of dominant groups may be disconcerting for minorities, the constitutional principle of separation allows public schools to forbid T-shirt proselytizing. The more one thinks about this American problem, the more sensible seems the equivocal French resolution about female students wearing the Muslim veil: one looks in a particular case to see whether the veil is an instrument of religious propaganda and whether it prevents a school from functioning normally.²⁴

The question whether private religious schools should be supported with state funds has arisen in both France and the United States. Professor McConnell inverts the usual question and asks how it is consistent with our liberal, disestablishment, principles for the government to fund only schools owned and controlled by the state.²⁵ For hospitals, adoption agencies, and soup kitchens, religious providers should be eligible for aid along with other private associations, but I find the issue of aid to sectarian education much more troubling than does McConnell.²⁶ If sectarian schools receive substantial aid, public schools may suffer seriously, and education will be much more fragmented. The eventual result may be less tolerance about religious diversity, a civic harm. Although the competing arguments about aid are complex, substantial reasons exist not to provide heavy state assistance to sectarian education. Not the least of these is the fact

²⁴ *See id.*

²⁵ *See id.* at 1262-64.

²⁶ To be clear, I am not against religious schools. My late wife, Sanja, and I sent all of our three children to religious schools. My present wife, Elaine Pagels, and I have one of our two children in a religious school.

that religion seems to flourish much more in the United States than in European countries in which religious education receives generous aid. Whether the reasons against aid rise to a constitutional level is much more debatable; but I think they are sufficient to support the Supreme Court's reluctance until now to allow much direct financial aid to be given to religious schools.