# RELIGION AS PUBLIC RESOURCE

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Ten years ago I was an associate in a Boston law firm. We represented the Jesuit fathers in their plans to renovate and dramatically redesign the interior of the beautiful sanctuary of the Immaculate Conception Church in the South End. Because of a public outcry against the renovation, the Boston Landmarks Commission intervened to designate the church interior a landmark in order to control the manner and extent of redesign.

My astonishment grew as the central issue became clear: the fight would be over the altars. The Jesuits wanted only one new central altar; the Commission wanted the three existing altars to remain, and also wanted a hand in designing the new altar to ensure its aesthetic harmony with the rest of the sanctuary.

The Jesuits ended up in litigation against the Landmarks Commission and, long after I left practice, ultimately prevailed. In 1990, the Supreme Judicial Court of Massachusetts held that under the Massachusetts Constitution the Jesuits enjoyed the freedom to design their sanctuary as they saw fit. The possible loss of architectural heritage was the price we must pay for religious liberty.[1]

The Jesuits' plight caught the attention of "separationists" who emphasize the need to maintain a high wall of separation between church and state. The Jesuits' free exercise claim and the "wall of separation" metaphor, typically viewed as serving very different purposes, in this case served the same purpose: religious freedom was ensured by keeping the state out of the religious group's affairs.[2] The metaphor worked be-

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[1] *See generally* Society of Jesus of New England v. Boston Landmark Comm'n, 564 N.E.2d 571 (Mass. 1990). For a detailed discussion of the issues arising in church preservation cases, see Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401 (1991).

[2] Separationist theory contains both Jeffersonian (or enlightenment) and evangelical

cause the Jesuits were an identifiable religious group and the sanctuary was their most sacred space. The state's presence profaned that space. Beyond the metaphor, the interior space of the church could be quite literally "walled off" from the state's reach.

The decision of the Massachusetts high court was right: the Landmarks Commission could not make a museum out of this church building. I have, however, revisited the controversy that surrounded the case many times to try to understand the intense public reaction to the proposed renovation, particularly the fact that opposition came from Catholics and non-Catholics alike. Obviously many in the congregation itself were upset because they saw the proposed changes as unwarranted, a slap in the face to earlier generations who had financed, built, and prayed at the altars the Jesuits now sought to remove. In addition to the churchgoers, many spoke out: neighborhood residents, outsiders, and public officials alike were outraged. Concertgoers who had enjoyed organ music there protested that the organ would never sound the same again. Citizens who loved the space argued that the church's tax-exempt status entitled the city to prevent the renovation. The renovation was referred to as "desecration."

At first I attributed the intensity of the public reaction to extremist tendencies present in the historic preservation movement, particularly those that would advocate preservation of any beautiful structure without regard to any other factor. But as I continued to reflect on the matter, I realized a very simple fact: the church building was considered a "public" resource. By the word "public" I do not mean "governmental." I use the word to describe the overwhelming sense of ownership of, and access to, the faith and the fruits of the faith—great music, art, and architecture—felt by churchgoers, by people of many religious backgrounds, by people with no religious background. Of course I do not mean ownership as in equitable ownership, or access as in legal access to a public accommodation, but ownership and access in the sense that this church was given to the world. It "belonged" (in this psychological and social sense) not only to its Jesuit owners or even to its com-

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(or pietistic) notions: the former emphasizes protection of the state from the church's reach, but the latter emphasizes protection of the church from the state's reach. *See generally* Arlin M. Adams & Charles J. Emmerich, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES (1990). Thus, it is not surprising that separationist theory is often consistent with religious exemptions (or "exit rights") from burdensome laws. Such exemptions (such as exemptions from historic preservation laws) enable religious communities to practice their faith without government regulation or intervention—freedom to flourish on the other side of the wall, so to speak. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970), wherein Justice Burger found that the threat of state entanglement in the affairs of churches justified tax exemption for religious organizations.

munity of worshippers, but to everyone. Because this building had such a great impact on the larger community, the Landmarks Commission, together with the public, assumed that even the sanctuary came within the government's jurisdiction to steward public resources.

The public reaction captured intuitively the public character of religion. Throughout this century, theologians and sociologists of religion have noted that, at least among Christian communities, the orientation of a faith group toward the society tends to fall in either one of two categories: sect or church.[3] "Sects" stand apart from civil society, call people out of it to join them, and focus their efforts on the spiritual well-being of the small group of adherents. But "churches" in this sect-church dichotomy do not call people out from civil society. Churches address people at their location within civil society and are concerned for the well-being of the society as a whole. Churches are convinced that they have responsibilities to everyone, not only their adherents. The term "public church" has emerged to describe this phenomenon of a religious community offering itself in service to the wider society.[4] The field of public theology has emerged to describe the ways in which religious communities participate in the civil conversation and offer themselves, their traditions, their narratives, and their symbols as public resources to the culture.[5] Theologians have criticized the notion that religion is "private":

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[3] These categories of church and sect come out of the study of Christian theology, and particularly of ecclesiology, and were developed most fully in the work of Ernst Troeltsch. *See* 1 and 2 ERNST TROELTSCH, THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES (Olive Wyon trans., Westminster/John Knox Press 1992) (1931). For a discussion of other typologies, see Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782 (1992) and Angela C. Carmella, *The Religion Clauses and Acculturated Religious Conduct: Boundaries for the Regulation of Religion, in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE (James E. Wood, Jr. & Derek Davis eds., 1993).

The paradigmatic Christian "sect" is a small group of people called out from civil society to be a community of perfection. It has nothing to say to civil society. But the paradigmatic "church" sees itself as embracing many, both saints and sinners. It has much to say to civil society because nothing is beyond the reach of God's transformative grace—even politics and the market. A "church" therefore is committed to engaging and caring for the whole world; its strong sense of co-responsibility (with other institutions) for social conditions and public life reaches far beyond the realm of its members. For the sect, however, attempts to transform the world are hopeless and involve unacceptable compromise. It stands over against the world not to change it but rather to call people out of it for the sole purpose of living as a witness to the Gospel. While these categories relate primarily to the Christian tradition, they describe phenomena of engagement and withdrawal that occur in most religious traditions.

[4] *See, e.g.*, MICHAEL J. HIMES & KENNETH R. HIMES, FULLNESS OF FAITH: THE PUBLIC SIGNIFICANCE OF THEOLOGY (1993); MARTIN E. MARTY, THE PUBLIC CHURCH: MAINLINE-EVANGELICAL-CATHOLIC (1981).

[5] Public theology emerges from the paradigmatic "church," *see supra* note 3, because that ecclesiological category possesses a strong sense of responsibility for partici-

religion may be "profoundly personal,"[6] but it is publicly proclaimed, publicly shared and open to public scrutiny.[7]

If churches—using the word in its sociological sense—create and contribute *public* resources to our public life, then who is the proper steward of those resources? Certainly, in the Boston Landmarks case, the Immaculate Conception Church was a "public resource" not simply for the Jesuits' private use. It was for everyone, and it remains to this day a place of public activity, public service to the wider community and great public beauty (even after the renovation). But that did not mean the government was a capable steward of that resource; in fact, the court prohibited the government from playing that role. Only the religious group could appropriately steward that public resource because it is the role of the religious group to define, create, and offer that resource as it sees fit.

Recognizing the primacy of the Jesuits in the control of this resource was the correct result, and for me the only correct one in a constitutional system that protects religious liberty. But the legal analysis that leads to that result radically redefines a "church" to be a "sect." To be given the definitional freedom vis-à-vis their public resources, the Jesuits were treated not as a church with public resources but as a sect engaged in its

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pating in public life to help shape and define the "res publica," the common good, and the public order of the larger society. Catholicism and most Protestant communities fit within this conception of "church." *See, e.g.*, MICHAEL J. HIMES & KENNETH R. HIMES, FULLNESS OF FAITH: THE PUBLIC SIGNIFICANCE OF THEOLOGY (1993); MARTIN E. MARTY, THE PUBLIC CHURCH: MAINLINE-EVANGELICAL-CATHOLIC (1981); JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960); RONALD F. THIEMANN, CONSTRUCTING A PUBLIC THEOLOGY: THE CHURCH IN A PLURALISTIC CULTURE (1991); RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY (1996) [hereinafter THIEMANN, RELIGION IN PUBLIC LIFE].

Public theology addresses the theological task of speaking in and to the society. Public theology takes seriously the encounter with the religious pluralism and the broader pluralism of our culture. Public theology is not nostalgic for any "good old days," nor does it draw on notions of civil religion. It seeks dialogue with others of good will. "[P]ublic theology asks for no acceptance from people beyond what truth it can illuminate and make persuasive through public conversation and argument." HIMES & HIMES, *supra*, at 22. Religion can be part of the conversation because "fundamental orienting convictions are accessible to public inquiry and critique." THIEMANN, RELIGION IN PUBLIC LIFE, *supra*, at 154. The American bishops' pastoral letters addressed to the American people are often pointed to as good examples of how a particular religious group speaks in and to the culture. The Catholic Church "has no proper mission in the political, economic or social order, but it has a significant role to play in giving moral shape and direction to the political, economic and social order." Richard P. McBrien, *The Future of the Church in American Society, in* RELIGION AND POLITICS IN THE AMERICAN MILIEU 91 (Leslie Griffin ed., 1986).

[6] THIEMANN, RELIGION IN PUBLIC LIFE, *supra* note 5, at 155.

[7] *See id.* at 131-35.

private affairs and walled off in its own sanctuary.

The privatization of public religious resources in legal discourse has created real problems for the way Americans understand religion. Stephen Carter's recent book, *The Culture of Disbelief*, eloquently expresses how an over-emphasis on the wall metaphor and the private, sectarian vision of religion in the legal context has resulted in criticism of religious activism on the moral dimension of public issues.[8] I can well imagine the outcry if, after the Jesuits had been given the freedom to renovate their sanctuary, they had tried to mount a vigorous anti-abortion or anti-war campaign. People might have said, "You have nothing to say in the public square! Go pray in your sanctuary!" Professor Carter reminds us that two of the most important roles of religion are public ones: as an independent moral voice that provides people with the capacity to resist the state, and as a source of moral understanding that builds and sustains virtue in citizens and institutions.[9] Faith groups are thus capable of giving us not only great buildings and great art but ideas and insights into the sacredness of life and the human condition, and a horizon outside of history that can provide perspective on all our endeavors. Public theology can help to define and specify these religious resources offered to the society and articulate a proper understanding of the public character of religion.

If religious traditions are themselves public resources, and create public resources, what then is the appropriate legal posture of the state toward these resources? We could continue to require the state to acknowledge religion as private and sectarian; that certainly worked to protect the Jesuits.[10] In fact, there is a strong argument that characterizing religion as a sectarian endeavor gives it a uniqueness that justifies

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[8] *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

[9] *See id.* at 36.

[10] Another approach would be to ignore the question altogether and simply treat religion like other things—religion as speech, religion as social service, religion as association, religion as opinion. This is the approach of the proposed Religious Equality Amendment. *See* H.R.J. Res. 184, 104th Cong. (1996). For commentary on this proposal, see generally Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. REV. 569 (1996); John Frohnmayer, *Praying the Constitution Survives*, 64 U. CIN. L. REV. 937 (1996); John H. Garvey, *All Things Being Equal. . .*, 1996 BYU L. REV. 587 (1996); Frederick Mark Gedicks, *Introduction: An Ambivalent View of the Religious Equality Amendment*, 1996 BYU L. REV. 561 (1996); Sanford Levinson, *Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment: Thoughts Generated by Some Current Proposals to Amend the Constitution*, 1996 BYU L. REV. 611 (1996); Steven T. McFarland, *The Necessity and Impact of the Proposed Religious Equality Amendment*, 1996 BYU L. REV. 627 (1996); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 BYU L. REV. 645 (1996).

special protections under the Free Exercise Clause and special disabilities under the Establishment Clause. On the other hand, we could attempt to give legal expression to the theological and sociological notion of religion as public resource. What would this look like? Would such a theory entail giving the state affirmative stewardship of those resources?

To consider this question of state stewardship of religious resources, we must shift from the situation involving an identifiable religious group with a public resource, like the case of the Jesuits, to a situation where religious resources, such as ideas, language, texts, images, and symbols, are not connected to any particular group. This moves us from cases involving free exercise of religion to those involving establishment concerns. In fact, the most fundamental question implied in Establishment Clause cases is whether a particular state action is an appropriate stewardship of religious resources.

The cases concerning religion and public education are particularly interesting. Public education is the state's most significant normative undertaking; thus, the important question becomes whether the state *must* be a steward of public religious resources or whether it *cannot* be. Recall the Kentucky case in which the United States Supreme Court held unconstitutional the posting of the Ten Commandments on classroom walls.[11] Are the Ten Commandments private or public in character, or both? Do they have something to say only to Jewish and Christian communities, or to everyone? If they are public, can the state be a steward of these religious resources in a way that it could not be the steward of the sanctuary design? Or does placement of the sacred text in a government building profane that text, much like the involvement of the government profaned the Jesuits' sanctuary?

The Kentucky Legislature thought the commandments were public resources because of their status as "the fundamental legal code of Western Civilization and the Common Law of the United States."[12] The Supreme Court also acknowledged that the Ten Commandments were public resources when taught as part of the study of history, civilization, comparative religion, or ethics. This lack of teaching context proved dispositive. The mere posting of the text, without more, was seen as a private, devotional act that lacked public, educational value, and thus, would violate the Establishment Clause.[13]

It seems that religious resources, once defined as private, are automatically outside the appropriate stewardship of the state. Teacher-led

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[11] *See generally* Stone v. Graham, 449 U.S. 39 (1980).

[12] *Id.* at 41.

[13] It was "sacred text" that the children might "read, meditate upon, perhaps . . . venerate and obey." *Id.* at 41-42.

Bible reading[14] and prayer[15] in the classroom are considered private devotional activities and are, therefore, impermissible. Bible reading and prayer are permissible in public schools only when a limited public forum is created, such as a non-curricular club period, in which all speech is welcome.[16] The state in this situation is not steward of the religion but is steward only of the forum in which all sorts of private speech, including religious speech, occurs. Thus, regardless of whether religion is excluded from or included in the public school's life, the judiciary tends to characterize religion as private and sectarian in nature. While I do not intend to criticize the result of any particular case, it is clear that the legal discourse persists in "privatizing" what theologians would call public religious resources.

The implications of a jurisprudence that acknowledged the public character of religion are unclear. Would it necessarily involve the government in a stewardship role? Would the Jesuits' sanctuary be considered within the jurisdiction of the state because it is a public resource? Would such an acknowledgment erode settled Free Exercise and Establishment Clause precedent that has relied on sectarian definitions of religious conduct, or would we find other doctrines to protect religion while more accurately describing its public character? Would it improve our jurisprudence, or would it defeat precisely the types of protections the First Amendment is designed to offer? Would it clarify or further confuse? The answers lie outside the scope of this essay. But one thing *is* certain. There already exists government stewardship of public religious resources. Hence, the question is not whether it is ever legitimate for the state to steward such resources, but rather when and how and under what conditions. And the importance of the question grows as our national religious diversity grows.[17]

This stewardship is, and will be in the near future, most prevalent in the public school curriculum. The Supreme Court has repeatedly stressed in its public school cases under the Establishment Clause that nothing in these decisions prevents schools from teaching *about* religion.[18] The

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[14] *See generally* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[15] *See generally* Lee v. Weisman, 505 U.S. 577 (1992); Wallace v. Jaffree, 472 U.S. 38 (1985); Engel v. Vitale, 370 U.S. 421 (1962).

[16] *See generally* Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990). *See also* Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995); Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384 (1993).

[17] *See generally* Diana L. Eck, *Neighboring Faiths: How Will Americans Cope with Increasing Religious Diversity?*, 99 HARV. MAG. 38 (1996).

[18] This is different from *Edwards v. Aguillard*, 482 U.S. 578 (1987), and *Epperson v. Arkansas*, 393 U.S. 97 (1968), where the Court held that the curriculum was teaching

study of religion in art, music, literature, history, ethics, and many other areas is both permissible and encouraged. But it is harder than it may seem. Groups devoted to the study of religion in the public school have been working for years on curriculum reform, and educators have begun to focus on this task.[19] A growing number of states, including California, have begun to implement plans for the comprehensive study of religion.[20] Here we have an area completely outside Establishment Clause scrutiny, and yet government is permitted a major stewardship role over religion as a public resource.

The biggest threat of governmental stewardship of public religious resources, whether it be in the public school curriculum or in the efforts to preserve church buildings, is not that religion will be profaned or tainted by the state's involvement (though that is a concern), but that religion will be treated as something dead, something worthy of observation and study only because it once inspired and motivated, as if a museum piece.[21] But religious traditions are living traditions, and to avoid their "death" at the hands of a government that acts more as curator than as steward, I offer no solution. I can suggest only that we look for illumination in public theology. Perhaps in their conversation with the institutions of society, including agencies of government, public theologians can offer clarifying insights on these perplexing issues.

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[19] *See, e.g., Guide Tells How to Teach About Religion in Schools*, L.A. TIMES, June 1, 1988, at 5; Peter Steinfels, *Trend Gaining in Public Schools to Add Teaching About Religion*, N.Y. TIMES, Mar. 19, 1989, § 1 at 1; Laura Sessions Stepp, *Coalition Promotes Teaching About Religion in Schools*, WASH. POST, June 1, 1988, at A1.

[20] *See* Jim Castelli, *Schools Take Up Religion as an Academic Study*, USA TODAY, Nov. 6, 1990, at 4D; Judith Cebula, *After Years of Caution, Educators Reconsider Teaching of Religion*, INDIANAPOLIS STAR, Mar. 21, 1996, at D01; Larry Whitham, *Fourth R Winning Respect in School*, WASH. TIMES, Dec. 27, 1991, at F3.

[21] The Supreme Court struggles with this public-private issue most awkwardly in the cases concerning public displays of religious symbols. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).